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The Honorable William D. Murray

W. William Leaphart
Justice, Montana Supreme Court

IN MEMORIAM

The Honorable William D. Murray

November 20, 1908—October 3, 1994

In March of 1972, as a senior at the University of Montana School of Law, I decided to take a stab at an interview for a clerkship with Montana's most senior federal District Judge, W.D. Murray—a man whom I knew by reputation but had never met. It was a most fortunate trip for me. I landed the clerkship and spent two most enjoyable years law clerking.

At the time, Judge Murray was 64 years old and had been on the federal bench for 23 years—having been appointed by President Truman in 1949 when he (Judge Murray) was 41 years old. Judge Murray received his B.S. from Georgetown University in 1932, and his LL.B. from the University of Montana in 1938. He was awarded an honorary LL.D from the University of Montana in 1961.

I knew that the Judge had a reputation for being very strict, perhaps even irascible, in the courtroom—particularly if his back were hurting and he was having to stand behind the bench during the proceeding. From my new perch in the clerk's corner I soon discovered, however, that any attorney who came to court prepared and who followed the rules of procedure, was treated in a courteous and professional manner by a conscientious and compassionate judge. Those who did not come so prepared, wished they had. If court were set for 2:00 p.m., Judge Murray would be waiting in the anteroom. As soon as the clock struck two, he would walk through the courtroom door ready to commence. If an attorney were late, he or she would be fined. In the interests of consistency, there were a few occasions when he even fined himself for being late to court.

Prior to assuming the bench, Judge Murray had spent some time as a prosecutor for the U.S. Attorney's office in Butte. As a judge, he was unbending in his conviction to protect the pre-

sumption of innocence. God help the marshal who made the mistake of parading a defendant before a jury in prison attire or the prosecutor who conveniently left a weapon sitting on the counsel table in view of the jury before it had been admitted into evidence.

Judge Murray assumed senior status in 1965. During his years of semi-retirement, the Judge's excellent reputation for running a tight ship and keeping a current docket put him in great demand to serve as a visiting judge in other federal district courts where dockets had backlogged. With the advice of his wife and traveling companion Lu, he would review the ever growing list of trouble spots and would decide where he might do the most good and enjoy doing it—New England in the fall, New Orleans during Mardi gras. In the two short years that I clerked for him, he accepted assignments stretching from Phoenix to Boston and San Juan, Puerto Rico to Seattle. In between these district court assignments, he would, once or twice a year, also sit as a visiting appellate judge on the Ninth Circuit Court of Appeals. When he completed an assignment, the local docket would be current and his perspective on people and the law would be that much broader. Judge Murray was a valued asset to the federal courts throughout the country, as well as to his native State of Montana.

The geographic diversity of these assignments required him to quickly adapt to the customs and peculiarities of the local bar—not always an easy task. I recall one of our first days in court in Boston when two ivy leaguers were arguing a breach of contract issue. After listening to one attorney expound for ten minutes about the "paddy of the first pat" Judge Murray beckoned me to the bench and said "I'm not going to be able to resolve this issue until I understand the legal terminology, what's a paddy?" I said, "Judge, in Montana, I think we'd call it the 'party of the first part'."

In addition to his long and valued service to the State and the country as a jurist, Judge Murray, or "Dub" as he was called by his friends (not his law clerks), always found time for service to the community—particularly the educational community. During World War II, he served the country as a Lieutenant in the U.S. Navy from 1942-45. He served as Chairman of the Board of Visitors at The University of Montana School of Law, and was a Member of the Board of Regents at Gonzaga University. He was the recipient of the Borromeo Award from Carroll College (1960), and the De Smet Medal from Gonzaga University

(1967).

Judge Murray died in October of 1994 in Butte—where he had been born 86 years earlier. He spent over half his life as a Federal Judge—one of the longest tenures on the federal bench of any judge in the country. To those of us who were honored to have worked with him as clerks or attorneys, he will be missed as a fine jurist and mentor. To Lu, Bill, Gael, and Tim he will be remembered as a beloved mate and father.

—W. William Leaphart, Justice, Montana Supreme Court

TRIBUTE

A TRIBUTE TO DEAN RODNEY K. SMITH

As a Trustee of the University of Montana Foundation and a member of the Bar of the State of Montana, I would like to extend my heartfelt thanks to Dean Rodney K. Smith for the two years of service that he has given us as the Dean of the University of Montana School of Law. While Dean Smith's tenure may not have been as long as we would have wished, the benefits we received from his service have been considerable.

I first met Dean Smith two years ago when I was the President of the University of Montana Foundation. The Foundation had just launched an ambitious $40,000,000 capital campaign to try to meet some existing needs at the University. This was a far greater task than the Foundation had ever undertaken and one that required tremendous effort by many people. As part of the campaign, significant funds were expected to be raised for the benefit of the school of law. To say the least, I was apprehensive about the ability of a new dean, who had no connection with our State, to help the Foundation accomplish this task. What I found was a tireless advocate for the School of Law and the legal profession, as well as an effective fundraiser.

Dean Smith immediately made it a priority to travel throughout both the State of Montana and the United States to introduce himself to University of Montana School of Law graduates and sing the praises of the school of law. Dean Smith has always felt that he was the beneficiary of the significant contributions of the deans that had preceded him and that the School of Law was doing an excellent job in producing practicing attorneys. Dean Smith's experience as a small-town lawyer, as well as a professor and administrator, allowed him to relate to and understand the concerns of practicing lawyers and their thoughts about the effectiveness of the school.

Dean Smith's vision of the law school, however, has not been limited to the State of Montana. He was convinced that it was necessary for the law school to develop a solid financial basis that would allow the hiring of the most capable professors available within the country, to recruit outstanding students from both within and outside the State of Montana, and to attract outstanding visiting professors and lecturers such as United States Supreme Court Justice Sandra Day O'Connor and Robert Bennett. As a result of the persistent effort of Dean Smith, many lawyers are sharing this vision and sharing their resources with the school of law. I have been particularly impressed by Dean Smith's commitment to long-range goals in allocating private funding to the establishment of endowments for the benefit of the faculty and the students. The recent law school banquet disclosed the growth of endowed scholarships and faculty awards.

Generations of law students and faculty will benefit from the efforts of Dean Smith to improve the educational opportunities for law school students. And, he has established relationships between the school of law and the practicing bar that are necessary for the practicing bar to become more involved in providing funds for the education of future lawyers. This, in turn, will help the practicing bar by allowing the school of law to produce well-educated and effective graduates.

Again, I would like to thank Dean Smith for the significant contributions that he has made not only to the University of Montana School of Law, but also to the practicing Bar of the State of Montana. We do appreciate all that he has done, and I, along with many other lawyers in Montana, will miss his friendship and his counsel.

Thomas Boone

FACULTY TRIBUTE

Rodney Smith has been the consummate colleague. Rod's greatest joy in being a dean has been facilitating the productivity of faculty at The University of Montana School of Law. He has delighted in making possible and fully supporting any and all faculty endeavors. Whenever a faculty member needed a quick read of a manuscript and sound advice, Rod reviewed and extensively commented on a document overnight. If faculty wanted to create a new course or to devise innovative teaching techniques, Rod was fully supportive. When faculty members needed to attend a conference to stay current in their specific fields or to recruit diverse students, Rod found a way to make those things happen.

When Rod saw the detrimental effect of having the lowest-paid law school faculty in the nation, he immediately devised a creative pay plan, secured faculty, presidential and regential approval, and began implementing the plan. Realizing that enhanced income must entail greater responsibility and accountability, Rod carefully linked salary raises to increased faculty productivity.

Rod has attempted to improve the School of Law in numerous other ways. He assembled the finest scholars in the nation for a conference on religious freedom at the school in September 1994. The papers which those scholars delivered at the conference which appear in issue one of this volume probably comprise the best edition of the Montana Law Review that students have ever published.

Rod has fostered dialogue and diversity among faculty, students and staff, with the remainder of the University, and in the community, state, nation, and world. Rod has promoted racial, gender, and ethnic diversity as well as diversity of ideas. Rod has strongly supported interdisciplinary efforts, one of which culminated in the establishment of a joint degree program in law and environmental studies.

We wish Rod the best as he departs The University of Montana School of Law to return to Capital University. Rod will rejoin the faculty there, actively participating in teaching, service and scholarship and pursuing his first love, a book about conscience.

Carl Tobias

STUDENT TRIBUTE

As co-editors-in-chief of the Montana Law Review, we are extremely grateful for Dean Smith's many contributions to the law school. Throughout his two years as dean, he provided tremendous support to the law review. His vision, enthusiasm and leadership enabled us to improve our journal and, in turn, the national reputation of our law school.

Dean Smith worked very closely with the board-of-editors to organize the first annual James R. Browning Symposium, which focused on the Religious Freedom Restoration Act. Initially, Dean Smith secured the funding necessary to establish the symposium series through a generous donation from Jack Hursh, an alumnus of the law school. Then, Dean Smith volunteered to contact scholars from around the country and helped us to secure their articles and participation in the symposium. As preparations proceeded, he continued to promote the event by encouraging the attendance of the Bench and Bar of Montana. During the symposium, he acted as a wonderful host and presented his own article on Native American religious freedom. Beyond any doubt, we would not have enjoyed such a successful symposium without his involvement and support.

Afterwards, symposium participants responded that their weekend in Montana was the best symposium that they had ever attended. Not only did they enjoy the intellectual events, but Dean Smith and the Law Review also organized dinners and activities such as fly-fishing and a football game for the participants. Professor Ira C. Lupu from George Washington University said, "Your students were more than up to the task of running this symposium. They were extremely well-organized and well-prepared on every front. Throw in their Montana pride and good nature and the combination was almost overwhelming." Professor William P. Marshall from Case Western Reserve University commented, "It was the perfect mix of intellectual and social interaction. I was also greatly impressed by the University of Montana students. Their enthusiasm was terrific and contagious, and in my opinion the success of the program was a direct result of their participation."

After publication of the symposium issue, Dean Smith sent copies to all judges on the Ninth Circuit, to the justices of the United States Supreme Court, and to the deans of other law schools. As a result of the timeliness of the debate on the consti-

tutionality of the Religious Freedom Restoration Act and the stellar contributing scholars, we have received two to three out-of-state requests per week for the symposium issue. This issue has significantly elevated the scholarly reputation of the Montana Law Review and, therefore, the University of Montana School of Law as a whole.

Although the Montana Law Review's closest work with Dean Smith involved the symposium, he supported the law review in many other ways as well. Last summer, Dean Smith encouraged the law review's transition to a more modern publishing system. He secured the finances necessary for our conversion to "desktop publishing" through a generous gift from Sherman Lohn, an alumnus and long-time supporter of the University of Montana. The conversion to our own publishing system updated our process to the level of other law schools and enabled us to save both money and time.

Dean Smith not only receives our gratitude and admiration as members of the Montana Law Review, but as students in general. Dean Smith was extremely active in fund-raising and the promotion of scholarships and aid for students. He initiated the first Awards Banquet, which recognized scholarship donors and recipients and allowed them to meet each other. Similarly, Dean Smith always made time to encourage the post-graduation pursuits of his students. He was more than enthusiastic about writing a letter of recommendation, acting as a reference, or offering advice to the students that sought his help. Dean Smith's opinion of and vision for the University of Montana Law School is limitless, and he encouraged many students to pursue and achieve positions that they would not have otherwise thought possible.

Throughout Montana, people were impressed by the speaker at our law school commencement—Sandra Day O'Connor. All in attendance at graduation felt moved and inspired by Justice O'Connors' wisdom and love for the law. Dean Smith was entirely responsible for the procurement of her attendance at the graduation ceremony. He said that he simply wrote her a letter inviting her to speak and she accepted. Surprisingly, it turned out to be one of his easiest accomplishments—requiring only the willingness to believe and make the effort.

As a person, Dean Smith has been an example of a hard-working, open-hearted, and scholarly attorney. We are extremely grateful for his dedication to the improvement of the law review and his contribution to other scholarly attributes of the Universi-

ty of Montana School of Law. His enthusiasm and commitment to the law school remained constant and did not wane toward the end of his tenure in Montana. Current and future generations of Montana attorneys will benefit from the enhanced scholarly reputation of the Montana School of Law as a direct result of Dean Smith's endeavors. As students, we greatly appreciate his leadership and willingness to give of himself. We would like to thank Dean Smith for his generous support and for the inspiration he offers on a daily basis. We extend our best wishes to Dean Smith and his family in the future.

Hertha Lund
Stephanie Stimpson

"THIS STATE WILL SOON HAVE PLENTY OF LAWS"[1]—LESSONS FROM ONE HUNDRED YEARS OF CODIFICATION IN MONTANA

Andrew P. Morriss*

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1. Headline in the ANACONDA STANDARD, Jan. 29, 1895, at 1.

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I. INTRODUCTION

The Fourth Montana Legislature adopted more than 170 pounds of laws,[2] an estimated 784,000 words,[3] during 42 days in 1895.[4] With little attention to the details of its actions,[5] the

2. The enrolled versions of the Codes were reported as weighing: Code of Civil Procedure, 37 pounds, *The House*, HELENA DAILY HERALD, Feb. 13, 1895, at 1; *It Was All Spent*, DAILY INDEPENDENT (Helena), Feb. 14, 1895, at 5; Civil Code, 50 pounds, *The State Legislature*, DAILY INTERMOUNTAIN (Butte), Feb. 19, 1895, at 1; and Political Code, 50 pounds, *The State Legislature*, DAILY INTERMOUNTAIN (Butte), Feb. 19, 1895, at 1. Based on these estimates and the relative sizes of the printed Codes, I estimated a weight of 33 pounds for the Penal Code, which the newspapers appear to have forgotten to weigh. The description of the Codes in the popular press in pounds indicates both the vastness of their provisions and the novelty of such massive legal measures.

A brief note on sources is necessary: Because surviving nineteenth century Montana legislative records are sparse at best, I have taken most of the details of the various bills, amendments, and discussion in the legislature from newspapers' accounts. I relied most heavily on the two Helena papers, the Democratic *Daily Independent* and the Republican *Helena Daily Herald* since these papers covered the legislature and Bar Association activities in the most detail. In general, I used the daily editions of these papers rather than their weekly editions, which appear to consist of reprints from various dailies. Other papers from the period comprehensively reviewed include the *Anaconda Standard*, the Butte *Daily Intermountain*, and the *Missoulian*. For each of the relevant periods (the 1893, 1895, and 1897 sessions of the legislature and several weeks preceding and following each session) I read every story connected to the legislature, the Montana Bar Association, or the Governor in these papers. The style of reporting for the period often led to information regarding the Codes being buried in interior paragraphs of stories whose headlines suggested totally different topics.

Finally, a stylistic note: legislators and others often referred to the Codes in the singular. Except where directly quoting such a reference or referring to an individual Code, I have used the plural to refer to the Codes as a group.

3. *General Baggs' Army*, HELENA DAILY HERALD, Feb. 2, 1895, at 1.

4. This encompasses the time from introduction of the four Codes to the Governor's signature on the last Code.

5. The adoption of the Civil Code certainly has attracted little attention from historians other than Robert Natelson. *See infra* note 14. Standard works on Montana like K. ROSS TOOLE, MONTANA: AN UNCOMMON LAND (1959), do not mention the Code at all, and none of the major twentieth century Montana history sources mentions the Codes other than to note their passage. *See, e.g.*, MERRILL G. BURLINGAME & K. ROSS TOOLE, A HISTORY OF MONTANA (1957); BANCROFT, *infra* note 94. The otherwise exhaustive JAMES M. HAMILTON, FROM WILDERNESS TO STATEHOOD: A HISTORY OF MONTANA, 1805-1900 (1957), tells us only that Wade's codification work "has been the model for code commissions." *Id.* at 329.

Standard legal histories also give little attention to the Western codifiers in

legislature changed Montana's criminal law, civil law, procedural rules, and government structure, and revolutionized the state's infant legal system. While legislators debated patronage jobs and the selection of school textbooks with great fervor, no significant debate occurred on the massive changes in the substance and structure of Montana's laws.[6]

The story of codification in Montana is more than an amusing tale of frontier corruption and political ineptitude. Montana's codification experience provides important lessons for those engaged in attempts to revolutionize legal systems today. From the former Soviet Union and Soviet bloc countries to Latin America, political change has led to a demand for dramatic legal change. As these countries turn to the West for examples of laws, Montana's experience with the legal reforms created for New York in the 1860s and California in the 1870s suggests that reformers should approach the substance of "foreign" western law with caution. Adoption of laws without creation of the appropriate legal culture and without sensitivity to the laws' suitability to local conditions is a recipe for the distortion of substance. It undermines the rule of law by creating a dissonance between the written law and the law as applied by the courts. Moreover, the legal reforms in the former Soviet and Soviet Bloc countries have again raised the issue of whether reform is best accomplished through centralized, top-down efforts similar to the Montana Codes (the Codes), or through decentralized institutions such as the common law.[7] This Article describes the history of the Codes

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general, and even less to Montana. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 351-54 (1973) (mentioning Dakota, California and Montana and attributes the Codes' success in the West to those states being "sparsely settled;" no discussion of Montana codification); KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 126-27 (1989) (noting only the code of procedure and concluding "[t]he common law . . . was undisturbed"); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 117-18 (1992) (not mentioning Montana's adoption although listing Dakota Territory, California, and Georgia).

6. These changes were embodied in four Codes: a Civil Code, a Penal Code, a Political Code, and a Code of Civil Procedure. The Montana codifiers derived the Codes from drafts produced in New York between 1848 and 1865 by David Dudley Field and others. *See infra* part II.A. They also drew on California's experience with the Codes, where David's brother Stephen helped shepherd them to adoption in 1872, and the experience of the Dakota Territory, which had adopted Codes based on David Dudley Field's drafts in 1866.

7. *Compare* Paul H. Rubin, *Growing a Legal System in the Post-Communist Economies*, 27 CORNELL INT'L L. J. 1 (1994) (advocating common law system) *with* Rudiger Dornbusch, *Strategies and Priorities for Reform in* 1 THE TRANSITION TO A MARKET ECONOMY: THE BROAD ISSUES (Paul Marer & Salvatore Zecchini eds., 1991) (advocating wholesale adoption of existing foreign commercial codes).

in an attempt to show the pitfalls of the top-down approach to law reform.

The Codes' adoption signalled a failure of the young state's governance mechanisms. Rather than considering the substance of these bills, the legislature deferred to the small group of attorneys who vigorously pushed for codification. Legislators waived the safeguards that might have avoided unintended consequences, such as the political code's restructuring of municipal government salaries and offices.[8] At the same time, they slavishly followed procedures, like hand enrollment,[9] which served no purpose and yet were expensive. In doing so, the legislature abdicated its responsibility to govern. Inevitably, *after* passage, when people began to read the Codes, a multitude of problems surfaced.

Perhaps more surprising than the simple adoption of such massive changes in the legal system was the adoption of these changes based on "foreign"[10] law. Dating back to territorial days, Montana had a long history of opposition to outsiders' involvement in the local legal system.[11] Despite the significant differences between Montana's economy and society in the 1890s and those of the source states, the Fourth Legislature swallowed a massive dose of "foreign" law. Why?

Montana's advocates of codification succeeded for several reasons. First, many saw codification as an antidote to the chaos of the state's statutes. Thirty years of politics and carelessness produced a jumble of sometimes conflicting provisions, causing great uncertainty regarding the law's content. Although these conditions existed since the 1860s, by the 1890s the chaos reached epic proportions. Second, important elements of the bench and bar united behind the codification effort because it promised to make their lives easier by producing a single, readily available source of law. Unlike the New York Bar, which pro-

8. *See infra* notes 208-17 and accompanying text.

9. Enrolling bills required copying the final versions by hand. In the case of the Codes, this took weeks of work by a small army of clerks. *See infra* part II.D.3.

10. The Codes derived directly from David Dudley Field's attempts at codification in New York and Dakota's and California's adoption of modified versions of Field's drafts. *See infra* part II.A.

11. For an example of Montana's grievances against outsiders and their involvement in territorial government and law, see the speech of Congressional Delegate J. K. Toole to Congress on the subject in *The Territories' Rulers*, DAILY INDEPENDENT (Helena), Jan. 22, 1889, at 3 (a representative quote: "In short, Mr. Speaker, it [Congress] has made the territories the dumping-ground for all the experimental legislation which the whims and caprices of congress can invent.").

duced vigorous opposition to that state's codification, the Montana Bar was not yet a mature profession with strong interests in maintaining the legal status quo against the Codes' changes. Third, a public choice[12] analysis suggests that the Codes provided an opportune moment for legislators to create demand for their services. By passing such a comprehensive set of laws, the Fourth Legislature created both the need for amendments to "fix" problem areas and the opportunity to provide such services. Additionally, amendments to the Codes were far more difficult for outsiders to decipher than laws written from scratch. Amendments required possession of the Codes to determine what was being amended because the titles to amendments typically provided no information regarding their contents. Finally, Montanans saw the Codes as a chance for Montana to take its rightful place in the nation as a progressive, modern state. Denied statehood for years by national politics, and often chafing under the federal territorial appointees who dominated the executive and judicial branches, the Codes' image as a rational, forward-looking set of principles gave Montana a chance to leap to the forefront of legal reform.

The Codes also physically overwhelmed the Montana Legislature. Their sheer size and hurried passage meant that the usual mechanisms for review of legislation failed completely. An embarrassing legislative patronage scandal over clerical employees contributed to the disregard for the legislators' responsibility to review legislation; the passage of the Codes ended discussion of overstaffing. Indeed, rather than reducing patronage employees, the Codes created the need to expand the ranks of the patronage clerks to enroll the Codes by hand.[13]

The Codes' adoption had less impact on Montana's legal system than the codifiers hoped. Since adoption, the Montana courts have routinely ignored the Codes' provisions. With respect to employment law, for example, the Code provisions governing interpretation of indefinite employment contracts (discussed in Part IV, *infra*) proved ineffective in forestalling development of expansive common law remedies for wrongful discharge. Despite these remedies' clear conflict with the Civil Code, Montana's courts paid little attention to the Code's provisions. Because the Montana courts failed to follow the Civil Code, they created a dissonance between the written Codes and the common law,

12. Public choice is essentially the economic analysis of politics.

13. *See infra* part II.D.3.

which defeated the codifiers' attempt to create certain and easily known law. By failing to accommodate the common law changes to the clear text of the rule, the Montana courts undermined the Codes. Even worse, as Professor Robert Natelson has shown elsewhere,[14] when Montana courts did follow the Codes, the inappropriateness of the Codes' provisions sometimes distorted the development of law appropriate to Montana's conditions.

More importantly, examination of the development of wrongful discharge law in Montana illustrates a different sort of problem from the general problems associated with codification discussed above. In the Montana jurisprudence of wrongful discharge law, the Civil Code provisions provided an alternative to the Montana Supreme Court's misinterpretation of them. Because of its misinterpretation, the Montana Supreme Court distorted Montana's common law in a manner likely to harm Montana's economy. Had the court carefully followed the Code provisions in this area, it could have both avoided the harshness of the common law at-will rule and the excesses of the court-created remedies.

Part II of this Article briefly sketches the codification movement in the United States and the conditions in Montana in the 1890s. The remainder of Part II tells the story of Montana's adoption of the Civil, Criminal, Political, and Civil Procedure Codes of 1895. Part III examines in detail the subsequent treatment of some of the employment law sections of the Civil Code. Part IV draws lessons from codification and the Codes' application for future legal reform efforts.

II. ADOPTION OF THE MONTANA CODES

Montana's adoption of the Codes was the final success of a major nineteenth century intellectual movement. Codification was debated across the country[15] and took root in four states in the West and one in the South (besides Louisiana).[16] The original source of the Montana Codes was four draft codes prepared for New York in the 1850s and 1860s; although New York never adopted a large portion of them. California and Dakota Territory

14. Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17, 40-41 (1990).

15. *See* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981).

16. The Western Code states were California (1872), Montana (1895), North Dakota (1866) and South Dakota (1866) (while both were part of the Dakota Territory). Georgia codified its laws in 1860.

adopted versions of all four New York Codes before they were adopted in Montana.

A. *Codification in the United States*

Codification movements came and went throughout nineteenth century America.[17] As Roscoe Pound put it, "The French Civil Code had fascinated many in America as it had almost everyone abroad."[18] Jeremy Bentham[19] began the first systematic attempt to convince Americans of the virtues of codes over the common law, writing to President James Madison in 1811 to volunteer to produce a complete American code.[20] Upon receipt of a letter "importing *approbation* of this my humble Proposal," Bentham said he would commence drawing up:

> [A] *complete body* of proposed law, in the form of Statute law, say in one word a *Pannomion*–including a succedaneum to that mass of foreign law, the yoke of which in the *wordless*, as well as boundless, and shapeless shape of *common*, alias *unwritten* law, remains still about your necks–a *complete* body or such parts of it as the life and health of a man, whose age wants little of four and sixty, may allow of.[21]

Madison's reply, delayed by the War of 1812, refused to give Bentham the encouragement he sought to begin such a project.[22] While waiting for Madison to respond, however, Bentham became convinced that the states were the appropriate forum for his efforts.[23] He wrote to each of the states' governors to offer

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17. Codification was an important intellectual movement in Europe as well as in the United States. In England, Jeremy Bentham, for example, was a major proponent of codification. France's adoption of the Code Napoléon in the early part of the nineteenth century launched a codification movement across much of Europe. The Code Napoléon's influence spread with Napoleon's military accomplishments but did not recede with his defeats. Austria, Switzerland, Spain, Portugal, and several of the German and Italian states all adopted at least partial civil codes during the nineteenth century, as did Japan, Ottoman Turkey, and British India.

18. Roscoe Pound, *David Dudley Field: An Appraisal*, *in* DAVID DUDLEY FIELD CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 3, 8-9 (Alison Reppy ed., 1949) [hereinafter CENTENARY ESSAYS].

19. Bentham coined the word "codify." Natelson, *supra* note 14, at 36.

20. COOK, *supra* note 15, at 97-98.

21. Letter to James Madison (Oct. 30, 1811), *in* 8 THE CORRESPONDENCE OF JEREMY BENTHAM 182 (Timothy L.S. Sprigge, ed., 1988) (emphasis in original) [hereinafter BENTHAM].

22. Letter from James Madison (May 8, 1816), *in* BENTHAM, *supra* note 21, at 521-22.

23. COOK, *supra* note 15, at 98-99.

his services.[24] Only New Hampshire's governor showed much enthusiasm for the project, an enthusiasm the New Hampshire legislature did not share.[25] Although unsuccessful in his efforts, Bentham succeeded in promoting the idea of codification in the United States as a rationalization and modernization of the common law.

1. *The New York Codes – "Is it right? Is it just?"*[26]

> That a codification of the law is in itself desirable should seem hardly to admit of question. It is desirable alike for the judge, the lawyer, and the citizen, . . . above all to the citizen, because it shows him the laws by which he is to guide his daily conduct. Strange indeed does it seem that any unprejudiced person should imagine that the laws of the land should not, if possible, be written down for the people of the land.[27]
>
> David Dudley Field

In New York, the explosive growth of commercial activity in the first decades of the nineteenth century matched an equally impressive growth in legislative activity. New York's annual session law pamphlets "were rarely less than three hundred pages in length, with some exceeding five hundred pages during the first three decades of the nineteenth century."[28] Despite regular revisions, the growth in statutes combined with the rise in reported decisions made the law increasingly difficult to determine for lawyer and citizen alike.[29] As a result, throughout the first half of the century New York engaged in a prolonged debate over the comparative virtues of codification and revision.[30]

Two commissions drafted the New York Codes and reported them between 1848 (Civil Procedure) and 1865 (Civil Code).[31]

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24. COOK, *supra* note 15, at 100-01.

25. COOK, *supra* note 15, at 101-02.

26. The phrase is Henry Field's (David Dudley Field's brother and biographer). HENRY FIELD, THE LIFE OF DAVID DUDLEY FIELD 77 (1898).

27. David Dudley Field, *Codification in the United States*, 1 JURID. REV. 18, 23-24 (1889) [hereinafter Field, *Codification*].

28. COOK, *supra* note 15, at 131-32 (citation omitted).

29. COOK, *supra* note 15, at 132.

30. *See generally* COOK, *supra* note 15, at 121-200 (providing a detailed discussion of codification efforts in New York through 1860).

31. The New York Commissioners on Practice and Pleadings reported the Code of Civil Procedure on February 29, 1848 and it was enacted "with very little change" in April 1848. Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 241-42 (1942). A separate body,

Largely through the efforts of David Dudley Field,[32] codification

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the New York Code Commissioners, had also been appointed to draft political, penal, and civil codes. *Id.* at 243. Not until 1857, with the appointment of Field, Noyes, and Bradford, however, did this body begin to accomplish its task. The commission reported the first draft of the Political Code on March 10, 1859 and the final draft on April 10, 1860. *Id.* The first draft of the Penal Code was reported on April 2, 1864 and the final draft on February 13, 1865. *Id.* at 245. The Penal Code was adopted in 1881. Alison Reppy, *The Field Codification Concept, in* CENTENARY ESSAYS, *supra* note 18, at 17, 48. The Code Commissioners reported the first draft of the Field Civil Code on April 5, 1862. Coe & Morse, *supra*, at 245. The reported draft was the result of more than the labors of the commissioners and their assistants. Field claimed that "[a]s fast as my part of the Draft was prepared it was to be distributed among the Judges and others for examination, and afterwards to be re-examined, with the suggestions made." FIELD, *supra* note 26, at 78. Field distributed the 1862 draft to "judges and others" for review and the Code Commissioners "re-examined these two Codes [the Civil and Penal] and considered such suggestions as had been made" and "finally revised and agreed upon them." NINTH REPORT OF THE COMMISSIONERS OF THE CODE (Feb. 13, 1865), *in* the 1865 Draft, at iv. In light of these responses, the Code Commission revised the 1862 drafts, after circulating them to judges and members of the bar. The Commission issued an extensively modified final draft of the Civil Code on February 13, 1865, Field's sixtieth birthday. "The revision of the Civil Code involved as much labor as its original draft." Coe & Morse, *supra*, at 245; FIELD, *supra* note 26, at 81.

32. Field was a well-connected lawyer, often identified with the interests of the powerful New York street railway corporations. Field's reputation as a lawyer was blemished by his actions on behalf of Jim Fisk and Jay Gould in the Erie wars over control of the Albany and Susquehanna Railroad and in Gould's attempts to corner the gold market. DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW 238-80 (1986). In addition to the attacks on Field's professional ethics in connection with his actions in those cases, Field also defended William "Boss" Tweed against corruption charges, further sullying Field's reputation among both the profession and the general public. *Id.* at 293-310.

Despite these connections and his own wealth (Field earned at least $75,000 a year in 1869 and 1870, for example, putting him at the top of the profession in income, *see id.* at 251-52), Field offered an image of himself as a protector of the middle class, prompting his brother and biographer Henry to label him "the Reformer:"

> Justice, in the eye of the Reformer, was the rock, the corner-stone, on which to build the structure of human society. I never knew a man who had a stronger sense of justice. In framing a law it never occurred to him to modify it in the interest of this or that individual or of this or that class. The first question that he asked—and the only question—was, 'Is it right? Is it just?'

FIELD, *supra* note 26, at 77.

What Field thought was right and just was almost certainly influenced by his political views. Field began his involvement in politics as a Jacksonian Democrat and codification was a Jacksonian program. HORWITZ, *supra* note 5, at 9. He continued as a follower of Van Buren in the radical wing of the New York Democratic party, which sought strict limits on government power. VAN EE, *supra*, at 114-45. As party lines began to reform around slavery, Field, in 1856, reluctantly joined "with the friends of freedom" in the new Republican party. VAN EE, *supra*, at 131 (quoting FIELD, *supra* note 26, at 119 (quoting a letter to the ALBANY ATLAS)). Once a Republican, Field became part of the radical wing of the Republican party in the late 1850s. VAN EE, *supra*, at 132. Disgusted with Republican corruption after the Civil

of the common law in New York finally took on concrete form when Field and two others[33] were appointed in 1857[34] as a commission to codify the common law. Other than the Civil Procedure Code, the commissioners' work was largely ignored in New York in the 1860s, however, and Field turned his efforts to drafting an international code of laws.[35]

Although all four Codes contained innovations, the Civil Code was the most revolutionary. Field intended the Civil Code to displace the common law entirely.[36] In crafting his substitute for the common law, Field drew on a wide range of sources for the Civil Code's provisions: New York decisions; citations to reporters from both the United States and Britain; New York statutes; British statutes; the works of Coke, Blackstone, Kent, Story, and Lewin; and numerous other reference works.[37] Field aspired not simply to codify the existing law, but to improve upon it.[38] One of Field's major objectives, and an objective of the

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War, he returned to the Democratic fold. VAN EE, *supra*, at 204.

33. The Commissioners were David Dudley Field, who had primary responsibility for the Civil Code, William Curtiss Noyes, and Alexander W. Bradford. The Commissioners did not work alone, of course. Field had assistants, and his brother and biographer, Henry Field, reports:

> [H]e preferred young men to old men. They might not be so learned in the law, but that was in one view a qualification, as they were more free from the paralyzing influence of old traditions; more alert in mind as well as in body; more quick to receive new ideas; and last, but not least, had more power of continued labor.

FIELD, *supra* note 26, at 79. Thomas Shearman and Austin Abbott assisted Field with the Civil Code. FIELD, *supra* note 26, at 80.

34. COOK, *supra* note 15, at 196.

35. VAN EE, *supra* note 32, at 322-29. Field had no more success there where his international code was "for the most part regarded as a curiosity." VAN EE, *supra* note 32, at 328 (quoting MERLE CURTI, PEACE OR WAR: THE AMERICAN STRUGGLE, 1636-1936, at 100 (1959)).

36. Natelson, *supra* note 14, at 37-40; NEW YORK CIVIL CODE § 6 (1865) ("There is no common law in any case where the law is declared by the Five Codes.").

37. Rodolfo Batista, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799, 804 (1986). Batista is discussing the final 1865 draft, but inspection suggests that the sources generally remained the same between drafts.

38. In the final report of the Code Commission in 1865, the Commission summed up its work:

> In all this immense range of subjects, while it has been the general purpose of the Commissioners to give the law as it now exists, they have kept in mind the injunction of the Constitution to 'specify such alterations and amendments therein as they shall deem proper.' In obedience to this command of the organic law, they have specified various alterations and amendments which they consider proper to be adopted.

Final Report of the Code Commission (Feb. 13, 1865) *in* 1 SPEECHES, ARGUMENTS,

codification movement generally, was to make the law accessible to the individual layman.[39]

Renewed efforts to pass the other Field Codes in New York occurred in the 1880s and included numerous revisions of the proposed Codes.[40] A law revision commission's success in extensively revising Field's earlier Code of Civil Procedure in 1876 spurred the revival of interest in the Civil, Penal, and Political Codes. Field, for whatever reason, opposed the revisions of the Procedure Code, attempted to arrange their repeal, and delayed passage of the final revisions. To persuade Field to drop his opposition, the supporters of the civil procedure revision offered a compromise: They would enact the Civil, Political, and Penal Codes if Field would cease his opposition to the procedure revisions. Field accepted.[41] The New York Legislature adopted the Penal Code in 1881 and portions of the Political Code throughout the 1880s. Despite the Civil Code's passage through one or both houses of the New York Legislature on several occasions,[42] it

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AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 320 (A.P. Sprague ed., 1884).

This progressive orientation undoubtedly contributed to the preservation of the basic structure of Field's work in Montana's codification in 1895; how else can one explain the acceptance of the basics of a set of laws that originated thirty years and thousands of miles away? *See infra* note 254.

39. *See, e.g.*, Alexander Martin, *Codification*, *in* MISSOURI BAR ASSOCIATION REPORTS, 3D ANNUAL MEETING 152 (1883) ("As it now stands the law is like a sealed book to the citizen."); David Dudley Field, Remarks Before the American Bar Association (Aug. 20, 1886), *in* SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 233 (T. Coan ed., 1890) ("The question is, whether the laws made for the people are to be understood by the people.").

40. *See* Coe & Morse, *supra* note 31.

41. VAN EE, *supra* note 32, at 329-31.

42. How carefully legislatures examined the Field Codes is difficult to assess. Even in New York, where the debate was the longest and most heated, evidence suggests that the examination by the legislature was less than thorough. For example, the committee appointed by the Association of the Bar of the City of New York to oppose codification reported that *after* the Civil Code had passed the state assembly by a vote of 83-3 in 1881, "the result of many inquiries was an inability to find any member of the Assembly who was willing to acknowledge that he had *read* [the proposed Code], although one member did admit that he himself had *voted* for it, in order to rid the Assembly of its presence as an element of disturbance." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, [FIRST ANNUAL] REPORT OF THE SPECIAL COMMITTEE TO "URGE THE REJECTION OF THE PROPOSED CIVIL CODE," APPOINTED MAR. 15TH, 1881 (1881). Even discounting for exaggeration because of its source, it seems likely that few legislators troubled to read the more than two thousand sections which made up the Code. A similar lack of interest was reported among the bar. *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FIFTH ANNUAL REPORT OF THE SPECIAL COMMITTEE TO "URGE THE REJECTION OF THE PROPOSED CIVIL CODE," REAPPOINTED OCT. 14, 1984, at 9 (1885). Only 28 of 309 members responded to a New York State Bar Association survey on the Code and Field himself got only 50 responses to a question put to 700 members of the American Bar Association.

never became law. Each time one house passed it, the other house blocked it or the Governor vetoed it.

Among at least part of the public, Field's effort had certainly earned a reputation as a significant modern legal reform. That reputation may have attracted the interest of westerners seeking reform. At the same time, Field's codification efforts (and his tactics in representing clients like Jay Gould and Boss Tweed) had given portions of the New York legal community reason to dislike both Field and his Codes.[43] By the 1890s, New York had seen over thirty years of heated disputes concerning Field's Codes, and even a casual observer could not have failed to notice the criticisms of the Codes. Yet the Montana codification debate contained almost no mention of these controversies.

The debate in New York over Field's proposed Civil Code was lengthy and often acrimonious. Field's chief opponent was James C. Carter. In addition to attacking many of the particulars of Field's drafts,[44] Carter dismissed the claimed benefits of codification. He asserted that: the Codes would not enable people to know the law because many would be unable to read or comprehend the Codes; among those who could both read and understand the Codes, many would neglect to read them;[45] the increased number of law books was not an evil but the result of progress as in "all other sciences;"[46] nonlawyers charged with administering law, such as Justices of the Peace, would find the "precise formulas" of the Codes less comprehensible than "the simple principles of justice" and so would not be helped by the

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VAN EE, *supra* note 32, at 333.

43. The first modern bar association, the Association of the Bar of the City of New York, was created in response to Field's activities in the Erie litigation. *See supra* note 32. Although Field was invited to participate, which may have been due to a mistake, there was a distinct anti-Field flavor to much of the Association's activities. "[I]t fought his attempts at codification in the 1870s and 1880s with a vengeance that seemed as personal as it was political." Michael Schudson, *Private, Public, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 203-04 (1977). Schudson gives a thorough examination of the conflict over ethics surrounding Field's activities in the Erie litigation.

44. For examples of the specific criticisms, see *infra* note 329.

45. JAMES C. CARTER, THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW 19-20 (1889). Carter wrote widely on codification. I have relied here on an 1889 speech to the Virginia State Bar Association, published as a pamphlet, in which Carter summarized his views. Morton Horwitz takes a different view of Carter's objections, seeing them as unified by social Darwinism. HORWITZ, *supra* note 5, at 119-21. While there are certainly elements of social Darwinism in Carter's thought, I think Horwitz' view shortchanges the power of Carter's analysis of the adaptability of the common law.

46. Carter, *supra* note 45, at 21.

Codes;[47] and students and new lawyers would learn little from even "an age employed in the reading of dull statutes" compared to the knowledge gained from "a single year's intelligent study of the actual cases in which we find the law discussed, reasoned out and applied to the real transactions of men."[48]

Carter argued complete codification was impossible because no one could anticipate the facts of all future transactions. Without knowing the facts, the codifier could not frame the correct rule. "So far, therefore, as future transactions are concerned, codification is not simply morally impracticable, but philosophically impossible."[49] Even if legislators could write down a complete set of rules, Carter objected that such a code would freeze the development of the law and lose the evolutionary advantage of the common law:

> [The common law] takes the transactions of the past, and, by classifying them, makes its rules; but it makes them provisionally only. It declares that they are binding on the courts only so far as respects transactions substantially like those from the examination of which the rules have been framed. In respect to future cases which may wear different aspects, it suspends judgment. It leaves these to be examined and classified as they arise, when and when only, their features can be subjected to examination. But written law affirms that it has made an absolute classification of all possible transactions; and its rules are not subject to change or modification however ill-adapted they may prove to be to the business of the future to which they are to be applied. It refuses to proceed any further with the scientific method of examining and classifying transactions according to their actual features. It insists that however useful that process may have been in the past, it shall now cease.[50]

Carter's objections applied most strongly to Field's drafts, which sought to replace the common law as much as possible.[51] These objections also applied, however, to the less radical approaches to codification implemented in Montana and elsewhere in the West. Comprehensive codes, to the extent the courts paid

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47. Carter, *supra* note 45, at 20-21.
48. Carter, *supra* note 45, at 21.
49. Carter, *supra* note 45, at 29-30.
50. Carter, *supra* note 45, at 29-30.
51. CIVIL CODE § 6 (1865); Assembly Bill No. 182 § 6 (1880); Assembly Bill No. 62, § 6 (1881); Assembly Bill No. 215, § 6 (1882). The versions of the Civil Code introduced after 1882 did not include this section. *See infra* note 345 for citations to those versions.

attention to them, inevitably crowded out the common law in some areas and distorted its development in others. Successful codification would thus reduce the flexibility of the common law and hinder its development. Surprisingly, the western states' debates ignored many of the issues raised by Carter, as discussed in Part II, *infra*. Indeed, the Codes failed in Montana largely due to many of the problems raised by Carter.

2. *The Field Codes In the West: 1866-1872*

Despite Field's failure to persuade New York to adopt his Codes, the Dakota Territory and California enacted modified versions of all four of his Codes. Dakota's and particularly California's enacted versions provided the basis for much of the Montana codifiers' work.

a) *Dakota Territory*

Field's efforts at codification[52] first took hold far from New

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52. Georgia was the first state to successfully codify its common law. Marion Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178 (1930). Georgia did so in a Code adopted in December 1860, effective 1861. The Georgia codifiers' main goal was to collect and organize Georgia's existing law, a more limited mission than Field's or the western codifiers':

> The prominent and leading power of change exercised in construction and revision, has been to cut and unravel *Gordian knots*, resulting from conflicting decisions of the [c]ourts, to reconcile actual and apparently discordant legislation, harmonizing all conflicts to what seemed to be settled and favored public policy; to remedy existing defects by wise and harmonious provisions, and to supply omissions which the practice and experience of the [c]ourts had discovered and made manifest in existing legislation. In short, the great end and aim has been to reconcile, harmonize, render consistent the body of the Law, so as to give shape and order, system and efficiency, to the sometimes crude, and ill expressed, sovereign will of the State.

R. H. Clark et al., Report of the Committee, *Preface to* THE CODE OF THE STATE OF GEORGIA at viii (1861). Changes proposed were limited to resolving contradictions in the existing law. Although not aware of the Georgia Code at the time he was drafting his proposals for New York, "owing, it is supposed, to the breaking out of the Civil War," Field later complimented the Georgia Code as "drawn up with care and precision." Field, *Codification*, *supra* note 27, at 19.

As the first Georgia Code had been adopted shortly after secession, the Code was heavily modified after the war. As David Irwin, of the original codification committee, put it in his revised edition of 1867, "The late war and its results, having produced so many radical changes in the Constitution and Laws of Georgia, a revision of the Code of the State became a matter of necessity." *Preface to the Revised Edition* of THE CODE OF THE STATE OF GEORGIA at xi (David Irwin ed., Atlanta, Franklin Steam Printing House 1867). Further changes to the Georgia constitution and statutes required additional revision and a new edition was issued in 1873. THE CODE OF THE STATE OF GEORGIA (David Irwin et al. eds., 2d ed., J. W. Burke & Co.

York in the Dakota Territory.[53] After a copy of the Field Civil Code "came into the possession of the Supreme Court of the Territory,"[54] and with a haste that surpassed even

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1873) (1867). This edition added annotations and legislative enactments. A fourth edition in 1882 (the first without Irwin's participation) added more extensive annotations as well as updating the intervening legislative enactments. By 1895 a fifth revision was necessary. THE CODE OF THE STATE OF GEORGIA (John L. Hopkins et al. eds., 1896) (1867).

53. Dakota's accomplishment in this respect has long been overshadowed by California's adoption of the Field Codes in 1872, and despite the efforts of Dakota's partisans, even the North Dakota Supreme Court erroneously attributes the at-will provision of that state's code to the California Codes. *See* Wadeson v. American Family Mut. Ins. Co., 343 N.W.2d 367, 370 (N.D. 1984) ("The *Cleary* court did not apply the 'independent consideration rule' in construing California Labor Code § 2922 (formerly Cal. Civ. Code § 1999, from which our § 34-03-01, N.D.C.C., was derived)."). Section 34-03-01 actually derived directly from § 1029 of the 1865 Field draft code. Kingsbury's 1915 statement that "owing to the prominence of that state, the codes became popularly known as the California codes" but that "[t]his error . . . was later corrected, and Dakota gave the tribute of authorship where it of right belonged," has proven overly optimistic. GEORGE W. KINGSBURY, I HISTORY OF THE DAKOTA TERRITORY 430 (1915).

54. Kingsbury's 1915 history of Dakota gives this account:

> [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.

KINGSBURY, *supra* note 53, at 430. Showing an unusual degree of common sense, the Dakota Territory Legislature refrained from adopting the maritime code. Achieving unanimity of the bench and bar of the territory would not have been difficult as there appear to have been only 17 practicing lawyers and judges in the Dakota Territory in 1866. KINGSBURY, *supra* note 53, at 447-48. The 1862 Codes mentioned procedure and criminal laws, but did not address civil law as a whole. *See* George H. Hand, *Preface* to THE REVISED CODES OF THE TERRITORY OF DAKOTA at iv-v (1877) [hereinafter 1877 Code].

Dakota legal history being understandably sparse in this period, little else is known about either how the Field Codes "came into the possession of the Supreme Court of the Territory" or the particulars of the problems with the previously enacted 1862 Codes. Kingsbury, for example, has little more than the passage quoted on the Codes, while other Dakota histories contain only brief mentions of the enactment of the code or nothing at all. *See, e.g.*, HERBERT S. SCHELL, DAKOTA TERRITORY DURING THE EIGHTEEN SIXTIES (University of South Dakota, Governmental Research Bureau Report No. 30, 1954); DOANE ROBINSON, SOUTH DAKOTA, SUI GENERIS (1930); HERBERT S. SCHELL, HISTORY OF SOUTH DAKOTA 96 (3d ed. rev. 1975). All that is certain is that the early Dakota legislatures showed a keen interest in codification, passing codes of civil procedure in 1862 and 1868, codes of criminal procedure in 1862 and 1869, penal codes in 1862 and 1865, justice codes in 1863 and 1866, and a probate

Montana's,[55] the Dakota Territorial Legislature adopted the Field Civil Code in 1866. Field's 1865 draft was adopted "almost verbatim."[56] A code of civil procedure, presumably Field's, failed to pass during the 1866-67 session.[57] The adoption of the proposed New York Codes without significant changes "naturally left in the laws many repugnant provisions."[58]

Once adopted, the maintenance of a code as an organized code,[59] rather than as a mere collection of laws, required continued effort. In December 1870, Territorial Governor John Burbank called for a code commission in his first message to the legislature, saying "[R]evision and codification has [sic] become a matter of greatest importance, and the difficulty and uncertainty growing out of the present want of systematic arrangement is well known to all who have occasion to refer to [the statutes]."[60] His call went unanswered, and was repeated in 1872.[61] The 1873 legislature appointed an individual to "prepare a complete revision," but did not accept the resulting proposal.[62] Not until 1875 did the territorial legislature create a Code Commission to

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code in 1865. Horace G. Tilton, *History of the Dakota Codes*, 1 MONTHLY S. DAKOTAN 90, 90-91 (1898). The primary sources of information on the Dakota Codes are William B. Fisch, *Civil Code: Notes for an Uncelebrated Centennial*, 43 N.D. L. REV. 485 (1967) and William B. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D. L. REV. 17 (1968) [hereinafter Fisch, *More Notes*].

55. The degree of consideration which the Civil Code received is evident in the Yankton *Union and Dakotaian*'s editorial calling for its passage: "Our civil code is, to say the least, very defective, and needs altering and amending in many particulars. It might save time and trouble by adopting a new one entire." In the next sentence, the *Union and Dakotaian* went on to call for a new fence law, hardly a comparable goal. *The Legislature*, UNION AND DAKOTAIAN (Yankton), Nov. 25, 1865, at 2. The *Union and Dakotaian* recommended adoption, noting the Code "has been carefully prepared by some of the ablest legal merits in the state of New York, and will be a great improvement to the Dakota laws." *Legislative*, UNION AND DAKOTAIAN (Yankton), Dec. 30, 1865, at 2.

56. Fisch, *More Notes*, *supra* note 54, at 37.

57. The Code of Civil Procedure passed the Council but died in the lower house due to the objections of a few members to its "glaring faults." Its failure to pass was the subject of an uncharacteristic debate in the normally quiet pages of the *Union and Dakotaian*. *The Adjournment*, UNION AND DAKOTAIAN (Yankton), Jan. 19, 1867, at 2; C.H. McCarthy, *Reply to Dakotaian's Comment*, UNION AND DAKOTAIAN (Yankton), Jan. 26, 1867, at 2.

58. Tilton, *supra* note 54, at 91.

59. The Dakota Legislature sought federal financing for their code maintenance efforts in the session after the Civil Code was passed. *Legislative Proceedings*, UNION AND DAKOTAIAN (Yankton), Dec. 15, 1866, at 1, 3 (discussing memorial to congress for authorization to use funds saved out of appropriations "for the purpose of codifying the laws of Dakota").

60. KINGSBURY, *supra* note 53, at 560.

61. KINGSBURY, *supra* note 53, at 678.

62. Tilton, *supra* note 54, at 91.

handle the matter systematically.

The Commission, consisting of two territorial supreme court justices and a distinguished lawyer,[63] reported to the legislature a set of Codes, adopted in 1877,[64] "which gave to Dakota a code of laws and a system of jurisprudence not surpassed for excellence and completeness by any state or territory of the Union."[65] The 1877 Codes incorporated the two Field Codes not adopted in 1866. The completeness did not last for long, however, and by 1889 the governor had again submitted a new revision of the statutes and Codes to the legislature.[66]

For two reasons, Dakota's experience with the Codes should have provided important lessons for Montana's subsequent codification efforts. First, Dakota's haste in adoption and the subsequent difficulties from provisions "repugnant" to Dakota's conditions should have alerted Montanans to the need for careful revision of the proposed Codes. Second, Dakota's repeated problems in maintaining its Codes as codes provided clear evidence that adoption of Codes did not answer the problem of confused statutes that the Montana codifiers sought to resolve. Despite Dakota's geographical and socio-economic proximity, Montanans did not learn from their neighbors' experience.

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63. Fisch, *More Notes*, *supra* note 54, at 37.

64. Adoption was no doubt hastened, and debate shortened, by the fact that the Code Commission's secretary was also the chairman of the Judiciary Committee of the territorial House of Representatives. Hand, *supra* note 54, at vi. The Codes were apparently the reason for his election to the legislature as well. Kingsbury, the Dakota's most thorough historian, reports that "General Beadle [the secretary] had been elected a member of the House from Yankton County mainly because of his familiarity with the new code, which had been quite largely his handiwork as secretary of the code commission." KINGSBURY, *supra* note 53, at 1024. A twentieth-century historian describes Beadle as "pompous, verbose, and inclined to take a self-righteous stand upon all public issues, but Beadle's ability was so great that he came to be a major beneficent and reforming influence in the Republican party of territorial Dakota." HOWARD R. LAMAR, DAKOTA TERRITORY, 1861-1889, at 119 (1956).

65. KINGSBURY, *supra* note 53, at 1024.

66. KINGSBURY, *supra* note 53, at 1558. Even before then, market demand for updated versions had prompted a private publisher in 1884 to add more recent statutes to the Codes and to publish an unofficial edition entitled the Revised Codes of Dakota Territory. Tilton, *supra* note 54, at 91-92. In 1887 another committee was appointed but given no power to make substantive changes; the revision was to take effect after a gubernatorial proclamation, but no proclamation was issued. The 1889 legislature passed an act making the compilation official. Tilton, *supra* note 54, at 92. No further revisions to the Codes were made until this century in either North or South Dakota.

b) California

> This state has acted the part of a very young state in attaining codification.[67]
>
> Charles Lindley

The first California State Legislature adopted the common law as the basis for its legal system, rejecting a suggestion by Governor Peter Burnett that it adopt a mixture of the common law and Louisiana systems.[68] The second legislative session adopted versions of the Field Procedure Code.[69] The passage of legislation by subsequent legislatures led to confusion and disorder in the statutes, problems that "grew worse with each session of the legislature thereafter."[70] The California Legislature defeated repeated attempts at codification, however, and undertook less ambitious revisions instead.[71] Finally in 1868, a commission was appointed "to revise and compile the laws of the state into a comprehensive and concise system."[72] This commission did not complete its work in the time allotted, however, and a new commission was appointed.[73] Apparently the impetus for codification was that "those required to use the statutes of California were compelled to make their way among the eighteen volumes of session laws or rely upon Hittell's *General Laws* (through the 1863-64 session), together with the succeeding three volumes of session laws."[74]

Although the 1870 Commission received a broad mandate to correct errors and suggest improvements, "[t]he Commission . . . went a little beyond what was contemplated by the Governor when he made the appointments."[75] Instead of simply correcting the existing laws, the Commission created a new system based on Field's draft New York Codes.

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67. CHARLES LINDLEY, CALIFORNIA CODE COMMENTARIES App. at v (1874) (open letter from Charles Lindley to the Hon. H. H. Haight, Ex-Governor of California).

68. Ralph N. Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 CAL. L. REV. 766, 766 (1954); Arvo van Alstyne, *The California Civil Code*, *in* 6 CALIFORNIA CODE 2-3 (1982).

69. Kleps, *supra* note 68, at 767.

70. Kleps, *supra* note 68, at 767.

71. Kleps, *supra* note 68, at 768-70.

72. Statutes of 1867-68, ch. 365 *quoted in* Kleps, *supra* note 68, at 770.

73. Kleps, *supra* note 68, at 770-72.

74. Kleps, *supra* note 68, at 771.

75. LINDLEY, *supra* note 67, app. at ii.

In 1871 the Commission published drafts for comments.[76] "An intensive critical examination of the proposed Code[s] then began."[77] An Advisory Committee was appointed to examine the proposed Codes and recommended a number of changes.[78] In 1872, the Commission recommended, and California adopted, Civil, Political, Civil Procedure, and Penal Codes based on the New York Field drafts.[79] After passage, the governor appointed a commission, which included David's brother Stephen Field, to review the Codes.[80]

Foreshadowing some of the difficulties Montana would experience in physically incorporating such massive amounts of new law, the California Codes were not published as part of the statutes of 1871-72, and indeed were not published at all until March 31, 1873.[81] Moreover, the volume listing the prior statutes that would continue in force was not completed until November 1873.[82] In addition, the legislature failed to pass the statute designed to repeal those provisions of existing law that conflicted with the Codes.[83] Even after codification, a commission was necessary to keep the Codes up to date and modify

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76. Van Alstyne, *supra* note 68, at 7-8.

77. Van Alstyne, *supra* note 68, at 7.

78. Van Alstyne, *supra* note 68, at 7-8.

79. Rosamond Parma, *The History of the Adoption of the Codes of California*, 22 LAW LIBR. J. 8, 15 (1929). The California press gave scant attention to the Codes' progress through the legislature. The *Sacramento Reporter*, for example, barely mentioned them. *See, e.g.*, *California Legislature*, SACRAMENTO REP., Jan. 7, 1872, at 3 ("A message from the Governor was received transmitting the resolutions passed by the Revision Commission, to the effect that the Penal and Civil Procedure Code [sic] were now completed, and that the work on the Political Code was so far advanced that a committee from the Legislature could proceed to examine it."). The lengthiest report on the Codes in that paper was little more than a summary of the Revision Commission's reports. *The Revised Statutes—Political and Penal Code*, SACRAMENTO REP., Feb. 6, 1872, at 2. The passage of the Codes did not even warrant mention in the *Reporter's* summary of the legislative session. *Vale!*, SACRAMENTO REP., Apr. 2, 1872, at 2.

80. Oscar T. Shuck, *The California Code of Laws*, *in* HISTORY OF BENCH AND BAR OF CALIFORNIA 193 (Oscar T. Shuck ed., 1901).

California's adoption of the New York Codes was partly due to the efforts of David Dudley Field's brother Stephen Field. Natelson, *supra* note 14, at 40-41; Van Alstyne, *supra* note 68, at 6. Stephen Field was a member of the California Supreme Court from 1857 to 1863 and a member of the United States Supreme Court from 1863 to 1899. In 1872, Stephen Field was a member of the commission appointed to review the codes prepared by the Code Commission, which commission gave the Civil Code its "unqualified approval and endorsement." Shuck, *supra* note 80, at 193.

81. Kleps, *supra* note 68, at 774, 776.

82. Kleps, *supra* note 68, at 776-77 & n.38.

83. Kleps, *supra* note 68, at 775-76.

them to conform to the 1879 Constitution.[84] By 1895, when Montana adopted its Codes, California had demonstrated the difficulties of incorporating new statutes into the Codes while maintaining the Codes' integrity.[85]

The California codifiers made several important modifications to Field's original drafts.[86] Most significantly, California rejected Field's "displacement" approach to codification, where the Code supplanted the common law. Instead, the California codifiers specified liberal construction and treatment of Code provisions as continuations of common law rules and statutes similar to the Code provisions.[87] They also heavily modified the Political Code provisions. California provided direct evidence for the Montana codifiers of how well the Codes could solve problems of confused statutory schemes; it also demonstrated the extensive effort needed to adapt such laws to local conditions. As discussed below, Montana's codification advocates failed to examine that evidence.

B. "Montana, in the morning of its jurisprudence . . . ."[88]

> The statutes of Montana have always been imperfect, confused and incomplete.[89]
>
> Decius Wade

From the beginning, the Montana Territory's laws were in a state of confusion. When the Idaho Territory (present day Idaho, Montana, and part of Wyoming) was organized out of the Washington Territory, no copies of the Washington statutes were found in what is now Montana.[90] Things improved slightly in 1864 when Montana was created out of the Idaho Territory, since a single copy of the Idaho Territorial Statutes was present

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84. Kleps, *supra* note 68, at 779.

85. Kleps, *supra* note 68, at 779-81.

86. Without a detailed comparison of Field's drafts and the various California drafts, it is hard to pinpoint the source of innovations. Horwitz notes that the enacted version of the California Civil Code "was perhaps more radical." HORWITZ, *supra* note 5, at 118.

87. Natelson, *supra* note 14, at 40-41; CAL. CIV. CODE §§ 4-5 (1872).

88. Decius Wade, *The Bench and Bar 1880-1894*, *in* JOAQUIN MILLER, AN ILLUSTRATED HISTORY OF THE STATE OF MONTANA 634, 669 (1894) [hereinafter Wade, *1880-1894*].

89. *Id.* at 661.

90. W.F. Sanders, *Early Judiciary of Montana*, undated typescript, Montana Historical Society, Sanders File, Box 3, Folder 3, at 1.

in what became Montana. The Montana Territorial Supreme Court and the Territory's lawyers decided these would apply until the new Territory's legislature could produce a local substitute.[91] Little improvement in the condition of Montana's statutes occurred afterwards.

The First Territorial Legislature adjourned without passing a redistricting plan for future legislatures, as required by the Organic Act establishing the Montana Territory.[92] Montana held elections for the Second and Third Legislatures using the original districts.[93] In 1867,[94] the Republican-controlled Congress abrogated the statutes passed by the overwhelmingly Democratic Second and Third Territorial Legislatures,[95] leaving in

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91. Jesse B. Roote, *The Courts and Lawyers of Montana*, *in* 1 HELEN F. SANDERS, A HISTORY OF MONTANA 579, 582 (1913).

92. The First Territorial Legislature did establish a Code Commission, chaired by Wilbur F. Sanders, who became a prominent codification advocate in the 1890s. III MONTANA, ITS STORY AND BIOGRAPHY 957 (Tom Stout ed., 1921); Dave Walter, *Wilbur Fisk Sanders*, 63 MONTANA MAG. 58, 59 (1984). All records of this commission, except a file of receipts for its expenses, appear to have been lost. The 1865 commission spent over $8,800, including $3,500 for a clerk ($500 per month) and over $700 in rent for a house in which to meet. Record Series 146, File 1-1, Code Commission Territorial, Montana Historical Society.

93. These events were further confused by the absence of Governor Sidney Edgerton, who had gone to Washington to seek funds, since he had been personally paying for many of the territory's expenses. MERRILL G. BURLINGAME, THE MONTANA FRONTIER 158-59 (1942). In his absence, the governor's duties were exercised by Thomas Francis Meagher, who within a few months had switched from supporting the territorial Republicans to working closely with the local Democrats. The switch was caused in part by "his increasing animosity toward the vigorous Republican leaders, headed by Wilbur F. Sanders." *Id.* at 159-60. As Acting Governor, Meagher initially rejected the Democrats' claim that he had the authority to call a legislative session to solve the districting problem. Along with his changed political convictions came a new view of his authority, and Meagher soon called a new election. Two strongly Republican Territorial Supreme Court judges promptly struck the laws passed at this session as unconstitutional. The legislature responded by redistricting the two to "the eastern part of the Territory, where Indians and buffalo were the chief inhabitants, with the added provision that the judges must reside in their districts." *Id.* at 162. Sanders was dispatched to Congress to seek legislative relief against Meagher and the Democratic Legislatures. *Id.* at 163. *See also* Samuel Word, *History of the Democratic Party in Montana*, *in* MILLER, *supra* note 88, 592 at 597-600; Robert E. Albright, The Relations of Montana With The Federal Government, 1864-1889, 71-81 (1933) (unpublished Ph.D. dissertation, Stanford University).

94. HUBERT H. BANCROFT, HISTORY OF WASHINGTON, IDAHO, AND MONTANA, 1845-1889, at 667 (1890).

95. Decius S. Wade, Speech to the Montana Bar Association (Apr. 5, 1894), *in* MONT. B. ASS'N PROC., 1885-1902 (Edward C. Russel ed.) [hereinafter Wade, *Speech*] at 290; Miller, *supra* note 88, at 317. The districting controversy resulted from a squabble between the First Legislature and the territorial governor over the legislature's attempt to increase its size. Acting Governor Thomas Meagher threw his influence behind the local Democrats while the Governor was out of the territory, and called additional sessions of the legislature. *See* BANCROFT, *supra* note 94.

effect a hodgepodge of laws passed by the First and the Fourth Legislatures.[96]

To repair the confusing state of the statutes, the 1869 legislative assembly appointed the Territorial Supreme Court judges as a commission to codify and arrange the territorial statutes.[97] The court gathered all the laws, repealed and in effect, into a single collection, together with notes explaining what remained in effect. The cure proved worse than the disease:

> The work of this commission came before the legislative assembly of 1871-2. At that period the sessions were but forty days in length, including Sundays. The judiciary committee of the two houses changed, or attempted to change, the system of Judge Symes, by striking from his codification all of the repealed Acts, or parts of Acts, which it contained. But the shortness of the session and other duties prevented thoroughness in this work, and here is the source and beginning of the confusion and contradictions of our statutes. Acts that had been long since repealed were re-enacted, together with those that had been substituted for them.[98]

The unavailability of statutory materials worsened the legal uncertainty.[99] Despite compilations of statutes made in 1879 and 1887, things did not improve thereafter.[100]

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96. The confusion is best illustrated by the hypothetical of a law passed by the First Territorial Legislature and amended by the Second and Third Legislatures and again in the Fourth Territorial Legislature. The amendments from the Second and Third Territorial Legislatures would have been removed by the congressional action, while the amendments to the amendments passed by the Fourth Territorial Legislature remained. Even without addressing the substance of the law created by such a process, chances were small that it could be read coherently.

97. Roote, *supra* note 91, at 592.

98. Wade, *Speech*, *supra* note 95, at 291. Wade gives a similar account in his contribution to Joaquin Miller's history. Miller, *supra* note 88, at 380-81.

99. For example, in 1874, the omnipresent Wilbur F. Sanders, who (in addition to his other roles) was a prominent attorney, received a letter plaintively stating, "It is reported here that the mining law passed at the extra session limits the width of a quartz claim to 25 feet. If that is the fact it is terribly distressing to miners who have located since the last session as the law as published repealed all local laws on the subject of the width of claims. Please let me know how the statute stands on this subject." Letter from Jeff Lowry to Wilbur F. Sanders (Feb. 6, 1874) (Sanders File, Montana Historical Society, Box 2, Folder 2-21).

Those materials which were available were not of high physical quality. In 1889 the Montana Bar Association Committee on Jurisprudence and Law Reform reported that the binding of the compiled laws was "worthless" and that "after a book was handled a few times the cover is generally completely torn off or worn out." *Legal Luminaries*, DAILY INDEPENDENT (Helena), Jan. 10, 1889, at 4.

100. Wade, *1880 to 1894*, *supra* note 88, at 657. Indeed, the compilations introduced new errors. Wade describes how the 1879 revision left out an 1876 statute

By 1889, concern regarding the condition of the statutes prompted the last Territorial Legislature to put aside both its partisan bickering and the final push for statehood to address the issue. Governor Preston H. Leslie, in his address to the Sixteenth Territorial Legislature, called for codification.[101] He was joined by the Montana Bar Association, which petitioned the legislature to codify the political, civil, and criminal law and the rules of practice.[102] However, the press did not view the creation of a code commission as an important issue[103]—it limited reports on the progress of the code commission bill to brief notes within discussion of other legislative activity.[104] The only arguments advanced for codification were based on the "chaotic condition" of the statutes.[105]

The governor appointed to the Commission Judge N.W. McConnell, a recently resigned[106] Democratic member of the Territorial Supreme Court; former Republican Governor B. Platt Carpenter;[107] and F.W. Cole, a Democrat and prominent Butte attorney,[108] and the upper house confirmed them.[109] Both the

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giving widows dower rights, authorizing election under the husband's will, and abolishing tenancy by courtesy. The problem was not cured by subsequent legislative sessions or by the 1887 compilation. Wade, *1880 to 1894*, *supra* note 88, at 662.

101. Leslie's primary argument was the confusing state of the law and the difficulty for individuals to know the rules they were to obey. *Sixteenth Legislature*, HELENA DAILY HERALD, Jan. 16, 1889, at 8; *Leslie's Message*, DAILY INDEPENDENT (Helena), Jan. 16, 1889, at 1, 2.

102. *Sixteenth Legislature*, HELENA DAILY HERALD, Jan. 21, 1889, at 1; *Bar Association*, DAILY INDEPENDENT (Helena), Jan. 16, 1889, at 4.

103. One newspaper went so far as to call for the legislature to "finish up a registration law, drop everything else and adjourn" in view of imminence of statehood later that year, forgetting the code commission. *See, e.g.*, *Sixteenth Legislature*, HELENA DAILY HERALD, Feb. 27, 1889, at 8; *Sixteenth Legislature*, HELENA DAILY HERALD, Feb. 28, 1889, at 8; and *Forty-Sixth Day*, HELENA DAILY HERALD, Mar. 2, 1889, at 2.

104. Untitled Editorial, HELENA DAILY HERALD, Feb. 21, 1889, at 4. The only discussion reported in the papers was about the money appropriated to pay for the commission: sponsors started with $5,000, a cut to $2,500 was proposed, and a compromise on $4,000 reached. *Forty-Sixth Day*, HELENA DAILY HERALD, Mar. 2, 1889, at 2.

105. *The Legislature*, DAILY INDEPENDENT (Helena), Mar. 2, 1889, at 4. Interestingly Lee Mantle, one of Colonel Sanders' prime Republican opponents, spoke in favor of the commission. *Id.* Mantle later became Mayor of Butte and defeated Sanders for a United States Senate seat in 1893. *Rickards Will Appoint*, DAILY INDEPENDENT (Helena), Mar. 3, 1893, at 8.

106. McConnell reportedly resigned from the Territorial Supreme Court in 1889 partly to protest the admission of women to the bar in Montana. *The Montana Solons*, WEEKLY MISSOULIAN, Feb. 13, 1889, at 2.

107. Carpenter practiced law and served as a judge in New York. Wade, *1880-1894*, *supra* note 88, at 657.

108. Cole both studied and practiced law in New York and practiced in California, as well as served as a trial court judge in Nevada before coming to Montana.

Republican and Democratic press approved of the appointments. The Republican *Helena Daily Herald* called the commissioners "as fully competent to do their task as any who could be found" and noted that their unfamiliarity with past legislation was "more of a benefit than a disadvantage" because the Codes were "for the future and not for the past."[110] The Democratic Helena *Daily Independent* editorialized that "[b]etter selections could scarcely have been made."[111] Former Territorial Supreme Court Chief Justice Decius Wade[112] replaced McConnell in 1890.[113]

The Commission reported draft Codes two and a half years later.[114] Although the Code Commission's records unfortunately appear to be lost,[115] it modelled the Montana Codes after the California versions of the Field Codes, and Commissioner Decius Wade reported that the Montana codifiers used their provisions "so far as the same was applicable . . . to our State and constitution."[116] Leading codification proponent Colonel Wilbur F. Sanders later wrote to Field's brother Henry: "I consider the Montana Codes substantially the legislation prepared by [David Dudley Field]."[117] The Commission filed the Codes with the

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Wade, *1880-1894*, *supra* note 88, at 657; H. R. Whitehill, *Frederick W. Cole*, MONT. B. ASS'N PROC. 391 (1902).

109. *The Close*, HELENA DAILY HERALD, Mar. 15, 1889, at 2.

110. Untitled Editorial, HELENA DAILY HERALD, Mar. 15, 1889, at 4.

111. Untitled Editorial, DAILY INDEPENDENT (Helena), Mar. 15, 1889, at 2.

112. Wade's 1894 speech in favor of codification is cited as a major factor in obtaining their passage. Wade, *Speech*, *supra* note 95, at 296; *see* ROBERT G. RAYMER, MONTANA: THE LAND AND THE PEOPLE 383 (1930); Roote, *supra* note 91, at 602.

113. Roote, *supra* note 91, at 605.

114. Montana's admission as a state disrupted the Code Commission's work. When created in 1889, the legislature instructed the commission to report to the next session of the legislature, which would have been in 1891 but for statehood. A special session was called after admission, however, and the Codes were not done. The Civil Code had been completed, although it appears from the Code Commission's report to the Governor that they planned additional work upon it. *See* Joseph Toole, Untitled Typescript, (File LR-1, Folder 1-10, Montana State Archives, First Montana Legislative Assembly, 1889-1890, December 17, 1889, containing quotations from Code Commission report, at 15-16).

115. I was unable to locate any records in the Montana State Historical Society Library under either the Code Commission or under the names of its members.

116. Wade, *Speech*, *supra* note 95, at 293.

117. Field, *supra* note 26, at 92 (Letter to Henry Field (Jan. 24, 1896)). On the other hand, Sanders also had claimed that "the Montana Code Commission not wholly borrowing from any State, and modifying provisions in immaterial matters from them all, selected from Colorado, South Dakota, California, Missouri, Ohio, New York and other states, portions of their laws," so it is difficult to judge the weight to be given to his letter to Henry Field. Col. Wilbur F. Sanders, undated, unpublished manuscript 6 (Sanders File, Folder 4-3, Montana Historical Society Library).

State Auditor on February 4, 1892.

Montana codification proponents advanced arguments similar to some of those made by Field and the New York codification advocates. Both argued that the volume of common law court reports overwhelmed lawyers and courts.[118] Both argued that codification would eliminate inconsistencies and contradictions in the law.[119] Both argued that codification would put the law within the reach of the common man.[120]

Despite these similarities, Wade at least, was ambivalent about the Codes' eclipse of the common law. In an unpublished, undated manuscript entitled "The Common Law," Wade tried to reconcile a deep appreciation for the common law with his enthusiasm for codification.[121] Beginning with a description of the common law as "one of the marvels of human history,"[122] Wade attempted to link it to Roman codification. The imposition of Roman law in Britain, Wade claimed, was the key to the development of English common law.[123]

Besides the common law's Roman heritage, Wade claimed that the common law's codifiers shared with the Roman codifiers a mission and opponents. The Roman codifiers' attempts to "rescue the Roman law from the uncertainty and obscurity of traditional decrees, decisions, usages and customs" were opposed by "some of the Roman lawyers and judges, upon pretty much the same grounds as codification of the English common law is opposed."[124]

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118. *Current Topics*, ALBANY LAW JOURNAL, Dec. 26, 1885, at 502 ("Shall our laws be written in one volume or in five thousand?"); Wade, *1880-1894*, *supra* note 88, at 670 ("If the unlimited publication of the reports and law books manufactured therefrom continues, each year will contribute to the uncertainty and obscuration of the law until the condition becomes hopeless.").

119. *Current Topics*, *supra* note 118 ("Shall [our laws] be fixed, consistent and certain, or changing, contradictory and uncertain."); Wade, *1880-1894*, *supra* note 88, at 664 ("The people of Montana are entitled to a complete system of statutes free from contradictions or inconsistencies . . . .").

120. *Current Topics*, *supra* note 118 ("Shall [our laws] be within the reasonable reach and capacity of the public, or shall they require the searching and construction of an expert, high-priced and over-influential body of interpreters?"); Wade, *1880-1894*, *supra* note 88, at 664 ("[S]tatutes might be made so simple and plain as to be their own interpreters, without the aid of courts and lawyers, and by the same means systems of statutes or codes might be made so clear and certain as to require no revelation or rules of interpretation to understand them.").

121. Decius S. Wade, The Common Law (undated longhand manuscript, Wade File, Box 2, Folder 2-4, Montana Historical Society).

122. *Id.* at 1.

123. *Id.* at 16-18.

124. *Id.* at 2-3.

Despite this admiration for the Roman codes, Wade argued that precedent was the key to "[p]rogressive jurisprudence."[125] Wade concluded by linking the future of the common law and the "English-speaking race":

> The English-speaking race is in the infancy of its achievement, but whatever peaceful victories and conquests are before it, and to whatever heights it may attain, the kindly spirit of the common law, with its enlightened reason and justice, will hover near, to share in its triumphs.[126]

Even in his 1894 article on Montana's legal history, which reflected Wade's frustration at the 1893 legislature's failure to adopt the Codes, Wade found more beauty and strength in the common law than Field ever did: "These principles would not lose any of their grandeur, strength or beauty or any of their vigor in regulating the affairs of men by being so reduced to the form of statutes."[127] Wade resolved the contradiction between his admiration of the common law and his desire for codification by his conclusion that "[i]n this age of the world the discovery of new principles of law is rare, but there is a constant application of old principles to new facts and conditions."[128]

C. The Third Legislature: "Without breaking much of the furniture"[129]

Republican Governor John E. Rickards submitted the Codes to the legislature in January 1893. The four Codes were introduced as separate bills and were referred to the Judiciary Committees of both houses.[130] The Montana Bar Association endorsed action on them.[131] No action was taken in the 1893 session other than appropriations to pay the Code Commission clerks.[132] The Codes drew some opposition from attorneys outside Helena[133] and from mayors,[134] but the failure to pass

125. *Id.* at 3.
126. *Id.* at 56.
127. Wade, *1880-1894*, *supra* note 88, at 670.
128. Wade, *1880-1894*, *supra* note 88, at 670.
129. *After Sixty Long Days*, DAILY INDEPENDENT (Helena), Mar. 3, 1893, at 5 (assessing the work of the Third Legislature).
130. *The Merry War*, WEEKLY MISSOULIAN, Jan. 18, 1893, at 2; *Sable-Hued Eye*, WEEKLY MISSOULIAN, Jan. 18, 1893, at 8.
131. *The Bar Association*, DAILY INDEPENDENT (Helena), Jan. 5, 1893, at 8.
132. *Two New Counties*, WEEKLY MISSOULIAN, Feb. 8, 1893, at 6; *Blood, Iago, Blood*, WEEKLY MISSOULIAN, Feb. 15, 1893, at 6.
133. *Local Mention*, WEEKLY MISSOULIAN, Feb. 22, 1893, at 7 (reporting forma-

them does not seem to have been caused by the opposition. Rather, the Codes were apparently simply lost in the mass of "special"[135] legislation demanding attention from the legislature,[136] in the daily, unsuccessful attempts to choose a United States Senator,[137] and in the constant partisan bickering caused by the lack of an effective majority in the Montana House of Representatives (the House).[138] The press made little mention of the Codes, focusing instead on the daily excitement of the senatorial contest.[139] Governor Rickards declined to call a spe-

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tion of Missoula bar committee to oppose codes).

134. *Montana Mayors Meet*, DAILY INDEPENDENT (Helena), Feb. 9, 1893, at 1.

135. *But Four Days Remain*, DAILY INDEPENDENT (Helena), Feb. 26, 1893, at 5.

136. Republicans thought there was more than the usual degree of Democratic incompetence at work in the House in 1893: "[T]he house as a body was a disgrace to the state. Ignorance was at a premium and inexperience ranked as a virtue. The speaker, elected by a combination of democrats and populists as a matter of expediency, was an ass when he took his seat, and had not changed his skin when he stepped down and out. The employes [sic] of the house as a general rule were chumps, fit associates for the hodge podge which made up the collection." *Make It A Grave*, WEEKLY MISSOULIAN, Mar. 8, 1893, at 2.

Certainly the House was slow to consider legislation. With only nine working days left in the session, for example, it still had a hundred bills to be considered by the Committee of the Whole. *But Nine Working Days*, DAILY INDEPENDENT (Helena), Feb. 19, 1893, at 5. The House Judiciary Committee, to which the Codes had been referred, finally reported out many of the bills it had been sent without recommendation because so many of its members were on other committees that it had difficulty mustering a quorum. *He Caused A Sensation*, DAILY INDEPENDENT (Helena), Feb. 21, 1893, at 5. No overwhelming public demand for the Codes appears to have been noted by the press. *See, e.g.*, *But Four Days Remain*, DAILY INDEPENDENT (Helena) Feb. 26, 1893, at 5 ("The current belief is now that there is very little urgent demand for any general legislation" other than election law reforms; no mention of Codes.).

137. *Rickards Will Appoint*, DAILY INDEPENDENT (Helena), Mar. 3, 1893, at 8. Although Democrats had a plurality in the joint legislature, they were unable to unite behind a single candidate even though their failure to do so meant that the Republican governor would appoint a Republican. *See, e.g.*, *But Four Days Remain*, DAILY INDEPENDENT (Helena), Feb. 26, 1893, at 5 (describing determination of Democratic factions to prevent others from succeeding). Rickards' appointment of Lee Mantle was frustrated by the refusal of the federal Senate to seat Mantle. The *Daily Missoulian* claimed this was due to Mantle's "silver leaning." *Just A Few of 'Em*, DAILY MISSOULIAN, Jan. 3, 1895, at 1. *See also* Adelphus B. Keith, *History of the Republican Party*, in Roote, *supra* note 91, at 589-91.

138. There were twenty-six Democrats, twenty-six Republicans, and three Populists in the House. Keith, *supra* note 137, at 588. The Speaker was a Populist, chosen in part because hostility between the Populists and Code proponent Colonel Sanders led the Populists to side with the Democrats in organizing the House. *The House Organized*, DAILY INDEPENDENT (Helena), Jan. 4, 1893, at 8. The partisan maneuvering started the first day, with the Republicans unsuccessfully attempting to gain control of the House by taking advantage of a dispute over the credentials of one Democratic member and the Democrats and one Populist walking out. *Same Old Game*, DAILY INDEPENDENT (Helena), Jan. 3, 1893, at 8.

139. *See, e.g.*, *Governor's Message*, DAILY INDEPENDENT (Helena), Jan. 6, 1893, at

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

cial session of the legislature to pass the Codes due to the expense and because he thought the Codes' length made a full session necessary for their thorough consideration.[140]

D. "Work of the Wise Men"[141]

> The deal by which the codes were rushed through the legislature is beginning to bear fruit. Members who were led into voting for the measure under the promise that amendments they might suggest would be favorably acted on are having their eyes opened. The bulky codes have been enrolled and will be signed by the governor, and the bushel or two of amendments that have been offered are occupying snug pigeon holes in the several committee rooms. No one member of the house knew what he was voting for when he answered the roll call on the code, but now all are beginning to find out that they have made serious mistakes and will make efforts to rectify them.[142]
>
> *Great Falls Daily Tribune*

Montana Republicans scored major victories in the 1894 elections, due in part to the unpopularity in Montana of Democratic President Grover Cleveland and his opposition to bimetallism.[143] Republicans took control of both legislative houses by wide margins.[144] When the Fourth Legislature convened, the Codes were an important part of its agenda,[145] although they

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5, 6 (omitting section on Codes as one of "minor importance"). *The Governor's Message*, DAILY INDEPENDENT (Helena), Jan. 6, 1893, at 4 (explaining omissions).

140. *Not an Extra Session*, DAILY INDEPENDENT (Helena), Mar. 8, 1893, at 5. The Governor's estimate of the time which would be devoted to the Codes was, of course, wildly over-optimistic.

141. *Work of the Wise Men*, ANACONDA STANDARD, Jan. 29, 1895, at 1 (headline).

142. *A Code Mistake*, GREAT FALLS DAILY TRIBUNE, Feb. 14, 1895, at 2.

143. On Cleveland's unpopularity, see *The Mantle Hog*, HELENA DAILY HERALD, Jan. 8, 1895, at 1 (quoting an observer that "Grover Cleveland won the last campaign for the Republicans, and a wooden man could have been chairman of the state committee and won the election.") Bimetallism was the plan to introduce silver as a basis for the United States currency along with gold.

144. *Senator Makers*, HELENA DAILY HERALD, Nov. 21, 1894, at 5. There were thirteen Republicans, six Democrats, and two Populists in the Senate and forty-four Republicans, two Democrats, thirteen Populists, and two "Democrats and Populists" in the House. *Id.*

145. The most important issue before the legislature was, of course, the selection of two United States Senators, and codification was not addressed until that matter was resolved. Both Senators having been chosen by the Republican caucus by January 12, *For Senator, Thomas H. Carter*, HELENA DAILY HERALD, Jan. 12, 1895, at 1, 5, the legislature was ready to turn to legislation.

had not received widespread public notice.[146] Governor Rickards called for the Codes' adoption as a whole "in order that its [sic] harmony not be destroyed" with later revisions to be made as the legislature saw fit.[147] Representative Rudolph Von Tobel, a Republican from Valley and Fergus Counties and a member of the House Code Committee, introduced the Codes as four bills on January 15th.[148]

1. The House: "To take a pig in a bag"[149]

The House addressed the Codes first. The issue from the start was not *whether* but rather *how* to adopt the massive Codes. It avoided the problem of overwhelming the Judiciary Committee by appointing a special committee to handle the Codes.[150] The Committee first set out to determine what the House could physically do with the massive bills. Research determined that the bills could be read by title only on the first as well as the second reading, and the House proceeded to do so.[151]

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146. *It Is Indifference*, DAILY INDEPENDENT (Helena), Jan. 14, 1895, at 5 (reporting the President of Montana Bar Association's lament that "[n]o practical effort has been made to familiarize the public with [the Codes'] . . . contents").

147. *The Message*, HELENA DAILY HERALD, Jan. 8, 1895, at 2. The remainder of the message concerning the Codes was praise for the abilities of the Code Commissioners as "a guarantee that nearly every requirement within its field of labor will be satisfactorily met." *Id.*

The Codes were only the fifth subject raised in the hour-and-twenty-minute speech, so most members probably heard Rickards' advice. *Read His Message*, DAILY INDEPENDENT (Helena), Jan. 6, 1895, at 1.

148. *More New Bills*, HELENA DAILY HERALD, Jan. 16, 1895, at 3; *Roster of Bills*, HELENA DAILY HERALD, Jan. 16, 1895, at 6. Von Tobel was also a member of the three man committee appointed by the Montana Bar Association to recommend a means to physically pass the Codes. *Lawyers In Session*, DAILY INDEPENDENT (Helena), Jan. 9, 1895, at 5.

149. *Code Bills Passed*, DAILY INDEPENDENT (Helena), Jan. 26, 1895, at 5 (quoting Representative Alderson's description of the adoption of the Codes).

150. The House Code Committee consisted of Representatives Booth (R-Silver Bow) (Chair), Von Tobel (R-Valley and Fergus), Rodgers (R-Deer Lodge and Missoula); Hershey (R-Missoula), Meyer (R-Park), Bennett (R-Granite), Cooper (D-Gallatin), Corbett (P-Lewis and Clark), and Spriggs (D-P-Meagher). *The Committees*, DAILY INDEPENDENT (Helena), Jan. 12, 1895, at 7; *The Next Assembly*, DAILY INDEPENDENT (Helena), Jan. 3, 1895, at 5 (party and county identifications). Other than Booth and Von Tobel, the members did not figure significantly in the public debate. Interestingly, the committee was drawn entirely from southwestern Montana, as was the Senate Judiciary Committee; *see infra* note 177.

151. *This Was A Threat*, DAILY INDEPENDENT (Helena), Jan. 18, 1895, at 5, 7. The House refused to make this general policy, requiring other bills to be read in full on the first reading. *They Must Be Read*, DAILY INDEPENDENT (Helena), Jan. 19, 1895, at 5.

The next question was whether to pass the Codes and fix them later or to attempt to correct problems before passage. The Montana Bar Association and leading lawyers argued for adoption first, revision later.[152] In doing so, they often portrayed the Codes as merely a reorganization of existing Montana law. For example, the *Helena Daily Herald* reported that a panel of lawyers told a joint meeting of the Montana Senate Judiciary Committee and the House Code Committee that the Codes were "made up, with the exception of about one hundred sections, of the present Montana laws. The only difference is that in the new code the laws, instead of being scattered broadcast throughout the volume, have been put in their proper divisions under their proper heads."[153] It is difficult to imagine anyone familiar with the Codes' provisions believing such a statement.

Commissioner Wade addressed another potential concern, arguing:

> [T]here was a good deal of misunderstanding about the codes, even in the legal profession. It had been assumed that the code commission had formulated something purely original, something out of its own inner consciousness. On the contrary, there was scarcely a section or a line which had not been taken from the statutes *of some other state*, tried and approved statutes, upon which constructions had been placed by the supreme courts of the respective states concerned.[154]

Wade was technically correct, since the Code Commission had begun with the California version of the Field Codes. Whether wholesale importation of California law would be reasonable for Montana is another question. The lawyers testifying before the joint committee were confused at best: many of the provisions of the four Codes were new to Montana.

Some opposition to the "off-hand manner" proposed for adoption of the Codes was reported, although not identified, by the *Anaconda Standard*,[155] prompting the Code Committee chairman to send a survey to prominent members of the legal profession regarding the best method to proceed. The responses generally endorsed both adoption and the process of adopting

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152. *The Bar Association*, DAILY INDEPENDENT (Helena), Jan. 15, 1895, at 2.

153. *The New Code*, HELENA DAILY HERALD, Jan. 19, 1895, at 1.

154. *Over in Helena*, ANACONDA STANDARD, Jan. 22, 1895, at 2 (emphasis added). The quote is the *Anaconda Standard's*. Although the *Standard's* story does not claim the language as a direct quote but presents it as a paraphrase of Wade's, the language reads as a direct quote.

155. *Id.* at 2.

first and revising later.[156] The only other opposition in the House concerned the provisions of the Political Code concerning livestock marks and brands.[157] Even with this minimal opposition, the Helena *Daily Independent* predicted on January 20th that "the consideration of these codes will occupy the time of the house and the committee of the whole for several weeks."[158]

Work on passage began in earnest during the Montana Bar Association's meeting in Helena on January 21st. The Association endorsed the report of a special committee (Colonel Sanders, Judge Wade, and former Code Commissioner N.W. McConnell), which had itself endorsed the Codes. The Bar Association committee, continuing to misrepresent the scope of the changes, stated that "the changes are few and necessary" and argued for adoption based on the confusion that would result from further delay.[159]

Despite what one paper characterized as "a regular chewing match" on January 22nd by the House Code Committee and the Senate Judiciary Committee, the committees' only changes were

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156. Although the actual survey responses appear to have been lost, the *Helena Daily Herald* reported a sampling: Attorney General Haskell: the Codes should be adopted now and amendments should be done by a joint Senate-House committee now before adoption; Judge McHatton of Second Judicial District: adopt and adopt as a whole; Judge Benton of Eighth Judicial District: "I favor the adoption of the codes. The compiled statutes is a contradictory mass of legislation, much of it difficult of interpretation by bench and bar."; Judge Brantley of Third Judicial District: adopt as stands, then amend this session if practical; County Attorney Freeman of Cascade County: "heartily in favor" of codes, adopt as a whole; attorney Frank P. Sterling: "by no means" adopt as a whole; Judge Woody of Fourth Judicial District: adopt as a whole then amend, "I do not believe that our laws would be in any worse condition if the codes were adopted."; Durfee and Brown, Philipsburg attorneys: adopt "as quickly as possible" and adopt as a whole; Judge Marshall of Missoula: "I am in favor of the general idea of codification. Very many of the features embraced in the report of the commission are wise and prudential."; Goddard, President of Montana Bar Association: adopt as a whole; Luce & Luce, Bozeman attorneys: adopt without amendments "except for defects, if any, that may be patent"; Stanton & Stanton, Great Falls attorneys: "by all means" adopt as a whole; W.T. Hartman, Representative Hartman's brother: "I would say emphatically 'yes.'"; F.C. Webster: adopt as a whole; James R. Goss, Billings attorney: adopt and then amend later. *Adopt It First*, HELENA DAILY HERALD, Jan. 22, 1895, at 1.

157. In particular, the transfer of the office of Recorder of Marks and Brands to the Secretary of State from the Livestock Commission caused the livestock commissioners distress. The livestock commissioners argued that they required the marks and brand books daily and the transfer would prevent them from being able to perform their work. *11th District*, HELENA DAILY HERALD, Jan. 19, 1895, at 1; *They Must Be Read*, DAILY INDEPENDENT (Helena), Jan. 19, 1895, at 5. Other portions of the Code the commission found objectionable could be easily cured by amendment. *Id.*

158. *They're After Him*, DAILY INDEPENDENT (Helena), Jan. 20, 1895, at 8.

159. *They Want The Codes*, DAILY INDEPENDENT (Helena), Jan. 22, 1895, at 6.

to delete the mercantile corporations section and the ban on gambling. The two committees then agreed to work for passage without further amendment.[160]

In a rare dissent from the push for adoption, the Democratic *Great Falls Daily Tribune* editorialized that the Codes were an extreme remedy for the problem of confusion in the statutes: "[W]hy should this mon[s]ter code be adopted without any consideration? Has not our experience taught us that we have too much law and too little justice? Would it not be a practical thing to simplify rather than add to the written law?"[161] No one else publicly asked or discussed these questions, and the *Tribune* went unanswered.

By January 24, the House Code Committee had issued a favorable report emphasizing the need to clarify the state's laws, which the House adopted[162] with little debate.[163] The House

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160. *They Chewed It All Up*, ANACONDA STANDARD, Jan. 23, 1895, at 1. At least one member of the House seems to have shared these views. Republican Representative Dr. O. Leiser introduced a bill on January 23, 1895 to revise and compile the statutes, an unnecessary step if the Codes passed. *Without Any Rules*, DAILY INDEPENDENT (Helena), Jan. 23, 1895, at 5, 6. Leiser continued to have qualms about the Codes, unsuccessfully seeking to have the 26 page Code Committee report printed before adoption by the full House. *Ordered Engrossed*, DAILY INDEPENDENT (Helena), Jan. 25, 1895, at 5, 7. He did vote for the Codes on final passage, however. *Code Bills Passed*, DAILY INDEPENDENT (Helena), Jan. 25, 1895, at 5, 7.

161. *The New Code*, GREAT FALLS DAILY TRIBUNE, Jan. 23, 1895, at 2.

162. The Committee Report stated:

> Your committee are of the opinion that the present condition of the laws of this state are such that the proposed codes should be adopted by the legislative assembly at the earliest day possible. Our present laws are incoherent, in many instances, contradictory, in some cases, unconstitutional so that the interpretation of them on many points is practically impossible either by the judiciary or the bar of the state. This being true, a great majority of the people of the state are unable to arrive at a definite conclusion of what the laws are under which they live. This condition of affairs has arisen from a series of laws enacted by different legislatures, each acting as an independent body, and in many cases paying no attention whatever to the laws existing at the time of the enactment of certain statutes. Your committee are of the opinion that it is unnecessary in this report to add further reasons for the adoption of the proposed codes but would earnestly request that each member of the house give careful consideration to an address by the Hon. Decius S. Wade entitled: 'Necessities for Codification.'"

Mr. Booth's Plan, ANACONDA STANDARD, Jan. 25, 1895, at 1.

163. The discussion consisted of a question whether the Senate Judiciary Committee had been consulted and a motion to print the Code Committee report before adoption, which lost. As Representative Knippenberg put it, the House "took the word of the lawyers for it." *Ordered Engrossed*, DAILY INDEPENDENT (Helena), Jan. 25, 1895, at 5, 7. As Knippenberg was one of the more independent Republicans (he termed it a limit to the number of times he would say "cuckoo" for the caucus, *King Caucus Rules*, DAILY INDEPENDENT (Helena), Feb. 1, 1895, at 5), the lawyers truly had convinced the most skeptical members to take their word for it.

Code Committee recommended only five sets of amendments to the Commission drafts: (1) to preserve existing corporations; (2) to ensure that laws passed at the Third and Fourth Legislatures were maintained, in particular a series of acts establishing county boundaries and creating various state and local offices; (3) to delete the ban on gambling and retain the present law;[164] (4) to remove a section of the Penal Code that prohibited railroads from giving passes to office holders; and (5) to strike a provision giving the State Board of Education, rather than the legislature, the authority to select the state's school textbooks.[165] The House amendments thus aimed primarily at preserving the legislature's privileges and ability to satisfy special interests. Selecting school textbooks, for example, was a rich source of legislative "boodle,"[166] and the receipt of a free rail pass was a ma-

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164. Interestingly, the same legislature later passed a broad ban on gambling. *It Is Gone Forever*, DAILY INDEPENDENT (Helena), Mar. 1, 1895, at 8. The *Daily Independent* noted that the gambling interests "didn't seem to care a nickel one way or the other" about the gambling ban and were simply avoiding political extortion by the legislature. *In The Altogether*, DAILY INDEPENDENT (Helena), Mar. 9, 1895, at 5. The *Daily Missoulian* also noted the lack of opposition to the bill, which meant a loss of $30,000 to $40,000 a year in license revenues. *'Tis the Old Tale*, DAILY MISSOULIAN, Feb. 24, 1895, at 1. Even the bill's advocates did not argue the bill would stop gambling, but argued that state licensure "had a bad effect on those who are thinking of taking up their residence in the state." *Badly Jumbled Up*, DAILY MISSOULIAN, Feb. 17, 1895, at 2. The law was eventually declared unconstitutional. RAYMER, *supra* note 112, at 382-83.

165. *The Proposed Codes*, DAILY INDEPENDENT (Helena), Jan. 25, 1895, at 2; *The New Codes*, HELENA DAILY HERALD, Jan. 24, 1895, at 1. The legislature was unable to come to any final agreement on the school book issue and ended up leaving districts free to choose their own books, repealing all existing school text book laws. *A Thing of the Past*, DAILY INDEPENDENT (Helena), Mar. 8, 1895, at 1. The *Daily Missoulian* reported that "[t]he so-called textbook question is attracting more attention than any question since the senatorial fight was made." *Talked Out Loud*, DAILY MISSOULIAN, Feb. 15, 1895, at 1.

The issue, of course, surfaced at the next legislature. *See Is Left to Districts*, DAILY MISSOULIAN, Jan. 22, 1897, at 1. Then the *Daily Missoulian* advocated legislative book choice on the grounds that it would be more expensive to buy a majority of the legislature than to buy a text book commission and so, presumably, less likely to occur. *As To Textbooks*, DAILY MISSOULIAN, Feb. 18, 1897, at 2.

166. The *Daily Missoulian* described the textbook issue this way:

> The champions and friends of the American Book Company are working hard to have the old contract renewed and the old line of books retained, while the representatives of the houses outside the trust, some of whom are in the employ of the state, or at least in the offices of state officers, want a fair field and no favor. There are rumors of boodle galore, and the active interest taken in the matter by men who never knew until a week ago what books were used, would seem to indicate that all the enthusiasm aroused is not due entirely to patriotism.

Present Outlook, DAILY MISSOULIAN, Jan. 27, 1895, at 1. School texts continued to inspire visions of "fat batches of good dough" in the Fifth Legislature. *Committees*

jor benefit of a legislative seat.[167] Special laws concerning corporations were a similar source of favors.

Noticeably lacking from these changes were adjustments to adapt the Codes' provisions to Montana's circumstances. The flood of amendments that appeared later suggests that the Codes were far from perfectly suited to Montana.[168] The limited range of amendments made in the House evidences a failure to closely examine the substance of the four Codes.

The Codes were sent to the engrossing committee with the proposed amendments, where their size presented a problem. To engross them in the normal fashion would have required "four times as many clerks as are now employed by the house, and more time than the legislature has left in its session."[169] To resolve this problem, the House decided to make up the engrossed versions from the printed versions,[170] presumably by cutting and pasting in the five changed areas. By suspending the first and third readings, together with the usual practice of reading by title alone on the second reading, the House then could "bolt the codes like a dose of castor oil"[171] and pass the four bills the same day.[172] The House took only ten days from introduction to passage of the Codes, a time during which other matters primarily occupied the House.

Passage through the House was thus accomplished with little examination of the bills. As the skeptical *Great Falls Tri-*

Named, DAILY MISSOULIAN, Jan. 9, 1897, at 1.

167. The desire for rail passes was a feature common to many of Montana's legislatures. Commenting on the rejection of legislation to prohibit passes in 1897, the *Daily Missoulian* noted that "[t]he house has placed itself squarely on record as being in favor of free transportation on railroads and plenty of it." *State Legislature*, DAILY MISSOULIAN, Jan. 18, 1897, at 1.

168. The changes to municipal government structure, for example, were inappropriate to Montana's existing structures.

169. *Ordered Engrossed*, DAILY INDEPENDENT (Helena), Jan. 25, 1895, at 5.

170. *Id.*

171. *Code Bills Passed*, DAILY INDEPENDENT (Helena), January 26, 1895 at 5.

172. A smattering of opposition surfaced to the dispensing of the third reading, and the motion to do so with respect to the Civil Procedure Code passed by 45-11. When a similar objection was raised for the other three, the Code Committee Chairman again repeated his characterization of the Codes as "not new laws but simply the old ones compiled and codified with some necessary amendments and laws of late legislative assemblies." *Codes by the Cord*, ANACONDA STANDARD, Jan. 26, 1895, at 1. At least some of the opposition seems to have come from legislators who objected to the provisions concerning the cattle industry. *The First Law*, HELENA DAILY HERALD, Jan. 26, 1895, at 5. It certainly was not based on partisan lines; eight of 44 Republicans and three of 13 Populists opposed the motion. *See Id.* at 5 (listing opponents); *Senator Makers*, HELENA DAILY HERALD, Nov. 21, 1894, at 5 (listing party affiliations).

bune editorialized, upon passage of the Codes Montana would be able to "boast of a volume of law which for quantity is unsurpassed by any state, no matter what may be said of its quality. No one can vouch for that, for no one in the state has read the code[s] in [their] entirety."[173] This was more than editorial hyperbole—given the rapid passage through the lower house, it is doubtful that anyone had tackled the task of reading the entire body of Codes. The Code Commission, the Code Committee and, perhaps, the Montana Bar Association committee had considered them *en masse*, but it is doubtful whether any one individual from any of those bodies had read and considered all 170 pounds of laws.

2. *The Senate: "Warm Friends of the Codes"*[174]

In the Montana Senate (the Senate) the primary obstacle[175] to prompt passage was a determined effort by the State School Superintendent to incorporate some school law changes into the new Codes.[176] The same argument used against the livestock industry amendments in the House blocked these changes: to change any provision would open the floodgates of amendments and doom passage. Although this argument succeeded in blocking the school law changes, it did not stop the livestock interests in the Senate.

When the Codes reached the Senate Judiciary Committee[177] on January 28th,[178] all but one of the members joined

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173. GREAT FALLS DAILY TRIBUNE, Jan. 25, 1895, at 2. Similar claims were made in New York by opponents of the Codes. *See, e.g.*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: FIRST ANNUAL REPORT, *supra* note 42.

174. *Gambling and the Like*, ANACONDA STANDARD, Jan. 27, 1895, at 1.

175. Some opposition was also forecast in the Senate because of the House's action in eliminating the ban on gambling, primarily because some senators objected to the appearance of special treatment of gambling interests. "The only thing that will prevent a fight and probably a successful one being made on this matter is that the senators who hold these views are warm friends of the codes and fear to endanger the action of the house yesterday by making changes." *Id.*

176. *A Busy Week*, HELENA DAILY HERALD, Jan. 28, 1895, at 1. Steere sought a state board of education "selected from the most progressive educators in the state." He wanted this board to have not only authority over textbook selection but also "authority to make what changes they deem best in the management . . . of schools throughout the state." *Teachers Adjourn*, HELENA WEEKLY INDEPENDENT, Jan. 3, 1895, at 8; *see also The School Book Law*, DAILY INDEPENDENT (Helena), Jan. 11, 1895, at 5.

177. The Judiciary Committee consisted of Senators Leonard (R-Silver Bow) (Chair), Greene (R-Jefferson), Metzel (R-Madison), Eggleston (D-Deer Lodge), and Brosnan (P-Cascade). *See The Committees*, DAILY INDEPENDENT (Helena), Jan. 12, 1895, at 7 (committee assignments); *The Next Assembly*, DAILY INDEPENDENT (Hele-

in a majority report urging their adoption in the form passed by the House. Republican Senator Alex Metzel of Madison County offered a minority report on the Penal Code[179] and the Political Code with some amendments favored by the livestock industry.[180] In a tribute to the influence of the cattle and sheep industries, the minority report on the Penal Code was adopted with only six dissenting votes.[181] Senate Judiciary Committee Chairman Charles Leonard then withdrew the majority report on the Political Code and, "probably to show that he was not unalterably opposed to the amendments, passed another [amendment] to Senator Metzel and that gentleman presented it as a portion of his report." Leonard's amendment resolved the school book question, eliminating a Political Code section that gave the State Board of Education authority over school textbook selection. "Not one member out of ten know just what section was being eliminated."[182] The Senate then unanimously passed the Codes.[183] The Penal and Political Codes returned to the House, which concurred in the Senate amendments.[184]

3. *Enrollment Clerks: "General Baggs' Army"*[185]

> Go it, 'General,' work, ye slaves. The House has said it must have the Codes enrolled and in a hurry, so make your pens fly,

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na), Jan. 3, 1895, at 5 (party and county identification).

178. *General Assembly*, DAILY INDEPENDENT (Helena), Jan. 29, 1895, at 5.

179. Metzel sought changes in the Penal Code to require the display of hides for 10 days and to include unrecorded brands that are infringements on recorded brands within a section on unlawful brands. *The Codes Pass*, HELENA DAILY HERALD, Jan. 30, 1895, at 1. The changes are also summarized in *Metzel Made it Stick*, ANACONDA STANDARD, Jan. 31, 1895, at 1.

180. *All Done By Hand*, DAILY INDEPENDENT (Helena), Jan. 31, 1895, at 5; *Rap at the Codes*, DAILY MISSOULIAN, Jan. 31, 1895, at 1.

181. *Rap at the Codes*, DAILY MISSOULIAN, Jan. 31, 1895, at 5.

182. *Id.* at 1. The House had previously eliminated one such section; the Senate eliminated a second one. *All Done By Hand*, DAILY INDEPENDENT (Helena), Jan. 31, 1895, at 5 (discussing elimination of Political Code § 1,301 in the Senate); *They Must Be Read*, DAILY INDEPENDENT (Helena), Jan. 19, 1895, at 5 (discussing elimination of Political Code § 935(4) in the House).

183. *All Done By Hand*, DAILY INDEPENDENT (Helena), Jan. 31, 1895, at 5.

184. *The Codes Pass*, HELENA DAILY HERALD, Jan. 30, 1895, at 1; *The House*, HELENA DAILY HERALD, Jan. 31, 1895, at 3.

185. *General Baggs' Army*, HELENA DAILY HERALD, Feb. 2, 1895, at 1.

> trim de ink, and when your labors are at last completed a four-horse truck will come around and cart the results of your labors to the office of His Excellency for approval.[186]
>
> *Helena Daily Herald*

The usual procedure for House bills that passed both houses was enrollment by the House Committee on Enrollment. The Committee created a clean copy of each bill including all amendments. Although lack of amendments meant that there were few changes from the original printed bills to incorporate, the size of the Codes meant this was a formidable undertaking. Code Committee Chairman Booth offered a resolution giving the Committee on Enrollment authority over all the House clerks and to engage ten additional clerks as needed.[187] The day before, however, the House had appointed a special committee to investigate charges that the House had been "extravagant" in its hiring of clerks, who were patronage employees.[188] That committee was ready to present its report, and its Chairman, Republican Representative Henry Knippenberg of Beaverhead County, opposed Booth's resolution.[189] The matter was postponed to allow the Republican caucus to consider the question that night.[190]

Despite the lawyer members' advice that enrollment by hand was not legally required, the caucus decided to proceed with

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186. *Id.*

187. My account of the enrollment controversy is based on the accounts in a series of Montana newspapers at the time: *All Done by Hand*, DAILY INDEPENDENT (Helena), Jan. 31, 1895, at 5; *Code Clerks*, HELENA DAILY HERALD, Jan. 31, 1895, at 1; *Much Ado About Little*, DAILY INTERMOUNTAIN (Butte), Feb. 1, 1895, at 1; *King Caucus Rules*, DAILY INDEPENDENT (Helena), Feb. 1, 1895, at 5; *Rough on Clerks*, GREAT FALLS DAILY TRIBUNE, Feb. 2, 1895, at 1; *Smead's Big Bill*, DAILY MISSOULIAN, Feb. 2, 1895, at 1; *Ruled by Caucus*, DAILY INDEPENDENT (Helena), Feb. 2, 1895, at 5.

188. The method of selecting clerks had caused a "little row" earlier in the session in the House, when an unsuccessful attempt was made to give committee chairs the sole authority to pick clerks. *General Assembly*, DAILY INDEPENDENT (Helena), Jan. 12, 1895, at 5. Further disputes arose later when one member expressed annoyance at the lack of jobs for Union veterans compared with the large number of female clerks. *This Was A Threat*, DAILY INDEPENDENT (Helena), Jan. 18, 1895, at 5.

189. Knippenberg, who appears to have been something of a stuffed shirt as well as a regular thorn in the Republican leadership's side, later resigned from the legislature without explanation and left town to spend the winter in Florida. *How It Is Viewed*, HELENA DAILY HERALD, Feb. 19, 1895, at 2. His resignation was attributed by some to the criticism he had received in connection with his efforts in the House. *Id.* Knippenberg's major legislative efforts had been an attempt to ban display of any flag other than the United States' and to reduce the number of House clerks. *See Flag Field Day*, HELENA DAILY HERALD, Feb. 8, 1895, at 1, 5; *No Hope From Them*, DAILY INDEPENDENT (Helena), Jan. 28, 1895, at 5 (printing text of bill).

190. *King Caucus Rules*, DAILY INDEPENDENT (Helena), Feb. 1, 1895, at 5.

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

hand enrollment.[191] The caucus estimated that doing so would require at least a week's work by thirty-five to forty clerks at five dollars each per day.[192] As with other estimates concerning the Codes, this proved wildly optimistic; clerks labored for almost four weeks to enroll the Codes. The Knippenberg committee's report, which had recommended the discharge of eleven of the twenty-six existing committee clerks on grounds of incompetence, was tabled.[193] The Caucus did not acknowledge the Senate's offer to loan the House the Senate's clerks.[194] The Caucus ignored the governor's assurance that he would accept the Codes without enrollment.[195] Instead, the House hired more and more clerks, and although a number proved less than competent, few were discharged.[196]

On February 13th, almost two weeks after enrollment began, the Code of Civil Procedure was finished and sent to the governor for his signature.[197] Six days later, the Penal Code and Civ-

191. The enrollment of the Codes was justified by the Republican *Helena Daily Herald* on the grounds that the legislatures' printed versions of the code commissioners' handwritten work were not properly proofed. These errors were partially corrected by Code Commissioners Wade and Cole, who added various pencil notations to the printed versions. *The Enrollment of the Codes*, HELENA DAILY HERALD, Feb. 5, 1895, at 4. Even the *Herald* admitted, however, that the manner of enrollment was "an outrage." *Id.*

192. Salaries from *Now It Has Rules*, DAILY INDEPENDENT (Helena), Jan. 24, 1895, at 5.

193. *Ruled by Caucus*, DAILY INDEPENDENT (Helena), Feb. 2, 1895, at 5.

194. *The Enrollment of the Codes*, HELENA DAILY HERALD, Feb. 5, 1895, at 4. The "code clerks" also caused controversy concerning their employment on Sundays. Some apparently objected to working Sundays for religious reasons, and the House eventually decided to allow those clerks not to attend, but prevented them from claiming compensation for Sundays. *In The House*, HELENA DAILY HERALD, Feb. 9, 1895, at 1; *Thrown Wide Open*, DAILY MISSOULIAN, Feb. 10, 1895, at 1.

195. *The Governor's Position*, HELENA DAILY HERALD, Feb. 1, 1895, at 3; *see also Much Ado About Little*, DAILY INTERMOUNTAIN (Butte), Feb. 1, 1895, at 1.

196. *General Assembly*, DAILY INDEPENDENT (Helena), Feb. 5, 1895, at 5. Chairman Baggs attributed the number of incompetents to the rapid hiring of so many clerks (although fewer than hired at the start of the session) and claimed he did discharge incompetent clerks once their lack of ability became clear. *Very Little Show*, DAILY INDEPENDENT (Helena), Feb. 7, 1895, at 5, 6. A review after the end of the session disclosed that eighty-eight clerks were employed by both houses, at an expense of more than $10,000. *What It Costs To Make Laws*, DAILY INDEPENDENT (Helena), Nov. 25, 1896, at 8.

197. *It Was All Spent*, DAILY INDEPENDENT (Helena), Feb. 14, 1895, at 5; *The Work of Our Law Makers Begins to Produce Results*, RIVER PRESS (Fort Benton), Feb. 20, 1895, at 5. The arrival of the enrolled code was a momentous occasion in the House: "While the speaker was signing the bill, Tallant, Gordon and other prominent Republicans crowded around and viewed the work." *The House*, HELENA DAILY HERALD, Feb. 13, 1895, at 1.

il Code were completed.[198] The governor signed them on February 20th.[199] The Political Code was finally enrolled on February 25th[200] and signed the next day.[201] The first consequence of the Codes' passage was thus the perpetuation of the bloated legislative patronage staff and a waste of considerable public resources.[202]

4. Amendments: "make the people wish the legislature had left the codes alone"[203]

After passage, people began to read the Codes.[204] Changes the *Helena Daily Herald* characterized as "radical"[205] in placer[206] and quartz mining law were discovered.[207] All cities

198. *Two More Codes*, HELENA DAILY HERALD, Feb. 19, 1895, at 1.

199. *The House*, HELENA DAILY HERALD, Feb. 20, 1895, at 1.

200. *It Came To Life*, HELENA DAILY HERALD, Feb. 25, 1895, at 1, 5.

201. *Anti-Gambling*, HELENA DAILY HERALD, Feb. 26, 1895, at 1.

202. The Fourth Legislature's expenditures became an object lesson for the Fifth. Newly elected Governor Robert Smith cited the cost of $61,474.96 in his message to the Fifth. *Governor Smith Now*, DAILY MISSOULIAN, Jan. 4, 1897, at 1. To put that in perspective, total state revenues in 1896 were about $437,000. *The Message*, DAILY MISSOULIAN, Jan. 4, 1897, at 2.

Before the additional code clerks were hired, the legislature's staff had a payroll of $330 per day, of which $155 per day was for clerks. The Senate, a smaller body, survived with only five committee clerks. *Now It Has Rules*, DAILY INDEPENDENT (Helena), Jan. 24, 1895, at 5. The total cost of the Codes was estimated to be $2,000 or about three percent of the legislature's budget. *A Junketing Party*, DAILY INDEPENDENT (Helena), Feb. 10, 1895, at 6.

203. *In the Altogether*, DAILY INDEPENDENT (Helena), Mar. 9, 1895, at 5.

204. They did not necessarily read them right away. It was not until late 1896 that anyone appears to have noticed a Political Code section requiring county treasurers to furnish "indemnifying bonds" from banks in which they deposited public funds. *Those Codes Again*, DAILY MISSOULIAN, Dec. 23, 1896, at 1 (recounting how few counties had complied with the law and a recent opinion by the Attorney General that required compliance); *see also Failed to Comply*, DAILY INDEPENDENT (Helena), Dec. 22, 1896, at 8. Similarly, it took time for school officials to discover that "through a clerical error" there was no explicit provision authorizing school taxes, something remedied at the next legislature and handled in the interim by a court decision of "questionable" legality authorizing county commissioners to make a levy. *State Legislature*, DAILY MISSOULIAN, Mar. 3, 1897, at 1.

205. On a lighter note, a correspondent pointed out in a letter printed in the *Helena Daily Herald* that a provision requiring veterinarians to burn or bury deceased diseased animals was unartfully drafted and appeared to require the burning or burying of the animals' owners. *The New Codes*, HELENA DAILY HERALD, Mar. 5, 1895, at 8 (letter to the editor). A correspondent to the *Daily Independent* pointed out that the Code Commission draft had also included provisions which stated that a husband's adultery would have no effect on the legitimacy of the children of his wife and which made it illegal for a public official to make change for a taxpayer. *Again The Codes*, DAILY INDEPENDENT (Helena), Mar. 1, 1895, at 6 (letter).

206. Placer mining is the method of mining that uses water to extract gold from deposits of sand and gravel.

207. *New Mining Law*, HELENA DAILY HERALD, Mar. 15, 1895, at 2. The changes

except Helena underwent major changes in their governmental organizations, with salaries and fees for city officials cut dramatically.[208] Residence requirements for voting doubled from three to six months in the city,[209] the frequency of elections increased,[210] offices changed from appointed to elected,[211] unnaturalized residents were exempted from poll taxes (threatening a quarter of revenue from that source),[212] cities were made liable for damage from mobs and riots,[213] and police judges' jurisdiction greatly expanded.[214] Even the powerful live-

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made Montana's laws similar to Colorado's, South Dakota's, and Wyoming's. The new law extended the time for recording claims to ninety days from twenty, required shafts of ten feet be dug before recording, and required an additional 10 feet be dug for relocation of claims based on old discovery. *Id.*

208. *The New Code*, HELENA DAILY HERALD, Feb. 16, 1895, at 8. Helena had a special charter and so was unaffected by the changes in the general law. *Id.* As an example of the changes in salaries, Butte's mayor went from $2,000 annually to $600; aldermen's salaries were cut from $300 to $100. Fees were a major source of income for many officials; the new code abolished most of them. These changes were not a complete surprise because a group of mayors objected to them in 1893. *Montana Mayors Meet*, DAILY INDEPENDENT (Helena), Feb. 9, 1893, at 1. The legislature restored the salary levels. MONT. REV. CODE § 3240 (1907) (derived from act of March 3, 1895). The mayors specifically objected to the reduction of mayoral salaries, taxation provisions for special assessments, making police magistrates ex officio justices of the peace, and provisions requiring cash on hand before warrants could be issued. *Montana Mayors Meet*, DAILY INDEPENDENT (Helena), Feb. 9, 1893, at 1.

209. *Id.* Ward residency requirements were also increased from 10 to 30 days. *Id.*

210. *Id.* Elections were changed from biennial to annual.

211. *Id.* The city marshal was made an elected official. This caused the *Great Falls Daily Tribune* particular annoyance:

> Of all the city officials the marshal should of all others be appointive and subject to removal in the event of misbehavior. To make him elective, and every year, will be to place the position virtually at the disposal of an element that to say the least should not have any say in the selection of such an official. Reference is of course made to the element that exists in all large communities with which the marshal has the most business. If the office be made elective these people would see to it that a man who was satisfactory to them was nominated and elected, and in the slang of the street would "stand in with them. This is to be avoided, if possible, and the legislature should not adjourn without amending the code in this important particular. Even if the office be made elective the term of one year is too short, for it requires that length of time for a man to get acquainted with the duties of his office. As a matter of fact the city marshal and all the members of the police force should be selected on account of their fitness and the tenure of their office should be during good behavior. This is the great feature of the metropolitan system and is the feature that can be followed with profit in Montana cities.

A Code Mistake, GREAT FALLS DAILY TRIBUNE, Feb. 14, 1895, at 2.

212. *Should Be Amended*, DAILY INDEPENDENT (Helena), Feb. 25, 1895, at 8.

213. *Id.*

214. *The New Code*, HELENA DAILY HERALD, Feb. 16, 1895, at 8. For additional

stock interests were not immune from surprises: the Codes repealed the 1891 law making railroads liable for damage to livestock.[215] The road laws were changed to contain "serious obstacles to county commissioners" that could "in some instances bankrupt a county."[216] Important changes in the certification system surprised teachers.[217]

Amendments reversed some of these changes before the end of the session. In particular, after complaints by mayors, the legislature retreated from some of the more radical changes in municipal government.[218] Fixing the mistakes required many bills, and the legislature passed more than one hundred amendments to the four Codes.[219] Enough amendments remained unacted upon at the end of the session, however, that some predicted a special session would be necessary.[220]

The Codes' impact was felt indirectly as well. One necessary amendment, concerning construction of the Codes in relation to acts of previous legislatures, enabled the Senate to force the House to retain a contract system for the state prisons,[221] despite its previous refusals to do so.[222] Other matters were de-

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discussion of the dissatisfaction of the mayors with the various code provisions, see *Important Changes*, DAILY INDEPENDENT (Helena), Feb. 26, 1895, at 1.

215. *All Fled But One*, DAILY INDEPENDENT (Helena), Feb. 22, 1895, at 5, 6. The railroads and ranchers were engaged in a continual struggle over the railroads' liability for animals killed by trains. *See Is A Quiet Session*, DAILY INDEPENDENT (Helena), Jan. 11, 1897, at 8 (describing attempts to both extend the six month statute of limitations for claims against railroads for cattle killed by trains and change the law to force railroads to exhibit hides of animals killed at more central locations in each county).

216. *Montana Road Laws*, DAILY INDEPENDENT (Helena), Mar. 4, 1895, at 5.

217. *Makes New Rules*, DAILY INDEPENDENT (Helena), Jan. 27, 1897, at 8 (describing Codes' changes in certification process).

218. *Mayors Meet*, HELENA DAILY HERALD, Feb. 25, 1895, at 8; *Amendments Pending*, HELENA DAILY HERALD, Feb. 25, 1895, at 5; *City Attorneys and Mayors*, HELENA DAILY HERALD, Feb. 26, 1895, at 8 (Booth promised to introduce a bill containing changes sought by mayors.).

219. *Extra Session*, HELENA DAILY HERALD, Mar. 14, 1895, at 8; *In Retrospect*, HELENA DAILY HERALD, Mar. 9, 1895, at 5 (suggesting that Chairman Booth of the Code Committee had managed to get all but "one or two" of the required amendments to the Codes through the legislature).

220. *Extra Session*, HELENA DAILY HERALD, Mar. 14, 1895, at 8. More than 130 bills had been introduced by the fourth week of the legislative session, and one paper forecast over 500 for the session. *A Busy Week*, HELENA DAILY HERALD, Jan. 28, 1895, at 1.

221. The "contract system" presumably refers to the practice of contracting out prison labor.

222. *Sine Die*, HELENA DAILY HERALD, Mar. 8, 1895, at 1. Von Tobel specifically argued that the bill was absolutely necessary to the Codes and so should be passed despite his opposition to the contract system.

layed or stopped altogether due to possible conflicts with the Codes.[223] A new law governing the militia required extensive revision due to the Codes' provisions on the same subject.[224] A bill pertaining to altering and defacing brands also required reworking to fit the Codes.[225] Knippenberg's bill relating to fees and compensation was indefinitely postponed because of the Codes' provisions on the same subject.[226] Conflict with the Codes also led to at least one veto.[227] Errors in the Codes also affected state revenues. In 1897, the Secretary of State estimated that a loophole created by the Political Code provisions on filing fees for articles of incorporation cost the state $20,000 a year.[228]

Perhaps more importantly, the Code Committee was given jurisdiction over "[a]ll bills relating to any subject already covered by the Codes" to avoid damage to the "symmetry of the new laws"[229]—a far reaching mandate in light of the Codes' sweeping scope. The sheer press of business also had an effect. In one day the House disposed of 181 bills.[230] On another day, the House dealt with thirty bills, each receiving between three and five minutes.[231] These factors combined to give the Code Committee an unusual degree of centralized control over the Fourth Legislature's business.

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223. A Senate bill defining the rights of married women was postponed because the subject was dealt with in the Codes and the committee was unsure of the Code provisions. *The State Solons*, DAILY MISSOULIAN, Feb. 5, 1895, at 1. A bill regulating the medical profession was held up in the Senate because the effects of the Codes on the subject were unknown. *Did All The Work*, DAILY MISSOULIAN, Feb. 3, 1895, at 1. The Codes appear to have influenced the development of the law even before they took effect; the Montana Supreme Court cited the Civil Code's provision that a riparian land owner's property went to the low-water mark, rather than the high-water mark, in choosing the low-water rule in a February 26, 1895 decision. Gibson v. Kelly, 15 Mont. 417, 423, 39 P. 517, 519 (1895). I would like to thank Roy Andes for referring me to this case.

224. *Doing Business*, HELENA DAILY HERALD, Feb. 22, 1895, at 8.

225. *Two More Codes*, HELENA DAILY HERALD, Feb. 19, 1895, at 1, 5.

226. *Id.*

227. *It Was Veto Day*, DAILY INDEPENDENT (Helena), Mar. 21, 1895, at 5 (describing veto of a bill because it caused a problem when read in conjunction with code sections).

228. *To Build A Capitol*, DAILY INDEPENDENT (Helena), Feb. 26, 1897, at 5, 6 (The loophole allowed firms to file articles of incorporation for a small amount of capital, then amend them. This permitted them to take advantage of the flat rate for amendments to avoid payment of a higher fee for the initial filing, which was based on the amount of capital stock.)

229. *King Caucus Rules*, DAILY INDEPENDENT (Helena), Feb. 1, 1895, at 5.

230. *Broke All Records*, DAILY INDEPENDENT (Helena), Feb. 24, 1895, at 8.

231. *Draw Poker Barred*, DAILY INDEPENDENT (Helena), Feb. 26, 1895, at 5.

The Fourth Legislature's final procedural concern was to provide for the incorporation of the many amendments to the Codes as well as the other acts of the Fourth Legislature. If the Codes were to end the confusion in Montana's statutory law, they must be maintained as codes. Decius Wade was appointed commissioner to incorporate the acts of the Fourth and Fifth Legislatures into the Codes, prepare them for printing, and prepare indices.[232] Moreover, because of the haste in adoption, no time remained in the session to consider conflicts between legislation adopted in the current session and the Codes, leading to confusion over what law governed.[233]

As they reported these events, second thoughts crept into newspapers' coverage. The Helena *Daily Independent* called passage of the Codes "[t]he most important work of the legislature" but cautioned that "[w]hether it was the wisest piece of work remains to be seen."[234] After passage the *Daily Independent* discovered that the:

> [N]ew codes were prepared some years ago, and in many of their provisions were not applicable to existing laws or to present conditions. Yet it seemed to be absolutely necessary to have

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232. The Butte *Intermountain* won the more than $8,000 contract to print the completed Codes. *Mantle's Paper*, HELENA DAILY HERALD, Feb. 27, 1895, at 1. This might have been due to the influence of Silver Bow county legislators on the various Code committees since the *Intermountain's* bid was significantly higher than two of the three other bids. *Got A Cinch On It*, DAILY MISSOULIAN, Feb. 28, 1895, at 1. Sanders opposed the *Intermountain*'s edition, which included annotations by Fletcher Maddox consisting largely of California cases and which was published in two volumes, in what appears to be a beginning for a speech: "The Vampire of the Pacific Coast and the stormy petrel of the Rocky Mountains, - one or both of them, thinking they had a monopoly on publishing the laws of Montana" and attacked the circulation of a protest against the Montana Bar Association's one volume, unannotated edition (prepared by Sanders) (Sanders File, (undated), Box 4, Folder 4-3, Montana Historical Society). Sanders represented one of the losing bidders in an unsuccessful attempt to overturn the award to the *Intermountain*. *It Is A Hot Fight*, DAILY INDEPENDENT (Helena), Apr. 26, 1895, at 6; *Winked at Witness*, DAILY INDEPENDENT (Helena), Apr. 27, 1895, at 8; *The Board Upheld*, DAILY INDEPENDENT (Helena), May 7, 1895, at 3.

233. The members of the next legislature learned this lesson the hard way. The Codes had provided for mileage of $0.20 per mile each way for members to attend sessions; the Fourth Legislature had cut this to $0.10. By the time the members of the Fifth Legislature discovered they were entitled to only half the traditional amount, they had already collected the full sum from the state treasury and faced difficulties in paying it back. As the *Daily Independent* pointed out, "[i]f the law makers had been familiar with the laws, it would never have happened—perhaps." *Too Much Mileage*, DAILY INDEPENDENT (Helena), Feb. 4, 1897, at 1; *see also Was Close Enough*, DAILY INDEPENDENT (Helena), Feb. 5, 1897, at 1. See note 297 *infra* for additional discussion of this issue.

234. *In the Altogether*, DAILY INDEPENDENT (Helena), Mar. 9, 1895, at 5.

> the codes, so the legislature adopted them with a lot of provisions that were not wanted, and then set to work to amend them so as to get what was wanted. A great part of the legislation, or, rather, a large number of the bills acted on, related to provisions of the codes which were round to be unsatisfactory, and which the legislature sought to amend. In this proceeding there were doubtless some changes crept in which should not have been passed, and they will develop from time to time, and make the people wish the legislature had let the codes alone after passing them.[235]

The process by which the legislature considered the Code bills overwhelmed the legislature's mechanisms for debate and review, centralized power in the hands of a few members, and disenfranchised all but the most powerful interests.

5. *Looking Back*

After the session ended, the *Helena Daily Herald* summed up the legislature's work by calling the Codes a "radical movement" to solve the "momentous problem" of having "only fragmentary legislation,"[236] a sharp contrast from the paper's reporting before passage that the Codes were mere collections of existing law.[237] In many respects, the paper was correct—a radical change had taken place in Montana's legal system, and the problem was no longer "fragmentary" legislation but an overwhelming mass of legislation. No longer would the confusion in Montana's laws arise from political battles left over from Territorial days. Now it would result from the hasty adoption of measures designed for New York and Dakota in the 1860s and California in the 1870s, and their mixture with clerical errors,[238]

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235. *Id.*

236. *The Legislative Assembly*, HELENA DAILY HERALD, Mar. 8, 1895, at 4.

237. *See, e.g.*, *The New Code*, HELENA DAILY HERALD, Jan. 19, 1895, at 1.

238. For example, an enrolling clerk's error in a bill correcting various provisions of the Political Code resulted in the wrong section being repealed. *A Wrong Section*, DAILY INDEPENDENT (Helena), Mar. 14, 1895, at 5. Another oversight came from the omission of a section of the Code of Civil Procedure through an error by the Code Commission. When the problem was discovered, former Code Commissioner B.P. Carpenter offered this explanation: "Title 3, 'Assignment for the Benefit of Creditors,' of civil code, section 4510, et seq., was largely taken from California, but partly from the New York [sic]. The procedure for accounting, being insufficient in California, was taken from the New York statute, which I now supply you. It was prepared for insertion into the code of civil procedure, but through an oversight was never inserted . . . .The omission of strict and ample provisions for presentation and proof of claims and an accounting by assignees is one of the very worst defects in the code of civil procedure." *Work Well In Hand*, DAILY INDEPENDENT (Helena), Jan. 30, 1897, at

conflicting amendments, and the quirks of the Fourth Legislature's "bolting" of the Codes.[239]

Perhaps the most puzzling question is how Montana came to adopt the Field Codes in 1895 without any reference to the heated debates over codification that occurred in New York throughout the 1880s.[240] News from around the world filled Montana's newspapers; there was clearly no lack of interest in developments elsewhere. Despite more than nine revisions of the Field Codes in New York during the 1880s, the formation of the first modern bar association to fight the Codes there, and the extensive coverage of the codification debate in the New York press, no one seems to have mentioned that New York had repeatedly rejected the Civil Code.[241] The legislature willingly surveyed attorneys around the state, but apparently could not contact even a single attorney in New York.

The skeptical *Great Falls Daily Tribune* noted:

"In the passage of this code all the safeguards against hasty

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8. A more basic error was the Political Code's description of Cascade and Lewis and Clark Counties as overlapping. *Food Will Be Pure*, DAILY INDEPENDENT (Helena), Feb. 17, 1897, at 5.

239. *Ordered Engrossed*, DAILY INDEPENDENT (Helena), Jan. 25, 1895, at 5. In a February 26, 1895 opinion, the Montana Supreme Court suggested that the legislature and Code Commission had paid careful attention to the underpinnings of the various Code sections: "The code commission and the legislature had before them the legal literature and learning to which we have above referred, and as a result they have adopted the rule [in question]." Gibson v. Kelly, 15 Mont. 417, 422, 39 P. 517, 519 (1895).

240. The New York debates were vigorous, if fought primarily among a few hundred lawyers. *See* GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970 142-57 (1970) (describing battles of the 1880s). The debate was heated. The Association, for example, referred to changes in the proposed Civil Code as having "vicious character" and congratulated the Association "upon yet another escape from the dreaded results of the proposed innovation . . . and the consequent upheaval of the foundations of the settled jurisprudence of this State." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THIRD ANNUAL REPORT at 6-7 (1883). Field's allies, particularly those writing in the *Albany Law Journal*, used equally strong language. *See, e.g.*, *Current Topics*, ALBANY L. J., Apr. 25, 1885 at 322 (responding to a critic's mention of the Statute of Frauds as "the stock argument of duller wits"). From 1870 to 1889 the *Albany Law Journal* published numerous articles advocating codification. Codification was also frequently discussed in the *Nation*, *Evening Post*, *Tribune*, *American Law Review*, and other periodicals.

241. In calling for the code commission in 1889, Governor Leslie did note that three of the codes had not been adopted in New York, but he attributed this, incorrectly, to the New York Legislature being "too much occupied by special legislation to give the necessary time for their consideration[.]" *Leslie's Message*, DAILY INDEPENDENT (Helena), Jan. 16, 1889, at 1, 2. The author was unable to find any other mention of this important fact in the reported discussion of the codes through 1897.

> legislation have been ignored, the rules for government of the legislature have been summarily set aside, and the spirit if not the letter of the constitution infringed. It is beyond question that no member of either branch of the assembly has read or given any consideration to these codes. They are to them as a sealed book."[242]

The legislature might as well go home after final passage, the *Tribune* continued,

> [i]f they attempt any of the general legislation indicated by the several hundred bills already introduced many of them will conflict with the codes and the gentlemen will follow the example of the Indian chief who, upon opening a council, announced: 'The law we made yesterday we repeal today.' That will be about the size of it.[243]

The *Tribune's* skepticism is notable primarily because it was so unusual. As a Democratic paper, the *Tribune* may simply have been skeptical of a Republican legislature's accomplishments; its comments never went beyond questioning the haste in adoption to address the merits of codification. Compared with the level of debate in New York, the *Tribune's* comments appear almost timid. No evidence can be found in Montana's public record of New York's heated debates concerning the merits of codification compared with the common law.

Equally puzzling is why the Montana codification advocates ignored the evidence from California and the Dakotas that codification would not end statutory confusion. California had wrestled with its Codes for over twenty years by 1895 and both Dakotas had almost thirty years experience with their Codes. The frequent need for revisions in those states should have alerted Montanans that considerably more than codification was required to enable Montana to escape the confusion of uncollected session laws.

Montana also ignored the intensive process that California underwent in adapting the Codes. Not only had multiple bodies been appointed to examine and change the Codes there, but the 1870 Code Commission Chairman Charles Lindley, a strong advocate of codification, had resigned over the failure of the commission to adequately examine and complete the Codes. Lindley also wrote the California Code Commentaries, a work

242. *The Code*, GREAT FALLS DAILY TRIBUNE, Jan. 26, 1895, at 2 (editorial).
243. *Id.*

the Montana Commissioners surely examined. He published a letter in it explaining his resignation and decrying the state of the California Codes as proposed to the California Legislature.[244] Indeed, one of Lindley's primary criticisms of his own commission's product was the haste in adoption.[245] Despite this abundance of evidence regarding the level of effort needed to adapt the Codes to local conditions, the Montana codifiers made little effort to modify them.

Although the debate in Montana focused exclusively on local issues, some evidence exists that David Dudley Field himself was involved in the Montana Codes' passage. In November 1895, David Dudley's brother Stephen, then associate justice of the United States Supreme Court and once a leader of California's codification effort, replied to a letter from Wilbur F. Sanders, that:

> You say my brother took such an abiding interest in the adoption of the Codes, prepared substantially by him, and in his own conversation, addresses and letters had so much to do with their final passage in Montana, that you feel an irresistible impulse, now that he is dead, to send to me a volume of those laws. You also state that up to within a few weeks of his death his interest in your legislative action was intense, and that he was as active in procuring it as he could have been were he fifty years younger than he was.[246]

In addition in 1885 in New York, Sanders had heard David Dudley Field speak on codification (and probably met him) at least one American Bar Association meeting that discussed codification.[247] Although Field was no longer a Republican by the

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244. Lindley, *supra* note 67, App. at v.

245. Lindley, *supra* note 67, App. at v.

246. Letter from Stephen Field to Wilbur F. Sanders, Nov. 8, 1895, Sanders File, Montana Historical Society, Box 2, Folder 2-15. Unfortunately the author has been unable to locate Sanders' letter. Sanders and Stephen Field corresponded again in 1897 when Justice Field wrote Sanders asking him for a copy of his account of Sanders' time as a vigilante, mentioning how much he had enjoyed visiting with Sanders when Sanders called upon him. Letter from Stephen Field to Wilbur F. Sanders, Jan. 19, 1897, (Sanders File, Montana Historical Society, Box 2, Folder 2-15). Sanders and Stephen Field had had previous contacts, including in 1892 when Sanders, then a United States Senator, repudiated charges made by his fellow Montana Republican and the other Senator from Montana, T.C. Power, that Justice Field was a lobbyist for the Union Pacific Railroad. Power had cited Sanders as authority for the charges, apparently without Sanders' knowledge. *Power, Field and Sanders*, WEEKLY MISSOULIAN, Feb. 3, 1892, at 2 (A misprint on the masthead incorrectly identifies the issue as that of Jan. 20, 1892, at 2.).

247. 8 REPORT OF THE AMERICAN BAR ASSOCIATION, at 81 (1885) (noting a com-

1890s, he played an active role in Republican politics in the 1860s and 1870s, as did Wade[248] and Sanders.

Although the Codes' proponents claimed Field's authorship as an advantage,[249] no trace of David Dudley Field's "abiding interest" or activity on behalf of the Montana Codes appears in any of the Montana press accounts, in Decius Wade's account, or in either Wade's or Sanders' surviving papers.[250] Sanders' comments to Stephen may have simply been idle compliments for the recently deceased David, but I believe they indicate that Sanders, and by association with him, the other Montana Code advocates, knew of the extensive opposition to the Codes in New York. David was undeniably frustrated by New York's failure to adopt his work;[251] for him to have failed to comment on his frustration to anyone with whom he discussed codification during the 1880s and 1890s would have been unlikely. That the Montana codifiers never mentioned the New York opponents' arguments, even to rebut them, suggests an unwillingness to confront the reasons why codification might have been less beneficial than they portrayed it.

The almost complete lack of opposition,[252] and the legislature's tripartisan support for the Codes, suggest that all of the state's interests, from mining to livestock, and from corporations to labor, either supported the Codes or at least were indifferent to their passage. Such unanimity was rare in Montana

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ment by Sanders on a report on codification by a committee composed of Field and John F. Dillon). A typescript of this report is also in the Sanders file at the Montana Historical Society. (Sanders file, Box 4, Folder 4-1, Montana Historical Society).

248. Wade had strong family ties to the Republican party (ties that probably contributed significantly to his rise from probate judge in Ashtabula, Ohio to Territorial Supreme Court Chief Justice in Montana). His uncle Benjamin Franklin Wade was a Whig and then Republican Senator from Ohio between 1851 and 1869. Another relative, Edward Wade, was a Republican Congressman from Ohio from 1853 to 1861. OHIO BIOGRAPHICAL DICTIONARY 329-30 (1986).

249. *See, e.g.*, *They Want The Codes*, DAILY INDEPENDENT (Helena), Jan. 22, 1895, at 6 and *Leslie's Message*, DAILY INDEPENDENT (Helena), January 16, 1889 at 1, 2 ("David Dudley Field, whose able and persistent efforts were begun in 1839, is entitled to the credit for [creating the codes] . . . .").

250. In addition to the Wade and Sanders papers in the Montana Historical Society library, I also examined the Wade family papers in the Western Reserve Historical Society Library in Cleveland, Ohio, where some of Wade's family papers are archived. (Wade was originally from Ashtabula, Ohio and returned there in the 1890s).

251. FIELD, *supra* note 26, at 332 (quoting David Dudley Field: "It is a hard thing to bear, after all I have done.").

252. The occasional complaint of the *Great Falls Daily Tribune* was made exceptional by the absence of any other voices joined with it.

politics,[253] and is all the more startling due to the sweeping nature of the changes. One of the surprising features of the Codes' adoption in Montana was how little it took to accomplish such changes. A small group that found codification attractive pushed it through with almost no public debate.

The reasons Montana adopted the Codes are complex. The vision of a modern legal system that the Codes offered undoubtedly seduced some members as a chance for Montana to sweep to the forefront of legal reform and claim her rightful place as a modern state.[254] Appeals to state pride (combined with assurances that the Codes simply rationalized existing law) probably persuaded the majority of Montanans (and legislators) unaware of the Codes' actual provisions at a time when Montana was literally putting itself on the map. Others, particularly the lawyers, may have been determined to end the confusion caused by the scattered statutes. Montana's Bar had far less interest in maintaining the legal status quo than did the elements of the New York Bar that opposed codification. Not only were

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253. *See, e.g.*, Word, *supra* note 93; Keith, *supra* note 137.

254. Contemporaries often referred to the Codes in these terms. *See, e.g.*, C.P. Connolly, *Three Lawyers of Montana*, 14 MAG. OF W. HIST. 59, 61 (1891) (When Codes are done they "will be pronounced equal to that of any State in the Union."); *The Bar Association*, DAILY INDEPENDENT (Helena), Jan. 5, 1893 at 8 (passage of the Codes would be a "crowning glory" to members of the association who had worked for passage); *Leslie's Message*, DAILY INDEPENDENT (Helena), Jan. 16, 1889, at 1, 2 (governor calls for codification because statute law "is not up to the standard of progress which characterizes the policy and jurisprudence of the most advanced and enlightened states[.]"); Decius S. Wade, *1880-1894*, *supra* note 88, at 671:

> If Montana would rescue the benign common law from the chaos of the reports and the oblivion and obscurity of too many books, and extract therefrom all of the principles which a thousand years has developed and brought to light, reduce them to form and classify and arrange them without repetition, contradiction and confusion, then our noble commonwealth will have accomplished something for American jurisprudence and the rational administration of human justice.

There is some indication that a general feeling that civil law systems were more modern than common law systems was present in Montana as well. An editorial in the *Daily Independent*, for example, labelled common law water rights systems as "burdened at the very outset by the influence of feudal prejudices and privileges" while calling the civil law water rights system "promulgated by the greatest minds of ancient times." *Water Rights*, DAILY INDEPENDENT (Helena), Jan. 14, 1895, at 4. Although the codes had lost much of the civil law character Field had attempted to give them, notably their sections displacing the common law, such subtleties probably escaped the average lay person. The president of the Montana Bar Association in his address on codification in January 1895 asserted, quite erroneously, that codification of the common law "is the tendency" in the United States, implying the forces of history would eventually bring about codification. *It Is Indifference*, DAILY INDEPENDENT (Helena), Jan. 14, 1895, at 5.

Montana's statutes and laws in worse shape than New York's, but Montana lawyers had invested far less time and effort in mastering the existing law than their New York counterparts.

The Republicans also may have wanted to accomplish something to demonstrate that their control of the Montana's government benefitted the state.[255] Certainly the new Republican members of the legislature had little stake in preserving the law created by the largely Democratic legislatures of the past, and thus less reason to worry whether the Codes' proponents' assurances that the Codes preserved prior law were true.

Another explanation, inspired by public choice analyses of the 1986 Federal tax reform,[256] might be the opportunity the Codes offered the legislators to provide services to their constituents' interests. Not only did the massive, simultaneous adoption of the laws offer opportunities for slipping in unnoticed changes in the law, as Senator Leonard did,[257] but the creation of such an enormous body of law also produced an endless need for amendments and future changes. By enacting a comprehensive framework of rules, even if the particular rules were incorrect, the Fourth Legislature created demand for the services of future legislatures.

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255. The Codes proved an ineffective barrier to the "white" (pro-silver) tidal wave of 1896 which swept many of the Republicans from office, however. *See infra* notes 259-62 and accompanying text.

256. *See* Milton Friedman, *Tax Reform Lets Politicians Look for New Donors*, WALL ST. J., July 7, 1986:

> [The pre-1986] tax space was overcrowded with loopholes. There was no room to add any more without destroying the tax base altogether. In a last-ditch effort to preserve tax reform, Senator Bob Packwood made his now famous radical proposal—cut tax rates drastically and simultaneously eliminate most tax shelters. The rest is history. Whether he realized it or not, Senator Packwood's approach was an ingenious solution to the potential collapse of tax reform as a source of campaign funds. His bill disappoints almost all the lobbyists in one fell swoop, but it also wipes the slate clean, thereby providing space for the tax reform cycle to start over again.

WILLIAM C. MITCHELL & RANDY T. SIMMONS, BEYOND POLITICS at 58 (1994):

> Congressional politicians have in effect wiped the slate clean so that they may once more "auction" off tax exemptions and other privileges. The marginal value of the thousands of exemptions and loopholes had decreased enormously over the years; with fewer loopholes, their value increases sharply to the advantage of members of Congress, especially those on the tax committees. At the same time, the worth of tax lobbyists has also increased since they are the experts in obtaining a renewal of old loopholes.

See also Richard L. Doernburg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987) (describing creation of demand for congressional services in tax legislation).

257. *See supra* note 182 and accompanying text.

Amending the Codes also created more immediate opportunities for providing services. Because the format of bills amending the Codes made for obscure titles ("An act amending section XXX of the Political Code"),[258] public scrutiny of legislative activity became more difficult. Together with the sheer number of bills, this reduced scrutiny from the public and the press.[259]

Regardless of the motivation, the implementation of the reforms left a great deal to be desired. Enacted without public debate or adequate legislative consideration, the Codes made far reaching and often ill-considered changes in Montana's legal system.

E. The Fifth Legislature: "we are governed too much"[260]

> But the end came at last and Montana's legislative body passed out of existence unwept and unmourned and the people of the

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258. Consider, for example, a bill introduced in the 1897 legislature, the notice for which stated "To amend part three, title 10, chapter 13, article two of the political code, relating to licenses, by adding a section to be known as and numbered section 4084." *Called Down Hard*, DAILY INDEPENDENT (Helena), Jan. 26, 1897, at 5. Just what this bill contained would be unknowable to all but those able to procure both the Political Code and the bill itself. Even worse, consider a bill offered by Senator Stanton of Cascade, the notice for which read: "To amend sections 4733, 4740, 4741, 4743, 4748, 4752, 4754, 4756, 4762, 4768, 4780, 4781, 4784, 4786, 4789, 4816, 4911, 4912 and 4913 of the political code, relating to municipal elections; also to amend sections 4805, 4807, 4808, 4809, 4811, 4812, 4813, 4865, 4874 and 4900 of the political code, relating to ordinance and municipal affairs." *Had One Test Vote*, DAILY INDEPENDENT (Helena), Jan. 28, 1897, at 5, 6.

259. My review of the major newspapers between 1889 and 1897 convinces me that Montana's press was hardly a vigorous watch dog. It did, however, regularly print the text of important bills and there was extensive debate over some issues. A typical report of Code amendments in the Fourth Legislature was this one from the Helena *Daily Independent*: "A number of other bills amendatory of the codes were also favorably acted upon." *Must Come In Now*, DAILY INDEPENDENT (Helena), Mar. 7, 1895, at 5.

The effect of such reporting did not go unnoticed in the Legislature. Rep. Monteath complained about the number of bills which simply referred to the Codes, making them unintelligible to the vast majority of Montanans who were without copies of the Codes. *Its Seventh Week*, DAILY INDEPENDENT (Helena), Feb. 18, 1895, at 5. Review of subsequent reports of bills introduced suggested the practice continued despite Monteath's complaints. The passage of the Codes themselves drew little attention in some papers. The *Daily Missoulian*, for example, limited its coverage of passage in the house to a single sentence. *The State Solons*, DAILY MISSOULIAN, Jan. 25, 1895, at 1.

260. The quote is from Governor Smith's annual message. *Governor Smith to Montana Law-Makers*, HELENA DAILY HERALD, Jan. 5, 1897, at 7.

> state breath a sigh of relief that [the legislature] had done no worse than pass necessary appropriation bills with numerous measures amendatory of the codes.[261]
>
> *Helena Daily Herald*

The Codes' passage was insufficient to enable the Montana Republicans to retain control of the governor's office or legislature in the 1896 "white tide" of silver politics.[262] A Democratic-Populist "fusion" candidate won the governorship in 1896 with an unprecedented 21,000 vote majority.[263] Republicans lost thirty-six seats in the House and two in the Senate[264] as well as the governorship; they were saved from greater losses in the Senate only by the limited number of upper house seats up for election in 1896.[265] The new House contained only three members with any legislative experience and none from the previous session.[266]

New Governor Robert B. Smith's first annual message counseled restraint with respect to fixing the Codes:

> I am disposed to advocate that policy which will as far as possible maintain the permanency and stability of our law; I believe the great trouble with the world is a tendency to change and alter the laws too rapidly. Instead of not being governed enough I fear we are governed too much; therefore where the

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261. *In Retrospect*, HELENA DAILY HERALD, Mar. 6, 1897, at 8.

262. *Montana's Resources Ably Pictured*, HELENA DAILY HERALD, Jan. 13, 1897, at 2. ("Like all the silver states, Montana went 'white' with a vengeance last November.") "White" signified silver as opposed to gold. *See also* RAYMER, *supra* note 112, at 386-87.

263. *Montana's Resources Ably Pictured*, HELENA DAILY HERALD, Jan. 13, 1897, at 2.

264. Figures for the Fourth Legislative Assembly from *Senator Makers*, HELENA DAILY HERALD, Nov. 21, 1894, at 5. The Fifth Legislature had forty-four Democrats, sixteen Populists, and eight Republicans in the House and nine Democrats, three Populists, and eleven Republicans in the Senate. *Montana's Resources Ably Pictured*, HELENA DAILY HERALD, Jan. 13, 1897, at 2.

265. *Montana's Resources Ably Pictured*, HELENA DAILY HERALD, Jan. 13, 1897, at 2.

266. *Work of the Week*, DAILY INDEPENDENT (Helena), Jan. 11, 1897, at 5; *Above Average Age*, DAILY INDEPENDENT (Helena), Feb. 15, 1897, at 1. (One House member from the Fourth Legislature was elected as a member of the Senate in the Fifth). The new legislature was also a quieter group than the Fourth Legislature. *Is A Quiet Session*, DAILY INDEPENDENT (Helena), Jan. 11, 1897 at 8 ("The members are sedate and economical in their own affairs. The hotel bar rooms do not know them as they did of yore. They retire earlier to their homes, and, all in all, behave more like a man would in the city where he was born and brought up and where his reputation was worth a few dollars to him . . . .The last session would have been a shock to the community if it had met in Butte.").

> laws in the codes are not too conflicting or erroneous, leave them. We would better endure some inconvenience in the law and have it fixed and certain than to be in ignorance of the law by reason of its manifold changes and uncertainties.[267]

The Governor explicitly called for six changes: reform of the fellow servant rule,[268] amendment of the attachment law, repeal of the probate provisions allowing the living to testify concerning contracts and conversations with the deceased, revision of the municipal incorporation provisions, changes in the school tax collection law, and clarification of rules governing corporations.[269] Other groups sought changes as well, including the Bar Association,[270] city officials,[271] and livestock interests.[272] The Helena *Daily Independent* greeted the election results with the note that "[m]any amendments to the codes are wanted, to repair omissions and defects, some clerical and some otherwise."[273]

Despite the predictions at the end of the Fourth Legislature that many provisions would require amendment,[274] the Fifth Legislature accomplished few major changes in the Codes. The only major changes to the Codes were gambling prohibition,[275]

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267. *Governor Smith to Montana Law-Makers*, HELENA DAILY HERALD, Jan. 5, 1897, at 7.

268. This change was required by a court decision striking the previous law rather than because of a flaw in the Codes. *For Railway Employees*, DAILY INDEPENDENT (Helena), Feb. 9, 1897, at 6.

269. *Id.*

270. *See Montana Lawyers Meet*, DAILY INDEPENDENT (Helena), Jan. 11, 1897, at 6 (an important issue at meeting was proper form for amendments); *Lawyers Meet To-day*, DAILY INDEPENDENT (Helena), Jan. 12, 1897, at 5 (invitation to members to suggest "amendments and corrections to the codes"); *People Make Laws*, DAILY INDEPENDENT (Helena), Jan. 12, 1897, at 5 (describing bills introduced which "lawyers have contended for during some time past"); *Many Lawyers Came*, DAILY INDEPENDENT (Helena), Jan. 13, 1897, at 1 (describing problems identified by the Bar Association meeting); and *Poor Lo's Honesty*, DAILY INDEPENDENT (Helena), Feb. 2, 1897, at 5 (describing bills introduced at the request of the Bar Association).

271. *From Nine Towns*, DAILY INDEPENDENT (Helena), Jan. 12, 1897, at 6 (describing meeting to correct "many defects" found in Codes); *Powers of Cities*, DAILY INDEPENDENT (Helena), Feb. 18, 1897, at 8 (describing bills introduced to correct problems identified by cities.)

272. *See Is A Quiet Session*, DAILY INDEPENDENT (Helena), Jan. 11, 1897, at 8 (describing bills sought to benefit stockmen whose animals were killed by trains.)

273. *Work for the New Legislature*, DAILY INDEPENDENT (Helena), Nov. 24, 1896, at 2. Not everyone thought the legislature would be busy. The Daily Independent reported that a "Helena correspondent of a Butte paper Tuesday wrote that there was very little business to engage the attention of the legislature at its coming session." *Will Be A Busy One*, DAILY INDEPENDENT (Helena), Dec. 25, 1896, at 5.

274. *See Extra Session*, HELENA DAILY HERALD, Mar. 14, 1895, at 8.

275. The discussion of the anti-gambling measure took up a great deal of time

fish and game law revision,[276] increased penalties for livestock and horse theft,[277] correction of some errors regarding cities,[278] and restoration of prior law concerning some aspects of mining.[279]

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and energy. *See Pass the Bill*, HELENA DAILY HERALD, Mar. 4, 1897, at 8. Some claims were made that at least one member had been bribed in connection with the bill. *That Gambling Bill*, DAILY MISSOULIAN, Feb. 27, 1897, at 2 (editorial). No investigation occurred and the issue received little press attention. In an example of the lack of care with which legislation was drafted, the sponsor of the anti-gambling bill admitted he did not know what one of the games the bill banned was. He had merely copied the bill from a law in Missouri and so when asked "How do you play it?" he replied "Now you've got me[.] I don't know anything about it. But if it is unlawful to play it in Missouri it ought to be made unlawful here." *Has Plenty to Do*, DAILY INDEPENDENT (Helena), Jan. 25, 1897, at 8.

276. A complete replacement of the code sections on fish and game was proposed, with the sponsor arguing "[t]he fish and game laws of the codes as they stand now are so mixed that no one but a lawyer can tell which one is in force and effect." *Fish and Game*, HELENA DAILY HERALD, Jan. 22, 1897, at 8. Among the changes made were increases in the size of mesh required for fishing nets and restrictions on dynamiting fish. *Id.* An example of problems with the Code sections on this was the requirement that fish screens be in place between September and March on all irrigation ditches, a time when Montana weather prevented significant irrigation. The new bill changed the requirement to March to August. *New Game Law*, HELENA DAILY HERALD, Jan. 26, 1897, at 2. The agricultural lobby succeeded in having the requirement stricken entirely. *State Legislature*, DAILY MISSOULIAN, Feb. 20, 1897, at 1. *See also Scrap About Scrip*, DAILY INDEPENDENT (Helena), Feb. 20, 1897, at 5 (describing agricultural interests' opposition to screen requirement.)

The confusion in the fish and game laws stemmed from the manner in which the Codes were adapted to the acts of prior Legislatures. A general rule that the laws of the assemblies which had met since the Codes were drafted took precedence over the Code provisions, except where the Code provisions were amended during the Fourth Legislature. This led to the combination of some Code provisions and an 1893 fish and game law, with other Code provisions dropped. *See As the Law Stands*, DAILY INDEPENDENT (Helena), Mar. 25, 1895, at 6.

A similar argument that the Codes were confused and contradictory was made concerning the Code provisions on the selling of timber from state lands, prompting a bill to amend those sections. *Important Bills*, HELENA DAILY HERALD, Feb. 3, 1897, at 5.

277. The Codes had made horse and cattle theft petit larceny by restricting grand larceny to cases where property was taken from the person of another or exceed $50 in value. 1895 Penal Code §§ 883-884. Horse and cattle theft had previously been grand larceny and punishable by fines of $100 to $500 and imprisonment for one to fourteen years. REVISED STATUTES OF MONTANA (1879), 4th Division, § 72. The bill introduced made thefts of various listed animals grand larceny, thus returning the punishments to the prior ranges. *For Cattle Stealing*, HELENA DAILY HERALD, Jan. 9, 1897, at 8. REVISED CODES OF MONTANA (1907), Penal Code § 8645.

278. Reform of § 4800 of the Political Code governing licenses was a major goal of Montana city officials. *From Nine Towns*, DAILY INDEPENDENT (Helena), Jan. 12, 1897, at 6.

279. *Excited Members*, HELENA DAILY HERALD, Feb. 17, 1897, at 8 (In offering a bill, the Senate Judiciary Committee reported "the substitute offered is an exact copy of the law previous to the adoption of the codes and had been the law of Montana since January 14, 1872, and seems to have been operated satisfactorily. The Code

The Fifth Legislature was too distracted by the opportunities for Democratic and Populist patronage[280] (earlier vows to reform the government notwithstanding[281]), women's suffrage,[282] a Populist attempt to institute an initiative and referendum law,[283] the endless series of county division bills,[284] an

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law on this subject has been fruitful of law suits and has certainly been far from satisfactory to a large number of people interested in mines and mining."). The provision was eventually fixed in 1899. REVISED CODES OF MONTANA (1907), Code of Civil Procedure, § 6499.

280. *See, e.g., Majority Rules*, HELENA DAILY HERALD, Jan. 8, 1897, at 8 (discussion of appointment of clerks for committees by committee majority rather than by chair); *No More Economy*, HELENA DAILY HERALD, Jan. 12, 1897, at 5 ($57,000 appropriation for legislative pay and expenses passed without proper procedures); *No More Pages*, HELENA DAILY HERALD, Jan. 21, 1897, at 5 (hiring of two additional pages narrowly defeated); *Two More Clerks*, HELENA DAILY HERALD, Jan. 30, 1897, at 1 (House "kicks over the traces of the retrenchment policy" and hires more staff); and *Inconsistency*, HELENA DAILY HERALD, Feb. 27, 1897, at 5 (describing attempts to raise salaries of allies of various parties); *The Fifth Assembly*, DAILY MISSOULIAN, Mar. 5, 1897, at 2 (recounting declining enthusiasm for salary reduction and office elimination as session wore on). The Fifth Legislature was not without problems with clerks, although it seems to have been more prompt at discharging those who did nothing. *It Was Ladies' Day*, DAILY INDEPENDENT (Helena), Feb. 10, 1897, at 1, 6 (recounting discharge of clerk for doing nothing).

281. The opening days of the session found numerous cries for reduction of salaries for legislative employees and state and county officials. *See, e.g., To Cut Salaries*, HELENA DAILY HERALD, Jan. 6, 1897, at 5. Enthusiasm for these measures declined during the session. *The Fifth Assembly*, DAILY MISSOULIAN, Mar. 5, 1897, at 2. The salary bill which had passed both houses was apparently "lost" and so never signed. *Where Is That Bill?*, DAILY MISSOULIAN, Mar. 8, 1897, at 1.

282. *See, e.g., Woman's Day*, HELENA DAILY HERALD, Feb. 10, 1897, at 5. The bill fell five votes short of the two-thirds majority required in the House. *How It Died*, HELENA DAILY HERALD, Feb. 11, 1897, at 5.

283. *Elliot's I & R Bill*, HELENA DAILY HERALD, Jan. 13, 1897, at 3; *A Populistic Measure*, DAILY MISSOULIAN, Jan. 16, 1897, at 1 (printing text of bill). Debate over the bill took three days of legislative time in the House. *Looking Both Ways*, DAILY INDEPENDENT (Helena), Feb. 1, 1897, at 5. Although the initiative and referendum amendment failed in this session, *With a Vim*, HELENA DAILY HERALD, Jan. 28, 1897, at 5, Montana eventually adopted provisions similar to it. 1899 MONT. CONST. art. V, § 1 (amended 1905). Ironically, one of the arguments against the initiative and referendum measure in 1897 was that Montana should wait for other states to experiment with such legislation. *Debate Was Warm*, DAILY INDEPENDENT (Helena), Jan. 27, 1897, at 5.

284. County division seems to have been a state sport in late nineteenth century Montana. The Fifth Legislature considered bills to enlarge Cascade County (out of Meagher and Choteau counties), *Cascade County*, HELENA DAILY HERALD, Jan. 16, 1897, at 8, establish Rosebud County (out of Custer county), *New County Bills*, HELENA DAILY HERALD, Jan. 9, 1897, at 5, enlarge Lewis and Clark County (out of Meagher and Jefferson counties), *Penwell's Bill*, HELENA DAILY HERALD, Jan. 19, 1897, at 2, create Broadwater County (out of Deer Lodge county), *New County Bills*, HELENA DAILY HERALD, Jan. 9, 1897, at 5, create Powell County (out of Deer Lodge county), *Powell County*, HELENA DAILY HERALD, Jan. 22, 1897 at 8. The Broadwater County bill had been previously introduced in 1885, 1891, 1893, and 1895. *Twelve Years Old*, DAILY INDEPENDENT (Helena), Feb. 1, 1897, at 8.

eight-hour law for workers on state buildings,[285] attempts to restrict Native Americans to their reservations,[286] and scandals involving bribery in the House[287] and the commission charged with constructing the state capitol building[288] to contemplate extensive revision of the Codes. Although a host of amendments to the Codes were among the 464 bills introduced in the Senate and House,[289] most ended the session in the clerk's pigeonhole for unfinished business.[290] As the Helena *Daily Independent*

Although often cloaked in language about relative distances between county seats, road quality, and natural patterns of trade, political motives also played a role as well. *See, e.g., Lo, Poor Indian*, HELENA DAILY HERALD, Jan. 30, 1897, at 1 (Populist member arguing creating new county is means to increase anti-worker representation in the legislature in connection with Broadwater county bill); *A Big Political Deal*, DAILY MISSOULIAN, Feb. 9, 1897, at 1, 4 (alleging deal between Populists and Democrats to give Populists the Butte mayoralty in exchange for votes on Powell county bill). The *Weekly Missoulian* had joked about the number of county division bills in the 1893 legislature, claiming that the "144th" county division bill had been introduced to create Missoula County out of all territory not appropriated to other counties. *Dillon's Demand*, WEEKLY MISSOULIAN, Feb. 15, 1893, at 6.

285. *Eight Hour Law*, HELENA DAILY HERALD, Jan. 20, 1897, at 5; *A Legal Day's Work*, DAILY MISSOULIAN, Jan. 14, 1897, at 1 (printing text of bill).

286. Livestock interests sought the restrictions, enforceable by criminal penalties, arguing that the Native Americans killed livestock, set fires to the range, killed cowboys, and stole when off the reservations. *Lo, Poor Indian*, HELENA DAILY HERALD, Jan. 30, 1897, at 1. To their credit some members of the Legislature opposed the bill as an infringement of freedom. *See, e.g., Id.*, (Populist member argues measure would lead to similar measures against working people) and *The Indian Bill*, HELENA DAILY HERALD, Feb. 2, 1897, at 3 (Democratic member arguing Native Americans have as much right on public range as the white man and Populist argues for Constitutional right of all to go where they please). The bill died in the Senate.

287. *See Most Sensational*, HELENA DAILY HERALD, Mar. 5, 1897, at 3, 6, 7; *Expelled Him*, HELENA DAILY HERALD, Mar. 5, 1897, at 8. In sworn testimony, Representative Martin Buckley claimed he had found, on numerous occasions, cash in his room, left for him to give "to the boys to spend." *Most Sensational*, *supra*, at 1. Although he later claimed to have been drunk during his testimony and attempting to "josh" the investigating committee, Buckley was expelled. *Expelled Him*, *supra*, at 8.

288. *See Bad Management and Rank Fraud*, HELENA DAILY HERALD, Feb. 23, 1897, at 1, 4, 5; *What They Said*, HELENA DAILY HERALD, Feb. 24, 1897, at 1, 3; *One Man's Report*, HELENA DAILY HERALD, Feb. 24, 1897, at 8; *The End Not Yet*, HELENA DAILY HERALD, Mar. 4, 1897, at 3, 7; *Whiteside Again*, HELENA DAILY HERALD, Mar. 5, 1897 at 5. The scandal involved charges by Rep. Whiteside that $50,000 of state money was committed to pay an unqualified individual for incomplete plans. Whiteside's charges were made in a minority report of an investigating committee and caused an uproar. When Whiteside had difficulty in proving his claims of bribery and misdeeds, he claimed that he had been offered bribes to suppress his report. *Whiteside Again*, *supra*. Ultimately, no action was taken by the Legislature on the matter.

289. *In Retrospect*, HELENA DAILY HERALD, Mar. 6, 1897, at 8 (334 bills were introduced in the House and 130 were introduced in the Senate). By comparison, in the Third Legislature in 1893, there were 292 bills, 223 in the House and 69 in the Senate. *After Sixty Long Days*, DAILY INDEPENDENT (Helena), Mar. 3, 1893, at 5.

290. This was undoubtedly a good thing in some cases—one member was report-

noted at the end of the session, the codes were "not altogether straight yet."[291]

Many of those amendments cast doubt on the thoroughness of the initial code commission's work. For example, a bill to adopt a California law governing sheep grazing was introduced,[292] somewhat surprisingly in light of the Codes' California roots. A tax on livestock funded bounties for wolves and coyotes,[293] suggesting inadequate consideration during codification for an area critical to livestock interests. Similarly, bills were introduced to restore pre-code law on penal labor[294] and mining law,[295] again suggesting a lack of thoroughness in adapting the Codes to Montana's existing legal system. The same carelessness was apparent in the list of problems the Bar Association sought to remedy: "the lack of necessity for a reply; no limitations on life of judgments; inability to take depositions where the defendant had not appeared; absence of inhibition against a party testifying against the representative of a deceased party; lack of provisions to enforce collection of rents by execution purchases and many others."[296]

Legislators also introduced a bevy of technical amendments. For example, a clerical error in 1895 was blamed for raising the

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ed to have paid a stenographer $5 to "draft any old thing that is a bill, so I can get my name up as the author of a measure before I go home." *Some Are Waiting*, DAILY INDEPENDENT (Helena), Jan. 18, 1897, at 8.

Not all bills which ended up in pigeonholes were meant to be there. An important bill reforming the Political Code's provisions on licensing which was intended to provide city's with additional revenue was "lost" and not presented to the Governor for his signature. *Salary Bill Lost*, DAILY INDEPENDENT (Helena), Mar. 6, 1897, at 1. *See New License Bill*, DAILY INDEPENDENT (Helena), Feb. 16, 1897, at 8, for a description of the bill. Another bill that was "lost" reduced salaries of a number of state officers. A Legislative employee was later indicted on charges that he deliberately mislaid it. *Two Under Arrest*, DAILY INDEPENDENT (Helena), Mar. 30, 1897, at 1.

291. *Takes Them All In*, DAILY INDEPENDENT (Helena), Apr. 20, 1897, at 5.

292. *For Ranchers*, HELENA DAILY HERALD, Feb. 2, 1897, at 5 (sponsor states "This bill is copied from the statutes of California, where it has been in effect for many years and apparently has been considered good law.")

293. *Important Bills*, HELENA DAILY HERALD, Feb. 3, 1897, at 7.

294. *Important Bills*, HELENA DAILY HERALD, Feb. 3, 1897, at 5 (Sponsor argues "My bill is only a copy of the old law with the added clause that convict labor may be allowed outside prison walls . . . ") Text of measure given in *Important Bills*, HELENA DAILY HERALD, Feb. 4, 1897, at 2.

295. A number of amendments to the code provisions relating to mining were proposed: S.B. 31 amended section 4635 of the Political Code to reduce fees for filing and recording locations of placer and quartz claims, mill sites, and appropriation of water from $2 and $1 to $1 and twenty-five cents respectively. *The Senate*, HELENA DAILY HERALD, Jan. 21, 1897, at 5. The bill did not pass.

296. *Col. Botkin President*, HELENA DAILY HERALD, Jan. 13, 1897, at 5.

payment to county sheriffs from forty to fifty cents per day for boarding prisoners in jails.[297] In the same vein, a bill was introduced to resolve a conflict between the state constitution and the Political Code concerning when county commissioners took office.[298] The content and brevity of press reports describing the host of bills to amend the Codes suggest that there were many instances of minor problems with code changes to Montana law.[299] Despite the near universal agreement before passage that the Codes required substantial improvement to meet Montana's needs,[300] the Fourth and Fifth Legislatures made few changes, of either a major or minor character. Abundant evidence supports the accuracy of the pre-passage view of the need for amendments. Errors in fish and game laws, mining, and livestock related provisions suggest a failure to adapt the Codes

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297. *Raised by A Clerk*, DAILY INDEPENDENT (Helena), Mar. 16, 1895, at 8; *Prisoners' Board*, HELENA DAILY HERALD, Jan. 13, 1897, at 5. The Codes had altered a great number of financing arrangements. For example, section 2389 of the Political Code reserved all fees collected by the Secretary of State and ten percent of all fees collected by the clerk of the Supreme Court for the state law library, producing more than $10,000 annually, far more than Governor Smith thought necessary. *Communications*, HELENA DAILY HERALD, Jan. 14, 1897, at 8 (relating message from governor requesting revision of the section.)

A similar error occurred in setting mileage and per diem pay for members of the legislature. The code set these at the amounts the Montana Constitution provided for the First Legislature while a later bill passed by the Fourth Legislature halved the mileage allowance. *Rosebud County*, HELENA DAILY HERALD, Feb. 4, 1897, at 8. Apparently the later statute was not properly added to the Codes, and the members of the Fifth Legislature collected the additional moneys before the error was discovered. *Id.* Eventually it was determined that the holdover members of the Senate were entitled to the higher amount but not the newly elected members. *Mileage Question*, HELENA DAILY HERALD, Feb. 9, 1897, at 5.

298. *County Commissioners*, HELENA DAILY HERALD, Jan. 13, 1897, at 3 (bill introduced to amend constitution to resolve issue).

299. *See, e.g.*, *No More Economy*, HELENA DAILY HERALD, Jan. 12, 1897, at 5. There are numerous such reports. The brevity of the description suggests an editorial judgment of a lack of importance since the *Herald*, for example, routinely printed the full text of bills. Among the bills reported introduced in the week of January 11-16, 1897 (the first full week of legislative consideration of bills), for example, there were thirty-seven bills introduced in the House, sixteen of which were described in a manner suggesting they were minor amendments to the Codes. Unfortunately the Fifth Legislature's practice of not printing House bills unless they were recommended by a committee for adoption, *The First Stir*, HELENA DAILY HERALD, Jan. 8, 1897, at 2, and the sketchy nature of nineteenth century legislative records prevents a more complete analysis.

The Codes' size surfaced as an argument against the populist initiative and referendum bill, with *Helena Daily Herald* asking "How would you referee the laws passed by the legislature of 1895, consisting of 2000 pages, 16,539 sections, and numerous chapters and titles—as a whole, by codes, titles, chapters, pages or sections?" *Answer—No Evasion*, HELENA DAILY HERALD, Jan. 5, 1897, at 4 (editorial).

300. *See* HELENA DAILY HERALD, *supra* note 157 at 1.

even in areas critically important to Montana's economy. Montanans had welcomed the Codes as a clarifying measure, as an end to the confusion of the pre-code statutes, as a means by which the ordinary citizen would understand the law, and as a modernizing mechanism. By the end of the Fifth Legislature, evidence cast doubt on the Codes' success in any of these areas.[301]

F. Is Montana New York?

> New York and its methods are not to be reconciled with the plains of Montana, nor can the one understand the other.[302]

How reasonable was reliance on the New York Field Codes as filtered through Dakota and California? Montana differed significantly from the source states. The economies differed in scale and composition, the populations differed in size and distribution. Because Montana and the source states were not similar, the problems a set of Codes would need to address would often differ. Even when the problems did not differ, the societal dissimilarities would often dictate different answers.

Table 1[303] contains a number of measures of Montana's, California's, and New York's economies in the time periods roughly contemporaneous with the drafting of the Codes in each state. Table 2[304] gives greater detail on the composition of California's and Montana's economies at the relevant times. Table 3[305] gives demographic data.

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301. One example of the lack of clarity induced by the Codes concerned the power of county boards of commissioners with respect to the employment of deputies. "In some counties the question has caused a vast amount of argument between the commissioners and county officials reslting [sic], in a number of instances, in serious ructions between them." *Power of Boards*, DAILY INDEPENDENT (Helena), Mar. 6, 1897, at 5.

302. Hill Cattle Corp. v. Killhorn, 79 Mont. 327, 337, 256 P. 497, 501 (1927) (statement of defense counsel). The argument concerned whether Montanans had to fulfill their contracts in the same way as New Yorkers rather than the Field Codes, but the sentiment carries over.

303. Reliable data from the nineteenth century of any sort is difficult to come by. These data are from SIMON KUZNETS ET AL., POPULATION REDISTRIBUTION AND ECONOMIC GROWTH, UNITED STATES, 1870-1950 93-94, 129-31 (1960) (This data compiled from Tables A 2-8, A 3-5, A 3-6, and A 3-7). They are for the census years closest to the drafting or adoption of the codes (1870 for California and New York and 1890 and 1900 for Montana.)

304. EVERETT S. LEE ET. AL., POPULATION REDISTRIBUTION AND ECONOMIC GROWTH, UNITED STATES, 1870-1950 623, 627-28 (1957) This data derived from Table L-5.

305. HOPE T. ELDREDGE & DORTHY S. THOMAS, POPULATION REDISTRIBUTION AND

Table 1: Economic Statistics

Category relative to United States average (U.S. = 100)	California (year)	New York (year)	Montana (year)
Percent labor force in mining	690 (1880)	16 (1880)	727 (1890)
Percent labor force in manufacturing	83 (1880)	165 (1880)	60 (1900)
Relative wages per $1,000 value added	96 (1869)	96 (1869)	115 (1889)
Relative value added per capita	106 (1869)	172 (1869)	66 (1889)
Relative wages per wage earner	137 (1869)	107 (1869)	158 (1889)

Table 2: Workforce by Industry

	New York 1880	California 1880	Montana 1900
All industries	1,884,600	376,500	114,800
Agriculture	433,400 (23%)	94,900 (25%)	31,100 (27%)
Forestry & Fisheries	3,800 (0.2%)	3,000 (0.1%)	—
Mining	5,800 (0.3%)	49,300 (13%)	21,700 (20%)
Construction	149,700 (8%)	28,900 (8%)	6,100 (5%)
Manufacturing	419,300 (22%)	42,400 (11%)	10,100 (9%)
Transportation	135,600 (7%)	26,600 (7%)	15,400 (13%)
Trade, finance	322,400 (17%)	55,800 (15%)	12,700 (11%)
Services & public administration	411,300 (22%)	75,200 (20%)	17,000 (15%)

As these tables demonstrate, Montana, California, and New York, at the times of the Codes' debate in each, differed strikingly in economic and demographic characteristics. Not only were California's and New York's economies much larger on an absolute scale, but they had much larger trade and manufacturing

ECONOMIC GROWTH, UNITED STATES, 1870-1950 242-43, 254-55, 259 (1964). This data compiled from Tables A 2-8, A 3-5, A 3-6, and A 3-7.

sectors.[306] Montana also had a high wage sector in its economy, reflecting both the relative scarcity of labor and the high rewards possible in the dominant mining sector.[307]

Table 3: Demographic Characteristics

	California (1870-1880)	New York (1870-1880)	Montana (1890-1900)
Natural increase	119,000	614,000	25,000
Net migration	149,000	86,000	73,000
Net migration of foreign born white population	77,000	245,000	27,000
Rates of net foreign born white migration per 1,000 average population	121	52	155
Rates of net native white migration per 1,000 average native white population	162	-48	365

The general statistics fail to capture how fully mining and livestock dominated the 1890s Montana economy. In 1896 copper, gold, silver, and coal mining produced roughly fifty-four million dollars of output.[308] Livestock produced about eleven million dollars of revenue in 1896. All other agriculture and manufacturing combined produced less than three million dollars in revenue.[309] The livestock industry[310] shouldered the major burden of funding the state government, constituting forty percent of the total value of assessed property in the state in 1896, compared to five percent for mining interests.

Montana's demographics in the 1890s also differed sharply from the source states. Montana was much larger geographically than New York[311] (although roughly the same size as Califor-

306. *See* Table 2.

307. *See* Table 1.

308. *Montana's Resources Ably Pictured*, HELENA DAILY HERALD, Jan. 13, 1897, at 2. Copper dominated mining, accounting for over $25 million, silver accounted for $22 million, gold $4.3 million, and coal $4 million. *Id.*

309. Other agriculture accounted for $1.5 million of revenue. Timber production produced approximately $1 million in revenues, while manufacturing accounted only for $1.2 million. Notable manufacturing included beer, brick, sewer pipes, iron work, cigars, and soap. *Montana's Resources Ably Pictured*, HELENA DAILY HERALD, Jan. 13, 1897, at 2.

310. Montana had almost 192,378 horses, 659,474 cows, 2,815,829 sheep, and 21,793 hogs in 1896. *Stock Interests*, HELENA DAILY HERALD, Jan. 20, 1897, at 2.

311. 146,201 square miles compared to 47,645 square miles. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 38 (1975).

nia).[312] Its greater size was combined with a much smaller population than either of the two source states.[313] In addition, Montana's population was changing in strikingly different ways from those states. Table 3 shows some indicators of the scope of those changes: Montana was experiencing significantly larger rates of immigration than either of the source states, and its migrant stream was composed of relatively more native whites.[314] Montana, as a state comprised of recent immigrants, also had quite different patterns of land holding than either New York, which had a "quasi-feudal" system of land tenure,[315] or California, which had a long history of settlement and the complication of pre-existing Mexican land titles with which to contend.[316]

Although these are only rough proxies for the differences in the types of legal problems present in the different jurisdictions, these dissimilarities suggest that Montana's legal system faced quite different problems from those that confronted the source states' legal systems. Commerce in California, and particularly in New York, was much more complex than in Montana. Agriculture in both source states was of a completely different character, as were patterns of land holding. Moreover, a small number of mining concerns dominated Montana's economy.[317] Coping with the concentrated political power this economic concentration implied would require quite different laws and governance structures than necessary in a less concentrated economy, such as California's or New York's. The states' legal cultures also differed significantly. Western states had, and still have, far less respect for formalities than New York, a crucial difference when inter-

312. 155,900 square miles. Size is not everything, of course, and Montana's geography is quite different from California's. *Id.* at 38.

313. Montana's population in 1890 was 143,000; New York's in 1860 was 3,881,000 and in 1880 it was 5,083,000; California's population in 1870 was 560,000. *Id.* at 25, 30, 32.

314. The data do not include African-Americans as no significant migration of African-Americans into Montana occurred in this period. *See* LEE, *supra* note 304, at 168-69 (referring to Table P-1).

315. Natelson, *supra* note 14, at 90 (noting that much of New York's law on covenants running with the land came from litigation by members of the established families who sought to protect vested interests.)

316. The Treaty of Guadalupe Hidalgo required the United States to respect valid Mexican land grants in California. For a discussion of the problems caused by California's Mexican land law inheritance, see Robert Swenson, *Sources and Evolution of American Mining Law*, § 1.10, *in* 1 THE AMERICAN LAW OF MINING (1st ed. 1983).

317. See MICHAEL P. MALONE AND RICHARD B. ROEDER, MONTANA: A HISTORY OF TWO CENTURIES 152-77 (1976), on the dominance of the giant copper companies in this period.

preting statutes.[318]

Even California, whose economy and demographics during codification were closer to Montana's than New York's ever were, was a quite different society. Montana was virtually empty thirty-five years earlier (except for the Native American presence and whites quickly evicted them from areas whites sought to occupy). California had significant Asian and Hispanic populations and a culture predating annexation to the United States. Montana's population was largely white[319] and its culture recently developed. Furthermore, California went directly to statehood (after a brief period of anarchy),[320] while Montana languished under federal territorial rule for longer than many new states.[321] Additionally, as a largely Democratic territory during a lengthy period of national Republican rule, Montana suffered from an exceptional number of appointees who were out of touch with local views. Laws derived from California and New York would obviously require a great deal of adaptation to meet Montana's needs in the 1890s.

G. Consequences

In some respects, each of the four Codes' stories is similar: In each case a massive restructuring of a portion of the legal system was adopted with little thought. The legislators' willingness to defer to Wade, Sanders, and Booth, who were among the few with some idea of the Codes' substance, is both a tribute to the esteem the legislators held those men and an indication of the legislative system's inability to cope with reform on such a

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318. *See* Natelson, *supra* note 14, at 90 n.322 (noting difference with respect to formalities in property law.)

319. LEE, *supra* note 304, at 349, 352 (referring to Table P-4A).

320. Congress adjourned in 1849 without providing for a territorial government. Thus between 1849 and 1850 there was no legal structure in place to resolve most disputes. PAULA MITCHELL MARKS, PRECIOUS DUST 248 (1992); Charles W. McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth Century America*, 10 LAW & SOC. REV. 235-36 (1976). In addition, as summed up by Swenson, "[t]he legal status of California at successive periods of time between the years 1846 and 1849 is not entirely clear." Swenson, *supra* note 316, at 20.

321. Montana was a territory for over twenty-five years, longer than eight of the other fourteen territories which made up the "Second United States Empire" (Colorado, Kansas, Minnesota, Nebraska, Nevada, Oklahoma, Oregon and Wyoming). The territories stuck in territorial status longer were Utah (held back by anti-Mormon sentiment), Dakota (longer only because organized before Montana), New Mexico, Washington (organized earlier), Arizona, and Idaho (organized earlier). JACK ERICSON EBLEN, THE FIRST AND SECOND UNITED STATES EMPIRES 140 (1968).

massive scale. Men who fought bitterly over county boundaries accepted without public protest the complete revamping of the legal system.[322]

The consequences of each of four Codes' adoption differ in some respects. Numerous states adopted similar codes of civil procedure,[323] and adoption in Montana, for the most part, modernized Montana practice. The various errors and mistakes in the Civil Practice Code were probably caught relatively quickly through the experience of the trial bar. Because civil procedure codes were the one innovation of Field's adopted by a significant number of states, adopting a procedure code similar to other states' had the advantage of producing ready-made interpretations of the Code's provisions. In addition, since lawyers on the Code Commission and legislative committees revised and reviewed the Code, they were probably in the best position of any group in the state to ensure that the Codes adequately addressed their interests.[324] The involvement of former judges McConnell, Cole, and Wade, as well as the presence of Sanders and other prominent attorneys on the various committees, also made it unlikely that the Civil Procedure Code would significantly diverge for long from the bar's needs.[325] Even if successful at meeting the needs of the bar, however, the Code of Civil Procedure might not have been optimal for the other citizens of Montana. The keen interest of powerful sectors like the livestock industry in the Code's provisions suggests it may not have met other citizens' needs.

The Penal Code, aside from its potential for disrupting the

322. While it is true that county boundaries could have a direct impact on legislators, through changes in legislative districts, the Codes too had direct impacts on legislators. They were not simply abstract provisions, but immediate changes in laws important to most Montanans.

323. Arizona, California, Colorado, Dakota Territory, Idaho, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, Utah, Washington Territory, Wisconsin, and Wyoming all adopted forms of the procedure code. FRIEDMAN, *supra* note 5, at 343.

324. Montana's lawyers were not, however, unanimously enthusiastic about the Codes. The complaints of the elite lawyers in the Montana Bar Association suggest that many Montana lawyers were apathetic about the Codes. *Many Lawyers Came*, DAILY INDEPENDENT (Helena), Jan. 13, 1897, at 1 (retiring president of the association complains that "the greater number of our lawyers seem to be indifferent" to "the work of remodelling our laws and the purification of our legal system[.]")

325. *See It Is Indifference*, DAILY INDEPENDENT (Helena), Jan. 14, 1895, at 5 (noting that the Code of Civil Procedure had relatively few changes from the existing rules, listing those which would "be welcomed" by the bar in the report of the Montana Bar Association President's speech on the Codes.) There were a significant number of problems in the short run. *See supra* note 296 and accompanying text.

livestock industry, probably made little difference in the day-to-day life of most Montanans. Again, the bar could correct any egregious errors hampering the judicial system, and the other provisions largely dealt with defining crimes and punishments in a way not radically different from earlier law. With a few exceptions, notably the fish and game laws,[326] this Code probably came closest to the codifiers' ideal of a volume that ordinary citizens could consult to learn the substance of the law. By collecting into a single volume and systematically arranging all the provisions of the criminal law, the Penal Code made the rules easier to find, even if it did little to clarify the rules' substance. As has been true of massive crime bills since, however, it was not enough to solve Montana's crime problems: a Butte crime wave in 1897 brought the report of a new vigilance committee's formation.[327]

The Political Code presented different problems. It significantly changed Montana's state and local government. That alone meant little, as virtually every legislative session resulted in changes, although the extent of the changes made by the Political Code seemed larger. Based on the enormous spoils control of state government offered, and the regular and dramatic changes in partisan control of Montana's state government throughout the 1890s, the Political Code could be seen as just one of many restructurings to benefit friends and punish enemies. To the extent it succeeded in organizing the laws into a coherent framework, it at least served the purpose of making future legislatures' restructurings more convenient. (There is some doubt as to how well it succeeded at even that limited goal.)[328] The Code Commissioners were more ambitious than that, however. They sought to impose their own vision of an appropriate government structure on Montana. The restructuring of municipal salaries and fees, for example, fundamentally altered the nature of local government by reducing the rewards

326. *See supra* note 276.

327. *3-7-77, Beware!*, HELENA DAILY HERALD, Feb. 25, 1897, at 8. Vigilantism played an important role in Montana's early history, and the ubiquitous Wilbur F. Sanders was a leader of the 1866 Vigilance Committee. *See* THOMAS J. DIMSDALE, THE VIGILANTES OF MONTANA (reprint 1953) (1866) for a first hand account of their activities. "3-7-77" was the 1866 Vigilance Committee's sign, although its significance remains unclear.

328. See, e.g., the comments of M.D. Leehey, a member of the 1897 legislature from Silver Bow County, quoted in *Will Be A Busy One*, DAILY INDEPENDENT (Helena), Dec. 25, 1896, at 5 (noting the need for amendments to fix "many things" in the Codes, particularly in the Political Code.)

for government service and incentives for particular officials. Except where the Commissioners crossed particularly powerful (and alert) interests like the livestock industry, they largely succeeded. Even if the codifiers' vision was the correct one for Montana at the time, the adoption of the structure without debate betrayed the principle of self-government. Montana, like many Western states, has a rich heritage of provisions designed to bring government closer to the people. The widespread changes in the Codes deserved public debate.

The Civil Code had the most potential for far-reaching effects. Field's original intent was to displace the common law. The provisions seeking to create a United States version of the Code Napoléon were revised out of the Code by the Californians before it arrived in Montana.[329] Nevertheless, even without formal displacement of the common law, the Civil Code revolutionized it by offering rules on a wide range of subjects. By occupying space that the common law might have filled differently, the Civil Code in particular changed the development of the law in Montana. The next section examines the Code provisions on the duration of employment contracts as one example of the Codes' impact. Elsewhere, Professor Robert Natelson has traced the impact of the implementation of the Code provisions on covenants running with the land.[330] Montana's experience in these two areas suggests that the success of legal revolutions depends on more than having "plenty of laws." Success also requires institutions that implement those laws.

It is important to examine the Codes' implementation to gain an understanding of whether the Codes succeeded in directing the growth of Montana law. This specific area also illustrates a different type of problem with the Montana courts' treatment of the Code; here a combination of misinterpretations and failure to heed the Code provisions lost Montana the opportunity to develop an appropriate law.

III. IMPLEMENTATION: THE LAW OF EMPLOYMENT

A comparison of the Code states' experience with the common law states' experience involving similar rules and areas of the law helps to demonstrate the limits of codification. This section examines wrongful discharge, an area where Montana and the other Code states have ignored the Code provisions.[331]

329. Natelson, *supra* note 14, at 41.

330. Natelson, *supra* note 14.

331. See Andrew P. Morriss, *Developing a Framework for Empirical Research on*

Examining an area where the Codes' provisions failed to alter the common law's development highlights the importance of institutions that are willing to live within the confines of legal structures. The Montana courts, as well as the courts of the Dakotas and California, have not only followed prevailing common law developments despite Code provisions to the contrary, they have also led those innovations. Without a legal culture that respected the Codes, the Codes' influence quickly declined.

The development of the modern law of wrongful discharge makes this decline clear. Because employment contracts, like other contracts, often fail to contain specific terms regarding particular issues, courts must fill the gaps with default rules. A surprisingly common omission in employment agreements is the term of the contract. Late nineteenth century courts faced increasing numbers of claims from discharged employees. In response, every state eventually adopted the employment-at-will rule for indefinite employment contracts.[332] This rule simply means that where parties have failed to provide either a term for the contract or limits on the conditions under which it may terminate, either party may end the contract at any time. Most importantly, the existence of such a rule precludes wrongful discharge claims. Beginning in 1959, courts began to erode the at-will rule, creating common law exceptions that allowed discharged employees to sue their former employers.

Like the common law states, the Field Code states adopted versions of the at-will rule in their Codes. Examining these rules and subsequent common law developments in the Field Code states is useful because the parallel evolution of the common law on the subject provides a benchmark against which to evaluate the Codes' rules. Together with the history of the Code provisions on covenants running with the land discussed in Professor Natelson's article, the experience with these provisions provides

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the Common Law: General Principles and Case Studies of the Decline of Employment at Will, 45 CASE W. RES. L. REV. __, __ (forthcoming 1995), for a discussion of the modern rules in wrongful discharge cases.

332. For an in-depth empirical analysis of the adoption of the employment at will rule, see Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994). The explanation of the adoption of the at-will rule is controversial. For other views, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) (arguing for a Marxian explanation); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: A Historical Analysis*, 5 COMP. LAB. L. 85 (1982) (forwarding a social class explanation); and Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990) (arguing against Feinman's interpretation).

a means of evaluating the Codes' impact.

A. *Field's Drafts*

The 1862 draft of the Field Civil Code contained four sections concerning employment termination, only one of which dealt with indefinite contracts.[333] Section 830 stated: "An employment having no specified term may be terminated at the will of either party on notice to the other." As authority, the draft cited three sections of Story's agency treatise.[334] As noted earlier, Field drew on a wide range of sources for the Civil Code's provisions.[335] He certainly had access to, and used, English precedent and so he would have known of the contemporaneous English practice that presumed a definite term.[336] He also would have known of Blackstone's presumption of a yearly hiring based on agricultural work cycles.[337] He also used authority from other states, and thus undoubtedly knew of alternatives to the at-will rule used by mid-century American courts.[338] In-

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333. Section 831 listed events which terminate employment; § 832 made employment terminable upon the death or incapacity of the employer; and § 833 required employees to continue service after the death or incapacity of the employer so far as was necessary to protect the interests of the employer's successor in interest from "serious injury."

334. Sections 462, 476, and 477.

335. *See supra* note 37 and accompanying text.

336. See Jacoby, *supra* note 332, at 95-102, for a discussion of the English practice.

337. Blackstone's rule was:

> If the hiring be general without any particular time limit, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well as when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term.

WILLIAM BLACKSTONE, COMMENTARIES 413 (1765).

338. He was also aware of the at-will provisions of the Federal Currency Act, as he was counsel in a case where his client lost because of that section. Taylor v. Hutton, 18 Abb. Prac. 16, 34 Barb. 195 (1864). It does not appear, however, that Field thought he was changing the common law of New York in this regard. Although he had license to innovate, the Final Report noted that the innovations were identified in the text, and none of the employment termination provisions were so identified. *Id.* Thus, Field apparently thought that Blackstone's rule was no longer good law in New York by 1865. National banks and many of their state counterparts operated then (and today) under the strongest version of the at-will rule, one which precluded other types of contracts for certain bank officers. *See* Harrington v. First Nat'l Bank of Chittenango, 1 Thomp. & C. 361, 366 (N.Y. 1873) ("I think the power as well as the right of the defendant to dismiss the plaintiff exists by the act of Congress, under which all national banking institutions are organized, of which law the plaintiff is presumed to have notice. . . . The plaintiff's appointment could legal-

stead of relying on those sources, he turned to Story's agency treatise,[339] which provided that the principal could end the agency "at his mere pleasure."[340]

The 1865 Civil Code draft included new sections modifying

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ly be made in no other way, and could only be held by the tenure specified, to wit: the pleasure of the appointing power . . . ."). The National Bank Act of 1864 required banks organized under it to "elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss said officers or any of them at pleasure, and appoint others to fill their places . . . ." Similar language was in the previous year's banking acts. 12 Stat. 665, 668 (National Currency Act) ("To remove such president, cashier, officers, and agents at pleasure . . . ."); 13 Stat. 101 (National Bank Act). The modern version of this provision is contained in 12 U.S.C. § 24 (1992) and the Federal Home Loan Act, 12 U.S.C. § 1432(a) (1993). Similar provisions were present in state banking statutes as early as 1806. *See, e.g.*, LAWS OF THE STATE OF NEW YORK, Ch. 260, § 18 (1838), passed at the Sixty-First Session of the Legislature; 3 THE STATUTE LAW OF KENTUCKY, Ch. CCCXCIII § 11 (William Littell ed., 1806) ("Cashier, and such other offices and servants under them as may be necessary . . . removable at pleasure . . . ."); 1 RESOLVES AND PRIVATE LAWS OF THE STATE OF CONNECTICUT 86-87 (1834); and STATUTES AT LARGE OF SOUTH CAROLINA 14-15 (1810). New York passed the first general banking statute in 1838 and other states soon followed. BRAY HAMMOND, BANKING BEFORE THE CIVIL WAR 5-7 (Deane Carson ed., 1963). The New York act included "at pleasure" language.

339. Why would Field rely on Story rather than Blackstone? After all, Blackstone specifically addressed employment while Story's treatise was on agency. There are several explanations. First, Field's reliance on Story may be partially due to Story's own support for codification earlier in the century. Field used a report on codification in Massachusetts written by Story to argue for codification in New York, even reprinting it in 1852. Field cited Story's support for codification in an 1886 speech to the American Bar Association. David D. Field, *Remarks Before the American Bar Association* (Aug. 20, 1886), *in* 3 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 231 (T. Cole ed., 1890). Story's actual support for codification may have been considerably less than Field's, since the report, "while presenting excellent reasoned arguments for codification, had really been an attempt to forestall a general codification in Massachusetts." VAN EE, *supra* note 32, at 47. *See Codification of the Common Law*, THE MISCELLANEOUS WRITINGS OF JOSEPH STORY (William W. Story ed., 1852).

Second, the nineteenth-century view of the law included the belief that general rules could be stated which would govern a wide range of situations. Thus, agency was simply a general category which included employment. *See* RESTATEMENT OF AGENCY § 2 (1933). The first report of the Code Commission, for example, reported that a unified approach was needed to resolve the contradictions in the law. FIRST REPORT OF THE COMMISSIONERS OF THE CODE 6 (1858), *discussed in* J.O. Muus, *The Origin of the North Dakota Civil Code*, 4 N.D. L. REV. 103, 114 (1937).

Third, Field had been influenced by William Sampson's writings on the common law which were particularly critical of English common law. VAN EE, *supra* note 32, at 42. Sampson was an Anglophobe in general, although it is not clear Field shared those sentiments. VAN EE, *supra* note 32, at 42. An earlier tour of Europe had confirmed his preference for continental civil law over common law generally and English common law in particular. VAN EE, *supra* note 32, at 18-19. Field might therefore have sought to minimize his reliance on Blackstone.

340. JOSEPH STORY, STORY ON AGENCY § 476 (2d ed. 1844).

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

the at-will provision as well as changes in the language of the 1862 draft's section 830. That section, now section 1029, became:

> An employment having no specified term may be terminated by either party, on notice to the other, except where otherwise provided by this title.

Two new provisions were added, sections 1035-36, which read:

> 1035. A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term.
> 1036. In the absence of any agreement as to wages, a domestic servant is presumed to be hired by the month; a clerk, or other servant not merely mechanical, or agricultural, by the year; and other servants for no specified term.

The new draft supplemented the citations to Story's treatise with case citations.[341] Finally, the 1865 draft added a new section providing that personal service contracts (other than apprentice

341. To § 1029 were added citations to: Hathaway v. Bennett, 10 N.Y. 108 (N.Y. App. Div. 1854); Ward v. Ruckman, 34 Barb. 419 (1861); and Beeston v. Collyer, 4 Bing. 309. The new sections were supported by citations to: Davis v. Marshall, 4 L.T.R. (N.S.) 216; 6 H. & N. [Am.ed.] 916 (§ 1035) and Fawcett v. Cash, 5 B. & Ad. 904, 110 E.R. 1026 (1834) (§ 1036). The case citations Field added to the 1865 draft provide some additional information on the change. To the general at-will provision, Field added citations to *Ward* and *Hathaway*, two New York decisions. In *Ward*, a ship captain sought damages through an action for conversion of an interest in a schooner and for wrongfully depriving the captain of "master's interest" in the ship. In a brief opinion, the General Term of the New York Supreme Court found dismissal of the case justified because, among other reasons, such a contract could not be unlimited and therefore would be terminable upon reasonable notice. (The authority cited for this was Story's partnership treatise. *Ward*, 34 Barb. at 420.) In *Hathaway*, a newspaper publisher was sued for terminating a carrier. Field himself argued for the carrier, seeking reversal of the dismissal of the claim. Field argued that the English rule of allowing "one month's notice" should apply, but the court rejected his argument, as no custom had been shown to apply to justify such notice. To support the presumption of a contract for the period for estimation of wages, Field turned to the English case of Davis v. Marshall, 4 L.T.R. (N.S.) 216, 6 H. & N. [Am. ed.] 916. There the court upheld a verdict for an employee, finding that the combination of the employee's position (as a shoe manager) and hiring at thirty pounds per year was sufficient to show a year's contract despite monthly payments. *Davis*, 4 L.T.R. at 217. For the presumption of a month, Field cited Fawcett v. Cash, another English case, and one he had unsuccessfully relied on in his argument in *Hathaway*. In *Fawcett*, an employee sued under a written contract which provided for wages at a fixed rate "for the first year" and thereafter for a fixed annual increase. *Fawcett*, 5 B. & Ad. at 905. The judges' opinions all found this to be sufficient proof of an annual contract to support a verdict.

contracts) were not enforceable for more than two years.[342] These changes moved the Field Civil Code away from the pure at-will provision and toward a presumed term.[343]

Although many New York interests opposed the idea of codification, the opponents' attack focused mainly on the specifics of Field's draft.[344] Despite the controversy that raged around Field's draft, the employment sections did not seem to significantly interest either the bar or the public. None of the 1880s revisions to the Civil Code altered the employment termination provisions.[345] The Association of the Bar of the City of New York's Special Committee to Urge the Rejection of the Proposed Civil Code produced lengthy critiques of a number of Code sections. Neither these critiques nor the reports themselves criticized the weak version of the at-will rule as excessively favorable to employers; critiques of other sections did make this criticism.[346] One report attacked the time limitation on personal

342. Section 1013.

343. I found no direct evidence explaining why the Civil Code was changed in this regard. All that is known is that Field distributed the 1862 draft to "judges and others" for review and that the Code Commissioners "re-examined these two Codes [the Civil and Penal] and considered such suggestions as had been made" and "finally revised and agreed upon them." NINTH REPORT OF THE COMMISSIONERS OF THE CODE, at iv (Comn. Print 1865). One possible but unlikely explanation for the changes between the 1862 and 1865 drafts is simply that Field's practice led him to discover the pay period rule, and that he found it preferable to a blanket at-will rule on theoretical or policy grounds. Because Field was devoted to preserving his own reputation, VAN EE, *supra* note 32, at 253-310 (see a chapter entitled *What's Field Whining About?* for an account of Field's defense of his conduct in the Erie litigation), the more likely explanation may, therefore, be that he seized the opportunity to "correct" the judges in *Hathaway* by adding §§ 1035-36.

344. Field himself noted this, stating that "[t]he real objection on the part of lawyers is to any codification of the common law, though by way of warding off discussion respecting the desirability of such a work they take objection to this particular code." Field, *Codification*, *supra* note 27, at 23. *See also* Fisch, *More Notes*, *supra* note 54, at 20.

345. *See* Assembly Bill No. 182, §§ 1029, 1035-36 (1880); Assembly Bill No. 62, §§ 1029, 1035-36 (1881); Assembly Bill No. 215, §§ 1029, 1035-36 (1882); Senate Bill No. 300, §§ 1423, 1441-42 (1883); Senate Bill No. 87, §§ 1423, 1441-42 (1884); Senate Bill No. 135, §§ 1423, 1441-42 (1885); Assembly Bill No. 275, §§ 1423, 1441-42 (1885); Assembly Bill No. 50, §§ 1423, 1441-42 (1886); Assembly Bill No. 329, §§ 1423, 1441-42 (1887); Senate Bill No. 258, §§ 1423, 1441-42 (1888); and Assembly Bill No. 132, §§ 1423, 1441-42 (1888).

346. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE, APPOINTED MARCH 15, 1881" (Oct. 21, 1881) with attached Memorandum of Clifford Hand, Mar. 28, 1881; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE, REAPPOINTED NOVEMBER 1, 1881" (Oct. 10, 1882) with attached circular "Ought the Bill Entitled 'An Act to Establish a Civil Code' to be Enacted Into a Law?" (May 1882); ex-

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

service contracts other than apprenticeship, suggesting that the authors did not find the other provisions on employment duration especially objectionable.[347]

B. Montana

1. The Code Provisions

California modified Field's 1865 draft[348] provisions on em-

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tracts from Letters of John T. Doyle, Esq., Apr. 22, 1882 and May 28, 1882; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FOURTH ANNUAL REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE," REAPPOINTED OCTOBER 9, 1883 (Oct. 14, 1884) with attachments: "Paper by Theodore W. Dwight on the Obligations of the Legislature to Adopt the Code and on the Law of Landlord and Tenant," (Mar. 12, 1884) (discussing the title on hiring in general, which was located near the provisions on employment; "Paper by James C. Carter, An Examination of the First Forty-five Sections of the Title of Insurance in the Proposed Civil Code," Mar. 10, 1884; "Paper by Wm. B. Hornblower: 'Negotiable Instruments' and 'Trusts'," Mar. 11, 1884; "Paper by Albert Mathews, upon Several Sections of the Proposed Civil Code: 'Loans'," (Mar. 4, 1884); "Points Submitted by Mr. George H. Adams, of the Committee of the Association of the Bar in the City of New York, in opposition to the Proposed Civil Code, to the Judiciary Committees of the Senate and Assembly," (Mar. 12, 1884); and "Paper by J. Bleecker Miller, on Corporations under the Proposed Civil Code," (no date); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FIFTH ANNUAL REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE, REAPPOINTED OCTOBER 14, 1884 (Dec. 8, 1885) and ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, EIGHTH ANNUAL REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE, REAPPOINTED DECEMBER 14, 1888 (Dec. 11, 1888).

347. The only critique sponsored by the Association to specifically discuss the employment sections, Miller, *supra* note 346, at 56-61, criticized the weak at-will rule only for its effect, in combination with other provisions, on the hiring of contractors to perform specific work. Miller, *supra* note 346, at 56-61. Interestingly, this paper cites Wood's treatise in its criticism of the provision allowing discharge of ill employees. Miller, *supra* note 346, at 60. Particularly since other employment provisions were specifically criticized as too favorable to employers (Field represented a number of major railroads and other corporate clients, *see* VAN EE, *supra* note 32, at 212-52 (describing Field's practice)), it is significant that the at-will section was not also so criticized.

348. As in Field's 1865 draft, the Dakota Territorial Code stated, under the heading "Termination At Will," that "except where otherwise provided by this title" employments having no specified term "may be terminated at the will of either party." 1877 Code, *supra* note 54, § 1152. The Dakota Code, however, provided that for "servants" (without specifying the definition of servant) the period used for estimation of wages (a month if no such period was used) was to be the term. Only piece rate workers defaulted to contracts with no specified term. 1877 Code, *supra* note 54, §§ 1157-59. These provisions survived each subsequent territorial revision.

They continued after statehood in North Dakota until 1961. North Dakota repealed the two presumed term provisions, along with the other provisions in Ch. 34-04, the Master and Servant section of the Code, in 1961. S.L. 1961, ch. 234, 31. It did not repeal the at-will provision. There is no legislative history indicating why this occurred. The sponsors of the repeal also sponsored a bill providing compensa-

ployment duration, and the Montana Civil Code simply adopted and renumbered the California modifications.[349] California adopted three provisions concerning indefinite-term employment contracts in the 1872 Code. California section 1999[350] stated:

> An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this Title.

California sections 2010-11, gave the "otherwise" mentioned in California section 1999. California section 2010 provided:

> A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term.

California section 2011 provided:

> In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed.

The only significant difference from Field's 1865 draft was the substitution of the text of California section 2011 for Field's

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tion for work already performed for employees who were dismissed for good cause and for those who quit for good cause, as well as bills dealing with reform of the laws governing union-sector arrangements. S.L. 1961, chs. 233, 235-36.) The legislature passed all four bills during the same eight-day period (between March 8 and 16, 1961), suggesting some linkage.

The provisions remain in force in South Dakota today, S.D. CODIFIED LAWS ANN. §§ 60-1-3 and 60-1-4 (1988), but are rarely cited and appear to have been last cited in a published opinion in Amunson v. Hovelsrud, 42 N.W.2d 228 (S.D. 1950).

349. The common law states were also adopting similar duration of employment doctrines. By 1895, twelve common law states had adopted employment-at-will rules. These twelve constituted more than half of the U.S. economy by several measures. *See* Morriss, *supra* note 332, Table III, at 703; Generally these rules were somewhat stronger than the version in the Field Code states' codes since they applied with fewer exceptions. Nonetheless, if Field had been in advance of the common law's development in 1865, the common law had clearly caught up with his draft in the intervening thirty years. By the time Montana adopted the Codes, the at-will rule covered a majority of the United States economy and applied in most jurisdictions which had considered the question. For details on the common law adoption, *see* Morriss, *supra* note 332, at 700, Table II.

350. In 1915, California modified § 1999 to provide: "An employment, having no specified term, may be terminated at the will of either party, on notice to the other. Employment for a specified term shall mean employment for a period greater than one month."

section 1036.

Read together, these provisions create four groups of employees. First, those employees who have definite-term contracts (including employees with explicit at-will contracts) obviously have a contract for the term agreed. Second, employees who have indefinite contracts that contain a provision concerning wages per unit time have a contract for that period. Third, employees who have a contract that does not mention the time or rate of wages but are not paid under a piece rate have a monthly contract. Finally, employees who are paid piece rates have at-will contracts.[351]

The Montana Commissioners included California cases in their annotations, as well as citations to cases from other states and to Field's draft.[352] To support Montana section 2703 (renumbered from California section 1999), the Commissioners cited only one case,[353] *DeBriar v. Minturn*,[354] and summarized its

351. These provisions survived until 1969, although the legislature moved them to the Labor Code when it was created in 1929. Repealed by Stats. 1969, 1537 § 1, pt. 3132.

352. As authority for § 1999, the California annotators (two of the three members of the Code Commission) cited the same sections of Story's agency treatise and cases as Field's 1865 draft. For § 2010 the annotators again copied Field's case citation but added a note that "[i]t seems eminently proper, also, that the presumption, in the absence of express agreement, should here follow the same rule adopted for rent." *Note*, § 2010, 1872 Code, at 611. In addition to the note, the annotators referred to the section on rent, a California case supporting the rent rule, and to a California case holding no implied contract existed to pay for the service of a partner's wife as cook. For § 2011, which differed from Field's 1865 draft, they cited the same English case as Field, *Fawcett v. Cash*, 5 B. & Ad. 904, 110 E.R. 1026 (1834), but added citations on the measure of damages.

They also added a "but see" citation to DeBriar v. Minturn, lending indirect support to Horace Wood's much maligned later reliance on that case. Wood was a nineteenth century treatise writer whose 1877 treatise on employment law, HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (1st ed. 1877), is often claimed to be the source of the at-will rule. *See, e.g.*, Feinman, *supra* note 332; *Note, Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1978). Wood's innovation is generally denounced as unsupported by authority by those who believe he created the rule. These claims rest primarily upon an analysis of "footnote four" of the first edition of his treatise. Wood's defenders have argued that Wood did not invent the rule and that Wood properly cited the cases in footnote four, including *DeBriar*. For a full discussion of Wood's treatise, including its second edition in 1887, *see* Morriss, *supra* note 332, at 756-60.

353. The annotation for this also cites Sullivan v. Grass Valley Quartz Milling & Mining Co., 77 Cal. 418 (1888) for the right of an employee to compensation for past performance in some circumstances, a subject whose relationship to § 2703 may have been clearer to the nineteenth century legal mind than to this writer.

354. 1 Cal. 450 (1851). The California annotators cited this case, as did Horace Wood, in support of his version of the at-will rule.

holding as: "Master may discharge servant at any time after notice where there is no term of service, and may eject the servant by force if necessary."[355] As elaborately argued in the literature concerning Wood's treatise, due to the factual circumstances of *DeBriar*, it provided somewhat tenuous support for any rule concerning employment duration.[356] Since by 1895 numerous cases existed that were more persuasive support for the at-will rule, the choice of *DeBriar* suggests that either the rule was so obvious that it needed little support, or the section was so inconsequential that it did not merit the minimal attention needed to locate better authority.

For Montana section 2721's pay period rule (renumbered from California section 2010), the annotation cites *Beach v. Mullin*.[357] The annotation then cites two cases for the proposition that other evidence may overcome the presumption, and one case for the proposition that "permanent" employment constituted employment-at-will.[358] The text of section 2721 does not address either issue, and the citations appear to be aimed at filling gaps left by the drafters.

For Montana section 2722's presumption of a month (renumbered from California section 2011), the annotation is primarily devoted to undercutting the text of the section: It notes that a discharged employee may recover only nominal damages and that custom may vary the presumption; and, giving a "but see" cite to *DeBriar*, cites an English case that indirectly supports it.[359]

2. *Experience in the Montana Courts*

> Montana has proven a fertile field for such litigation and has developed its own law and precedent accordingly.[360]

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355. CODES AND STATUTES OF MONTANA, IN FORCE JULY 1, 1895. Reported by D. S. Wade, F. W. Cole, and B. P. Carpenter, Annotated by Edwin S. Booth § 2703, at 1194 (1895).

356. It dealt with the eviction of a former employee from rooms provided by the employer. 1 Cal. at 451. *See, e.g.*, *Note*, *supra* note 352.

357. 5 N.J.L. [Vroom] 343 (1870).

358. Overcoming the presumption: Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Prentiss v. Ledyard, 28 Wisc. 131 (1871). Permanent employment: Lord v. Goldberg, 81 Cal. 596 (1889).

359. *Fawcett*, 5 B. & Ad. 90, 110 E.R. 1028. *Fawcett* found a year contract, and one judge noted in passing: "This is not the case of a domestic servant, where the contract might have been put an end to by paying a month's wages or giving a month's warning." 110 E.R. at 1027 (Patteson, J.).

360. Prout v. Sears, Roebuck, and Co., 236 Mont. 132, 156-57, 772 P.2d 288, 290

The Montana courts have paid little attention to these Code provisions.[361] Although there have been occasional flashes of recognition that the Code provisions differ in both character and content from common law rules, when the courts have referred to these provisions they have often done so in a manner that ignores the Code provisions' plain meaning. The result has undercut the certainty that the Codes sought to create and has distorted Montana law.

The first reported Montana case wrestling with the problem of interpreting employment contracts with vague or nonexistent duration provisions did not appear until 1923. In *Weir v. Ryan*,[362] the Montana Supreme Court found that a monthly rate of pay and the oral statement "I will give you work the year round" sufficient to establish a year contract rather than a

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(1989).

361. The experience of the other Field Code states has been similar. The California courts' interpretation of the codified at-will rule has not differed significantly from the common law states' courts interpretation of their rules. The codified at-will rule did not prevent California from adopting the nation's first public policy exception, without discussion of authority or more than a passing mention of the codified rule. Petermann v. International Brotherhood of Teamsters, 344 P.2d 25 (Cal.App. 1959) (creating the first public policy exception without citing authority or acknowledging it was changing a statutory rule). Nor did it prevent California from adopting, at least temporarily, some of the most far-reaching theories for wrongful discharge litigation. Cleary v. American Airlines, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980) (establishing the implied covenant of good faith and fair dealing theory and allowing tort damages for breach of the covenant) *rev'd in part and aff'd in part*, Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (eliminating tort damages from the implied covenant, significantly reducing its attractiveness to plaintiffs).

South Dakota's courts have not interpreted the duration Code provision nor have the South Dakota courts relied on it in any significant way. Similarly, North Dakota courts have paid little judicial attention to the Code provisions on employment term. *See, e.g.*, McGregor v. Harm, 125 N.W. 885 (N.D. 1910) (concerning term of contract does not mention the code's pay period section despite contract's use of weekly period for calculating compensation and conclusion that contract was for a weekly term); Wood v. Buchanan, 5 N.W.2d 680, 682 (N.D. 1942) (stating, rather than citing the at-will section, "In this country a general or indefinite hiring is presumed to be a hiring at will and may be terminated at the will of either party. 39 C.J., pp. 44, 71; 1 Labatt's Master & Servants, 2nd Ed., §§ 159, 160, 165." The failure to cite the code is even more astonishing since the next sentence cites C.L. 1913, §§ 6135-6137!); Wadeson v. American Family Mut. Ins. Co., 343 N.W.2d 367, 370 (N.D. 1984) (noting that at-will rule was stated in Sand v. Queen City Packing Company, 108 N.W.2d 448 (N.D. 1961), without mentioning the code provision).

Neither provision has hampered the adoption of modern common law exceptions. *See, e.g.*, Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 227 (S.D. 1988) (adopting public policy exception despite noting the general rule of employment at will set forth in the statute) and Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987) (adopting public policy exception without mentioning statute).

362. 68 Mont. 336, 218 P. 947 (1923).

month-to-month contract.[363] The opinion did not mention the Code provisions. The defendant's position that the contract was month-to-month clearly reflected the Code's requirement that an employee whose wages were calculated on a monthly basis have a monthly contract. This is evidence of the Codes' indirect influence. Most notable about *Weir*, however, is the extremely weak evidence needed to remove the employee from the default rules' operation. Some common law rule states had much stronger versions of the at-will rule under which "work the year round" would not have overcome the default presumption.[364] The court addressed the issue in the same fashion in 1935 in *Harrington v. Deloraine Refining Co.*,[365] with similar results.

Until 1980, published cases paid little attention to duration issues in employment contracts after *Harrington*, perhaps because the Code provisions were clear and easily applied. The Montana Supreme Court's decision in *Keneally v. Orgain*[366] began a steady flow of opinions that destroyed the system of rules established by the Codes. In *Keneally*, a discharged employee made a claim for wrongful discharge against his supervisor (Orgain) and employer (National Cash Register). In reciting the facts, the Montana Supreme Court simply labeled plaintiff's contract "at will" without mentioning section 39-2-503 of the Montana Code (the current location of the at-will provision), and then noted that the contract was "governed by an NCR employment contract and company manuals."[367]

Discussing only a five-year-old federal district court opinion from Missouri that had not recognized a claim,[368] the court noted the growing national trend to recognize claims for discharges that violated public policy.[369] Although the court found that

363. *Id.* at 339, 218 P. at 948.

364. *See, e.g.*, Rape v. Mobile & O.R.R. Co., 100 So. 585 (Miss. 1924); Louisville Tobacco Warehouse Co. v. Zeigler, 244 S.W. 899 (Ky. 1922); Combs v. Hazard Ice & Storage Co., 290 S.W. 1035 (Ky. 1927).

365. 99 Mont. 78, 43 P.2d 660 (1935). The only difference was the defendant's claim that the employee's contract was specifically "at the pleasure" of its board of directors rather than on a month-to-month basis. Duration had been indirectly discussed in Miller v. Yellowstone Irrigation District, 91 Mont. 538, 9 P.2d 795 (1932).

366. 186 Mont. 1, 606 P.2d 127 (1980).

367. *Id.* at 3, 606 P.2d at 128. Because it would be unlikely that an employee of Keneally's position (account manager) would not be paid in a fashion as to remove him from the default at-will provisions, it may be that Keneally had an explicit provision in his contract providing that he was an at-will employee, although the court does not mention such a provision.

368. Percival v. General Motors Corp., 400 F.Supp. 1322 (E.D. Mo. 1975).

369. 186 Mont. at 5, 606 P.2d at 129.

Keneally had not alleged facts that would establish a claim, it noted that "[w]e do not disagree at this juncture that in a proper case a cause for wrongful discharge could be made out by an employee."[370] The court did not explain how to reconcile the creation of a public policy exception to the codified at-will rule.

Five months later in *Reiter v. Yellowstone County*, the Montana Supreme Court addressed a public employee's claim that his discharge violated his due process rights.[371] Invoking the Due Process Clause of the state or federal constitution required identification of a property right in continued employment. Citing the Code's at-will provision, but ignoring the implied duration provisions,[372] the Montana Supreme Court found no property interest could exist since Reiter was an at-will employee.[373]

Reiter also argued that the implied covenant of good faith and fair dealing inherent in all contracts existed in his employment contract. The longevity of his service meant that the implied covenant created a property right in his continued employment.[374] The court rejected this argument:

> Appellant's argument on implied contracts cannot successfully circumvent the Montana statute which clearly denies his claim of entitlement to continued employment. Even though appellant may have had an implied contract with the county by virtue of his longevity of service, it would be a contradiction in terms to say that he had an "implied specified" period of employment. A specified term is one which the parties expressed, and there was no expression here concerning the length of employment. Section 39-2-503, MCA, operates to fill the gap left by the parties by defining the relationship as an "at-will" employment. While the rule may well be outdated, it is uniquely a province of the legislature to change it.[375]

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370. *Id.* at 6, 606 P.2d at 130.

371. 192 Mont. 194, 627 P.2d 845 (1981).

372. The implied duration provisions appear in the section entitled "Master and Servant" following the at-will provision, which is in the section headed "Termination of Employment." One might argue that there is a distinction between employees and servants and that the implied duration provisions do not therefore apply to employees. The definition of servant in § 39-2-601 is sufficiently broad that this would be a difficult argument to sustain in light of the historical use of "master and servant" to refer to employers and employees. More to the point, no Montana opinion makes such a distinction.

373. 192 Mont. at 199, 627 P.2d at 848.

374. *Id.* at 199, 627 P.2d at 849.

375. 192 Mont. at 200, 627 P.2d at 849.

The difficulty with this analysis is that it ignores section 39-2-602 of the Montana Code, which implies a term to contracts based upon the period used for estimation of wages. Although the opinion does not disclose the basis for the estimation of Reiter's wages, it seems unlikely that Reiter would not have had his wages estimated on an annual basis, the usual practice for supervisors.

Despite its failure to consider section 39-2-602 of the Montana Code, the Montana Supreme Court clearly recognized the statutory nature of the at-will rule in *Reiter*. The court's interpretation of the law thus far made only limited inroads on the Code provisions.[376] In January 1982, however, the court decided two cases which signalled that it did not view its development of wrongful discharge law as constrained by the Code provisions.

In *Gates v. Life of Montana Insurance Company*[377] ("*Gates I*"), the court addressed the implied covenant of good faith and fair dealing suggested by *Reiter*, and held that a fact question existed concerning whether the employer's failure to follow its own handbook of personnel policies, which included procedures to be followed in termination cases, would constitute a violation of the covenant.[378] Although the *Gates I* court attempted to distinguish *Reiter* due to that case's public employment context,[379] that distinction was irrelevant to the issue of the Code rule's applicability. The court did not directly address *Reiter's* holding that the statute imposed the at-will rule and could not be circumvented through common law developments.

In *Nye v. Department of Livestock*,[380] the Montana Supreme Court reviewed a district court's dismissal of a public employee's wrongful discharge claim. Because Nye was classified (again probably incorrectly) as an at-will employee under section 39-2-503 of the Montana Code,[381] the district court rejected her claim. The Montana Supreme Court found that simply classifying an employee as "at will" was insufficient to end the inquiry because "the tort of wrongful discharge may apply to an at-will

376. The public policy exception that the *Keneally* opinion hinted at was a relatively minor restriction on the operation of the at-will and presumed term provisions, while the failure to consider the presumed term provisions was an oversight which could have been easily corrected.

377. 96 Mont. 178, 638 P.2d 1063 (1982).

378. 196 Mont. at 184, 638 P.2d. at 1067.

379. *Id.* at 183, 638 P.2d at 1066.

380. 196 Mont. 222, 639 P.2d. at 498 (1982).

381. Again, § 39-2-602 of the Montana Code would likely have given Nye a term contract.

employment situation."[382] Pausing only to note that "the theory of wrongful discharge has developed in response to the harshness of the application of the at will doctrine, under which an employee may be terminated without cause[,]" the Montana court expanded the notion of public policy to include administrative rules requiring certain procedures before dismissal.[383]

The only authority cited was the New Jersey Supreme Court decision in *Pierce v. Ortho Pharmaceutical Corp.*,[384] and the Montana court misapplied that case in three respects. First, *Pierce* involved the modification of a common law rule rather than a statutory rule. Second, the "harsh" rule that *Pierce* modified was not the same as the rule provided by the combination of sections 39-2-503 and 39-2-602 of the Montana Code. Under New Jersey's version of the at-will rule, an employer could terminate with or without cause all employees not covered by a specific contractual term governing duration or discharge.[385] In Montana, most employees would have a claim for breach of contract of the presumed term contract created by section 39-2-602 of the Montana Code. Third, *Pierce* suggested a far less expansive modification than that provided in *Nye*. In *Pierce*, the New Jersey Supreme Court found a public policy exception to the at-will rule where an employee refused "to perform an act that is a violation of a clear mandate of public policy" and listed a number of sources of such a mandate.[386] *Nye* transformed reference to sources into the basis for a claim. The regulation became a means of circumventing the at-will rule when the public employer violated its rules on the procedures for discharge, an action for which a remedy already existed under Montana law.[387]

A second opinion in *Gates* (*Gates II*) allowed the court to provide details of the cause of action available under the implied covenant.[388] Despite the recitation that Gates was employed under "an oral contract of indefinite duration,"[389] the *Gates II* opinion did not address the implied term provisions of the Code.[390]

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382. *Nye*, 196 Mont. at 228, 639 P.2d. at 502.
383. *Id.*
384. 417 A.2d 505 (N.J. 1980).
385. *Id.* at 509.
386. *Id.* at 512.
387. Nye v. Department of Livestock, 196 Mont. 222, 225, 639 P.2d 498, 499-500 (1982) (describing administrative appeal of discharge).
388. Gates v. Life of Montana Ins. Co., 205 Mont. 304, 668 P.2d 213 (1983).
389. *Id.* at 306, 668 P.2d at 214.
390. Although the majority's description of the facts concerned the coercion of a

After *Gates II*, the Montana Supreme Court continued to expand the implied covenant theory while refraining from comment on how the theory could co-exist with the Code provisions. For example, in *Dare v. Montana Petroleum Marketing Co.*,[391] the Montana Supreme Court held that:

> Whether a covenant of good faith and fair dealing is implied in a particular case depends upon objective manifestations by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly. The presence of such facts indicates that the term of employment has gone beyond the indefinite period contemplated in the at will employment statute, Section 39-2-503, MCA, and is founded upon some more secure and objective basis.[392]

Not only did the court fail to follow the at-will provision, but it also ignored the pay period rule, which would have reinforced the at-will presumption.[393]

If Montana was modifying a common law at-will rule, the analysis might have been appropriate. The idea that evidence might suggest that the parties went "beyond" the indefinite employment relationship provided by a common law rule could be a valid application of a default rule.[394] Faced with a codified rule, however, it is difficult to understand how the Montana court reached such a conclusion. Even if one accepts the Montana Supreme Court's reading of the at-will rule as generally applicable, its modification of the rule ignores the difference between the formulation of the codified rule and the common law rule. The codified rule provides that "an employment having no specified term may be terminated at the will of either party on notice to the other, except where otherwise provided by this chapter . . . ."[395] To belabor the obvious, under normal rules of statutory construction, the clause beginning with "except" would operate to preclude the creation of remedies not provided by the

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letter of resignation from an employee and a supervisor's refusal to return the letter when asked, Justice Gulbrandson's dissent (joined by Justice Harrison) pointed out that the case was not tried solely on a theory that those actions were the tortious conduct, but rather that it was termination without notice which also produced liability. *Id.* at 312, 668 P.2d at 217 (Gulbrandson, J., dissenting).

391. 212 Mont. 274, 687 P.2d 1015 (1984).

392. *Dare*, 212 Mont. at 282, 687 P.2d at 1020 (citation omitted).

393. Dare had been paid by the hour. *Id.* at 277, 687 P.2d at 1017.

394. In the case of a clear and long-standing rule such as the at-will rule, I would argue that it would be more appropriate not to modify the rule under such circumstances.

395. MONT. CODE ANN. § 39-2-503 (1993).

statute.

In 1984, Montana's implied covenant doctrine developed a reach beyond that given the doctrine anywhere else when the Montana Supreme Court upheld an award of $125,000 in compensatory damages and $25,000 in punitive damages for a respiratory therapist discharged during a probationary period.[396] Besides the huge award for a probationary employee, *Crenshaw v. Bozeman Deaconess Hospital* is significant as the court's only attempt to explain how the implied covenant theory relates to the codified at-will rule:

> We hold that the "at-will" statute, section 39-2-503, MCA, is very much alive. The *Gates I* decision does not preempt the statute. There is no legitimate precedent for an exception for probationary employees. Therefore, Crenshaw even as a probationary employee was owed a duty of good faith under the mandate of *Gates I*. This requirement of good faith and fair dealing does not conflict with section 39-2-503, MCA, but merely supplements it. Employers can still terminate untenured employees at-will and do so without notice. They simply may not do so in bad faith or unfairly without becoming liable for damages.[397]

The ability to terminate "except in bad faith or unfairly" is, of course, not the ability to discharge "at the will of either party."[398] "Supplementing" the Code section in this fashion was inconsistent with the plain language of the Code.

The court continued to expand the covenant's reach throughout the 1980s. In *Kerr v. Gibson's Products Co. of Bozeman*,[399] the court found that defendant's having "repeatedly acknowledged respondent's work as satisfactory through promotions and pay increases" was sufficient evidence to make it reasonable for the employee "to believe she had job security and would be treated fairly" and invoke the covenant.[400] Under such a test, few employees were left outside the covenant's reach, and the Code sections became irrelevant.

The effect of the Montana Supreme Court's employment decisions in the 1980s was to effectively repeal sections 39-2-503 and 39-2-602 of the Montana Code. The presence of section 39-2-

396. Crenshaw v. Bozeman Deaconess Hosp., 213 Mont. 488, 693 P.2d 487 (1984).
397. *Crenshaw*, 213 Mont. at 498, 693 P.2d at 492.
398. MONT. CODE ANN. § 39-2-503 (1993).
399. 226 Mont. 69, 733 P.2d 1292 (1987).
400. *Kerr*, 226 Mont. at 73, 733 P.2d at 1295.

503 of the Montana Code did nothing to slow the court's adoption of the most pro-plaintiff interpretations of the modern common law exceptions, ultimately provoking a backlash that led to the 1987 statutory replacement.[401] The Montana Legislature proved no more observant of section 39-2-503 of the Montana Code than the courts were, however, and it neither repealed nor explained the reasons for the survival of section 39-2-503 of the Montana Code when it passed the 1987 Wrongful Discharge From Employment Act.[402] Similarly, both the Montana Supreme Court and the Montana Legislature have ignored the effects of section 39-2-602 of the Montana Code, which created presumed term exemptions from the at-will rule that would have allowed employees a measure of protection from arbitrary discharge.

Unfortunately, the best one can say for Montana's experience with these sections of the Civil Code is that the provisions did little harm. Because the at-will provisions closely resembled those adopted in the common law states, they did not distort the Montana legal system in the same ways as the Code provisions concerning covenants.[403] By ignoring these sections, the Montana courts ended up more or less in the same position as most of the common law rule states. If the Montana courts paid attention to the provisions, they might have prevented or delayed the creation of common law wrongful discharge remedies by removing many employees from the at-will category. The state's economy might have thus avoided significant harm.[404] Since common law wrongful discharge remedies appear to have a negative impact on state economies,[405] the Code provisions could have been

401. *See* LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 96-106 (1990).

402. MONT. CODE ANN. § 39-2-901 to -914 (1989).

403. *See* Natelson, *supra* note 14.

404. *See* Meech v. Hillhaven West, Inc., 238 Mont. 21, 48, 776 P.2d 488, 504 (1989) (upholding Wrongful Discharge from Employment Act against constitutional challenges and summarizing testimony that "large judgments in common law wrongful discharge cases could discourage employers from locating their businesses in Montana"). Such a course would have also likely forestalled the passage of the new Act. *See* Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644 (1991) (showing that passage of the Montana act, and introduction of similar acts elsewhere, is heavily dependent on employer support). Although I disagree with some of Krueger's characterizations of court opinions, I found his conclusions generally did not depend upon those characterizations. *See* Morriss, *supra* note 331, at __.

405. JAMES DERTOUZOS & LYNN KAROLY, LABOR MARKET RESPONSE TO EMPLOYER LIABILITY, Rand Corporation, Institute for Civil Justice Paper R-3989-ICJ (1992) (finding that adoption of common law exceptions to employment-at-will had a significant

a positive force. Because the courts ignored them, however, they had no significant impact on the development of wrongful discharge law in Montana.

Ironically, given the Code provisions' New York origins, the cost of ignoring the Codes was the lost opportunity to create a Montana jurisprudence of employment duration. Such a jurisprudence would have enhanced, rather than wounded, Montana's economy. Had the Montana Supreme Court simply applied the language in the Code provisions, it would have created a remedy for limited damages for most employees and precluded the extreme results (e.g. *Crenshaw*'s huge award for a probationary employee) that threatened economic harm. In addition, through application of the Code provisions, the Montana court might have developed clear rules regarding the evidence required to overcome the default rule provisions. Most importantly, by consistently applying the Code provisions, the Montana courts would have developed the necessary information for the Montana Legislature to modify the Code provisions to fit Montana's needs.

IV. CONCLUSIONS FROM THE CODES: THE RULE OF LAW AND LAW REFORM

> It is difficult to measure the importance of this great subject. Gathering together and arranging in logical order the fragmentary elements of a legal system, the reorganization and re-expression of a body of laws for a people, is an event that can have no parallel in magnitude in the history of that people. A Dictator may take the place of a President; a commune may sweep away the Dictator; still the great body of laws remains substantially the same. The system that we *now* establish, will go down with succeeding generations, until a new race shall come, or until new conditions, wrought under the law of progress, shall make a new system necessary in one, five or twenty centuries.[406]
>
> Charles Lindley

The final assessment of the Codes depends on the quality of contemporary alternatives. Clearly, problems with the status quo needed to be addressed. Although writing alternative history is

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and negative impact on gross state product, suggesting that the social cost of wrongful discharge suits is large). As with Krueger's analysis, a reanalysis of Dertouzos and Karoly's data to account for my characterizations of legal opinions did not change their basic conclusions. *See* Morriss, *supra* note 331 at __.

406. LINDLEY, *supra* note 67, Appendix at v.

always dangerous,[407] a clear alternative to Codes existed. Instead of a Code Commission, the last Territorial Legislature might have authorized a commission to undertake a new revision of the existing statutes. Limited to rearrangement of the existing law and recommendations for clarifying amendments, the commission could have eliminated much of the disorder in the statutory law. The invention of pocket parts alone might have solved many problems. Considering the additional confusion caused by the Codes' and their amendments' conflicting provisions, errors, and clerical mistakes and the more limited scope of a revision (most of the Civil Code would not have been part of any revision), a revision commission probably would have avoided many of the mistakes of past revisers. (Incorporating future laws into revision would have been no harder than incorporating them into the Codes.)

Such a course would have left Montana with fewer rules than it had after adoption of the Codes, particularly in private law areas. The law would have developed through the normal common law process of case-by-case decisions, as in most states. This process would have undoubtedly taken longer to develop rules, but the rules chosen would probably have more appropriately fit Montana's conditions.

Not only would revision have avoided many of the opportunities for the sale of legislative services to "fix" the Codes, but it would have also forestalled the development of the special interests that the new Code provisions created. When the Codes established a rule that previously did not exist (as opposed to simply rearranging existing Montana statutes), some interests benefitted from the new rule. Those interests now had a stake in defending the continued existence of the new rule, an interest they would not have had otherwise.[408] By creating a rule, the legislature provided an incentive to organize the affected interests in the rule's defense, assisting in overcoming the collective action problems inherent in lobbying.

Additionally, the lack of a comprehensive code would have

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407. *See* Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339 (1992).

408. Of course, even in the absence of a specific rule, an interest group might have an interest in obtaining that rule, and so organize to influence the legislature. Gaining a new benefit and defending an existing benefit are different, however, and the costs of creation of a new benefit are likely to be higher than the costs of defending an existing one. This suggests that existing benefits will be defended on more occasions than new benefits will be successfully sought.

eliminated the political legitimacy granted to interventionist legislation by the Codes' attempt to gather all of Montana society within their framework. Of course, legislators in states without codes have managed to serve special interests at the expense of the public and to pass statist legislation. Nevertheless, increasing the barriers to such actions would have served Montana well.

Montana's experience with the Codes has some relevant lessons for those considering large scale legal reform. Simply having "plenty of laws" does not ease the confusion accompanying a new legal system. If the laws do not fit the circumstances and needs of the society that they are to regulate, their effects may range from irrelevance to distortion. Since the collapse of the communist regimes of the Eastern Bloc, lawyers from the United States and Western Europe have flocked to offer advice on appropriate laws and legal systems to the new governments in Russia and Eastern Europe. Western lawyers are involved in every aspect of law reform from training judges[409] to drafting laws[410] and constitutions.[411] Those new states are in a position not entirely dissimilar to Montana's in 1889—they have a confusing hodgepodge of laws leftover from the communist era combined with the new statutes, some of which are based on pre-

409. James H. Andrews, *Helping Law Come In From the Cold*, CHRISTIAN SCI. MONITOR, Mar. 21, 1994, at 15 (describing CEELI project to produce 350 page "bench book" for Russian judges); Gloria J. Garland, *Building a Justice System Upon A Weak Judiciary*, THE RECORDER, May 11, 1994, at 8 (CEELI liaison describes judicial training project in Slovakia).

410. This has been most extensively described in popular press accounts. *See, e.g.*, Greg Rushford, *World Bank: Building Economies, Laws*, LEGAL TIMES, June 13, 1994, at S38 ("[c]hief counsel of World Bank's Europe and Central Asia Division . . . [is] intimately involved in helping craft the legal framework to enable the formerly communist countries . . . to develop market-based economies."). Some law review accounts are beginning to appear, however, focused on specific areas of the law. *See, e.g.*, Spencer W. Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 KAN. L. REV. 557, 570 (1994) ("Much of the effort [of U.S. legal consultants in Eastern Europe] appears to be aimed at selling the Sherman Act as an appropriate model for other countries that are drafting new competition provisions."); Roger W. Mastalir, *Regulation of Competition in the "New" Free Markets of Eastern Europe*, 19 N.C.J. INT'L L. & COM. REG. 61, 84 (1993) (noting that despite attention paid to local conditions and history in drafting laws, "Eastern Europe has extensively transplanted policies and regulations from Western antitrust law . . . .").

411. Jonathan M. Moses, *U.S. Lawyers are Welcomed by Russia*, WALL ST. J., June 12, 1992, at B6 (describing influx of United States lawyers, judges and law teachers into former Soviet Bloc); Nancy E. Roman, *Democracy Gets U.S. Legal Aid*, WASH. TIMES, Apr. 11, 1993, at A1 ("Within months of the Berlin Wall coming down, Eastern Europe was awash with Western lawyers offering advice, setting up private companies and trying to help draft constitutions."); Donn Rubin, *Tales from the Albanian Constitutional Trenches*, CONN. L. TRIB., Nov. 22, 1993, at 17 (CEELI liaison in Albania details efforts to produce new constitution).

communist legal systems.[412] Like the new state of Montana, many of these nations were delivered from rulers imposed by outsiders and anxiously seek to assert their independence through changes to their legal systems. Montana's experience with the Codes suggests some of the pitfalls encountered in importation of "foreign" law in similar circumstances.

The most obvious lesson is that wholesale adoption of laws or governmental structures from elsewhere probably does not produce viable, stable legal regimes in the long run. Similarly, the importance of having the institutional structure to support the implementation of law reform is highlighted by Montana's experience with the Field Codes. Without a legal culture that respected the Codes as codes, Code rules such as the employment termination provisions fell into obscurity. Although these conclusions may appear obvious, they escaped legislators in Dakota Territory, California, and Montana in the nineteenth century, and may be missed again.

Montana's experience with the Codes suggests caution when adopting massive legal reforms. Creating conditions of certainty under which the rule of law can flourish requires much more than reams of laws. Indeed, it may require that there *not* be reams of laws. Laws must answer the questions people ask, not questions from another time and place—as did the requirement of fish guards for irrigation ditches during the winter months in Montana. When the law provides answers, these solutions must be appropriate to the conditions the law seeks to regulate. Professor Natelson's analysis indicates that some of Montana's rules concerning covenants running with the land are clearly not appropriate to Montana's conditions. If the courts ignore the answers, as with the employment-at-will provisions, the point of the Code as a code is destroyed. Reforms must try not to disrupt existing, functioning institutions, as the Codes clearly did with respect to livestock brands and municipal government.

Montana's governance structure's complete failure to review the Codes before passage in 1895 suggests the limits to which

412. *See, e.g.*, Frank Jossi, *For Albanians, Uncharted Legal Territory*, NAT'L L.J., Dec. 5, 1994, at A12 (describing lack of office space, uncollected state of legal materials requiring knowing the week a statute passed to locate it, and lack of law libraries). Albanians and their Western advisors seem to be falling into the "plenty of laws" trap. The article quotes Roland Bassett, a Texas lawyer representing the American Bar Association in Albania: "I read where the Prime Minister said that the Albanian Parliament passed 89 pieces of legislation last year and that no other country in the Free World had passed that many laws. But that's not many compared to what they need." *Id.*

legislative institutions can process massive reforms. Presented with a 170 pound stack of Codes, the legislators simply abdicated their responsibilities to understand what they enacted. Anxious to return to subdividing Montana's counties and collecting textbook companies' 'boodle', they focused on the physical process of making the bills laws rather than on the Codes' substance. Aside from the *Great Falls Tribune*, no one seemed to have asked the obvious question: why are we passing these laws? When presented with four bills, which together overwhelmed the legislature's physical capacities, it seems difficult to explain why legislators rushed ahead rather than undertaking a more modest reform.[413]

When Montana's codification commission began work in 1889, the Territory's statutory law was a disaster: printed versions of laws were often scarce or unavailable, laws were badly drafted, and contradictory provisions abounded. Despite the problem's origins in the previous territorial legislatures' actions, the Code Commission prescribed *more* legislation on a grander scale. Montana's legislators succumbed to legislation's appearance as "a quick, rational, and far-reaching remedy against every kind of evil or inconvenience."[414] As Bruno Leoni noted, however, "a remedy by legislation may be too quick to be efficacious, too unpredictably far-reaching to be wholly beneficial, and too directly connected with the contingent views of a handful of people (the legislators), whoever they may be, to be, in fact, a remedy for all concerned."[415] Leoni's general argument describes the problems with Montana's codification efforts. "Bolting the codes" left Montana with a massive tangle of legislation that required years to adapt to Montana's conditions. Adoption of Codes written for New York and California, with the adjustments of the Code Commissioners and the few members of the legislature who succeeded in affecting the Codes' provisions, gave Montana laws written to serve the interests of a tiny minority of Montanans.

Adoption had costs beyond the salaries of the clerks retained to enroll the bills by hand. Creating massive bodies of laws requiring hundreds of amendments over the following years divert-

413. Admittedly, overwhelming the Fourth Legislature was not exceptionally difficult. It managed to lose a bill passed by both houses raising legislative salaries for the next session, a subject presumably dear to most members' pocketbooks. *The Same Old Price*, DAILY INDEPENDENT (Helena), Mar. 10, 1895, at 1.

414. BRUNO LEONI, FREEDOM AND THE LAW 5 (1961).

415. *Id.* at 5.

ed legislative efforts to adjusting the Codes and away from other, potentially beneficial pursuits. Montana's legislatures in the years after 1895 could have spent time on local issues, but too often they were busy fixing the Codes.

More generally, the Codes also had an effect on Montana's common law development. Having rejected Field's original vision of displacement of the common law, the Montana Codes had to coexist with the common law. Sometimes the courts ignored or misinterpreted the Code provisions, as with the development of the modern law of wrongful discharge. Other times, however, the Code provisions distorted the common law's development, as Professor Natelson described with respect to covenants running with the land.[416] Natelson summarized the problem with the code provisions, stating "newly-borrowed concepts must be kept within common law containers, from which those concepts can be readily returned if they fail to meet local needs. During the early years of a state's juristic development, locking borrowed ideas in statutory strongboxes seems most unwise."[417] To the extent that the Codes prevented the development of a Montana common law appropriate to Montana's conditions, codification had a heavy price.

The Codes' comprehensiveness imposed an additional cost. The existence of the comprehensive Civil Code promoted the idea that the legislature's role legitimately included subjects such as limiting the freedom of individuals to contract for employment longer than two years[418] or requiring licenses of the owners of stallions whose owners sold their breeding services.[419] The codifiers created a system built around legislation rather than law. This left Montana with an interventionist government mindset that continues today.[420]

Even if we restrict our evaluation to the central problem the codifiers set out to solve, the lack of certainty in Montana's legal system, the Codes cannot be considered a success. Certainty in

416. *See* Natelson, *supra* note 14, at 44, 58, 63-64.

417. Natelson, *supra* note 14, at 91.

418. Civil Code § 2674.

419. Political Code sec. 4070.

420. *See, e.g.*, MONT. CODE. ANN. §§ 16-2-101 to -303 (establishing state liquor monopoly); 17-6-401 to -411 (socialized venture capital program); 19-2-101 to 19-21-212 (state monopoly retirement system for most state employees); 30-14-214 (requiring minimum fair prices for agricultural products); 30-14-801 to -806 (minimum pricing of motor fuels) (extended Ch. 519, L 1993); 80-2-201 to -245 (socialized hail insurance); 81-23-302 (minimum price for milk); 81-8-606 (pork marketing); 81-21-411 (barring sale of filled dairy products) (1993).

the law means more than creation of written rules; it also requires stability of the rules themselves over time.[421] The legal upheaval of the Codes' adoption and the endless amendments that followed hardly promoted certainty in this second sense, even if the Codes themselves met the test of precision. In attempting to repair the damage of a territorial history of partisan bickering and pandering to special interests, the codifiers rushed through too much, too fast. Moreover, the treatment of the Codes' provisions by the Montana courts has sometimes promoted confusion.[422] Rather than curing confusion, the Codes transformed and multiplied it.

Moreover, code systems at best provide rules optimal at the time of adoption.[423] "As soon as a code is passed, however, it begins to become obsolete, and its maladaption becomes larger until a new code is adopted. The common law, on the other hand, is always somewhat maladapted, but its lack of adaptation is limited because it is continually changing."[424] When a legislature adopts a set of codes with Montana's haste and lack of consideration, even the initial advantage of optimality is sacrificed.

Is there something to celebrate in this centennial year of the Codes? The codifiers thought they were creating something that history would celebrate. Sanders, for example, enthused that:

> [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 mother tongue; this Book of the Law [the 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.[425]

Unfortunately they were wrong.

In 1876, Decius Wade published his only novel, *Clare Lin-*

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421. LEONI, *supra* note 414, at 95:

> [T]he certainty of the law has been conceived in two different and, in the last analysis, even incompatible ways: first, as the precision of a written text emanating from legislators, and secondly, as the possibility open to individuals of making long run plans on the basis of a series of rules spontaneously adopted by people in common and eventually ascertained by judges through centuries and generations.

422. Natelson, *supra* note 14, at 58, 63-65, 88 (describing effect of decisions to undermine Civil Code; describing circular arguments used to avoid code provisions; and concluding that Montana cases inconsistent with the Code cannot be explained by changed circumstances).

423. Rubin, *supra* note 7, at 11.

424. Rubin, *supra* note 7, at 11.

425. Letter to Henry Field, Jan. 24, 1896, *in* HENRY FIELD, *supra* note 26, at 92.

coln.[426] Although Wade was a far better writer of judicial opinions[427] than of novels,[428] the cautionary words of his hero Richard Pembroke to the villain William Stacy would have been wise advice for Wade, Sanders, and their fellow codifiers in the 1890s:

> And so, in conquering a profession, or even a book, if we hurry by, or go around principles we do not comprehend or understand, we shall find ourselves cut off from our base of supplies, floundering in an unknown country, beset with difficulties upon every hand, an enemy behind harassing and distressing us and defeat would be the certain result; while if we conquer every principle as we proceed, leaving no troublesome enemy in the rear, victory is ensured before even the campaign is commenced.[429]

Montana's legislators would have served their state better had they followed that advice and refrained from reform on such a dramatic and massive scale. A slow and steady revision of existing law would have avoided the distortions introduced by the inappropriate provisions of the "foreign" codes on Montana's le-

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426. DECIUS S. WADE, CLARE LINCOLN (1876).

427. Wade's, and his associates', opinions are referred to as "everywhere recognized among the soundest and ablest in the whole country" and Wade's decisions "had much to do with perfecting the practice of law in the courts of Montana." C.P. Connolly, *supra* note 254, at 60.

428. CLARE LINCOLN is deservedly obscure, although it was apparently popular in Montana when published. *Id.* at 62. Given the difficulty of obtaining a conveniently readable copy (I was able to borrow a microfilm copy through interlibrary loan), I will briefly summarize the plot for the curious. Those who plan to read the book, a course I advise against, should skip the remainder of this footnote. Richard Pembroke, a schoolteacher, Harvard man, and heir to an old New England family now burdened by a debt to a miser, Bowker, falls in love with his 13 year old pupil, Clare Lincoln. Torn from her by the outbreak of the Civil War, Richard meets up with Clare's dying father on the battlefield and receives a message for Clare. Meanwhile, Clare's mother has died and Clare is taken in by kindly Doctor Cornelius Hume, a wealthy man who sees his lost daughter Laura in Clare. Clare is wooed by William Stacy, a cad who affects a humble demeanor to gain her hand in marriage, anticipating that Doctor Hume will leave his vast estate, Evergreen Home, to Clare. Rejected by Clare, Stacy plots with the unethical lawyers Sharp Popper and Popper Sharp to forge a will of a prior owner of Evergreen Home (from whose heirs Hume had bought the property) and secure Evergreen Home for himself. Ultimately, Clare travels to the English Channel Islands where she discovers the true last will of the original owner, returns with it in time for Richard to triumph at the trial and save Evergreen Home for Dr. Hume. Clare is then discovered to be the only heir of the miser Bowker and so owner of Richard's family estate, which Bowker had seized when Richard's parents had defaulted on their mortgage. Clare and Richard marry and all is well. The reader who has made it through this footnote has just spared herself reading the 451 pages of the novel.

429. WADE, *supra* note 426, at 192.

gal development. Legal reformers elsewhere would do well to heed the lessons of Montana's experience with the Codes.

FREEDOM OF RELIGION IN INDIAN COUNTRY

Sharon L. O'Brien*

The Supreme Court's opinions in *Lyng v. Northwest Indian Cemetery Protective Ass'n.*[1] and *Employment Division v. Smith*[2] dealt devastating blows to Indian religious rights and their assumed protection under the First Amendment.[3] In terms of historical precedent, the decisions were not surprising. The United States has a history of overt and covert policies designed to destroy or to impede the practice of Indian religions.[4]

The Court's ruling in *Smith* considerably narrowed the "compelling interest test" previously used by courts[5] to determine whether the government illegally infringed on religious rights. The decision galvanized religious leaders and constitutional scholars around the country to pass the Religious Freedom Restoration Act of 1993 (RFRA).[6] RFRA, finding that "laws 'neutral' toward religion may burden religious exercise"[7] and that "governments should not substantially burden religious exercise without compelling justification,"[8] restores the compelling interest test established in *Sherbert v. Verner*[9] and *Wisconsin v. Yoder.*[10]

While prompted by the Court's failure to protect Indian religious rights, the passage of RFRA is, nonetheless, not expected to adequately secure to American Indians the free exercise of

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1. 485 U.S. 439 (1988); *see infra* text and accompanying notes 127-31.

2. 494 U.S. 872 (1990); *see infra* text and accompanying notes 62-72.

3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend I.

4. *See infra* notes 20-32 and accompanying text.

5. According to Justice Brennan a government's compelling interest included only those actions that posed a substantial threat to the public safety, peace, or order. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

6. 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993).

7. 42 U.S.C. § 2000bb(a)(2).

8. 42 U.S.C. § 2000bb(a)(3).

9. 374 U.S. 398, 406-09 (1963) (explaining the compelling interest test).

10. 406 U.S. 205, 214-15 (1972); 42 U.S.C. § 2000bb(b)(1). The act specifically refers to the Court's decision in Employment Div. v. Smith, 494 U.S. 872 (1990), which eliminated the "compelling government interest" test. *See* 42 U.S.C. § 2000bb(a)(4). The legislation reinstates the compelling interest rule, but does not overrule the decision in the *Smith* case, which still stands as law.

The only exception allowed by the act is if there is a compelling governmental interest which is the least restrictive means of furthering the government's interest. *See* 42 U.S.C. § 2000bb-1(b). The Act also provides for judicial remedies against the government. *See* 42 U.S.C. § 2000bb-1(c).

their First Amendment rights.[11] To ensure the protection of Indian religious freedoms, the Indian Religious Coalition[12] has lobbied for the last four years to obtain passage of legislation designed to fill the gaps in RFRA[13] and to secure the unrealized promises of the previously enacted 1978 American Indian Religious Freedom Act (AIRFA).[14]

This article argues that the federal government is obligated by the special status of American Indians and Congress' special trust relationship with tribes to ensure the preservation of Indian religious rights. Part I provides an overview of the historical events, cultural conflicts, and legal issues that have merged to create the current precarious state for Indian religious expression. The government's historical treatment and cultural understandings of Indian religions is briefly examined as well as the courts' findings in several recent decisions relating to peyote use,

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11. *See infra* notes 141-43 and accompanying text.

12. The Coalition, which was founded in 1988 by the Native American Rights Fund (NARF), the National Congress of American Indians (NCAI), and the Association on American Indian Affairs (AAIA), is now comprised of more than 63 organizations. For a listing of the members (as of 1993) of the American Religious Freedom Coalition for the Amendments to the American Indian Religious Freedom Act, see *Effectiveness of Pub. L. No. 95-341, The American Indian Religious Freedom Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources*, 103d Cong., 1st Sess. 69 (1993).

13. Congress considered three bills in the last session. S. 2269, 103d Cong., 2d Sess. (1994), introduced by U.S. Senator Daniel K. Inouye (D-Haw.) on July 1, 1994, is the most comprehensive of the three. *See generally Proposed Amendments to the American Indian Religious Freedom Act 1993: Oversight Hearings on the Need for Proposed Amendments to the American Indian Religious Freedom Act Before the United States Senate Select Comm. on Indian Affairs*, 103d Cong., 1st Sess. (1993) [hereinafter *Proposed Amendments*]. On August 10, 1994, the Senate Indian Affairs Committee favorably reported the bill, but offered a substitution: the bill died on the floor of the house. *See* CONGRESSIONAL RESEARCH SERVICE, Bill Tracking S. 2269, 103d Cong., 2d Sess. (1994), *available in* LEXIS, Genfed Library, BLT 103 file.

Representative William B. Richardson (D-N.M.) introduced two bills in the House. H.R. 4230, 103d Cong., 2d Sess. (1994) introduced on April 14, 1994, amends the American Indian Religious Freedom Act to provide for the traditional use of peyote by Indians for religious purposes. On October 7, 1994, the House passed H.R. 4230, American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (1994).

Another bill, American Indian Religious Freedom Act Amendments of 1994, H.R. 4155, 103d Cong., 2d Sess. (1994) introduced March 24, 1994, was not passed in the last Congress. The purpose of the bill is to provide for access to sacred sites on federal lands. *See Proposed Amendments*, *supra* at pt. 1.

14. 42 U.S.C. § 1996 (1978). This law instructed the President to direct all federal agencies to review their procedures and policies and determine changes needed to preserve Native American religious rights and practices. Agencies, which were to consult with traditional Indian leaders, were to report their findings to Congress within 12 months. For legislative history, see H.R. REP. NO. 95-1308, 95th Cong., 2d Sess. (1978) *reprinted in* 1978 U.S.C.C.A.N. 1262.

the religious practices of inmates, the taking of ritual animals, and sacred site access.

Part II reviews the judicial interpretations and issues that still inhibit the protection of Indian religious rights, despite the best intentions of RFRA and the proposed Native American Cultural Protection and Free Exercise of Religion Act of 1994.[15] Part III reviews the Court's application of the trust doctrine and the government's responsibility to preserve tribal existence and culture.

I. INDIAN RELIGIOUS PRACTICE

As many authors have written, Indian religions interweave and integrate all aspects of human and spiritual existence.[16] Most Indian languages do not possess a word translatable as "religion."[17] Rather, the concept of religion permeates one's existence and is indistinguishable from one's cultural, political, and economic existence. Western religion, on the other hand, is understood and referenced to a linear concept of time and to the celebration of important messiahs, prophets, and sacred events.

The rituals of many Indian religions *are required* to maintain the spiritual and earthly harmony and balance of nature, the community, and the person. As Deward Walker has explained, "American Indian culture . . . entails actually entering sacredness rather than merely praying to it or propitiating it."[18]

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15. *See supra* note 13.

16. Indian religions cannot be discussed as a monolithic system of beliefs and practices. Tribal religions do tend to share some common features as do Judaism, Christianity, and Islam.

Several books and articles have detailed the United States' treatment of American Indian religious rights. *See, e.g.*, HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM (Christopher Vecsey ed., 1991); JOSEPH E. BROWN, SPIRITUAL LEGACY OF THE AMERICAN INDIAN (1982); AKE HULTKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS (1979); VINE DELORIA, JR., GOD IS RED (1973); Robert S. Michaelsen, *American Indian Religious Freedom Litigation: Promise and Perils*, 3 J.L. & RELIGION 47 (1985); OMER C. STEWART, PEYOTE RELIGION: A HISTORY (1987); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans* 52 MONT. L. REV. 13 (1991); Deward E. Walker, Jr., *Protection of American Indian Sacred Geography*, *in* HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 100 (Christopher Vecsey ed., 1991).

17. Michaelsen, *supra* note 16, at 49.

18. Walker, *supra* note 16, at 104.

> Whereas Judeo-Christian religion tends to create its own sacred space and times arbitrarily by special rituals of sacralization, American Indians attempt to discover "access points" or "portals" to the sacred . . . .
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> These access points to the sacred . . . are not only points in space, but also points in time . . . dawn . . . dusk . . . equinoxes and solstices . . . certain . . . points may be used rarely but can still be very valuable

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

For a society accustomed to primarily attending services on Sundays and to worship at any of several locations, it is most difficult to appreciate a non-Western religion that requires the performance of a ritualistic act at a certain time and in a certain place.

American society's ignorance of and animosity towards Indian religions is long standing, deep seated, and multilayered. Hostility to Indian religions has assumed many forms, ranging from the direct to the indirect. The very premise of Christianity, which requires a belief in Christ as a source of redemption, inherently demands the proselytation of non-Christians.[19] The saving of heathen souls is a directive of many Christian sects. As an admittedly Christian nation,[20] it is understandable that efforts to christianize the American Indian very early suffused federal policies.[21] From the beginning of the nation's development, federal efforts to civilize and christianize Indians were indistinguishable policies. The Bureau of Indian Affairs (BIA) turned to the churches for administrative, personnel, and financial support in their efforts to acculturate the Indian.[22] The policy to exterminate the buffalo,[23] thereby starving the Lakota and

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at appropriate times.

Walker, *supra* note 16, at 104.

19. *See, e.g.*, FORREST G. WOOD, THE ARROGANCE OF FAITH: CHRISTIANITY AND FAITH IN AMERICA (1990); DAVID E. STANNARD, AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD (1992); Steven Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery,* Johnson v. McIntosh, *and Plenary Power*, 20 REV. L. & SOC. CHANGE 303 (1993).

20. *See* Edwin B. Firmage, *Free Exercise of Religion in Nineteenth Century America: The Mormon Cases*, 7 J.L. & RELIGION 281 (1989).

21. FRANCIS P. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984).

22. The government and the religious societies were intertwined in their efforts to civilize and Christianize the Indians throughout the 19th century. The government supported missionaries with funds, assigned agencies to religious societies, and provided land for the building of churches. The question is whether this intermingling constituted an establishment of religion. FEDERAL AGENCIES TASK FORCE, DEP'T OF THE INTERIOR, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 3-6 (1979) [hereinafter AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT]. This study was mandated by § 2 of the American Indian Religious Freedom Act (AIRFA), Pub. L. No. 95-341, § 1, 92 Stat. 469 (1978).

In Quick Bear v. Leupp, 210 U.S. 50 (1908), the Court ruled that the use of federal funds to establish a Catholic Church on the Rosebud Indian Reservation did not violate the Establishment Clause. *See* FRANCIS P. PRUCHA, THE CHURCHES AND THE INDIAN SCHOOLS 1888-1912 (1979).

23. It is estimated that white hunters had killed forty million buffalo within three decades. In 1889, 20 buffalo were known to still live within the Yellowstone Park. *See* FRANK G. ROE, THE NORTH AMERICAN BUFFALO: A CRITICAL STUDY OF THE SPECIES IN ITS WILD STATE 493 (1951); PETER MATTHIESSEN, WILDLIFE IN AMERICA

other plains tribes into submission,[24] attacked the very cultural and spiritual psyche of the tribes. In 1892, Commissioner of the BIA, Thomas Morgan, directed Indian Courts of Federal Offenses to enforce a series of laws outlawing religious practices, including "heathenish" dances, plural marriages, ceremonies by medicine men, intoxicants, and the destruction of property at burials.[25] Violators were punishable by imprisonment or denial of rations.[26]

By 1934, BIA Commissioner John Collier had ended the Bureau's overt and repressive policies. However, society's and the government's failure to understand the tenets, premises and needs of Indian religious practices caused indirect attacks to persist.[27] Prevention of access to sacred sites for ceremonies and the collection of herbs and medicines, imprisonment for the ritual killing and possession of animal parts,[28] the use of sacramental peyote, and the display of sacred objects and human remains prompted tribal lobbying for passage of AIRFA.[29]

This joint resolution directed the federal government to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian."[30] After many unsuccessful legal attempts by Indians to cite the AIRFA for the protection of their rights,[31] few would disagree with Justice O'Connor's description

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(1959).

24. In 1840 a state legislative report concluded, "[S]o far as game and hunting are concerned, the sooner our wild animals are extinct the better, for they serve to support a few individuals just on the borders of a savage state . . . ." JAMES A. TOBER, WHO OWNS THE WILDLIFE?: THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH CENTURY AMERICA 714 (1981). During congressional discussion of the Buffalo Protection Bill, congressmen argued that the extermination of the buffalo promoted the submission of the Indian. 2 CONG. REC. 2105-08 (1874).

25. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 29-30 (1892); *see* AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, *supra* note 22, at 6; *see also* Circular No. 1665 6-7 (April 26, 1921).

26. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 29-30 (1892) at 29; *see* AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, *supra* note 22, at 6.

27. *See, e.g., American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. (1978).

28. Frank v. State, 604 P.2d 1068, 1069 (Alaska 1979).

29. *See* Circular No. 2970, signed by Secretary of the Interior Harold C. Ickes at the request of Commissioner John Collier, and sent to all Indian agencies. Entitled "Indian Religious Freedom and Indian Culture," the circular stated that "no interference with Indian religious life or ceremonial expression will hereafter be tolerated." *Id.*

30. 42 U.S.C. § 1996 (1988).

31. *See* Sharon O'Brien, *A Legal Analysis of the American Indian Religious Freedom Act, in* HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM, *supra* note 16

of the policy as a law with "no teeth."[32]

A. *Religious Rights: Tests and Interpretations*

Over the last one hundred years, the Supreme Court has developed a number of tests and interpretative approaches to determine when the government is impermissibly prohibiting the free exercise of one's religion and/or when it is improperly involved in the establishment of religion. When seeking to protect their religious rights from governmental interference, individuals must answer a number of questions developed by the courts and must convince the judiciary to employ those tests and interpretations that will most benefit their arguments. For example, is the belief sincerely held? Is the practice in question central to the plaintiff's practice of his religion? Does the governmental law or regulation prohibit belief, interfere with religious practice or actually prevent the practice of the religion? If a governmental exemption from the law in question is needed, is the exemption a "proper accommodation" or a violation of the Establishment Clause? Will the exemption violate the equal protection rights of non-members?

The Court first considered the proper interpretation of the Free Exercise Clause in *Reynolds v. United States*, an 1878 case.[33] Reynolds, a Mormon arrested for polygamy, argued the First Amendment protected his right to marry more than one wife. The Supreme Court ruled that a Mormon's religious directive to engage in polygamy did not exempt him from adherence to a criminal statute.[34] Establishing a test that distinguished between belief and conduct, the Court reasoned that the First Amendment protected belief, but not conduct.[35] Conduct threatening the civil order could be regulated by the government.[36]

In *West Virginia State Board of Education v. Barnette*, the

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at 27; Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983) ("Thus AIRFA requires federal agencies to consider, but not necessarily to defer to Indian religious values. It does not prohibit agencies from adopting all land uses that conflict with traditional Indian religious beliefs or practices.").

32. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) (quoting 124 CONG. REG. 21,445 (1978) (statement of Rep. Udall)). AIRFA contains no enforcement mechanisms to ensure the protection of Indian religious rights or penalties for their violation.

33. 98 U.S. 145 (1878).

34. *Id.* at 166-67.

35. *Id.* at 167.

36. *Id.* at 164-65; *see also* Cantwell v. Connecticut, 310 U.S. 296 (1940); Davis v. Beason, 133 U.S. 333 (1890).

Court revised the belief/conduct test.[37] In that case, the Court ruled that the government could not interfere with the exercise of religious rights without a compelling interest.[38] In the 1963 case *Sherbert v. Verner,*[39] the Court instructed that the "compelling interest" test be construed as narrowly as possible. According to Justice Brennan, a government's "compelling interest" entailed only those actions that posed a substantial threat to the public safety, peace, or order.[40] The Court again applied this reasoning in *Wisconsin v. Yoder,*[41] a case in which the Amish requested an exemption from Wisconsin's school attendance laws on the grounds that their religion forbade them to send their children to school past the eighth grade. The Court acceded, ruling that the state's need for its school attendance policy did not outweigh the rights of the Amish to be protected in the exercise of their religious duties.[42]

The next section of this article briefly reviews the judicial efforts of Indian people in the last three decades to protect their religious practices by navigating through the courts' various First Amendment tests and interpretations. Practices briefly reviewed include the Native American Church's use of peyote; the right of Indian inmates to gain access to religious expression, rites, and spiritual leaders; the right to hunt and use animals in religious ceremonies; and Indian access to sacred lands.

B. Use of Peyote

Archaeologists estimate that peyote use among Indians is more than 10,000 years old.[43] Obtained from the button of the cactus Lophophora Williamsee, religious practitioners ingest peyote by chewing, making a tea of the button, or swallowing a capsule. Peyote, which contains mescaline, induces a hallucinogenic state. This condition, according to believers, allows the opening of their minds to God's teachings. Peyote is revered as a deified messenger. Today, the majority of Indian people who use peyote are members of the Native American Church. Incorporated in 1918 in Oklahoma, the Native American Church is estimat-

37. 319 U.S. 624 (1943).
38. *Id.* at 639.
39. 374 U.S. 398 (1963).
40. *Id.* at 403.
41. 406 U.S. 205 (1972).
42. *Id.* at 234.
43. STEWART, *supra* note 16, at 17.

ed to have approximately 250,000 members.

Indians have suffered historically from repeated efforts to prohibit and to eradicate their use of peyote. The Spanish outlawed peyote use in 1620. The BIA directed its Indian agents throughout Oklahoma, formerly the Indian Territory, between 1888 and 1934 to consider peyote an intoxicating liquor and to "seize and destroy" it. In 1889, the Oklahoma Territory enacted the first statutory prohibition of peyote, which was subsequently repealed in 1908. Congress considered, but did not enact, twelve bills between 1917 and 1933 to ban peyote.[44]

By the 1960s, government officials had acquired a more sophisticated understanding of the role and function of peyote in Indian religious services. Although the 1965 Drug Abuse Control Amendments Act[45] and the Comprehensive Drug Abuse Prevention and Control Act of 1970[46] list peyote as an illegal Schedule I intoxicant, Drug Enforcement Agency (DEA) regulations specifically exempt peyote used in Indian religious ceremonies.[47] Laws in twenty-two states now permit peyote use.[48] In at least three of these states, exemptions resulted from state court rulings that laws prohibiting peyote use violated the religious rights of American Indians.[49]

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44. *Indian Religion; Must Say No*, THE ECONOMIST, Oct. 6, 1990, at 25.

45. Pub. L. No. 89-74, 79 Stat. 226 (codified as amended at 21 U.S.C. §§ 321, 331, 333, 334, 360, 372 (1988 & Supp. V 1993).

46. Pub. L. No. 91-513, 84 Stat. 1236, 1247 (codified as amended at 21 U.S.C. § 812(c) (1988)); *see* David P. Babner, *The Religious Use of Peyote After* Smith II, 28 IDAHO L. REV. 65, 80-81 (1991-1992) (discussing the exemptions afforded by the DEA for Indian religious use of peyote).

47. 21 C.F.R. § 1307.31 (1994) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religiots [sic] ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration.")

48. *See, e.g.*, N.M. STAT. ANN. § 30-31-6(D) (Michie Supp. 1989); COLO. REV. STAT. § 12-22-317(3) (1990); ARIZ. REV. STAT. ANN. § 13-3402(B) (1989); KAN. STAT. ANN. § 65-4116(c)(8) (1992).

For a breakdown of the individual state statutes regarding the use of peyote, see H.R. REP. NO. 675, 103d Cong., 2d Sess. (1994).

49. In People v. Woody, 394 P.2d 813 (Cal. 1964), the California Supreme Court dismissed the conviction of two Native American Church members arrested for ingesting peyote. In an often cited passage, the court reasoned:

> [T]he right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote . . . .

Somewhat ironically, the courts have supported and justified Indian sacramental peyote use most strongly in cases that have not involved Indians as plaintiffs or defendants.[50] In several instances, non-Indians have requested that an exemption for religious drug use either be extended to their drug of choice, such as marijuana,[51] or to their churches.[52] To not extend a similar exemption, these groups have argued, violated their free exercise rights, the Equal Protection Clause, and the Establishment Clause.

In *Olsen v. DEA*, for example, members of the Ethiopian Zion Coptic Church argued that the government's refusal to provide an exemption for marijuana use in their church services unfairly infringed upon their Equal Protection rights and violated the Establishment Clause in light of the peyote exemption for American Indians.[53] In response, the court distinguished between the central role played by peyote in the Native American Church and the function of marijuana in the Ethiopian Zion Coptic Church.[54] Within the Native American Church, the court stated, peyote is regarded as a deity; it is an object of worship.[55] The use of peyote outside of church services by any Native American Church member is regarded as sacrilegious.[56] The court stressed that the Ethiopian Coptic Church allowed for marijuana use outside the church.[57]

Id. at 821-22; *see also* Whitehorn v. State, 561 P.2d 539 (Okla. Crim. App. 1977); State v. Whittingham, 504 P.2d 950 (Ariz. Ct. App. 1973) (holding First Amendment protects rights of Indians to use peyote in bona fide pursuit of religious faith), *review denied*, 517 P.2d 1275 (Ariz. 1974), *cert. denied*, 417 U.S. 946 (1974).

50. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1214-16 (5th Cir. 1991); United States v. Warner, 595 F. Supp. 595, 599 (D.N.D. 1984) (holding that despite the importance of peyote to the Native American Church, the state interest overrides defendants' free exercise claim).

51. *See* United States v. Rush, 738 F.2d 497, 512-13 (1st Cir. 1984) (denying marijuana exemption for Ethiopian Zion Coptic Church); Leary v. United States, 383 F.2d 851, 861 n.11 (5th Cir. 1967). In at least one case, a court has denied a request by Indians to exempt use of marijuana on religious grounds. United States v. Carlson, No. 90-10465 (9th Cir. Apr. 2, 1992) (unpublished disposition at 958 F.2d 242 (9th Cir. 1992) (finding no religious exemption for marijuana use by Yurok Indian in religious ceremonies).

52. *See Peyote Way*, 922 F.2d at 1212; Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415, 417 (9th Cir. 1972) (refusing request by Church of the Awakening that peyote exemption extend to their church); *Warner*, 595 F. Supp. at 597.

53. 878 F.2d 1458, 1459 (D.C. Cir. 1989).

54. *Olsen* 878 F.2d at 1464-65.

55. *Id.* at 1464.

56. *Id.* at 1467.

57. *Id.*

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

A second line of challenges has come from peyote users who are not members of the Native American Church but of other non-native churches that incorporate the use of peyote. In *Peyote Way Church of God v. Thornburgh*, members of the Peyote Way Church of God argued that the Free Exercise and the Equal Protection Clauses of the Constitution required a similar exemption for their church.[58] The Fifth Circuit recognized that the federal government's political relationship with tribes and its obligation under the trust relationship to protect Indian culture and religion ameliorated violations of the First Amendment and Equal Protection Clause.[59] Specifically, the court stated: "We hold that the federal [Native American Church] exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture."[60]

Despite these legislative, regulatory, and judicial advances, Indians were still prohibited in approximately twenty-eight states from using peyote—laws which the Supreme Court judged in *Employment Division v. Smith*[61] do not violate the First Amendment rights of American Indians. In *Smith*, the Supreme Court considered a case involving two Indian alcohol drug counselors who were fired from their jobs for testing positive for peyo-

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58. 922 F.2d 1210, 1212-13 (5th Cir. 1991).

59. *Id.* at 1217. The court in *Peyote Way* stated:

> The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.

Id. at 1217.

60. *Id.* at 1216; *see also* United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984) ("[R]eligion is an integral part of the Indian culture and that the use of . . . peyote [is] necessary to the survival of Indian religion and culture.") (quoting Peyote Way Church of God, Inc. v. Smith, 556 F. Supp. 632, 637 (N.D. Tex. 1983)); United States v. Warner, 595 F. Supp. 595 (D.N.D. 1984); Peyote Way Church of God, Inc. v. Smith, 556 F. Supp. 632, 639 (N.D. Tex. 1983) ("Congress has the power or duty to preserve our Native American Indians . . . as a cohesive culture."). *But see* United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991) (ruling that Native American Church exemption is not restricted solely to non-Indian members); Native American Church v. United States, 468 F. Supp. 1247, 1251 (S.D.N.Y. 1979) (holding that exemption for peyote is equally available to the plaintiff, if in fact, it is a bona fide religious organization, using peyote for sacramental purposes and regarding it as a deity); State v. Whittingham, 504 P.2d 950, 952 (Ariz. Ct. App. 1973) (holding Free Exercise Clause protects use of peyote in connection with a bona fide practice of a religious belief).

61. 494 U.S. 872 (1990).

te use. The two counselors, both recovering alcoholics, were practicing members of the Native American Church.[62] Their use of peyote and their spiritual beliefs had played a major role in their own recovery from alcoholism. Arguing they were fired for legitimate cause, the State denied them unemployment benefits. The men appealed, charging the state with a violation of their First Amendment rights.[63] Justice Scalia, writing for the majority, ruled that state law forbidding the ingestion of peyote did not violate the counselors' First Amendment Rights.[64] Justice Scalia reasoned that, in essence, states may choose to allow or to prohibit the religious use of peyote by American Indians, depending upon the state's definition of "public safety."[65]

In reaching its decision, the Court declined to use the two-part compelling interest test that it had previously employed to determine if a law impermissibly burdened religion.[66] In a return to the belief/conduct interpretation, Justice Scalia stated that allowing individuals to determine which laws they would obey according to their personally held religious beliefs would allow a religious objector "to become a law unto himself."[67] The protection of minority religions, according to Justice Scalia, was a "luxury" that would "court[ ] anarchy."[68] The Court concluded that if minority religions desired such protection, the most appropriate forum was the political process and the passage of specialized laws.[69]

On October 6, 1994, Congress responded to Justice Scalia's invitation with the passage of AIRFA.[70] The law provides that "the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State."[71]

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62. *Id.* at 874.

63. *Id.*, at 874.

64. *Id.* at 890.

65. *Id.* at 878-89; *see, e.g.*, State v. Bullard, 148 S.E. 2d. 565, 569 (N.C. 1966); State v. Big Sheep, 75 Mont. 219, 239, 243 P. 1067, 1073 (1926).

66. *Smith*, 494 U.S. at 885. According to Scalia, the Court had used the Sherbert test only in instances related to a denial of unemployment compensation. *Id.* at 883-85.

67. *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

68. *Id.* at 888.

69. *Id.* at 890; *see supra* notes 11-13 and accompanying text.

70. AIRFA, Pub. L. No. 103-344, §§ 1-3, 108 Stat. 3125, 3125 (1994).

71. AIRFA, Pub. L. No. 103-344, § 3(5)(b)(1), 108 Stat. 3125, 3125 (1994). Section 3(4) of the law specifically cites the *Smith* decision and the uncertainty raised by the case as to the protection of peyote under the compelling interest test. Section

C. Exercise of Prisoners' Religious Rights

Minorities comprise a disproportionate number of inmates in the federal and state prisons. Indians are no exception. According to the 1980 census, there are as many Indians living in prison cells as live in college dorm rooms.[72]

Prisoners do not forfeit all their constitutional rights once incarcerated.[73] The right to practice one's religion is clearly retained.[74] From a rehabilitative standpoint, an inmate's re-identification with his or her religious and cultural teachings has proven beneficial.[75] For many Indian prisoners, access to spiritual leaders; the practice of their traditional ceremonies, including those associated with the sweat lodge, the pipe and the Native American Church; the wearing of a medicine bag, or wearing one's hair long or with a headband are important to Indian spiritual existence. The judiciary has supported Indian prisoners in their requests to express their religious needs only in those instances in which penological interests relating to security and health are found to be of less importance. The test employed by the courts to determine how one's religious needs are weighed against the prison's interest is obviously critical to the outcome.

The courts have employed two primary tests to determine if prison regulations legitimately interfere with prisoners' constitutional rights.[76] The older of the two is the "least restrictive means" test, which requires prison officials to attain their objectives by using the least restrictive procedures or methods.[77] The

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3(b)(6) provides that any regulations promulgated by federal agencies and states in the enforcement of their traffic laws must comply with the balancing test set forth in The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (Supp. V 1993).

Although the courts have not yet adjudicated Pub. L. No. 103-344, supporters hope that this law will finally secure to Indians the complete protection of religious peyote use that the First Amendment and AIRFA failed to provide.

72. *See* MATTHEW SNIPP, AMERICAN INDIANS: THE FIRST OF THIS LAND 106 (1989).

73. Bell v. Wolfish, 441 U.S. 520, 545 (1979).

74. *See* Pell v. Procunier, 417 U.S. 817, 822 (1974) (prisoner retains First Amendment rights not inconsistent with penological objectives); Cruz v. Beto, 405 U.S. 319, 322 (1972).

75. Alcohol use is implicated in a significant portion (97%) of crimes for which Indians are convicted. *See* RONET BACHMAN, DEATH AND VIOLENCE ON THE RESERVATION 30-32 (1992). One of the most effective methods for reversing alcohol use on reservations has been the use of religious and cultural teachings.

76. *See* Comment, *The Religious Rights of the Incarcerated*, 125 U. PA. L. REV. 812, 837-56 (1977) (arguing that courts have employed at least seven different standards to determine prisoners' free exercise claims).

77. Teterud v. Burns, 522 F.2d 357, 359 (8th Cir. 1975).

more recent test, enunciated in two 1987 Supreme Court cases, *Turner v. Safley*[78] and *O'Lone v. Estate of Shabazz*,[79] provides that prison regulations may interfere with First Amendment guarantees if "reasonably related"[80] to the legitimate interests of the prison facility.[81]

Indian inmates, on balance, have successfully argued that they, like Christian and Muslim prisoners, have a right of access to their own spiritual leaders and ceremonies.[82] How often and under what conditions this right of access occurs is more problematic. In *Allen v. Toombs*,[83] an Indian inmate requested daily access to a sweat lodge, arguing that his fellow Christian prisoners were able to attend church daily. The Ninth Circuit ruled that access to a weekly sweat lodge ceremony provided inmates with a reasonable ability to exercise their religious rights.[84] In 1992, the Seventh Circuit ruled that an Indian prisoner's attendance at three ceremonies within a four month time period, provided him with an adequate opportunity to practice his religious ceremonies.[85] In *Indian Inmates v. Grammer*,[86] the court held that not permitting Indian inmates to use peyote during their Native American Church services was a "serious interference with their free exercise rights," but that prisons, nonetheless, have the right to refuse peyote use for purposes of security, safety, and discipline.[87]

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78. 482 U.S. 78, 89 (1987).

79. 482 U.S. 342 (1987) (upholding prison regulations which prevented Islamic prisoner from attending Friday services and from wearing a beard).

80. In *Turner*, the Supreme Court established a four prong test to determine the validity of a prison regulation in the face of constitutional guarantees: (1) whether a "valid, rational connection" existed between the regulation and the legitimate government interest; (2) whether an alternative means was available to allow for the exercise of the right in question; (3) the manner in which an accommodation would affect the prison resources and the impact the accommodation would have on prison guards and other inmates; (4) if an alternative exists to the impeding prison function. 482 U.S. at 89-91.

81. *O'Lone*, 482 U.S. at 349.

82. *See, e.g.*, Indian Inmates v. Gunter, 660 F. Supp. 394 (D. Neb. 1987); Marshno v. McMannus, Case No. 79-3146 (D. Kan. Nov. 14, 1980); Bear Ribs v. Taylor, Civ. No.77-3985RJK(G) (C.D. Cal. Apr. 1, 1979).

83. 827 F.2d 563 (9th Cir. 1987).

84. *Allen*, 827 F.2d at 566-67.

85. Frederick v. Murphy, No. 91-3699, 1994 WL 4851 (7th Cir. Jan. 12, 1993); *see also Gunter*, 660 F. Supp. at 398-99 (concluding that Indian prisoners had a right to visit with medicine men, but not to access sweat lodges).

86. 649 F. Supp. 1374, 1374 (D. Neb. 1986).

87. *Gunter*, 649 F. Supp. at 1379. H.R. 4230 provides: "This section shall not be construed as requiring prison authorities to permit, nor shall it be construed to prohibit prison authorities from permitting, access to peyote by Indians while incarcerat-

Many penological institutions argue that the same objectives of security, safety, and discipline require inmates to maintain short hair. For the vast majority of prisoners this mandate represents little hardship. For many Indian people, however, the wearing of long hair is of deep religious importance, signifying oneness with the Great Spirit. Braids symbolize the integration of one's mind, body, and spirit. In two earlier cases, *Teterud v. Burns*[88] and *Gallahan v. Hollyfield*,[89] the courts held that the two prisons in question had violated the Indian inmates' First Amendment right by requiring the wearing of short hair.[90]

The courts' current interpretation has severely compromised Indian rights in this regard. In *O'Lone v. Estate of Shabazz*,[91] the Court ruled that penological requirements for short hair outweighed a Moslem prisoner's religious requirement to maintain long hair. Two subsequent appellate decisions applied the Court's ruling to Indian inmates. In *Hall v. Bellmon*[92] and *Holmes v. Schneider*,[93] the courts held that the prisons' right to force the cutting of hair for reasons of safety overrode the Indian inmates' constitutional claims to First Amendment protection.[94]

Prisoners' requests to wear headbands—the symbol of the sacred circle—have received an equally mixed reception. In a district court decision, *Reinert v. Haas*, the court analogized the headband's symbol to the sacred circle with the sign of the Christian cross and found that Indian inmates possessed a constitutionally protected right to wear their headbands.[95] More recent-

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ed within Federal or State prison facilities." H.R. 4230, 103d Cong. 2d Sess. § 3b(5) (1994).

88. 522 F.2d 357, 362-63 (8th Cir. 1975); *see also* Alabama & Coushatta Tribes v. Big Sandy Sch. Dist., 817 F. Supp. 1319, 1329 (E.D. Tex. 1993) (finding the decision in *Teterud* to be persuasive in ordering an injunction against school regulations requiring Indian children to cut their hair, despite the Supreme Court's ruling in *Smith*).

89. 670 F.2d 1345 (4th Cir. 1982).

90. *Gallahan*, 670 F.2d at 1346-47.

91. 482 U.S. 342 (1987).

92. 935 F.2d 1106, 1114 (10th Cir. 1991).

93. No. 92-1451, 1992 WL 323469 (8th Cir. Nov. 6, 1992).

94. In Pollock v. Marshall, 845 F.2d 656 (6th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988), *reh'g denied*, 488 U.S. 987 (1988), the Sixth Circuit (applying the *Turner* factors, *supra* note 81) ruled that, "[a]fter balancing the defendant's interest in keeping prisoners' hair short against the right of the plaintiff to exercise the religion of the Lakota Indians, we hold that the regulation restricting hair length, as applied to the plaintiff, is not unconstitutional." *Pollock*, 845 F.2d at 659-60; *see also* Iron Eyes v. Henry, 907 F.2d 810, 814 (8th Cir. 1990); Cole v. Flick, 758 F.2d 124 (3rd Cir. 1985) (denying prisoner's right to wear long hair for religious purposes protected by First Amendment).

95. 585 F. Supp. 477, 481 (S.D. Iowa 1984).

ly, however, the Ninth Circuit in *Standing Deer v. Carlson*,[96] ruled that prison regulations against wearing headgear were "logically connected" to prison objectives to maintain security.[97]

It is too early to determine if RFRA will adequately assist Indian prisoners in the protection of their First Amendment rights.[98] In several opinions courts have ruled that RFRA has provided a new standard of judicial review. By reinstating the "compelling interest" test, justices are now to consider "the least restrictive means" of furthering prison objectives rather than considering whether prison restrictions serve a "legitimate penological interest."[99]

D. Use of Animals for Ceremonial Purposes

Animals play a central role in many Indian religious ceremonies. Fishing tribes of the Pacific Northwest celebrate salmon. Alaskan natives consider the bear, moose, and elk to be of ritualistic importance. Whales are central to the spiritual integrity of Inuit groups. Many Indian peoples believe the eagle is preeminent, symbolizing a spiritual connection with the Great Creator. The necessity to incorporate certain animals into Indian rituals directly conflicts with state and federal laws protecting wildlife.[100] The 1918 Migratory Bird Treaty Act,[101] the 1940 Bald Eagle Protection Act,[102] and the 1973 Endangered Species

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96. 831 F.2d 1525 (9th Cir. 1987).

97. *Standing Deer*, 831 F.2d at 1528.

98. As of fall 1994, courts had not heard any cases involving Indian inmates and alleged violations of RFRA.

99. *See generally* Abbott Cooper, *Dam the RFRA at the Prison Gate: The Religious Freedom Restoration Act's Import on Correctional Litigation*, 56 MONT. L. REV. 325 (1995); *see also* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 203-05 (1995). *See, e.g.*, Brown-El v. Harris, 26 F.3d 68, 69 (8th Cir. 1994); Messina v. Mazzeo, 854 F. Supp. 116 (E.D. N.Y. 1994).

100. However, various exemptions do appear in specific treaties, typically allowing for subsistence takings by Eskimos and Indians. For example, the 1916 Canadian Convention excepts the taking of birds by Eskimos and Indians for food and clothing. Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, 1703, T.S. No. 628. Eagles first received federal protection pursuant to the 1936 convention between the United States and Mexico. *See* Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912 (providing for later inclusion of migratory birds at the request of the Presidents of both nations).

101. 16 U.S.C. §§ 703-15 (1988).

102. *See* Tina S. Boradiansky, Comment, *Conflicting Values: The Religious Killing of Federally Protected Wildlife*, 30 NAT. RESOURCES J. 709 (1990), for a discussion of how these acts have impacted on the religious taking of animals. The author argues

Act[103] prohibit Indians from taking protected animals from their own lands. To counter these federally imposed prohibitions and state game laws, tribes have argued that these laws violate protected hunting and fishing rights[104] and violate their First Amendment rights.[105]

Again the courts' understanding of and rulings concerning ceremonial animal use has been inconsistent. In *United States v. Billie*,[106] the court refused to find the defendant, the tribal chairman of the Seminole Tribe, exempt from violating the Endangered Species Act on the basis of his First Amendment rights. Employing the centrality test,[107] the court ruled that the panther was not indispensable to the practice of the Seminole religion. Moreover, the court asserted, the panther's importance to Billie's spiritual life was outweighed by the government's interest in protecting wildlife.

However, in *United States v. Abeyta*,[108] the court ruled that the First Amendment protected the Pueblos' taking of golden eagles on their own lands. As the symbol of the overseer of life, the eagle holds an exalted position in Pueblo religious life. The government's use of a permit system to dispense eagle parts for religious purposes was found to be an impermissible burden on Indian religious practices.[109]

Not surprisingly, tribes have proven most successful in pro-

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that Indian religious rights should not be interpreted as more protected than the rights of endangered species.

103. 16 U.S.C. §§ 1531-1544 (1988).

104. *See* Andrus v. Allard, 444 U.S. 51 (1979); United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980), *cert. denied*, 449 U.S. 1004 (1980); United States v. Allard, 397 F. Supp. 429 (D. Mont. 1975).

105. *See* United States v. Dion, 762 F.2d 674 (8th Cir. 1985); United States v. Top Sky, 547 F.2d 483 (9th Cir. 1976); United States v. Abeyta, 632 F. Supp. 1301 (D. N.M. 1986); United States v. Thirty Eight Golden Eagles, 649 F. Supp. 269 (D. Nev. 1986).

106. 667 F. Supp. 1485, 1497 (S.D. Fla. 1987).

107. *Billie*, 667 F. Supp. at 1497.

108. 632 F. Supp. 1301 (D. N.M. 1986).

109. *Abeyta*, 632 F. Supp. at 1307. The permit system was also challenged in *Top Sky*, 547 F.2d at 483 (ruling that the defendant did not have standing to assert infringement on Indian Religious practices and free exercise and that commercial purposes were outside scope of religious practices). *See also Golden Eagles*, 649 F. Supp 269 (recognizing permit system as a burden, but holding wildlife protection an appropriate governmental interest).

In recognition of this impediment, President Clinton established new policies for use of eagle feathers by Indian religious leaders. *See* Memorandum for the Heads of Executive Departments and Agencies, Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes from William J. Clinton, April 29, 1994.

tecting their rights before courts when they have successfully translated for the courts their practices into Christian analogies.[110] In *Frank v. Alaska*,[111] the Alaska Supreme Court upheld the First Amendment rights of an Alaskan native by exempting him from criminal charges for killing a moose out of season. The use of moose meat in a funeral ceremony, the court concluded, was of equal symbolism to the "wine and wafer in Christianity."[112]

E. Access to and Protection of Religious Sites[113]

Given the courts' application of First Amendment tests and interpretations, Indians have found it virtually impossible to obtain protection of and access to their sacred sites.[114] In

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110. *See* Reinert v. Haas, 585 F. Supp. 477, 481 (S.D. Iowa 1984) (contrasting the penitentiary's prohibition of Native Americans wearing headbands with permitting Christians to wear crosses and medals).

111. 604 P.2d 1068, 1072 (Alaska 1979).

112. *Frank*, 604 P.2d at 1072. The court further ruled that exempting Indians from state game law was a justifiable accommodation of religious practice that did not violate the Establishment Clause. Rather, such an approach reflected the government's "obligation of neutrality in the face of religious differences." *Id.* at 1075 (quoting Wisconsin v. Yoder, 406 U.S. 205, 234 (1972)); *see also Golden Eagles*, 649 F. Supp. at 276 ("As the claimant's affidavits demonstrate, experts in comparative religion have likened the status of the eagle feather in Indian religion to that of the cross in the Christian faith.").

It is ironic at the minimum, and unfair, at the maximum, that the courts are most understanding of Indian religious rights when they are able to translate Indian religious practices or to favor Christianity as the preeminent religion—in contravention to the Establishment Clause.

113. A number of legal scholars have detailed the problems which arise for tribes in their efforts to protect their sacred lands. *See, e.g.*, Robert C. Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L. Q. 795 (1992).

114. *See, e.g.*, Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983); Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980), *cert. denied* 449 U.S. 953 (1980); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

In 1970, in one of the few instances in which the government has returned land to a tribe, President Richard Nixon executed the return of Blue Lake to the Taos, an area of deep cultural significance. FRANCIS P. PRUCHA, THE GREAT FATHER 1127 (1984); *see* Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. REV. L. & SOC. CHANGE 373 (1993) (reporting that an administrative law judge ruled against the development of a proposed hydroelectric plant); *In re* Northern Lights, Inc., 39 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,352 at 107-08 (1987).

In 1992 the Blackfeet of Montana filed a suit to restore their rights to hunt, fish, log, graze livestock, and operate commercial ventures in Glacier National Park under the terms of their 1895 treaty. More than 120 tribes border federal parks.

Sequoyah v. Tennessee Valley Authority,[115] the Cherokees filed suit for an injunction against the flooding of lands by the Tellico dam. Flooding would prevent access to their sacred birthplace, Chota—an area important for the collection of medicinal herbs—and to their ancestral burial grounds.[116] Dismissing the centrality of the Cherokees' religious beliefs, the court ruled that the tribal members were expressing "a personal preference;" their concerns were not with religious beliefs, but with the "historical beginnings of the Cherokees and their cultural development."[117]

That same year, the Tenth Circuit refused a request by Navajo religious leaders that Rainbow Bridge National Monument be closed periodically to tourists and that alcoholic beverages not be sold at the monument.[118] The court acknowledged that the Navajos regarded Rainbow Bridge as the incarnation of a deity and that it was therefore of central importance to Navajo religion.[119] But, in a return to the *Reynolds* test, the court concluded that although the Park Service's regulations hindered the Navajo's religious exercise, the regulations did not compel the Navajos to violate the tenets of their religion.[120] Moreover, the government's need for low-cost electricity and to promote tourism outweighed the Navajo's right to freedom of expression.[121] Finally, the government's closure of the monument to tourism—even periodically—would constitute impermissible support of a religion in violation of the Establishment Clause.[122]

The Navajos, joined by the Hopis, were equally unsuccessful in preventing the Forest Service's and the Department of Agriculture's expansion of a ski area in the San Francisco

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Todd Wilkinson, *Ancestral Lands: Native Americans Seek to Restore Treaty Rights to Worship and Hunt in Many National Parks*, 67 NATIONAL PARKS 30 (July 1993). In the Rocky Mountain region alone, more than 50 Indian nations possess a historic or spiritual interest in 41 park units. *Id.* at 35. Recent improvements in negotiations and communications have also been undertaken in very recent years between the Park Service and the tribes. *Id.*; *see also* Patrick Dawson, *Indian Religion a Matter of Land*, CHICAGO TRIBUNE, June 7, 1993, at 8; Jessica Maxwell, *Curly Bear's Prayer; One Blackfeet Indian's Effort to Stop Gold Mining in the Sweet Grass Hills Area of Montana*, 95 AUDUBON 114 (Mar. 1993) (discussing the BLM's proposed expansion of a gold mine on the edge of the Fort Belknap Reservation in Montana).

115. 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).
116. *Sequoyah*, 620 F.2d at 1160.
117. *Id.* at 1164.
118. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980).
119. *Id.* at 176.
120. *Id.* at 178.
121. *Id.* at 176-78.
122. *Id.* at 179.

Peaks.[123] The court concluded that while the religious leaders had demonstrated the importance of the peaks to their religion, they had not proven their "indispensability."[124] Accordingly, the proposed development only "offended," but did not "penalize" members for their religious practices.[125]

The Lakota and Tsistsistas (Cheyenne) confronted similar reasoning in *Crow v. Gullet*[126] where religious leaders attempted to halt the expansion of tourist facilities at Bear Butte. State projects and regulations had seriously compromised tribal members' ability to worship at this sacred location. Again, the courts recognized that Bear Butte was one of, if not the most sacred of the ceremonial sites in the Black Hills.[127] However, interference with the tribal members' ability to practice their religion did not force them to relinquish their religious beliefs or to totally abandon their religious practices. Furthermore, the lower court warned that if the government acceded to the spiritual leaders' requests, its actions could be construed as overly accommodating and possibly in violation of the Establishment Clause.[128]

The Court echoed this analysis in *Lyng v. Northwest Indian Cemetery Protective Ass'n*.[129] Members of the Yurok, Karok, and Tolowa tribes sought to prevent the Forest Service from constructing a five-mile logging road through their sacred lands.[130] The Court again declined to apply the strict scrutiny test that required careful assessment if religious rights were even indirectly coerced or penalized.[131] Justice O'Connor, writing for the majority, agreed that "the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion."[132] The

123. *See* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983), and *cert. denied*, 464 U.S. 1056 (1983).

124. *Id.* at 744.

125. *Id.* at 745.

126. 541 F. Supp. 785, 794 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983). In *Badoni*, the court ruled that to exclude tourists from the Navajo's sacred area as requested "would seem a clear violation of the Establishment Clause." 638 F.2d 172 at 179. The Fifth Circuit has used *Smith* to find that "the federal and Texas statutes prohibiting peyote possession do not offend the First Amendment's free exercise clause." Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991).

127. *Crow*, 541 F. Supp. at 788.

128. *Id.* at 794.

129. 485 U.S. 439 (1988).

130. *Lyng*, 486 U.S. at 442.

131. *Id.* at 447.

132. *Id.*

government's proposed actions, nonetheless, would not prohibit the tribes from exercising their religious beliefs.[133] Furthermore, the Court ruled that the hands of the federal government could not be tied in the conduct of its own business on its own land.[134]

II. RFRA, AIRFRA, AND THE FUTURE OF INDIAN RELIGIOUS RIGHTS

From the perspective of Indian religious practitioners, it is difficult to escape the conclusion that the courts have subjected Indian religious rights to a more rigorous standard of review than other religious groups.[135] In several non-Indian decisions, courts have stated that they were not competent, nor would they question or judge the accuracy of a religious belief.[136] However, in the *Seqoyah* and *Badoni* cases, the courts engaged in exactly that speculation.[137] Even if Indian plaintiffs pass the sincerity and centrality tests, they have found it difficult to win the compelling-interest test and convince the courts that their right to practice their religion outweighs the government's overriding need to pursue its own interest.[138] In many instances, when

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133. Contrast the Court's decision in this case with the laws of Israel and Saudia Arabia protecting sacred places. Israel's Law states:

> 1. The Holy Places shall be protected from desecration and any other violation from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places.
>
> 2.(a) Whosoever desecrates or otherwise violates a Holy Place shall be liable to imprisonment for a term of seven years. (b) Whosoever does anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places shall be liable to imprisonment for a term of five years.

Israel's Protection of Holy Places Law of 5727 (Sefer ha-Chukim, 1967).

134. *Lyng*, 485 U.S. at 453. *See* Ward, *supra* note 113 for a discussion of those federal uses most endangering access and protection of Indian sacred sites and the range of current federal laws designed to protect some aspect of land use. As Ward concludes, none of these federal laws, e.g., the Antiquities Act of 1906 or the National Historic Preservation Act of 1966, are adequate to the protection of sacred lands. Ward, *supra* note 113, at 820.

135. As many commentators have pointed out, the Court's standards are ethnocentrically based. *See* Timothy L. Fort, *The Free Exercise Rights of Native Americans and the Prospects for a Conservative Jurisprudence Protecting the Rights of Minorities*, 23 N. M. L. REV. 187, 204 (1993).

136. *See, e.g.*, United States v. Ballard, 322 U.S. 78 (1944).

137. *See* Sequoyah v. TVA, 620 F.2d 1159, 1164 (6th Cir. 1980); Badoni v. Higginson, 638 F.2d 172, 178 (10th Cir. 1980); *see also* Inupiat Community v. United States, 548 F. Supp. 182, 188 (D. Alaska 1982).

138. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

tribes had hoped to prove the validity of their claims using a compelling-interest test, courts have declined to apply the test and have instead retrenched to the stricter belief-conduct interpretation. The re-use of this test has allowed the government to conclude that as long as the government is not telling Indians how to believe or preventing them from believing, the government may restrict and even destroy their ability to practice their religion.[139] Finally, when Indian religious leaders have hoped to obtain a permissible exemption or accommodation from the government as the Court has extended to other religious groups, Indians have been told that such an exemption would be an impermissible violation of the Establishment Clause.[140]

RFRA directs the courts to return to the pre-*Smith* position and to employ the compelling interest test when evaluating government infringement on religious rights. The legislation, although supported by tribes, does not offer Indian people adequate protection in the preservation of their religious practices. The reasons for this concern are substantial. The constitutionality of RFRA may be challenged.[141] Does Congress have the authority to dictate to the judiciary which tests or which preferred interpretations the courts should use?[142] Will RFRA pass the Court's analysis of the Acts Establishment Clause implications?[143]

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139. *Id.* at 451-52.

140. *See supra* text accompanying notes 114-18; *see also* Rodney K. Smith, *Sovereignty and the Sacred: The Establishment Clause in Indian Country*, 56 MONT. L. REV. 295 (1995). *See generally* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

141. *See, e.g.*, Canedy v. Boardman, 16 F.3d 183, 186 n.2 (7th Cir. 1994) ("The constitutionality of this legislation—surely not before us here—raises a number of questions involving the extent of Congress's [sic] powers under Section 5 of the Fourteenth Amendment.").

142. Congress ostensibly has the authority under § 5 of the Fourteenth Amendment to pass RFRA. Section 5 provides Congress with the authority "to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. According to *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879), Congress possesses the authority to pass legislation to enforce constitutional amendments as long as that authority is not prohibited. *See* South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966).

143. Establishment Clause cases have proven the most troublesome for the Court in the last thirty years. *See* Fort, *supra* note 132, at 188 & n.3.

The Court currently employs a three-prong test to determine if a government action violates the Establishment Clause: the action must neither advance nor inhibit religion, have a primarily secular effect, and not excessively entangle the government with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). "Excessive entanglement" is concluded by determining: the nature and character of the religion benefitting from the governmental action, the nature of the governmental assistance, and

Even if the constitutionality of RFRA is secure, it is unlikely that RFRA's provisions are sufficiently broad to cover all instances pertaining to important Indian religious practices.[144] The Justice Department, for example, has already indicated that it does not consider RFRA to protect access to sacred sites.[145]

Recognizing the possible shortcomings of RFRA and the obvious failures of AIRFA, congressional supporters of Indian religious rights have introduced a number of bills designed to protect Indians' First Amendment rights.[146] The most compre-

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the characterization of the resulting relationship between the government and the religion. *Id.* at 615.

The Court has accommodated religious practices without finding an interference with the Establishment Clause in several instances. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (allowing exemptions from state school attendance laws); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (allowing state property tax exemption for churches); Sherbert v. Verner, 374 U.S. 398 (1963) (allowing state unemployment benefits for Seventh Day Adventist who was fired for her inability to work on Saturday, her Sabbath); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981) (allowing unemployment benefits to Jehovah's Witness who quit job on religious grounds); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 4 n.8 (citing other examples). *But see* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (overturning a zoning law which allowed churches to prevent issuance of liquor licenses to establishments within 500 feet of church property).

Several authors have argued that the protection of Indian religious sites and practices would not excessively entangle the United States government with Indian religions. *See, e.g.*, Michaelsen, *supra* note 16; Ward, *supra* note 114.

In Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991), the court addressed the establishment issue:

> The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.
>
> . . . Thus, we hold that the federal NAC exemption represents the government's protection of the culture of quasi-sovereign Native American tribes and as such, does not represent an establishment of religion in contravention of the First Amendment.

Id. at 1217.

144. For a detailed examination of those areas in which RFRA is unlikely to protect Indian concerns, see Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 102d Cong., 2d Sess. 424-43 (1992); *see also* Trope, *infra* note 114 (summarizing the concerns expressed in the hearings).

The proposed Senate Bill 2269, in an acknowledgement that RFRA is not presumed to cover all religious practices, states in Title VI, § 601 (b) that the act is considered as a supplement to the Religious Freedom Restoration Act of 1993.

145. *See* Statement by Philip P. Frickey, Hearings, Senate Select Committee on Indian Affairs, Mar. 8, 1993, pp. 13-14; 105-13.

146. President Clinton stated at his meeting with tribal leaders in April:

Last year, I was pleased to sign a law that restored certain constitutional

hensive is Senate Bill 2269, which is intended to supplement RFRA and is designed to overcome the Court's decisions in *Lyng* and *Smith*.[147] In general, the proposed legislation provides for a scheme by which sacred sites are to be identified and protected; an exemption for the religious use, possession, or transportation of peyote by American Indians at the federal and state levels; Indian inmates to have access to spiritual leaders, sacred objects and religious facilities, and to have the right to wear their hair long (the use of peyote by prisoners is neither exempted or promoted); and the prompt disbursement of bald and golden eagles and simplification of the permit process for the taking of bald and golden eagles. In addition, the legislation provides for the levying of penalties and fines for violation of the Act's provisions.[148]

Passage of this Act and the one proposed in the House to protect religious sites remains uncertain. Like RFRA, the bills' constitutionality may be challenged or the bills may be interpreted so weakly as to offer Indians little protection.[149] If passed, the bills face uncertain adjudication before the courts.[150] The Court's support of any religious rights—but especially those of Indians—is speculative. Religious freedom cases by definition are complex cases to resolve. This is understandable given the changing nature of American society, the innate tension between the Free Exercise and Establishment Clauses, and the First

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> protection for those who want to express their faith in this country.
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> No agenda for religious freedom will be complete until traditional Native American religious practices have received all the protection they deserve. Legislation is needed to protect Native American religious practices threatened by [f]ederal action. The Native American free exercise of religion act is long overdue. And I will continue to work closely with you and Members of Congress to make sure the law is constitutional and strong. I want it passed so that I can invite you back here and sign it into law in your presence.

Remarks to American Indian and Alaska Native Tribal Leaders, *in* 30 Wkly Compilations Pres. Doc. 941, 942, 944 (April 29, 1994).

147. S. 2269, 103d Cong., 2d Sess. (1994).

148. S. 2269, 103d Cong., 2d Sess. (1994).

149. This is the fate of the American Indian Religious Freedom Act. *See supra* note 14.

150. Walker, *supra* note 16 (arguing that the "centrality" test be replaced by an "integrity" test); Martin C. Loesch, *The First Americans and the "Free" Exercise of Religion*, 18 AM. INDIAN L. REV. 313, (1993) (arguing that the test of "indirect" harm be dropped); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans* 52 MONT. L. REV. 13 (1991) (arguing for the adoption of a "substantial threat" test); Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989) (arguing that the government's trust obligation to protect Indian lands should extend to sacred sites).

Amendment's importance within constitutional law.

The inherent difficulties of religion cases when combined with American society's ignorance of native religious practices severely handicap Indian people in the preservation of their religious identities. Indian people, by having to struggle against a pervasive lack of knowledge and against a sense of superiority that has generated years of persecution, are inextricably placed at a disadvantage.[151] Perhaps no other field of American law is so replete with examples of judicial activism and redefinition as that which concerns the general rights and status of Indians. And, as described above, tribes are particularly perplexed about the rationale for the courts' use of interpretative tests in deciding their religious rights.[152]

It is for these reasons that tribes cannot rely solely on legislation such as AIRFA or RFRA and their legal interpretations to adequately protect tribal religious rights. In addition to their efforts to pass protective legislation and adjudication, tribes must continue to push for expanded recognition and interpretation of their special status as inherent sovereigns that maintain a trust relationship with the federal government. Courts' acknowledgement of the government's obligation to protect Indian existence under the trust relationship should provide the courts with the necessary "hybrid" situation described by Scalia in the *Smith* case or the necessary "weight" needed to tip the balance for the protection of Indian First Amendment Rights under a restored compelling interest test.

III. THE TRUST DOCTRINE AS A COROLLARY TO FIRST AMENDMENT PROTECTION

The federal government, by virtue of the unique political status possessed by tribes, may extend special treatment to Indian people. Indeed, the extension of positive rights and special treatment may be necessary (or even required), as in the case of religious exemptions, to preserve Indian existence.

Tribes, as inherent sovereigns, lie outside the constitutional

151. *See* Firmage, *supra* note 20, at 282 (explaining how Christianity in the last century suffused the Court's writings). For examples of such writings see Vidal v. Girard's Ex'r, 43 U.S. 127 (2 How. 1844) and Holy Trinity Church v. United States, 143 U.S. 457 (1892).

152. For an updated description of the problems confronted by Indian people, see the hearings held by the House and Senate since passage of AIRFA. *Oversight Hearing on the Need for Amendments to the Indian Religions Freedom Act Before the Senate Select Committee on Indian Affairs*, 102d Cong., 2d. Sess. (1992).

standards imposed by the Bill of Rights upon other groups and individuals in American society. Unlike the states, tribal governments are not pro-forma bound by the United States Constitution's Bill of Right guarantees when regulating actions of their members.[153] Tribal status and the special political relationship that Congress maintains with Indian people, taken together, allow for a separate standard of individual treatment in seeming contradiction to the Fourteenth Amendment Equal Protection Clause.

The Supreme Court most squarely recognized this principle in the 1896 *Talton v. Mayes*[154] case, which considered the applicability of the Fifth Amendment to the Cherokee Nation. The previous year, the Cherokee Nation Supreme Court had sentenced Bob Talton, an enrolled member of the Cherokee Nation, to death for murder. Talton appealed his conviction to the United States Supreme Court alleging that the Cherokees had violated his Fifth and Fourteenth Amendment rights under the United States Constitution by empaneling a Cherokee grand jury of five members. In finding that the Cherokees were not bound by the requirements of the Fifth Amendment, the Court ruled that "the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment."[155]

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153. This does not mean that tribal individuals do not possess individual protections against their tribal governments. Most tribal governments have adopted within their tribal constitutions their own set of individual guarantees. And, in 1968 Congress passed the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, which applied many rights found in the federal Bill of Rights to tribal governments. The fact remains, however, that tribal sovereignty is inherent and does not receive its political authority from the United States Constitution.

154. 163 U.S. 376 (1896).

155. *Talton*, 163 U.S. at 384. The Court also stated:

> [Whether the Fifth Amendment applies to the Cherokee nation] depends upon whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress.

Id. at 382-83.

In Kobogum v. Jackson Iron Co., 43 N.W. 602 (Mich. 1889), the state court ruled that Indian marriages involving polygamy did not violate state or federal law:

> While most civilized nations in our day very wisely discard polygamy, and it is not probably lawful anywhere among English speaking nations . . . .We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are so regarded . . . .They did not occupy their territory by our grace and permis-

In 1959, the Tenth Circuit applied the same logic to the applicability of the First Amendment to the actions of the Navajo government. In deciding that the Free Exercise Clause did not prevent the Navajo tribal government from barring the sale, use, or possession of peyote on the reservation, the court stated:

> [Indian tribes] have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them . . . . No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so.[156]

Tribal exemptions from the usual standards of constitutional application are most readily apparent in the number of cases involving Indian exemptions from the Fourteenth Amendment Equal Protection Clause. In 1978, the Supreme Court issued two decisions concerning the applicability of the Equal Protection Clause to the rights of Indian individuals and the rights of tribal governments. In *Morton v. Mancari*,[157] two non-Indian BIA employees sued the federal government for violation of the Fifth Amendment.[158] They charged that the BIA's Indian preference requirement constituted improper racial discrimination and violated their right to equal treatment.[159] The Indian preference laws, which had operated since 1934, mandated that Indian individuals be given preferential hiring and promotion with the BIA.[160] The Court ruled that such a provision was not violative of the Due Process Clause.[161] Preferential hiring of American

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> sion, but by a right beyond our control. They were placed by the [C]onstitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India.

Id. at 605.

The *Kobogum* decision is particularly interesting given the importance to the discussion of religious protection of the Supreme Court's ruling in Reynolds v. United States, 98 U.S. 145 (1878). The Michigan court declined to apply the rationale in *Reynolds* holding in *Kobogum*. *See id.* at 605-06.

156. Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134-35 (10th Cir. 1959); *see also* Mission Indians v. American Mgt. & Amusement, Inc., 840 F.2d 1394 (9th Cir. 1987); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); Seneca Constitutional Rights Org. v. George, 348 F. Supp. 51 (W.D.N.Y. 1972); Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963).

157. 417 U.S. 535 (1974).

158. *Id.* at 539.

159. *Id.*

160. *See id.* at 537-38.

161. *Id.* at 555.

Indians was not a racial arrangement but a political arrangement that was tied rationally to the government's fulfillment of its special political relationship with tribes.[162]

In *Santa Clara Pueblo v. Martinez*,[163] Maria Martinez challenged the validity of the Santa Clara Pueblo's enrollment requirements.[164] Children born to Santa Clara Pueblo women who married outside the tribe were ineligible for membership; yet, the ordinance extended membership to children of male members who married outside the tribe.[165] Mrs. Martinez, on behalf of herself and her children, argued that the tribal laws constituted impermissible sex and ancestry discrimination in violation of the Indian Civil Rights Act of 1968.[166]

The Court ruled, "[T]ribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments."[167] Therefore the Court held that the United States was obligated to protect Indian status and culture and denied Mrs. Martinez's claim.[168]

As discussed previously, challenges to special treatment for American Indians have arisen in a number of cases dealing with federal and state exemptions for sacramental peyote use by American Indians.[169] Courts have supported differential treat-

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162. Morton, 417 U.S. at 553-55. The Court based its decision on: (1) the historically unique guardian-ward trust relationship of the federal government with quasi-sovereign Native American tribes; (2) Congress' plenary authority under Article 1 "'to regulate Commerce . . . with the Indian Tribes;'" (3) the federal government's treaty power in Article II, § 2; and (4) precedent in which the Court had upheld preferential treatment of Indians. *Id.* at 551-55.

163. 436 U.S. 49 (1978).

164. *Id.* at 51.

165. *Id.*

166. *Id.*

167. *Id.* at 71. "As [the Supreme Court has] repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad . . . ." *Id.* at 72; *see* United States v. Antelope, 430 U.S. 641 (1977) (finding an equal protection violation by prosecuting Indians under stricter federal law rather than less-strict state law); *see also* Fisher v. District Court, 424 U.S. 382, *reh'g denied*, 425 U.S. 926 (1976); Livingston v. Ewing, 601 F.2d 1110 (10th Cir.), *cert. denied*, 444 U.S. 870 (1979) (upholding New Mexico's right to pass legislation allowing for Indian commercial sales to the exclusion of other artists in defined locations); White v. Califano, 437 F. Supp. 543 (D.S.D. 1977) ("[A]n equal protection analysis cannot be reached in this case because federal law requires that Florence Red Dog be treated differently than other South Dakota citizens precisely because she is an Indian person residing in Indian country."). For a discussion of the Equal Protection Clause as it relates to American Indians, see Ralph W. Johnson & Susan E. Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979).

168. *Santa Clara Pueblo*, 436 U.S. at 71-72.

169. *See supra* text accompanying notes 46-60.

ment for Indian peyote use when challenged by non-Indians. In *Peyote Way Church of God v. Thornburgh*,[170] the Fifth Circuit held that federal and state exemptions for the use of peyote by Native American Church members did not violate the petitioners' free exercise rights, equal protection rights, or the Establishment Clause.[171]

If, as courts have concluded, Indians are not necessarily judged by the same standards of constitutional interpretation as non-Indians, an important question remains: By what standards are Indians' rights to be judged? The answer to this question is found partly in the answer to why Indians are not judged by the same constitutional standards. Indians are accorded a different standard of protection and review because of their special status and relationship to the federal government. This relationship, referred to as the trust relationship, obligates the federal government to protect tribal existence for as long as the tribes request such protection. Accordingly, the courts must interpret Indian First Amendment rights such that Indian religions are preserved.

The trust doctrine is, admittedly, one of the most reinvented and reconstructed concepts in federal Indian law.[172] The source of its creation,[173] to whom it extends, and what it entails are debated issues. The source of this debate lies in the shifting history of federal-Indian relations. The European powers, followed by the United States, recognized the Indian nations as independent sovereigns, conducting their relations through the treaty process. As Indian power diminished and American objectives towards Indian lands, resources and existence transformed over time, federal policies changed. The government embarked on a process of "domesticating" Indians both legally and sociologically into the American mainstream. The judiciary has supported these changes in federal policies through creative legal find-

170. 922 F.2d 1210 (5th Cir. 1991).

171. *Id.* at 1213, 1216, 1220.

172. Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981); Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

173. *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 225-26 (1983) (stating that the trust doctrine is implicit in certain statutes and arises from a general trust relationship between the United States and Indian people); United States v. Sioux Nation, 448 U.S. 371, 415 (1980); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); Cramer v. United States, 261 U.S. 219, 228-29 (1923). Treaties also serve as a source of the trust relationship.

ings and new interpretations and tests.[174] The trust doctrine or relationship has prevailed despite changing federal policies and definitions of Indian status.[175]

Today the trust relationship can be described as an implicit compact between the United States government and the aboriginal peoples of the United States. It is a relationship derived and emanating from the natives' cession of lands to the United States. In return for land, the United States has obligated itself to protect native existence.[176] Given that existence is self-defining, the trust relationship requires a cooperative and equitable relationship between the two parties.

The existence of the trust doctrine is well documented through treaties,[177] legal opinions,[178] and congressional legislation.[179] Chief Justice John Marshall first referred judi-

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174. The Court's distinction between recognized and aboriginal title in Tee-Hit-Ton Indians v. United States, 348 U.S. 2721 (1955), and United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941) is one example. *See* Joseph W. Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994) (discussing how the Court's definition of aboriginal rights deviates from Justice John Marshall's description of Indian property rights). Given this historical context, the attempt to provide an overall and coherent framework for federal Indian law, based on logical precedent, is an enterprise taxing to even the most creative legal minds.

175. Several authors have pointed to the trust doctrine's importance in assisting tribes to protect their religious rights, but have understandably concluded that the courts' use of the trust relationship is too misunderstood and misapplied. *See* Ward *supra* note 113, at 809. *But see* Jeri Beth K. Ezra, Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989).

176. *See* WILLIAM C CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 34-37 (2d ed. 1988); Chambers, *supra* note 172 at 1219; Clinton, *supra* note 172, at 984-86; Sen. Daniel K. Inouye, *Discrimination and Native American Religious Rights*, 23 U.W.L.A. L. REV. 3, 18 (1992).

As the Court made clear in *Mitchell*, there is an "undisputed existence of a general trust relationship between the United States and the Indian people." 463 U.S. at 225. This general trust relationship, however, does not automatically provide Indian people with a cause of action for money damages for the breach of the trust. *See* Gila River Pina-Maricopa Indian Community v. United States, 427 F.2d 1194, 1201 (Ct. Cl. 1970) (Davis, J., concurring) ("[T]he 'fair and honorable dealings' clause was [not] a catch-all allowing monetary redress for the general harm—psychological, social, cultural, economic—done the Indians by the historical national policy of semi-apartheid."), *cert. denied*, 400 U.S. 819 (1970).

177. The United States has negotiated more than 800 treaties with tribes. Of these, 371 remain legally binding. For a listing of most treaties negotiated with Indian Nations, see CHARLES J. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES (1904).

178. *See infra* text accompanying notes 180-99.

179. *See infra* text accompanying notes 200-04. The existence of a trust duty between the United States and an Indian or Indian tribe can be inferred from the provisions of a statute or regulation, "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitch-*

cially to the relationship in *Cherokee Nation v. Georgia*[180] and in *Worcester v. Georgia*.[181] The Cherokees were a domestic dependent nation[182] that exercised exclusive authority within its territorial boundaries.[183] According to Marshall, the relationship between the Cherokees and the United States was that of a ward to his guardian.[184] The Cherokees were a protectorate of the United States; a weaker state, which without giving up its sovereignty, had accepted the protection of a more powerful state.[185]

Over the years, the courts have continually reinterpreted the trust relationship as that of guardian to a ward.[186] As guardian, the United States possessed total rights and control to dictate the content and parameters of the relationship. The Court's reasoning was carried to its most extreme in the *United States v. Kagama*[187] and *Lone Wolf v. Hitchcock*[188] decisions. In *Kagama*, the Court emphasized that tribes are the wards of the government and stated that as a result of "their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."[189] In *Lone Wolf*, the Court found that the only limitations on the government's authority were those "considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."[190]

By the mid-1930s, in *United States v. Creek Nation*,[191] the Court had begun to re-balance the trust relationship, acknowl-

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ell, 463 U.S. at 225; *see also* Navajo Tribe of Indians v. United States, Nos. 69, 299 & 353, slip. op. at 5 (Ct. Cl. Sept. 19, 1978) ("The trust relationship does not depend for its existence on the terms of treaties, agreements, and statutes.").

180. 30 U.S. (5 Pet.) 1 (1831).

181. 31 U.S. (6 Pet.) 515 (1832).

182. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

183. *Id.* at 17, 53, 74.

184. *Id.* at 17.

185. *Id.* at 17, 24.

186. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); United States v. Kagama, 118 U.S. 375, 383 (1886).

187. *Kagama*, 118 U.S. at 383-84.

188. 187 U.S. 553 (1903).

189. *Kagama*, 118 U.S. at 384.

190. 187 U.S. at 565 (quoting Beecher v. Wetherby, 95 U.S. 517, 525 (1877)). In Sioux Nation of Indians v. United States, 601 F.2d 1157 (Ct. Cl. 1979), Judge Nichols referred to the date of the *Lone Wolf* decision as "one of the blackest days in the history of the American Indian, the Indians' Dred Scott decision." *Id.* at 1173 (Nichols, J., concurring).

191. 295 U.S. 103 (1935).

edging that the United States possessed judiciable obligations in its relationship with Indian tribes.[192] A series of cases followed in which the Court ruled that the United States possessed a fiduciary responsibility to protect tribal lands[193] and resources.[194]

Subsequent decisions[195] confirmed the United States' obligation to protect Indian culture and existence, including health[196] and education. In *Peyote Way Church of God, Inc. v. Smith*[197] the court stated, "Congress has the power . . . to preserve our Native American Indians . . . as a cohesive culture until such time, if ever, all of them are assimilated in the main stream of American culture."[198] The court held that the federal exemption "allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture."[199]

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192. *Id.* at 108-09. In *Lane v. Pueblo of Santa Rosa*, the Court held that the government's disposition of tribal lands under the public land laws would be an act of confiscation, not guardianship. 249 U.S. 110 (1919)

193. *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371 (1980); Menominee Tribe v. United States, 391 U.S. 404 (1968); *see* Jeri Beth K. Ezra, Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989) (discussing the trust doctrine's application to sacred sites as a function of the government's obligation to protect Indian property rights).

194. In Seminole Nation v. United States, 316 U.S. 286, 297 (1942), the Court extended the government's responsibility to include tribal funds held in trust. *See* Ezra, *supra* note 193, at 719-20.

195. *See* FRANCIS P. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN 399 (1984).

196. *See, e.g.*, White v. Califano, 581 F.2d 697, 698 (1978) ("We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians."). In *Lincoln v. Vigil*, 113 S. Ct. 2024, 2033 (1993), the Court refused to determine whether the Secretary's decision to cancel a program for handicapped children violated the trust relationship, but stated: "Whatever the contours of that relationship, though, it could not limit the Service's discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide."

197. 556 F. Supp. 632 (N.D. Tex. 1983).

198. *Id.* at 639.

199. 922 F.2d 1210, 1216 (1991). In at least two cases, the courts have found that the states may legitimately exercise a trust relationship towards Indians. *See, e.g.*, Livingston v. Ewing, 601 F.2d 1110 (10th Cir. 1979) (upholding a Sante Fe, New Mexico ordinance which allowed Indian artisans exclusive commercial areas against equal protection claims by finding that states may exercise the federal trust power for the benefit of American Indians), *cert. denied*, 444 U.S. 870 (1979); St. Paul Intertribal Hous. Bd. v. Reynolds, 564 F. Supp. 1408, 1412 (D. Minn. 1983) ("State action for the benefit of Indians can also fall under the trust doctrine and therefore be protected from challenge under the equal protection clause or civil rights statutes.").

In several recent bills, Congress has acknowledged the special political relationship that it maintains with tribes and has accepted its responsibility to ensure the continued future of Indian people. In the 1978 Indian Child Welfare Act[200] Congress stated:

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people . . . Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources . . . .[201]

The 1976 Indian Health Care Improvement Act affirms that "Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians."[202] The recently passed Indian Tribal Justice Act states that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government."[203]

The proposed Native American Cultural Protection and Free Exercise of Religion Act of 1994 emphasizes:

> [T]he United States has a unique, government-to-government relationship . . . which permits the United States to take measures to protect against interference with the continuing cultural cohesiveness and integrity of Indian tribes and Native American traditional cultures . . . as part of the historic Federal-Indian trust relationship it is the intent of the United States to pursue enforceable Federal policies which will protect the Native American community and tribal vitality and cultural integrity . . . .[204]

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200. 25 U.S.C. §§ 1901-1963 (1988 & Supp. V 1993).

201. Sub-section (3) continues: "[T]here is no resource that is more vital to the *continued existence* and integrity of Indian tribes than their children and . . . the United States has a direct interest, as trustee, in protecting Indian children . . . ." 25 U.S.C. § 1901(3)(1988) (emphasis added).

202. Pub. L. No. 94-437, § 3, 90 Stat. 1400, 1401 (1976) (codified in scattered sections of 25 U.S.C.); *see* White v. Califano, 437 F. Supp. 543, 555 (D. S.D 1977), *aff'd per curiam*, 581 F.2d 697 (8th Cir. 1978) ("We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians. This stems from the 'unique relationship' between Indians and the federal government, a relationship that is reflected in hundreds of cases . . . .").

203. 25 U.S.C. § 3601(2) (1988 & Supp. 1993).

204. S. 2269, 103d Cong., 2d Sess. § 101(4)(5) (1994); *see also* The Indian Self-

Recent presidential addresses provide further proof of the government's responsibility to protect Indian existence. In a meeting with Indian leaders in 1991, President Bush stated, "[t]oday we move forward toward a permanent relationship of understanding and trust, a relationship in which the tribes of the nation sit in positions of dependent sovereignty along with other governments that compose the family that is America."[205]

In April 1994, President Bill Clinton held a historic meeting with tribal leaders at the White House. In his address he not only reaffirmed the importance of the government's obligation, but specifically spoke of the government's responsibility to preserve Indian existence and religion:

> Today I reaffirm our commitment to self-determination for tribal governments. I pledge to fulfill the trust obligations of the Federal Government. I vow to honor and respect tribal sovereignty based upon our unique historic relationship. And I pledge to continue my efforts to protect your right to fully exercise your faith as you wish . . . your culture and your very existence.[206]

IV. CONCLUSION

Justice Scalia based his rejection of the strict scrutiny/compelling state interest test in *Smith* on the Court's prior refusal to grant exemption unless the free exercise claim was supported by another constitutional claim, such as the right to free speech in the *Sherbert*[207] decision and the right to educate one's children in *Yoder*.[208] However, the Court has at its disposal the trust doctrine, which not only meets this hybrid requirement, but by the Court's own analysis, must be used to

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Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1988).

205. 27 PUB. PAPERS 783, 785 (June 14, 1991).

206. President William Clinton further emphasized:

> This then is our first principle: respecting your values, your religions, your identity, and your sovereignty. This brings us to the second principle that should guide our relationship: We must dramatically improve the Federal Government's relationships with the tribes and become full partners with the tribal nations . . . .The judgement of history will be that the President of the United States and the leaders of the sovereign Indian nations met and kept faith with each other and our common heritage and together lifted our great nations to a new and better place.

Remarks to American Indian and Alaska Native Tribal Leaders, *in* 30 PUB. PAPERS 941, 942, 944 (April 29, 1994).

207. *Smith*, 494 U.S. 872, 881 (1990).

208. *Yoder*, 406 U.S. 205 (1972).

protect tribal rights.[209] As the Court has recognized,[210] the United States government is not mandated by the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to hold Indians to the same standards of constitutional protection as other groups. The Court's decisions in *Talton*, *Mancari*, *Martinez*, and a number of other cases have conclusively proven this.[211] The tribes' status as inherent sovereigns predating the existence of the United States Constitution precludes any other analysis.[212]

The courts then may apply a separate standard to tribes. The trust doctrine, as discussed, obligates the United States government to take those measures, which, as trustee, will ensure continued tribal existence. Congress, the President, and the courts have recognized that religion is an immutable aspect of Indian culture, life, and existence.[213] As the receiver of more than ninety-seven percent of the continental United States, the government has obligated itself, as trustee, to be held to high fiduciary standards.[214]

209. *See* Fort, *supra* note 135, at 205-08 (offering an analysis whereby the Court can protect the rights of minorities through the First Amendment).

210. From a political philosophical perspective, one can also argue that Indian people are not part of the consent of the governed.

211. *See supra* text accompanying notes 153-69.

212. *See supra* text accompanying notes 153-69.

213. *See* Michaelsen, *supra* note 16 at 47.

214. Over the years the Court has developed canons of construction to be applied in deciding Indian rights cases. See, e.g., Bryan v. Itasca City, 426 U.S. 373 (1976); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (requiring clear and specific statement by Congress before divestment of Indian authority); DeCoteau v. District County Court, 420 U.S. 425 (1975).

A TRIUMPH OF MYTH OVER PRINCIPLE: THE SAGA OF THE MONTANA OPEN-RANGE

Roy H. Andes*

"Oh give me lands,
Lots of lands under starry skies above,
Don't fence me in . . ."[1]

I. INTRODUCTION

Many city people—as well as full fledged Montana-borns—find part of Montana's charm in its wide open spaces. Cresting a hilltop by car, one may encounter a cowperson on horseback, a Kenworth tractor-trailer, a bull elk, or a pair of black angus heifers. By romantic tradition and to large extent by law, all have equal run of Montana's range. The "open range" tradition permits free-ranging livestock, limited only by fence-building or herding by persons who wish to exclude wandering animals. The word "free" is literal; the livestock-owner pays nothing for grazing other people's unfenced grass.

Most people assume that "open range" is the law of Montana.[2] The Supreme Court of the Montana Territory so held in *Smith v. Williams*.[3] Therein, the court concluded that damages caused by trespassing livestock may not be recovered unless the plaintiff had erected a statutory "legal" fence to fence out animals.[4] But that tradition may not well-serve modern Montana with high speed automobiles, growing population and increasing urbanization. This Article first surveys national range law, then compares the national trend to Montana's law. The Article concludes by assessing to what extent open range rules should remain part of Montana law.

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1. Lyrics by Robert Fletcher; melody by Cole Porter.

2. *See* Williams v. Selstad, 235 Mont. 137, 766 P.2d 247 (1988); State *ex rel.* Martin v. Finley, 227 Mont. 242, 738 P.2d 497 (1987); Siegfried v. Atchison, 219 Mont. 14, 709 P.2d 1006 (1985); Ambrogini v. Todd, 197 Mont. 111, 642 P.2d 1013 (1982).

3. 2 Mont. 195, 202 (1874).

4. *Smith*, 2 Mont. at 197-202 (interpreting the predecessor statute to MONT. CODE ANN. § 81-4-215 (1993)).

II. RANGE LAW NATIONALLY

A. *In the Beginning—Mere Custom*

An understanding of range law requires examination of its social and legal history. One scholar described the law of the range as the purest example of geographical circumstances determining legal rules.[5]

In contrast to the open range policy of the western United States, the common law of the range derives from England and requires the stock owner to restrain his livestock from running at large. Failure to restrain animals imposes strict liability for any damages caused by trespassing livestock. Such common law range rules apply in most jurisdictions, particularly the eastern states.[6]

However, by early custom in the West, the federal government allowed private individuals to gratuitously graze stock at large on federal lands. The practice was permitted because of the presence of "great plains and vast tracts of unenclosed land, suitable for pasture."[7] At the time, "[it] was reasoned that much of the land would be unused if farmers were required to limit grazing to areas enclosed with fences."[8] Nineteenth century ethics abhorred such "waste," so the western territories and newly admitted states generally continued the open range custom either by statute or judicial decision.[9] In 1894, the United States Supreme Court summarized as follows:

> As there are, or were, in the State of Texas, as well as in the newer [s]tates of the West generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle

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5. Bernhard Grossfeld, *Geography and Law*, 82 MICH. L. REV. 1510, 1515 (1984).

6. Light v. United States, 220 U.S. 523, 535 (1911); Buford v. Houtz, 133 U.S. 320, 326 (1890); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 76, at 538-41 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS, § 504 cmt. f (1977).

7. *Light*, 220 U.S. at 535.

8. Marsha K. Ternus, *Liability for the Escape of Animals*, 30 DRAKE L. REV. 257, 257 (1980).

9. *See* KEETON, *supra* note 6, at 540, text accompanying notes 21-22.

accidentally straying upon the land of others.[10]

The "open range" was mere custom—"an implied license"—unless embodied in state or territorial statutes.[11] The United States Supreme Court in 1911 described it thusly:

> And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for [open range]. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent.[12]

B. Range Law Becomes Statute

Range custom evolved into statutes when state and territorial legislatures began to enact legislation. The "open range" statutes in western states followed an almost identical pattern. Montana's statute provides:

> If any [livestock] break into any enclosure and the fence of the enclosure is legal, as provided in [another code section], the owner of the animals is liable for all damages to the owner or occupant of the enclosure. This section may not be construed to require a legal fence in order to maintain an action for injury done by animals running at large contrary to law.[13]

The First Territorial Legislature at Bannack enacted the Montana Open Range Statute in 1865. Today, its language remains substantially unchanged.[14] A later companion section defines "legal fence" as to height and spacing of posts and wires.[15]

The statutes of most other western states are substantively identical to Montana's, including Arizona, Arkansas, California, the Dakotas, Idaho, Illinois, Indiana, Kansas, Texas and Washington.[16] These statutes are notable as much for what they

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10. Lazarus v. Phelps, 152 U.S. 81, 85 (1894).

11. Buford v. Houtz, 133 U.S. 320, 326 (1890).

12. Light v. United States, 220 U.S. 523, 535 (1911).

13. MONT. CODE ANN. § 81-4-215 (1993). This statute is referred to as the "Montana Open Range Statute" throughout the text of this article.

14. ACTS, RESOLUTIONS AND MEMORIALS OF THE TERRITORY OF MONTANA, PASSED BY THE FIRST LEGISLATIVE ASSEMBLY § 1, at 351-52 (Bannack 1864) (current version at MONT. CODE ANN. § 81-4-215 (1993)).

15. MONT. CODE ANN. § 81-4-101 (1993).

16. Kobayashi v. Strangeway, 116 P. 461, 462 (Wash. 1911); Union Pac. Ry. Co. v. Rollins, 5 Kan. 98 (1869); Thomas L. Palmer, *Determining Liability of Ranchers and Farmers for Injuries Caused by Fencing or Not Fencing Rangelands*, 14 J. AGRIC.

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

failed to do, as for what they did do. On their face the statutes forbid collection of damages from the owner of wandering livestock unless one had a "legal fence" around one's land. Significantly, these statutes did not declare a right to graze livestock on another person's land. Neither did they discuss any other remedies one might employ—such as injunctions, nuisance law, or self-help. Likewise, the statutes did not treat other issues that might arise—such as standards of care or highway problems. Compared to the broad custom they replaced, the open range statutes were facially quite narrow. This divergence left much room for judicial interpretation.

C. A Changing West Provokes Changing Range Laws

Well before the turn of the century, fundamental societal changes, primarily the increase in population and a change of attitude towards pastureland and farmland, were already undermining the rationale for the open range. Other changes included: the arrival of railroads capable of delivering fence posts to the prairies, the invention of barbed wire in the 1870's, and the iron windmill which could provide water to livestock nearly anywhere.[17]

By 1889, the law of the open range was under attack.[18] In 1894, in *Lazarus v. Phelps*,[19] the United States Supreme Court held that common law liability principles continued to apply, despite Texas' open range statute, where the defendant had stocked the range with more animals than his portion of the land would support. The Court construed the Texas Open Range Statute narrowly:

> The object of the statute . . . is manifest . . . . It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands, and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. *In other words, the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle* . . . . The ordinary rule that a man is bound to contemplate the natural and probable consequences of his

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TAX'N & L. 25, 27 (1992); Grossfeld, *supra* note 5, at 1517 n.47.

17. Grossfeld, *supra* note 5, at 1517.

18. Buford v. Houtz, 133 U.S. 320, 328 (1890).

19. 152 U.S. 81 (1894).

own act would apply in such a case.[20]

The *Lazarus* Court listed a variety of acts that would take a stock owner's actions outside the protection of the Texas Open Range Statute, including driving cattle upon another's lands, overstocking the range, and enclosing another's lands along with one's own.[21]

In essence, *Lazarus* established the principle that the common law remains intact, except to the extent it is modified by open range statutes. The Court interpreted the Texas Open Range Statutes as narrowly condoning only accidental trespass by livestock.[22] Other trespasses remained subject to common law remedies.[23] By the first decade of this century, most courts in open range states were either following the narrow-construction principle from *Lazarus*, or independently adopting it on their own.[24]

Soon after *Lazarus*, the gratuitous open range came to an end on most federal land. In 1897 forest reserve legislation commanded the responsible federal agency "to make such rules and regulations . . . as will insure the objects of such reservation . . . and to preserve the forests thereon from destruction."[25] The regulations adopted by the Secretary of Agriculture prohibited all but de minimis grazing on national forest reserves without paying for a grazing permit.

The federal regulations were challenged by Fred Light, a rancher who owned 540 acres of Colorado land near the Holy Cross Forest Reserve. He annually grazed 500 head of cattle on the unfenced range consisting of his ranch, the land around it, and the Reserve. The government sued to enjoin Light from turning out his cattle to wander on the Reserve. Light responded that Colorado's range statute gave him license to freely graze his

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20. *Lazarus*, 152 U.S. at 85 (emphasis added).

21. *Id.* at 85-86.

22. *Id.* at 85. The Texas open range statutes provided: "Every gardener, farmer, or planter shall make a sufficient fence about his clear land under cultivation at least five feet high, and make such fence sufficiently close to prevent hogs from passing through the same." TEX. REV. CIV. STAT. § 2431 (1840). "If it shall appear that the said fence is insufficient, then the owner of such [livestock] shall not be liable to make satisfaction for such damages." TEX. REV. CIV. STAT. § 2434 (1840).

23. *Lazarus*, 152 U.S. at 84-86.

24. Kobayashi v. Strangeway, 116 P. 461 (Wash. 1911); Jones v. Blythe, 93 P. 994 (Utah 1908); Bell v. Gonzales, 83 P. 639 (Colo. 1905); Martin v. Platte Valley Sheep Co., 76 P. 571 (Wyo. 1904); Monroe v. Cannon, 24 Mont. 316, 61 P. 863 (1900); Poindexter v. May, 34 S.E. 971 (Va. 1900); Union Pac. Ry. v. Rollins, 5 Kan. 98, 103-04 (1869). *See also* Robinson v. Kerr, 355 P.2d 117 (Colo. 1960).

25. Act of June 4, 1897, ch. 2, 30 Stat. 11, 35. (appropriations bill).

stock and that the forest regulations were void to the extent that they exempted federal lands from the open range laws of Colorado.[26]

In *Light v. United States*, the United States Supreme Court held that the federal government is not prohibited by the Colorado Open Range Statute from revoking the license to graze on federal land, whether the land is owned in either a sovereign or proprietary capacity.[27] In that the case the Court stated, "Fence laws do not authorize wanton and willful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another."[28] The Court interpreted Mr. Light's refusal to get a grazing permit, his statement that he would resist the removal of his cattle from the reserve, and his intention to continue "turning out his cattle" as beyond the protection of Colorado's open-range statute.[29] While the Court did not expressly require all users to acquire forest grazing permits, the holding is broader than it asserts. The Court upheld the grazing restrictions despite the absence of evidence that Mr. Light committed any sort of overt act of the kind proscribed in *Lazarus*.[30] Most significantly, the Court implicitly held, for the first time, that passive open-range grazing could create liability on unfenced land.

Since *Light*, grazing prohibitions on unfenced federal land have withstood every challenge. In *Shannon v. United States*,[31] the same 1897 federal legislation was at issue in Montana's Little Belt Mountains. The defendant argued that the Montana Open Range Statute justified his grazing. The Ninth Circuit reasoned that the Property Clause of the United States Constitution preempted any police power legislation of Montana that might otherwise apply:

> [Montana] could not give to the people of that state the right to pasture cattle upon the public domain, or in any way to use the same. Its own laws in regard to fencing and pasturing cattle at large must be held to apply only to land subject to its own dominion. No one within the state can claim any right in the

26. Light v. United States, 220 U.S. 525, 526 (1911).
27. *Id.* at 537 (citing *inter alia Lazarus*, 152 U.S. at 81, and Monroe v. Cannon, 24 Mont. 316, 61 P.2d 863 (1900)).
28. *Light*, 220 U.S. at 537.
29. *Id.* at 536-38.
30. *Lazarus*, 152 U.S. at 85-86; *see supra* text accompanying note 21.
31. 160 F. 870 (9th Cir. 1908).

public land by virtue of such a statute.[32]

Subsequently, the holdings of *Light* and *Shannon* were adopted in *United States v. Thompson*,[33] despite arguments that neither case was applicable unless the defendant willfully committed trespass upon federal land. The court in *Thompson* concluded that while state police power statutes might permit cattle on private lands to graze at large unless "fenced out," proprietary federal property rights entitle the United States to reverse that rule on federal land.[34] Consistent subsequent cases appear to settle the issue: The free "open range" in national forests and reserves is officially dead, state customs and statutes notwithstanding.[35]

Changes in grazing laws were also underway within open range states. Most state legislatures enacted herd district statutes that, by initiative of a local community, allowed the community to fully or partially revert to the common law inside the districts.[36] Many other types of statutes also reimposed common law fencing requirements in varying degrees and for various purposes in what had formerly been the open range.[37]

In addition, by the beginning of this century, most state courts were adopting the narrow-construction principle from *Lazarus* which held that open range statutes are effective only to modify, but not abolish common law liability.[38] The common law requires owners to "fence in" their livestock or else pay for resulting trespasses. Thereupon, western courts became engaged in the task of distinguishing protected activities under open range statutes from those subject to common law liability. For example, the Washington Supreme Court concluded that common law rules controlled where adjoining landowners jointly enclosed within an exterior boundary fence had not exercised their statu-

32. *Shannon*, 160 F. at 875.

33. 41 F. Supp. 13, 15 (E.D. Wash. 1941).

34. *Id.* at 15-16.

35. Bilderback v. United States, 558 F. Supp. 903 (D. Or. 1982); United States v. Holman, 247 F. Supp. 920 (E.D. Mo. 1965); United States v. Johnston, 38 F. Supp. 4 (S.D. W. Va. 1941); United States v. Gurley, 279 F. 874 (N.D. Ga. 1922).

36. *See, e.g.*, Easley v. Lee, 721 P.2d 215 (Idaho 1986); Lindsay v. Cobb, 627 P.2d 349 (Kan. Ct. App. 1981).

37. *See, e.g.*, Vanderwater v. Hatch, 835 F.2d 239 (10th Cir. 1987); Fuchser v. Jacobson, 290 N.W.2d 449 (Neb. 1980); Carver v. Ford, 591 P.2d 305 (Okla. 1979); Wenndt v. Latare, 200 N.W.2d 862 (Iowa 1972); Vangilder v. Faulk, 426 S.W.2d 821 (Ark. 1968); Poindexter v. May, 34 S.E. 971 (Va. 1900); Haigh v. Bell, 23 S.E. 666 (W. Va. 1895).

38. *See supra* note 24.

tory right to erect a partition fence between them.[39] The court awarded the plaintiff damages caused by defendant's trespassing livestock.[40]

For the last half-century, range issues in state courts have increasingly shifted from farmer/rancher litigation to motorist/rancher cases. These new-generation range cases typically involve claims for death or injury from vehicle accidents caused by livestock wandering onto highways.

Historically, the common law had provided a "public ways" exception to the fencing-in requirement for livestock. Unless the animals were known to possess "an unruly disposition," they were free to roam public roads at will.[41] Thus, in highway cases in western states these two different theories were effectively argued to justify judgments for defendant stockmen, both common law *and* open range law.[42]

As vehicle congestion increased, however, many state courts began to modify the common law, stating essentially, "There is no reason for exempting cattle owners from the same duty applicable to other people to use 'ordinary care or skill in the management of [their] property.'"[43] Thus, in many states the common law immunity was changed to reflect an ordinary negligence standard for stock owners—a trend increasingly followed throughout the United States.[44] Even most of the open range states now appear to require "ordinary due care" by owners of livestock with regard to the animals' presence on public highways.[45] In doing so, some courts expressly considered and rejected the applicability of their states' open range laws in vehicle-livestock collisions.[46] A few dissenting courts remain, but the

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39. Kobayashi v. Strangeway, 116 P. 461, 462 (Wash. 1911).

40. *Id.*; *see supra* note 24.

41. *See, e.g.*, Pelham v. Spears, 132 So. 886 (Ala. 1931).

42. *See, e.g.*, Bartsch v. Irvine Co., 149 Mont. 405, 427 P.2d 302 (1967).

43. Galeppi Bros. v. Bartlett, 120 F.2d 208, 210 (9th Cir. 1941) (quoting CAL. CIV. CODE § 1714).

44. George v. Perkins, 221 So. 2d 717 (Miss. 1969); Rice v. Turner, 62 S.E.2d 24 (Va. 1950); Bender v. Welsh, 25 A.2d 182 (Pa. 1942); Drew v. Gross, 147 N.E. 757 (Ohio 1925); James L. Rigelhaupt, Jr., Annotation, *Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting From Collision with Domestic Animal at Large in Street or Highway*, 29 A.L.R. 4th 431, 443-47 (1984).

45. *Galeppi Bros.*, 120 F.2d at 209 (applying California law); Carrow Co. v. Lusby, 804 P.2d 747 (Ariz. 1990); Grubb v. Wolfe, 408 P.2d 756 (N.M. 1965); Eixenberger v. Belle Fourche Livestock Exch., 58 N.W.2d 235 (S.D. 1953); Shepard v. Smith, 263 P.2d 985 (Idaho 1953); Summers v. Parker, 259 P.2d 59 (Cal. Ct. App. 1953); Jackson v. Hardy, 160 P.2d 161 (Cal. Ct. App. 1945).

46. *Carrow*, 804 P.2d at 750-54; *Grubb*, 408 P.2d at 758-60; *Galeppi Bros.*, 120

modern view that stock owners will be held to ordinary negligence duties seems to be most widely accepted.[47]

Although open range statutes remain on the books in many states, the circumstances justifying them have largely vanished in the dust of history. Erecting fences and watering stock in remote places is no longer impossible, and little chance remains of "wasting" uneaten grass. More significantly, most of the West is now in private or proprietary ownership with commensurate competing land uses. In light of these changes, legislative and judicial inroads have cut deeply into the open range. However, Montana's situation appears to be unique.

III. MONTANA RANGE LAW

A. *Before the Turn of the Century*

The early Montana Supreme Court briefly gave great deference to the concept of the open range.[48] In 1874, the court in *Smith v. Williams* interpreted the territorial Open Range Statute[49] to require complete enclosure as a prerequisite to receiving damages from trespassing stock.[50] The court insisted that a "legal fence" at the point of breach was insufficient.[51] Again, in 1889, the court affirmed a jury instruction under the Open Range Statute that if a defendant drove livestock onto plaintiff's unfenced land for pasture, *but did not do so with malice*, then the defendant must prevail in a damages action.[52]

By the close of the century, Montana's range was changing along with the rest of the country's. The 1895 legislature enacted various regulations and closures of the open range. These enactments categorically closed the range to "swine,"[53] and any "stud horse, ridgeling, or unaltered male mule or jackass over [eighteen] months . . . ."[54] The open range was closed to rams and

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F.2d at 210; *Jackson*, 160 P.2d. at 165.

47. *Compare Galeppi Bros.*, 120 F.2d at 209; *Carrow Co.*, 804 P.2d 747; *Grubb*, 408 P.2d 756; *Eixenberger*, 58 N.W.2d 235; *Shepard*, 263 P.2d 985; *Summers*, 259 P.2d 59; *Jackson*, 160 P.2d 161 *with George*, 221 So. 2d 717; *Rice*, 62 S.E.2d 24; *Bender*, 25 A.2d 182; *Drew*, 147 N.E. 757.

48. *See* Smith v. Williams, 2 Mont. 195 (1874).

49. ACTS, RESOLUTIONS AND MEMORIALS OF THE TERRITORY OF MONTANA, PASSED BY THE FIRST LEGISLATIVE ASSEMBLY § 1, at 351 (Bannack 1864) (current version at MONT. CODE ANN. § 81-4-215 (1993)).

50. *Smith*, 2 Mont. at 201.

51. *Id.*

52. Fant v. Lyman, 9 Mont. 61, 22 P. 120 (1889).

53. IV. THE CODES AND STAT. OF MONT. tit. XIV., § 1165 (1895).

54. IV. THE CODES AND STAT. OF MONT. tit. XIV., § 1163 (1895).

"he goat[s]" from August 1 to December 1.[55] Over the years, those types of restrictions multiplied. The following are all now forbidden to run at large in Montana: swine, sheep, llamas, alpacas, bison, goats,[56] "male equine animals,"[57] mixed-breed bulls, and bulls of any kind between December 1 and June 1.[58]

Over time the legislature has imposed many regulations on what was once the open range.[59] Herd district laws were enacted in 1917.[60] Owners or possessors of fifty-five percent of the land, not less than twelve square miles in size, must petition to create a district.[61] Allowing animals to run at large in a herd district is a misdemeanor.[62]

B. Open Range Cases From 1900 to 1960

Apace with a changing Montana, in 1900, the Montana Supreme Court criticized its 1889 *Fant* decision and expressly adopted the *Lazarus* principle, becoming one of the first state courts to do so.[63] *Monroe v. Cannon* applied common law strict liability principles to permit a landowner to seek damages from a sheepman who had herded his stock onto the plaintiff's land, saying:

> [A]ppellant contends that the provisions of [the Montana Open Range Statute] . . . negative the right to sue for damages, where the premises are not inclosed by a legal fence . . . . If appellant is correct, no man whose field, or pasture, or garden is not inclosed by a legal fence, is entitled to any protection under the law from the trespasses of any man who may desire to drive or herd his cattle or sheep upon it . . . . *The mistake appellant makes is in concluding that the [Montana Open Range Statute] . . . does not modify, but abrogates the rights existing under the common law.*[64]

In adopting the *Lazarus* principle, the Montana Supreme Court

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55. IV. THE CODES AND STAT. OF MONT. tit. XIV., § 1164 (1895).
56. MONT. CODE ANN. § 81-4-201 (1993).
57. MONT. CODE ANN. § 81-4-204 (1993).
58. MONT. CODE ANN. § 81-4-210 (1993).
59. *See generally* MONT. CODE ANN. §§ 81-4-201 to -220 (1993); MONT. CODE. ANN. §§ 76-16-101 to -415 (1993); *see also* 1939 Mont. Laws 554, § 26.
60. 1917 Mont. Laws 102 (current version at MONT. CODE ANN. §§ 81-4-309 to -328 (1993)).
61. MONT. CODE ANN. § 81-4-301 (1993).
62. MONT. CODE ANN. § 81-4-306 (1993).
63. Monroe v. Cannon, 24 Mont. 316, 324-26, 61 P. 863, 865-66 (1900).
64. *Id.* at 321-22, 61 P. at 864-65 (emphasis added).

applied an elementary rule of statutory construction—common law controls except when modified by statute.[65] The court held that deliberate herding of stock onto unfenced private lands was not within the scope of the Open Range Statute, and was not, therefore, insulated from common law strict liability.

Two years later, in *Beinhorn v. Griswold*,[66] the Montana Supreme Court broadened its interpretation of the *Lazarus* principle in light of the Open Range Statute. Beinhorn's cattle were grazing public range when they wandered onto Griswold's unfenced mining claim, drank from open containers of cyanide solution and, regrettably, died. At issue was the standard of care to be imposed on Griswold—was he entitled to treat the cattle as trespassers, licensees or invitees? Using the *Lazarus* principle, the court concluded that common law tort rules were not displaced by the Open Range Statute. Thus, the cattle were treated as trespassers:

> The owner is entitled to the exclusive possession of his land, whether fenced or not; and it is beyond the power of the legislature to prescribe, or of custom to create, a right in another to occupy the land or enjoy its fruits. Either written law or custom may withhold from the owner who does not fence his land a remedy for loss suffered by reason of casual trespasses by cattle which stray upon it, and may give a remedy for such trespasses to those only who inclose their land . . . . This is undoubtedly a legitimate exercise of the police power. It falls far short, however, of conferring a legal right to dispossess the nonfencing owner . . . . *The owners of domestic animals hold no servitude upon or interest, temporary or permanent, in, the open land of another, merely because it is open.*[67]

Starting with *Monroe* and *Beinhorn*, for the first sixty years of this century, the Montana Supreme Court conscientiously applied the *Lazarus* principle to open range issues. The court decided fifteen open range cases, using the common law rather than the Open Range Statute in ten of them.[68] In only two cas-

65. MONT. CODE ANN. §§ 1-1-108-109, 1-2-103 (1993); O'Fallon v. Farmers Ins. Exch., 260 Mont. 233, 244, 859 P.2d 1008, 1015 (1993); State *ex rel.* La Point v. District Court, 69 Mont. 29, 33, 220 P. 88, 89 (1923); Finlen v. Heinze, 28 Mont. 548, 563-64, 73 P. 123, 126 (1903).

66. 27 Mont. 79, 69 P. 557 (1902).

67. *Id.* at 89, 69 P. at 558 (emphasis added).

68. Thompson v. Mattuschek, 134 Mont. 500, 333 P.2d 1022 (1959); Hill v. Chappel Bros. Inc., 93 Mont. 92, 18 P.2d 1106 (1932); Herness v. McCann, 90 Mont. 95, 300 P. 257 (1931); Long v. Davis, 68 Mont. 85, 217 P. 667 (1923); Dorman v. Erie, 63 Mont. 579, 208 P. 908 (1922); Chilcott v. Rea, 52 Mont. 134, 155 P. 1114

es did the court apply the Open Range Statute and insulate stock owners from liability.[69] Generally, the court's decisions carefully distinguished conduct prohibited under common law grazing rules from actions that were permitted by the Open Range Statute. In doing so, like other states' courts, the Montana Supreme Court increasingly tended to restrict the types of conduct permitted on the open range.

In 1912, the court expanded on *Monroe* by holding that one who deliberately herds stock on unfenced range does so "at his peril" with regard to the location of boundaries between his leased range and his neighbor's land.[70] In *Herrin v. Sieben*, the plaintiff owned land in checkerboard with the defendant's federally leased range. The evidence supporting the jury verdict showed that the defendant had "depastured substantially the whole area of plaintiff's lands, and that during this time he realized no benefit from them."[71]

In 1916, the common law liability imposed upon herders of stock was expanded a step further.[72] In *Chilcott v. Rea*, the defendants were herding sheep along a public road when nightfall forced them to bed down the sheep without food or water.[73] During the night the sheep broke through a fence and consumed $7,570 worth of the plaintiff's orchard. The defendants argued that "no right to recover for depredations of this sort can be based upon ordinary negligence, but the 'complaint must either show that the lands were inclosed with a legal fence, or that the trespass was the result of the willful, intentional act of the defendants.'"[74] The supreme court disagreed, stating:

> [W]here negligence is charged to the owner of such animals, and where it is claimed by him that the nonexistence of a legal fence was a factor in the control by him of such animals, the absence of a fence or its nonlegal character might be material

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(1916); Herrin v. Sieben, 46 Mont. 226, 127 P. 323 (1912); Musselshell Cattle Co. v. Woolfolk, 34 Mont. 126, 85 P. 874 (1906); *Beinhorn*, 27 Mont at 89, 69 P. at 558; Monroe v. Cannon, 24 Mont. 316, 61 P. 863 (1900).

69. Dunbar v. Emigh, 117 Mont. 287, 158 P.2d 311 (1945); Schreiner v. Deep Creek Stock Ass'n, 68 Mont. 104, 217 P. 663 (1923). Three cases were ultimately decided on collateral issues: Thompson v. Tobacco Root Coop., 121 Mont. 445, 193 P.2d 811 (1948); Rea Bros. Sheep Co. v. Rudi, 46 Mont. 149, 127 P. 85 (1912); Clemmons v. Gillette, 33 Mont. 321, 83 P. 879 (1905).

70. *Herrin*, 46 Mont. at 233, 127 P. at 327.

71. *Id.* at 229, 127 P. at 326.

72. *Chilcott*, 52 Mont. at 138, 155 P. at 1115.

73. *Id.* at 139, 155 P. at 1115.

74. *Id.* 138, 155 P. at 1115.

> upon the question of his negligence; but where animals are held in herd . . . and they invade such property through either *the willful act or the negligence* of their owner . . . such invasion is an actionable trespass, and the want of a legal fence is not material.[75]

Monroe, *Herrin*, and *Chilcott* established the principle that herding stock on unfenced land would give rise to common law damages if the injury resulted from a willful act, negligence, or an error in ascertaining ownership boundaries. Thereafter, the Montana Supreme Court began to impose common law liability on various other open range activities, even though no herding was involved.

In 1922, the court held that the Open Range Statute was intended only to avoid liability for stock running on the public range, but not to apply in disputes between adjoining owners whose lands are wholly enclosed from the public range.[76] In *Dorman v. Erie*, Mr. Erie's half-mile long fence was located thirty feet inside of the boundary line with his neighbor. Erie frequently opened the gate in this fence, thereby allowing his cattle to graze on the thirty-foot strip as well as his neighbor's adjoining pasture. The supreme court imposed liability on Eire, noting that *Monroe v. Cannon* "declared that the purpose of [the Open Range Statute] was to condone trespasses committed by animals lawfully running at large, and that the common-law rule is left otherwise unchanged."[77]

Then, in 1932, the court in *Hill v. Chappel Bros. Inc.*, expressly followed *Lazarus* and prohibited overstocking of the range.[78] In that case, the defendants and the plaintiffs had both leased vast tracts of open range on the Fort Belknap Indian Reservation. Defendants, however, ran several thousand more horses on the range than their share would support. The court concluded: "[F]ence laws do not furnish immunity to one who, in disregard of property rights, turns loose his cattle under circumstances showing that they were intended to graze upon the land of another."[79]

Likewise, in 1959, in *Thompson v. Mattuschek*, the court

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75. *Id.* at 138-39, 155 P. at 1115 (emphasis added).

76. Dorman v. Erie, 63 Mont. 579, 583-84, 208 P. 908, 909 (1922) (citing cases from the following open range states: Washington, Utah, Indiana and California).

77. *Id.* at 585, 208 P. at 909.

78. 93 Mont. 92, 101, 18 P.2d 1106, 1109 (1932).

79. *Hill*, 93 Mont. at 101, 18 P.2d at 1109 (citing Light v. United States, 220 U.S. 523, 527 (1910)).

held that tearing down the partition fence between neighbors was beyond the protection of the Open Range Statute where, as a result, defendant's cattle grazed on plaintiff's land.[80] Mattuschek's and Thompson's land was wholly enclosed by an external perimeter fence.[81]

Only two of the fifteen open range cases decided by the Montana Supreme Court between 1900 and 1960 invoked the immunities of the Open Range Statute.[82] In the first case, decided in 1923, the court explained that merely using line-riders for the general purpose of keeping cattle under control did not automatically impose common law liability for straying cattle.[83] The court ruled that to be held liable, the stockowner must act negli-

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80. 134 Mont. 500, 509, 333 P.2d 1022, 1027 (1959).

81. By statute in Montana, fences are of two basic kinds: personal and partition. Personal fences are built entirely on one persons property and at one's personal expense. Partition fences are built on, or as directly adjoining property boundaries as feasible (bluffs, perhaps interfering). *See* Montgomery v. Gehring, 145 Mont. 278, 400 P.2d 403 (1965). The expense of building and maintaining partition fences will, under certain circumstances, be shared. Regarding partition fences, any agreement between the parties controls. The statutes only apply if there is no agreement. *See Thompson*, 134 Mont. at 508, 333 P.2d at 1026.

Absent an agreement, statutes provide that the construction and maintenance of partition fences between neighbors, both of whom enclose their lands, shall be shared equally. MONT. CODE ANN. § 70-16-206 (1993). Likewise, where externally *fenced* lands are shared in common between adjoining landowners, and one owner wishes to end the common range, he can on six months notice, compel the adjoining owner to build half the fence or share half the cost of construction. MONT. CODE ANN. § 70-16-208 (1993).

Where the perimeter of the common pasture *is not fenced*, if one party fences his land, he may erect a partition fence between him and his neighbor. But the neighbor will not be required to pay for half, *unless and until* the neighbor chooses to fence his perimeter and thereby makes use of the partition fence previously erected. MONT. CODE ANN. § 70-16-207 (1993); *see, e.g.*, Sparks v. Halseth, 154 Mont. 395, 465 P.2d 100 (1970).

The reverse is also true. Where a partition fence divides properties, both of which are fenced on the perimeter, one party, on six months notice, may decide to remove his half of the partition fence, unless his neighbor buys him out. The buyout means paying half the value of the fence. MONT. CODE ANN. § 70-16-210 (1993). *This only works where the initiating neighbor also removes or destroys a substantial part of his perimeter fence. See* MONT. CODE ANN. § 70-16-207 (1993).

Where a legitimate partition fence exists, and the parties are jointly responsible for it, a neglect to repair by any party empowers his neighbor to repair it as his expense on 5 days notice or to replace it on 60 days notice. MONT. CODE ANN. § 70-16-209 (1993). Each landowner is responsible for maintaining the "right" half of the fence as he views it from his property. Where one owner's land is completely enclosed by the others, then they are each to maintain half of the fence to the right of the northeasterly corner as each views it. MONT. CODE ANN. § 70-16-205 (1993).

82. Dunbar v. Emigh, 117 Mont. 287, 158 P.2d 311 (1945); Schreiner v. Deep Creek Stock Ass'n, 68 Mont. 104, 217 P. 663 (1923).

83. *Schreiner*, 68 Mont. at 108-12, 217 P. at 664-66.

gently or willfully in causing the animals' presence on the plaintiff's land.[84]

Then, in 1945, the court held that when there was no evidence of willfulness or negligence, "the mere knowledge or expectation by one who turns cattle loose in a place where he has a right to release them that they may or probably will wander upon the lands of another . . . is not alone sufficient to constitute willful trespass."[85] The court interpreted the Open Range Statute to insulate such a defendant from injunctive relief as well as damages.[86] Notably, a substantial part of the defendant's land was wholly surrounded by the plaintiff's, and the court pointed out that the injunction remained valid to the extent that "there were willful acts or negligence on [defendant's] part in causing the livestock to enter plaintiff's lands."[87] Both *Schreiner v. Deep Creek Stock Ass'n* and *Dunbar v. Emigh* were careful to discuss and distinguish the application of the *Lazarus* principle.[88]

For sixty years, therefore, the Montana Supreme Court was largely consistent in its treatment of open range issues. Accidental trespass by livestock at large was insulated by the Open Range Statute from liability for damages. However, numerous other trespasses at common law were not insulated—herding of stock willfully, negligently, or in error as to land boundaries. In addition, overstocking, willful fence destruction and any turning loose of one's livestock "under circumstances showing that they were intended to graze upon the land of another"[89] were all subject to common law damages.

C. The Modern Court Adopts the Myth

The year 1964 marked a turning point for Montana range law. Thereafter, the Montana Supreme Court departed altogether from its careful scholarship that for six decades had maintained a balance between open range and common law principles. The change might be attributed to new members on the court. Also, by then issues of range law occupied less space on

84. *Id.*
85. *Dunbar*, 117 Mont. at 292, 158 P.2d at 313.
86. *Id.* at 294, 158 P.2d at 314.
87. *Id.* at 293, 158 P.2d at 314.
88. *Id.* at 291-94, 158 P.2d at 313-14; *Schreiner*, 68 Mont. at 109-12, 217 P. at 664-66.
89. Thompson v. Mattuschek, 134 Mont. 500, 508, 333 P.2d 1022, 1026-27 (1959) (quoting *Dunbar*, 117 Mont. at 291, 158 P.2d at 313).

the jurisprudential horizon which possibly produced less incentive for careful scholarship. For whatever reason, beginning in 1964, the Montana Supreme Court ceased even to consider the *Lazarus* principle in any of its decisions and embarked on what can fairly be described as a wholesale embrace of the western myth of the open range.[90]

Another change happened in the 1960's. As in other courts in the nation,[91] most Montana open range cases shifted to livestock accidents on highways[92] or other livestock tort situations.[93] Only one case considered a fairly traditional open range issue.[94]

In the first case of this era, decided in 1964, an electrical substation was fenced five feet inside the property boundary.[95] The power company sprayed a poisonous chemical along the base of the fence solely on its own land. The plaintiff's cattle, which were fenced into the adjoining field but not separated from the substation fence, died after consuming the poisoned grass. The supreme court affirmed a jury verdict on the basis of a duty to warn the cattle's owner. The court's opinion discussed neither the *Lazarus* principle nor common law tort principles (which arguably would have applied under the *Lazarus* principle). Instead, with a lengthy factual discussion, the court stated that defendant should be held to the standard of care of an "ordinary prudent person," and distinguished *Beinhorn v. Griswold* "on its facts."[96] The *Hopkins* decision could probably be justified under common law principles as holding that the plaintiff's cattle benefitted from an implied license to graze up to the substation fence,

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90. No Montana Supreme Court case after 1945 has cited either *Lazarus* or *Monroe*. *Compare infra* notes 92-93 *with Dunbar*, 117 Mont. at 292, 158 P.2d at 313. However, in 1959, the court discussed and applied the *Lazarus* principle, without citing it. *Thompson*, 134 Mont. at 508-09, 333 P.2d at 1026-27.

91. *See supra* note 44 and accompanying text.

92. Yager v. Deane, 258 Mont. 453, 853 P.2d 1214 (1993); Williams v. Selstad, 235 Mont. 137, 766 P.2d 247 (1988); Siegfried v. Atchison, 219 Mont. 14, 709 P.2d 1006 (1985); Ambrogini v. Todd, 197 Mont. 111, 642 P.2d 1013 (1982); Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 500 P.2d 397 (1972); Jenkins v. Valley Garden Ranch, Inc., 151 Mont. 463, 443 P.2d 753 (1968); Bartsch v. Irvine Co., 149 Mont. 405, 427 P.2d 302 (1967).

93. State *ex rel.* Martin v. Finley, 227 Mont. 242, 738 P.2d 497 (1987) (addressing livestock as a public nuisance); Hopkins v. Ravalli County Elec. Coop., 144 Mont. 161, 395 P.2d 106 (1964) (addressing premises liability).

94. Montgomery v. Gehring, 145 Mont. 278, 283, 400 P.2d 403, 406 (1965). Although the case principally involved boundary definitions in a deed, the Montana Supreme Court *sua sponte* added a discussion on open range fencing.

95. *Hopkins*, 144 Mont. at 163, 395 P.2d at 109.

96. *Id.* at 165, 395 P.2d at 108.

and therefore the plaintiff was owed the duties due to a licensee. The decision was so vague it is difficult to discern the court's reasoning.

In 1967, the court considered its first automobile/livestock collision case. The wife of the plaintiff was killed in an auto collision with a black horse that wandered onto the highway in open range at night.[97] The plaintiff argued that the defendant had a tort duty of ordinary "due care" arising from both common law and statute.[98] A $64,000 jury verdict for the husband was reversed in an opinion that quoted the *Smith*, *Beinhorn*, *Schreiner*, *Thompson*, and *Montgomery* cases for the general proposition "that Montana remains an open range state" and "the owner of livestock has no duty to prevent the livestock from wandering."[99] The Montana Supreme Court, therefore, held that the defendant had "no duty" in tort or otherwise to keep his horse off the highway.[100] The court did not further analyze open range issues. It made no comment on the holding of *Beinhorn* which applied the *Lazarus* principle.[101] Nor did the court note that *Schreiner* had been partly repudiated by *Herness*, precisely on the question of whether "negligence" removed a stock owner from the protection of the Open Range Statute.[102] Without mention or discussion, the court ignored the authorities cited by the plaintiff from the growing number of states that impose ordinary negligence duties on the owners of stock involved in highway crashes.[103]

Thereafter, in six subsequent highway cases the Montana Supreme Court reflexively cited and applied the *Bartsch* holding without further analysis of open range issues.[104] The court's opinions propounded wide generalities such as, "An open range designation implies that an owner is not liable for his wandering

97. Bartsch v. Irvine Co., 149 Mont. 405, 407, 427 P.2d 302, 303 (1967); Respondent's Brief at 1-2, 18-37, *Bartsch* (No. 11252).

98. *Bartsch*, 149 Mont. at 407, 427 P.2d at 303.

99. *Id.* at 407-409, 427 P.2d at 304-305.

100. *Id.* at 409, 427 P.2d at 305.

101. Beinhorn v. Griswold, 27 Mont. 79, 89-90, 69 P. 557, 558-59 (1902).

102. Herness v. McCann, 90 Mont. 95, 102, 300 P. 257, 259 (1931).

103. *See supra* note 45 and accompanying text; *see also* Respondent's Brief at 18-37, *Bartsch* (No. 11252).

104. Yager v. Deane, 258 Mont. 453, 458-60, 853 P.2d 1214, 1217-19 (1993); Williams v. Selstad, 235 Mont. 137, 139, 766 P.2d 247, 248 (1988); Siegfried v. Atchison, 219 Mont. 14, 16, 709 P.2d 1006, 1007 (1985); Ambrogini v. Todd, 197 Mont. 111, 119, 642 P.2d 1013, 1018 (1982); Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 78, 500 P.2d 397, 400 (1972); Jenkins v. Valley Garden Ranch, Inc., 151 Mont. 463, 465, 443 P.2d 753, 754-55 (1968).

livestock."[105] Most recently the court hailed, "[O]ur consistent refusal to impose a duty on . . . livestock owners relative to fencing livestock off roadways . . . ."[106]

In two highway cases, the court did rule favorably for plaintiffs injured by collisions with livestock. But in neither case did the court analyze the *Lazarus* principle nor otherwise integrate its decisions with earlier ones. In 1972, in *Sanders v. Mount Haggin Livestock*, the court concluded: "No one will dispute that Montana is an open range state. This Court has many times so ruled. But, as with every rule of law, definite exceptions do exist. The exception to the open range rule exists when the animals in question are in charge of herders."[107] Unfortunately, the court in *Sanders* apparently failed to comprehend either the source of the exception it applied,[108] or its scope.[109] Nor did the court correctly analyze the common law duties that consequently result.[110] At common law, even as modified by cases in majority courts, one is entitled to herd livestock on public roadways, but in doing so the herdsman must exercise due care.[111]

In 1982, the court again reflexively followed *Bartsch*, and pronounced Montana to be an open range state. However, the court reversed summary judgment for the defendant because a 1974 statutory amendment, that forbade the negligent release of livestock onto primary highways, gave rise to an issue of fact.[112] That statute was enacted in 1951 to forbid "willful" release of stock on fenced highways,[113] then amended to impose a negligence standard on the stock owner.[114] Even today, howev-

105. *Ambrogini*, 197 Mont. at 119, 642 P.2d at 1018.

106. *Yager*, 258 Mont. at 460, 853 P.2d at 1219.

107. 160 Mont. at 78, 500 P.2d at 400.

108. Monroe v. Cannon, 24 Mont. 326, 61 P. 863 (1900) *following* Lazarus v. Phelps, 152 U.S. 81 (1893); *see supra* note 63 and accompanying text.

109. *Sanders*, 160 Mont. at 78, 500 P.2d at 400. *Sanders* suggests that any animals in the charge of herders are within the exception, even though Schreiner v. Deep Creek Stock Ass'n., 68 Mont. 104, 217 P. 663 (1923), and Herness v. McCann, 90 Mont. 95, 300 P. 257 (1931), hold otherwise, depending on circumstances.

110. *Sanders*, 160 Mont. at 78, 500 P.2d at 400.

111. *See supra* note 45 and accompanying text.

112. Ambrogini v. Todd, 197 Mont. 111, 119-21, 642 P.2d 1013, 1018-19 (1982) (citing MONT. CODE ANN. §§ 60-7-201 to -202 (1993)).

113. 1951 Mont. Laws 157-58 (codified as amended at REV. CODE MONT. § 32-1018 (1947) (superseded)) (crime of using United States highways for pasturage or running of livestock).

114. 1974 Mont. Laws 872 (codified as amended at REV. CODE MONT. § 32-21-176 -177 (1974) (superseded) (current version at MONT. CODE ANN. § 60-7-201 (1993)) (revision of laws relating to the department of highways).

er, the statute is subject to broad exclusions,[115] and the legislature, perhaps well-representing its ranching constituency, has put most of the burden for fencing highways onto the state.[116] These legislative changes, even though significant, do not address a myriad of situations; such as liability for escaping stock, city and county road issues, and ordinary nuisance.

In 1987, the Montana Supreme Court considered one of these issues in a case brought by the Mineral County Attorney for statutory public nuisance against stock owners whose animals were roaming at will on public roads and private land.[117] The court quashed an injunction against the stock owners. Once again, the court reflexively followed *Bartsch* and refused to apply the public nuisance statute in the face of the open range custom.[118] The court made no mention of *Lazarus*, *Monroe*, or the Open Range Statute itself.[119]

A more scholarly opinion would have affirmed the district court. For example, the supreme court could easily have reconciled the two seemingly inconsistent statutes since the Open Range Statute forecloses only "damages." The Open Range Statute says nothing about preempting other statutory remedies such as nuisance. Alternatively, the court could have applied the *Lazarus* principle to affirm the injunction as a legitimate exercise of public nuisance law—a common law set of principles that survive the Open Range Statute.

IV. CONCLUSION

The open range remains a charming myth of the old West. But Montana has changed since the enactment of the Open Range Statute 130 years ago. The Montana Supreme Court so declared in *Ambrogini* in 1982, saying, "The open range tradition has become increasingly eroded over the years as a greater number of motorists have appeared on Montana's roads and highways."[120] Similarly, in a 1967 plaintive concurrence, Justice John C. Harrison cried out for changes to the open range

115. MONT. CODE ANN. § 60-7-202 (1993).

116. MONT. CODE ANN. §§ 60-7-101 to -103 (1993) (requiring the Department of Transportation to erect fences in most new or reconstructed areas of the state highway system).

117. State *ex rel.* Martin v. Finley, 227 Mont. 242, 245, 738 P.2d 497, 499 (1987).

118. *Id.*

119. MONT. CODE ANN. § 81-4-215 (1993).

120. Ambrogini v. Todd, 197 Mont. 111, 119, 642 P.2d 1013, 1018 (1982).

law of Montana.[121] Still, the modern supreme court has all but abdicated power on open range questions by reflexively repeating the myth. In so doing, the court abandons the issue to the legislature's periodic tinkering.

Today, however, public policy needs reason rather than romance. Motorists are maimed or die in collisions with livestock whose owners are not required to fence them off highways.[122] Roaming livestock belonging to a single owner can create a public nuisance for an entire community.[123] These situations need not be condoned by law. The Montana Supreme Court should return to its historically narrow construction of open range law by re-embracing its own sixty years of authority from 1900 to 1960. The court should follow the lead of other western state courts that impose a duty of ordinary care on stockowners.

Unfortunately, since 1964, the Montana Supreme Court's unequivocal embrace of the open range concept makes it doubtful the court will be receptive to a revival of the *Lazarus* principle from *Monroe v. Cannon*. Doing so would require the court to limit, criticize, or outright overrule many recent decisions.[124] Nonetheless, the court has corrected its errors in the past;[125] the court should do so again.

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121. Bartsch v. Irvine Co., 149 Mont. 405, 410-11, 427 P.2d 302, 305 (1967) (Harrison, J., concurring).

122. *See, e.g.*, Yager v. Deane, 258 Mont. 453, 853 P.2d 1214 (1993); *Bartsch*, 149 Mont. 405, 427 P.2d 302.

123. *See, e.g.*, State *ex rel.* Martin v. Finley, 227 Mont. 242, 738 P.2d 497 (1987).

124. Williams v. Selstad 235 Mont. 137, 766 P.2d 247 (1988); *State ex rel. Martin*, 227 Mont. 242, 738 P.2d 497; Siegfried v. Atchison, 219 Mont. 14, 709 P.2d 1006 (1985); Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 500 P.2d 397 (1972); Jenkins v. Valley Garden Ranch, Inc., 151 Mont. 463, 443 P.2d 753 (1968); *Bartsch*, 149 Mont. 405, 427 P.2d 302.

125. With regard to determining titles in navigable rivers, for purposes of distinguishing the doctrines of avulsion from accretion and reliction, the Montana Supreme Court redefined the term avulsion consistently with other authorities and repudiated its earlier holding. Montana Dep't of State Lands v. Armstrong, 251 Mont. 235, 238, 824 P.2d 255, 257-58 (1992) (criticizing McCafferty v. Young, 144 Mont. 385, 397 P.2d 96 (1964)).

THE INDIAN CHILD WELFARE ACT OF 1978: A MONTANA ANALYSIS

INDIAN CHILDREN ONCE YOUNG FOREVER INDIAN[1]

Debra DuMontier-Pierre

I. INTRODUCTION

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) to prevent the unwarranted breakup of Indian families and to give Indian tribes a substantial role in matters concerning custody of Indian children.[2] Through ICWA, Congress declared a national policy to keep Indian children with their families, to defer to tribal jurisdiction in child custody proceedings, and to place Indian children who have been removed from their homes with extended family members or within their own Indian tribe.[3] To counter cultural biases, ICWA establishes minimum federal substantive and procedural requirements that state courts must follow in child custody proceedings involving Indian children.[4]

Even though Congress enacted ICWA seventeen years ago, state courts, attorneys and agencies still ignore the letter and the spirit of ICWA.[5] For example, the Idaho Supreme Court recently reversed the lower court's finding that ICWA did not apply in a child custody proceeding involving an Indian child. The court remanded the case and ordered the lower court to apply ICWA.[6] In that case, the mother arranged for placement of her Indian child through an adoption agency.[7] The agency placed the day-old baby with a non-Indian couple, the Swensons. Even though the adoptive parents notified the Indian tribe of the action to terminate the father's rights,[8] apparently the mother

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1. THEY ARE YOUNG ONCE BUT INDIAN FOREVER: A SUMMARY AND ANALYSIS OF INVESTIGATIVE HEARINGS ON INDIAN CHILD WELFARE (Joseph A. Myers ed., 1981).

2. Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901-1963) (1988)).

3. 25 U.S.C. § 1902 (1988).

4. 25 U.S.C. §§ 1901-1963 (1988).

5. *See, e.g., In re* J.W., 498 N.W.2d 417 (Iowa Ct. App. 1993) (finding no compliance with ICWA for failure to give notice to tribe).

6. *In re* Baby Boy Doe, 849 P.2d 925, 933 (Idaho 1993), *cert. denied* 114 S. Ct. 173 (1993).

7. *Baby Boy Doe*, 849 P.2d at 927.

8. 25 U.S.C. § 1911(c) (1988) (guaranteeing right of an Indian tribe or custodian to intervene in a child custody proceeding of Indian child); 25 U.S.C. § 1912(a)

and the adoptive parents delayed notifying the father and Indian tribe of the child's birth and subsequent adoption proceedings.[9] The Indian tribe immediately moved to intervene,[10] and sought placement of the Indian child with an extended family member as mandated by ICWA.[11] Despite the Indian family placement preference required by ICWA, the Indian child remained with the Swensons throughout the four-year court battle.

In *In re Baby Boy Doe*, the adoption agency and the attorney for the non-Indian couple ignored ICWA, and the trial court attempted to circumvent the Act. The court's holding in that case demonstrates that ignoring the requirements of ICWA prolongs the custody dispute and promotes delay which is detrimental to all parties.[12] Furthermore, it fosters public misunderstanding about the policy of ICWA and the Indian tribe's role in seeking to protect Indian children.[13]

The United States Supreme Court has decided one case regarding ICWA.[14] Still, no uniform application of ICWA exists on a national level. Numerous state decisions interpreting ICWA have resulted in confusion and inconsistency in the application of ICWA.[15] This article concentrates on Montana's reaction and response to ICWA. Part II provides a brief background on the necessity for the enactment of ICWA. Part III examines the applicability of ICWA and the judicially created exception attempting to avoid application of ICWA. Part IV discusses the dual jurisdictional scheme of ICWA and the sole United States Supreme Court opinion interpreting ICWA.

(1988) (requiring party seeking termination of parental rights to notify parent, custodian or Indian tribe).

9. Robert J. McCarthy, Swenson v. Oglala Sioux Tribe, 1 NATIVE AM. BAR ASS'N NEWSLETTER at 9, (1994).

10. *Baby Boy Doe*, 849 P.2d at 928.

11. *Id.*

12. *Id.*; *see also In re* M.R.D.B., 241 Mont. 455, 787 P.2d 1219 (1990) (transferring jurisdiction to Indian tribe two years after tribe intervened since the Indian child was ward of the tribal court).

13. Lisa Morris, *Welfare Act Fosters Racist Action*, LAKE COUNTY LEADER (Polson, Mont.), Nov. 18, 1993, at 5A. The first paragraph states:

> In Idaho last month, a child was taken from his parents. Mr. and Mrs. Leland Swenson of Nampa, Idaho, lost their child to the Oglala Sioux tribe. The Indian Child Welfare Act prevailed again. . . . But every time that I hear about another child being taken from a home that he is happy with, and placed in a home with "his" people, I get sick to my stomach.

Id.

14. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (affirming the intent and purposes of the ICWA).

15. CRAIG, J. DORSAY ET AL 1992 UPDATE TO THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES MANUAL 1 (1992)

The latter sections are devoted to Montana. Part V analyzes Montana child custody proceedings involving Indian children, before and after the enactment of ICWA. Part VI examines Montana's legislative response to ICWA. Part VII examines the Confederated Salish and Kootenai Tribes' commitment to implement ICWA. In conclusion, Part VIII finds that ICWA is in the best interest of the Indian child, that the tribal court system is the best forum to determine Indian child custody issues, and that ICWA is a law that should be followed, not ignored.

II. BACKGROUND

> The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.[16]

The ICWA became necessary to counteract the detrimental effects of past federal and state policies dealing with Indian tribes. The federal Indian policy of assimilation[17] and termination[18] nearly destroyed the Indian family. In 1968, the Association on American Indian Affairs (AAIA) conducted a survey of Indian child custody problems in states with large Indian populations.[19] The AAIA reported that Indian children were "removed from their families and placed in adoptive care, foster care, special institutions, and federal boarding schools at rates grossly disproportionate to non-Indian [children]."[20] After four years of investigative hearings,[21] Congress found an alarmingly high percentage of Indian families separated by the unwarranted removal of their children.[22] Additionally, the states' failure to

16. William Byler, *The Destruction of American Indian Families*, *in* THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 1 (Steven Unger ed., 1977).

17. The General Allotment Act of 1887, Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 (1988)) (allotting individual Indians plots of land attempting to assimilate tribal members into mainstream of American culture).

18. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 229-51 (3d ed. 1993) (describing Termination Period (1945-1961), an attempt to end trust relationship of the federal government with Indian tribes and subject Indian tribes to state law).

19. *See* CRAIG J. DORSAY, THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES MANUAL 34 (1984).

20. Steven Unger, *Preface* to THE DESTRUCTION OF AMERICAN INDIAN FAMILIES at iii (Steven Unger ed., 1977).

21. *See* Dorsay, *supra* note 19, at 268 (listing various legislative history references). For more information on legislative hearings, treatises and law review articles, see Mary L. Vanderpan, *In Re D.L.L. & C.L.L., Minors: Ruling on the Constitutionality of the Indian Child Welfare Act*, 26 S.D. L. REV. 68 n.6 (1981).

22. 25 U.S.C. § 1901 (1988). This code section provides as follows:

recognize the unique values of Indian culture contributed to the removal of Indian children from their homes.[23]

Indian children adopted into non-Indian homes encounter serious adjustment problems in adolescence.[24] Studies indicate that Indian children placed in non-Indian homes have significant social problems including a high rate of suicide and substance abuse.[25] In 1974, the chairman from the Winnebago Tribe testified at an ICWA hearing:

> I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that is A-1 in the state of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—
> (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the culture and social standards prevailing in Indian communities and families.

23. 25 U.S.C. § 1901(5) (1988). *See* Dorsay, *supra* note 19, at 34; Charles Horejsi et al., *Reactions by Native American Parents to Child Protection Agencies: Cultural and Community Factors*, LXXI CHILD WELFARE 329 (July-Aug. 1992).

24. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989).

25. Donna Goldsmith, *There is Only One Child, and Her Name is Children*, 36 FED. B. NEWS & J. 446, 449 (1989).

think . . . destroy him.[26]

Congress enacted ICWA because it found that Indian children raised in non-Indian families lose ties with their tribal community, risking identity problems and alienation from both worlds.[27]

III. THE APPLICABILITY OF ICWA

The purpose of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ."[28] Some of ICWA's safeguards include: notice of the proceedings to the parent and Indian tribe;[29] appointment of counsel;[30] an opportunity for the Indian tribe to intervene and request transfer of the proceeding to tribal court;[31] requirement of proof beyond a reasonable doubt before terminating parental rights;[32] and preferred placement of the child with an Indian family.[33]

All too often, dire consequences result when the applicability of ICWA goes unrecognized. The child's parent, custodian or Indian tribe may petition the court to invalidate a child custody proceeding that violates ICWA.[34] In addition, if an attorney fails to follow the requirements of ICWA, the proceeding may result in an invalid proceeding and a malpractice action.[35] Moreover, a violation of ICWA may result in civil tort liability if an individual, acting under the color of state law, violates another person's federal rights.[36] Even before a child custody proceeding is filed in court, a caseworker or attorney should determine whether ICWA applies in the proceeding so that the child and the tribe receive the minimum federal protection.

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26. S. REP. NO. 597, 95th Cong., 2d. Sess. 43 (1977).

27. Irving N. Berlin, *Anglo Adoptions of Native Americans: Repercussions in Adolescence*, AMERICAN ACADEMY OF CHILD PSYCHIATRY 387 (1978).

28. 25 U.S.C. § 1902 (1988).

29. 25 U.S.C. § 1912(a) (1988).

30. 25 U.S.C. § 1912(b) (1988).

31. 25 U.S.C. § 1911 (1988).

32. 25 U.S.C. § 1912(f) (1988).

33. 25 U.S.C. § 1915(a) (1988).

34. 25 U.S.C. § 1914 (1988).

35. Doe v. Hughes, 838 P.2d 804 (Alaska 1992) (holding that even though adoption decree was affirmed, law firm's failure to comply with terms of ICWA was malpractice).

36. 42 U.S.C. § 1983 (1988). *See also* B.J. Jones, *Potential Federal Court Remedies for ICWA Violations*, Address Before the Indian Law Conference, Albuquerque, New Mexico (Apr. 7, 1994), *in* FED. B. ASS'N 331, 334.

A. The Two-Step Analysis

To satisfy the purpose and requirements of ICWA, adoption agencies, practitioners, social workers and courts of Montana should learn to recognize an ICWA case. An ICWA case has two pre-requisites: 1) a child custody proceeding, and 2) an Indian child. First, ICWA defines a child custody proceeding to include foster care placement,[37] a termination of parental rights,[38] a pre-adoptive placement,[39] or an adoptive placement.[40] The ICWA explicitly excludes divorce proceedings and juvenile criminal proceedings.[41] Second, the child involved must be an Indian child as defined by ICWA. An "Indian child" means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[42] The Indian tribe's determination whether a child is a member of that tribe is conclusive.[43] Membership in an Indian tribe does not require enrollment of the child[44] because an Indian tribe may recognize other criteria for membership.[45] In addition, a state court may apply ICWA prior to the determination of the tribe that the child is eligible for membership.[46] A state court is deemed notified that an Indian child is involved whenever informed of such by any party to the case.[47]

Despite the clear guidelines, however, state courts still violate ICWA. For example, in *In re Baby Boy Doe*, even though the

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37. 25 U.S.C. § 1903(1)(i) (1988).
38. 25 U.S.C. § 1903(1)(ii).
39. 25 U.S.C. § 1903(1)(iii).
40. 25 U.S.C. 1903(1)(iv).
41. 25 U.S.C. § 1903(1).
42. 25 U.S.C. § 1903(4).
43. *In re* Junious M., 193 Cal. Rptr. 40, 44 (Cal. App. 1983).
44. *Id. But see In re* J.L.M., 451 N.W.2d 377 (Neb. 1990) (holding membership and enrollment synonymous).
45. *See, e.g.*, THE LAW AND ORDER CODE OF THE CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBES OF THE FLATHEAD INDIAN RESERVATION, MONTANA, Ch. VI, § 1(6)(o) (1986) ("*Indian youth or Indian child*' means a child of Indian descent who is either enrolled or enrollable in an Indian tribe, band, community or who is a biological descendant of an enrolled member and has significant contacts or identification with an Indian community.").
46. *In re* Baby Boy Doe, 849 P.2d 925, 931 (Idaho 1993). The party asserting the applicability of the ICWA has the burden of producing the necessary evidence for the trial court to make this determination. *Id.*
47. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (1979) [hereinafter BIA Guidelines]. In 1979, the BIA published the Guidelines for State Courts providing interpretations and assistance in implementing and applies the ICWA. *Id.* at 67,584.

child involved was one-half Indian blood quantum, the trial judge ruled that ICWA did not apply because the child was not an "Indian child."[48] The child's tribe appealed the determination of the trial court. The appellate court found that the Indian tribe's appeal was frivolous and ordered the tribe to pay $8,500 in attorney fees.[49] As discussed earlier, the Idaho Supreme Court reversed the "Indian child" determination finding the evidence presented satisfied ICWA and the federal guideline definition of an Indian child.[50] The attitude of the lower court toward the Indian tribe's challenge illustrates the indifference and disrespect Indian tribes encounter when seeking to enforce ICWA's mandates.

B. Existing Indian Family Exception

Courts in some states have created judicial exceptions to avoid the mandates of ICWA,[51] even though the plain language of the Act requires only two prerequisites to trigger application of ICWA.[52] In *In re Baby Boy Doe*, the trial court adopted the "existing Indian family" test to avoid application of ICWA.[53] The trial court reasoned that ICWA only applies when a child custody proceeding involves an Indian child who has been removed from an existing Indian family.[54] The trial court held that ICWA did not apply because Baby Boy Doe lived with the non-Indian adoptive couple since his birth, had never lived in the Indian community, and had never been exposed to Indian cul-

48. *Baby Boy Doe*, 849 P.2d at 929. The Tribe's enrollment director advised the court that membership could not be determined because the birth certificate was missing from child's application. *Id.* at 930.

49. *Baby Boy Doe*, 849 P.2d at 929.

50. *Id.* at 931-34. The evidence included the Tribe's requirements for enrollment, the finding that the father was one of the child's parents, and that the father owned land on the reservation which established the child's eligibility for membership with the Tribe. *Id.*

51. *In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982); *see*, Toni H. Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 464 (1993) (analyzing "existing Indian family" exception and theory that judicially created exception undermines the ICWA).

52. 25 U.S.C. § 1903 (1988).

53. *Baby Boy Doe*, 849 P.2d at 928.

54. *Id.*; *see also Baby Boy L.*, 643 P.2d at 175; *In re* S.C. & J.C., 833 P.2d 1249, 1253 (Okla. 1992) (relying on existing Indian family exception to refuse to apply ICWA to father's efforts to invalidate adoption, and supporting judicially created exception with the failed 1987 amendment to the ICWA that would have overruled the exception).

ture.[55]

Reversing the lower court, the Idaho Supreme Court refused to adopt the existing Indian family exception.[56] The Idaho Supreme Court concluded that although other states have applied the Indian family requirement, the United States Supreme Court did not uphold this requirement.[57] Similarly, in another case involving Montana Indian children, the Illinois Court of Appeals refused to adopt the existing Indian family exception and transferred a child custody proceeding to the Fort Peck Tribal Court in Montana.[58] The Illinois appellate court reasoned that the emphasis of ICWA is not only on the child's past and present ties to the Indian community, but also on whether such ties might be established in the future.[59] Similarly, other state courts should reject the "existing Indian family" exception and require adoption agencies, state officials, and social workers to faithfully follow the mandates of ICWA.[60]

IV. JURISDICTION

After finding ICWA applies in a case, the court will next address the jurisdiction issue. The heart of ICWA is the dual jurisdictional scheme based on the domicile of the Indian child.[61] Seeking to address the unwarranted separation of Indian families, ICWA favors tribal court jurisdiction. Still, the state court determines the residence and domicile of the child, a major factor in the determination of jurisdiction.[62]

A. Exclusive or Concurrent Jurisdiction

First, reaffirming the role of the Indian tribe, the ICWA grants the tribal court exclusive jurisdiction in a child custody proceeding involving an Indian child domiciled on the reservation or who is a ward of the tribal court regardless of domicile.[63]

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55. *Baby Boy Doe*, 849 P.2d at 928.
56. *Id.* at 931-32.
57. *Id.* at 931. *See also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (holding that twin babies immediately placed for adoption after birth, who never lived with an Indian family or returned to their Indian community, did not render the ICWA inapplicable).
58. *In re* Adoption of S.S., 622 N.E.2d 832 (Ill. App. Ct. 1993).
59. *Id.* at 840.
60. Davis, *supra* note 52, at 495-96.
61. *Holyfield*, 490 U.S. at 36; 25 U.S.C. § 1911(a) (1988).
62. BIA Guidelines, *supra* note 47, at 67,584; 25 U.S.C. § 1911 (1988).
63. 25 U.S.C. § 1911(a) (1988). The statute provides an exception when jurisdic-

Second, ICWA allows concurrent jurisdiction between tribal court and state court if the Indian child is not domiciled on the reservation.[64] Upon petition of either the parent, the Indian custodian or the child's Indian tribe, the state court must transfer the proceeding to tribal court.[65] However, ICWA provides three exceptions to the preferred jurisdiction of tribal court. First, the Indian tribe may decline jurisdiction.[66] Second, either parent may object to the transfer of the proceeding to tribal court. Third, the state court may find that "good cause" exists not to transfer the proceeding to tribal court.[67]

Acknowledging interracial relationships between Indian and non-Indian couples,[68] ICWA includes political compromises evident in the jurisdictional portion of ICWA. For example, in *In re Baby Boy Doe*, the mother filed an objection to the Indian tribe's motion to transfer and superseded the Indian tribe's request to transfer the case to tribal court under ICWA.[69] Congress has not passed legislation to remove the exceptions that mandate the transfer of a proceeding from a state court to a tribal court.[70]

B. *Holyfield* Analysis: Definition of Domicile

A decade after the enactment of ICWA, the United States Supreme Court addressed the issue of domicile in *Mississippi Band of Choctaw Indians v. Holyfield*.[71] In its only interpretation of ICWA, the Court affirmed the congressional intent and purpose of ICWA.[72] *Holyfield* involved an unmarried couple who

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tion is otherwise vested in the state by existing federal law. *See, e.g.*, 18 U.S.C. § 1162(a) (1988); 28 U.S.C. § 1360(a) (1988).

64. 25 U.S.C. § 1911(b) (1988).

65. 25 U.S.C. § 1911(b) (1988).

66. Indian tribes rarely decline jurisdiction. *But see In re* W.L., 260 Mont. 325, 859 P.2d 1019 (1993) (involving mother in dependency and neglect proceeding who unsuccessfully sought transfer to tribal court). In *W.L.*, the court does not explore the Indian tribe's reasons for declining jurisdiction.

67. 25 U.S.C. § 1911(b) (1988). *See infra* p. 33 and note 155. For analysis of exceptions, see Michael E. Connelly, Comment, *Tribal Jurisdiction under Section 1911(b) of the Indian Child Welfare Act of 1878 (sic): Are the States Respecting Indian Sovereignty?*, 23 N.M. L. REV. 479 (1993).

68. 25 U.S.C. § 1903(1) (1988) (providing that ICWA does not apply in divorce proceedings involving custody disputes).

69. 849 P.2d 925, 928 (Idaho 1993).

70. S. 1976, 100th Cong., 1st Sess. (1987). *See also* John R. Renner, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power Over Indian Affairs*, 17 AM. INDIAN L. REV. 129 (1992).

71. 490 U.S. 30 (1989).

72. *Id.* at 36.

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

were both enrolled members of the Mississippi Band of Choctaw Indians and resided on the Choctaw Reservation, in Neshoba County, Mississippi. The couple drove 200 miles to an off-reservation hospital where the mother gave birth to twins on December 29, 1985.[73] The couple voluntarily placed the twins for adoption with a non-Indian couple, the Holyfields.[74] The trial court granted the Holyfield's petition for adoption and entered the final decree less than one month after the birth of the twins.[75] Two months later, the Indian tribe filed a motion to vacate the adoption based on a violation of ICWA.[76] The Indian tribe claimed ICWA granted exclusive jurisdiction to the tribe.[77]

Reasoning that the parents "went to some efforts" to see that the babies were born outside the confines of the reservation, the trial court denied the Indian tribe's motion.[78] The trial court held that the state court had jurisdiction because the twins, at no time from their birth to the present date, had ever resided on or physically been on the Choctaw Indian Reservation.[79] The Supreme Court of Mississippi affirmed the finding that none of the provisions of ICWA applied and held the trial court properly exercised jurisdiction.[80]

On appeal, however, the United States Supreme Court reversed the Mississippi court's decision.[81] Finding that ICWA applied, the Court determined the sole issue was whether the twins were "domiciled" on the reservation for purposes of jurisdiction.[82] The Court emphasized that exclusive tribal jurisdiction is central to the overall scheme of ICWA.[83] After reviewing ICWA and the legislative history, the Court reasoned that it was doubtful Congress intended state law to define key jurisdictional

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73. *Id.* at 37.

74. *Id.* at 38.

75. *Id.* at 37 n.10. Mississippi state law required a six-month waiting period between interlocutory and final decrees of adoption, but also grants the court discretion to waive the requirement. *Id.*

76. *Id.* at 38 (basing motion on 25 U.S.C. § 1914 (1988)).

77. *Id.*

78. *Id.* at 39. No obstetric facilities were located on the reservation, but a hospital was located nearer to the reservation than 200 miles. *Id.* at 37.

79. *Id.* at 39 (remarking on the trial court's one-page opinion relying on these two facts to reach its conclusion).

80. Mississippi Band of Choctaw Indians v. Holyfield, 511 So. 2d 918 (Miss. 1987), *rev'd*, 490 U.S. 30 (1989).

81. *Holyfield*, 490 U.S. at 40.

82. *Id.* at 42. It was undisputed that the state court adoption was a "child custody proceeding" and the twins were "Indian children" as defined by the ICWA. *Id.*

83. *Id.* at 41.

definitions.[84] More importantly, the Court recognized the Indian tribe's interest stating:

> Tribal jurisdiction under §1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of the Indian Children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.[85]

The Court held that to allow an individual tribal member to defeat the exclusive jurisdiction of the tribe simply by giving birth off the reservation would nullify the purposes of ICWA.[86]

The Court declared the adoption invalid and held that the tribal court had exclusive jurisdiction pursuant to ICWA.[87] The Court noted that if the state court had initially complied with the mandates of ICWA, it would have avoided three years of delay and anguish.[88] In addition, the Court refused to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing [and protracted] litigation."[89] The Court concluded that "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."[90] Accordingly, *Holyfield* confirms that maintaining contact with the Indian tribe serves the Indian child's interest, as well as the survival of Indian culture dependent on the Indian tribe's ability to continue as a self-governing community.[91]

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84. *Id.* at 45.

85. *Id.* at 49.

86. *Id.* at 50 (citing House Report at 12, 1978 U.S.C.C.A.N. at 7534 ("One of the effects of our national paternalism has been to so alienate some Indian [parents] from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family.").

87. *Id.* at 54.

88. *Id.*; *In re* Adoption of Halloway, 732 P.2d 962 (Utah 1986) (involving Navajo boy placed with Utah non-Indian couple with consent of mother. Six years after the removal of the child, the Utah Supreme Court declared the state adoption invalid and concluded that the Navajo Tribal Court had exclusive jurisdiction.).

89. *Holyfield*, 490 U.S. at 54 (quoting *Halloway*, 732 P.2d at 972).

90. *Id.* Mr. Holyfield died while this case was pending. Upon remand to tribal court, the court terminated the parental rights and granted the adoption petition of Mrs. Holyfield. *See* Diane Allbaugh, *Tribal Jurisdiction Over Indian Children:* Mississippi Band of Choctaw Indians v. Holyfield, 16 AM. INDIAN L. REV. 534, 558 (1991).

91. *Holyfield*, 490 U.S. at 33.

V. MONTANA'S JUDICIAL INTERPRETATION OF ICWA

The evolution of ICWA involves Montana court decisions, Indian children and Indian tribes. Montana is home to seven federally recognized Indian reservations.[92] The removal of Indian children from their homes is a national crisis, and Montana shares this problem.[93] In Montana, the Native American population comprises a little less than five percent of the state's residents.[94] In 1978, however, Congress found that Indian children of Montana were thirteen times more likely to be placed in adoptive or foster care homes than non-Indian children.[95] Currently in Montana, forty-two percent of children placed out of the home for two years or more are Indian children.[96]

A. Pre-ICWA

The Pre-ICWA decisions of the Montana Supreme Court portray Montana as one of the states Congress found insensitive to tribal jurisdiction in Indian child custody proceedings.[97] In 1972, Montana reported the first case allowing a state court to assume jurisdiction of an Indian child allegedly abandoned off the reservation by his parents.[98] In *In re Cantrell*, the mother resided on the reservation, and prior to the state court proceeding, the Tribal Court of the Fort Peck Indian Reservation adjudicated custody proceedings of the Indian child. Nevertheless, the Montana Supreme Court reasoned that the abandonment of the child occurred off the reservation, continued for over a year, thereby vesting jurisdiction of the custody proceeding with state court.[99]

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92. JAMES J. LOPACH ET AL., TRIBAL GOVERNMENT TODAY: POLITICS ON MONTANA INDIAN RESERVATIONS 3 (1990).

93. Russel L. Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1288 (1980).

94. LOPACH ET AL., *supra* note 92, at 3.

95. H.R. REP. NO. 1386, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531; *see* Barsh, *supra* note 93, at 1288-90.

96. Telephone Interview with Trudy Flamand Miller, Indian Child Welfare Specialist, Department of Family Services, Helena, Mont. (Apr. 5, 1995) (During interview, Ms. Miller indicated this statistic includes state, tribal and Bureau of Indian Affairs placements).

97. *See* 25 U.S.C. § 1901(5) (1988).

98. *In re* Cantrell, 159 Mont. 66, 495 P.2d 179 (1972). For an analysis of pre-ICWA cases, see Manuel P. Guerreo, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51 (1979).

99. *Cantrell*, 159 Mont. at 71, 495 P.2d at 182.

Again the Montana Supreme Court attempted to defeat tribal jurisdiction supporting an individual's choice to use a state forum rather than deferring to tribal jurisdiction in a child custody proceeding involving an Indian child.[100] Despite Montana's equal protection concern, the United States Supreme Court reversed.[101] In *Fisher v. District Court*, the Court held that tribal court has exclusive jurisdiction in an adoption proceeding involving parties who are all tribal members and residents of Indian reservation.[102] The Court found that tribal jurisdiction benefits the plaintiff's class and furthers congressional policy of Indian self-government.[103] For those reasons, the Court concluded that tribal jurisdiction outweighed the denial of a state forum to the Indian plaintiff.

In contrast, another Montana tribal court claimed exclusive jurisdiction of a child custody proceeding involving an Indian child filed in a Maryland state court. In *Wakefield v. Little Light*, the Crow Tribal Court of Montana appointed a non-Indian couple the legal guardian of an Indian child for a limited period.[104] After leaving the reservation, the non-Indian couple petitioned the Maryland state court seeking custody of the child over the objections of the Indian mother and Indian tribe.[105] The Maryland Court of Appeals declared that child-rearing is an essential tribal function and that state interference in custody matters of Indian children is a significant infringement on the right of Indian tribes to govern themselves.[106] The Maryland court held that the child's domicile should be used to determine subject matter jurisdiction, and in this case the Crow Tribal Court of Montana had exclusive jurisdiction of an Indian child domiciled on the reservation.[107] Consequently, Congress codified the *Fisher* principle in ICWA jurisdiction scheme.[108]

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100. Firecrow v. District Court, 167 Mont. 139, 536 P.2d 190 (1975), *cert. granted*, 424 U.S. 382 (1976).

101. Fisher v. District Court, 424 U.S. 382, 391 (1976) (per curiam).

102. *Id.* at 389.

103. *Id.* at 390-91. *See also* Morton v. Mancari, 417 U.S. 535 (1974) (upholding the Bureau of Indian Affairs race-based policy in employee promotions because it furthered Indian self-governance).

104. Wakefield v. Little Light, 347 A.2d 228, 230 (Md. 1975).

105. *Id.* at 230-31.

106. *Id.* at 237-38 (citing Williams v. Lee, 358 U.S. 217, 219-20 (1959) which held that Indian tribes have the right to make laws and be governed by those laws. States may act where essential tribal relations are not involved and where the rights of Indians are not jeopardized).

107. *Id.* at 239.

108. *See* 25 U.S.C. § 1911(a) (1988).

B. Post-ICWA

As a result of the high population of Native Americans in Montana, the Montana Supreme Court has considered several ICWA cases. Twenty-five percent of state foster care placements in Montana are Indian children.[109] A chronological analysis of these cases demonstrates the court's vacillating position construing ICWA. The Montana Supreme Court's interpretation of ICWA is both supportive and restrictive.[110] Montana acknowledges the importance of ICWA but does not advance the literal and broad interpretation of *Holyfield* in construing ICWA.

Shortly after the passage of ICWA, the Montana Supreme Court restricted the application of ICWA creating a judicial exception for intra-family disputes involving custody of Indian children.[111] In *In re Bertelson*, a custody dispute arose between the non-Indian mother and the Indian paternal grandparents.[112] Relying on congressional policy, the Montana Supreme Court reasoned that ICWA did not apply in an intra-family dispute because the purpose of ICWA was to "preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution."[113]

Although the Montana Supreme Court found that ICWA did not apply, it remanded *Bertelson* requiring the trial court to apply a balancing test to determine whether jurisdiction was more appropriate in state or tribal court.[114] The Montana Supreme Court cautioned the trial court to respect tribal sovereignty and to consider the rights of the Indian child and the Indian tribe in deciding whether to accept or decline jurisdiction.[115] Identifying its goal to choose the most appropriate forum, the

109. Telephone Interview with Francis A. Kromkowski, Department of Family Services, Helena, Montana (Apr. 22, 1994).

110. Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 294-95 (1991).

111. *See In re* Bertelson, 189 Mont. 524, 617 P.2d 121 (1980).

112. *Id.* at 528, 617 P.2d at 124. Initially, the Montana Supreme Court reversed the District Court decision holding that the tribal court was the best forum for the custody dispute. *Id.* However, the court granted the mother's petition for rehearing alleging the court relied on erroneous facts. *Id.* at 528, 617 P.2d at 124.

113. *Bertelson*, 189 Mont. at 531, 617 P.2d at 125.

114. *Id.* at 540-41; 617 P.2d at 130-31. Initially, the state court took jurisdiction of the case because the father voluntarily sought a divorce in state court. *In re* Stanley, 7 Indian L. Rep. (Am. Indian Law. Training Program) 4039, 4039-40 (June 6, 1980).

115. *Bertelson*, 189 Mont. at 533, 617 P.2d at 126.

Montana Supreme Court cautioned the lower court not to ignore the importance of the child's Indian heritage and customs when determining jurisdiction.[116]

However, due to the significant tribal interests and the mandates of ICWA, the Montana Supreme Court should have transferred the custody dispute to tribal court when it arose instead of remanding the matter. The child, an enrolled tribal member, was a ward of the tribal court. The child resided with her grandparents on the Rocky Boy Reservation, and the mother had voluntarily left the child with the grandparents.[117] Despite the Montana Supreme Court's recognition of tribal interests, *Bertelson* circumvented ICWA protection. A custody dispute within the extended family is not excluded by ICWA definition of a child custody proceeding.[118] Consequently, other courts have declined to follow *Bertelson* finding the Montana Supreme Court's exception in the case "contrary to the express provisions of the ICWA."[119]

Even though the Montana Supreme Court created a judicial exception to avoid application of ICWA, the court has also stressed the necessity to follow the mandates of ICWA. For instance, a court's failure to appoint counsel for an indigent parent or Indian custodian, as required by the express language of ICWA to ensure procedural fairness, is reversible error.[120] Also, the Montana Supreme Court acknowledges a responsibility to promote and protect the unique Indian culture in applying state law and ICWA.[121] In *In re Baby Girl Jane Doe*, the Montana Supreme Court faced a conflict between a mother's interest in anonymity[122] and the Indian tribe's interest in enforcing the

116. *Id.* at 540, 617 P.2d at 130.

117. *Id.* at 528, 617 P.2d at 124.

118. 25 U.S.C. § 1903(1) (1988) (explicitly excluding application of the ICWA in divorce or juvenile delinquency proceedings).

119. *See, e.g.*, A.B.M. v. M.H. & A.H., 651 P.2d 1170, 1173 (Alaska 1982) (involving custody issue between natural mother and her sister and brother-in-law); *In re* Crystal K., 276 Cal. Rptr. 619 (Cal. Ct. App. 1991) (applying ICWA between divorced parents in which mother sought termination of father's rights in step-parent adoption); Adoption of Lindsay C., 280 Cal. Rptr. 194 (Cal. Ct. App. 1991) (applying ICWA to step-parent adoption).

120. *In re M.E.M.*, 195 Mont. 329, 335, 635 P.2d 1313, 1316-17; *see also In re* G.L.O.C., 205 Mont. 352, 668 P.2d 235, 237 (1983) (stating trial court must determine non-Indian parent's right to counsel prior to transfer of ICWA case).

121. *M.E.M.*, 195 Mont. at 332, 635 P.2d at 1316. *But see*, Newville v. State, ___ Mont. ___, 883 P.2d 793, 796 (1994) (involving negligence action for injuries suffered by Indian child while in foster care. The Montana Supreme Court stated: "Adoptive placement was further complicated because any adoptive placement had to comply with the provisions of the Indian Child Welfare Act 25 U.S.C. § 1915.").

122. *In re* Baby Girl Jane Doe, 262 Mont. 380, 865 P.2d 1090 (1993); 25 U.S.C.

statutory preference for placement of an Indian child.[123] Reversing the lower court, the Montana Supreme Court held an Indian tribe's statutory right to enforce the placement preference in an adoption of an Indian child is paramount to achieve the goals of ICWA and to protect the best interest of the child.[124]

Assisting state courts with interpretation and implementation of ICWA, the Bureau of Indian Affairs published guidelines for state courts.[125] While the BIA guidelines are not binding on a state court, the Montana Supreme Court has held in *In re M.E.M.* that the BIA Guidelines are applicable and should be considered in ICWA cases.[126] In that case, the Montana Supreme Court vacated the lower court's order terminating parental rights and remanded the case for determination of the jurisdictional issue.[127] The Montana Supreme Court directed the trial court to consider the BIA Guidelines in determining whether to transfer jurisdiction to the intervening tribal court.[128]

Without citing a source, however, the Montana Supreme Court reinstated the best interest of the child principle to prevent a transfer of jurisdiction to tribal court.[129] Contrary to the protective measures of ICWA, the court incorporated the state's subjective and vague standard which Congress sought to remove by enacting ICWA.[130] Congress recognized that state agencies and judges are accustomed to non-Indian values and often make subjective decisions detrimental to Indian children based on those values. The congressional policy clearly states that the underlying principle of ICWA, instead of a judge's subjective

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§ 1915(c) (1988) (regarding anonymity in application of preferences).

123. 25 U.S.C. § 1915(a) (1988) provides as follows:

> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with
> (1) a member of the child's extended family;
> (2) other members of the Indian child's tribe; or
> (3) other Indian families.

124. *Baby Girl Jane Doe*, 262 Mont. at 388, 865 P.2d at 1095.

125. BIA Guidelines, *supra* note 47, at 67584.

126. *M.E.M.* 195 Mont. at 336-37, 635 P.2d at 1318 (finding that "qualified expert witness" was not defined by ICWA, but that BIA guidelines provided state court with definition to consider).

127. *Id.* at 337, 635 P.2d at 1318.

128. *Id.* at 336, 635 P.2d at 1317.

129. *Id.*; *see, e.g. In re* N.L., 754 P.2d 863, 869 (Okla. 1988) (citing *In re M.E.M.* and holding that the trial court may consider the best interest of the Indian child as a factor in determining whether to transfer the case to tribal court).

130. 25 U.S.C. § 1901(5) (1988).

opinion, is in the best interest of the child.[131]

Justice Sheehy's dissent in *In re M.E.M.* suggests that non-Indian subjective values were factored into the court's majority decision of jurisdiction. Justice Sheehy stated that instead of remanding the matter, the case should be transferred immediately to the intervening tribal court of North Dakota.[132] Justice Sheehy accused the trial court of refusing to transfer jurisdiction because it disapproved of the tribal court's child custody arrangements.[133] He stressed that "the purpose of the ICWA is to remove as far as possible the white man's perceptions in these matters where Indian values may conflict."[134] Justice Sheehy added that the case should be transferred to the tribal court, "before a federal court does it for us."[135]

Inconsistently claiming to recognize the policies of the ICWA, the Montana Supreme Court in another case, *In re M.E.M., Jr.*, allowed a child custody proceeding to bypass the procedural safeguards of ICWA.[136] In that case, the mother alleged that the prior temporary custody proceeding violated ICWA and requested that the Montana Supreme Court invalidate both the temporary and permanent custody proceedings.[137] Assuming arguendo that the temporary custody proceedings violated ICWA, the Montana Supreme Court nonetheless refused to invalidate the permanent custody proceeding because the court found that it complied with ICWA.[138] Still, the court encouraged "the district courts to diligently follow the requirements of the ICWA" emphasized in the mother's brief.[139] The federal minimum protection of ICWA seeks to ensure procedural fairness and requires strict adherence. Thus, a violation of ICWA, regardless at what stage of the process, should invalidate a proceeding.

The Montana Supreme Court has not always neglected the policy of ICWA. Two years later, *In re M.E.M., Jr.* returned to the Montana Supreme Court for consideration of the substantive

131. H.R. REP. NO. 1386, 95th Cong., 2d Sess. (1978), *reprinted in* U.S.C.C.A.N. 7530, 7541.

132. *M.E.M.*, 195 Mont. at 337, 635 P.2d at 1318 (Sheehy, J. dissenting).

133. *Id.*

134. *Id.*

135. *Id. But see* Robert J. McCarthy, *The Indian Child Welfare Act: In the Best Interests of the Child and Tribe*, CLEARINGHOUSE REV. 864, 869 n.55 (1993) (citing principles of federalism and noting that federal courts have limited review of state court ICWA decisions).

136. *In re* M.E.M., Jr., 209 Mont. 192, 679 P.2d 1241 (1984).

137. *Id.* at 195, 679 P.2d at 1243.

138. *Id.*

139. *Id.* at 198, 679 P.2d at 1245.

requirements of ICWA.[140] The Montana Supreme Court properly permitted the aunt of the Indian child, an extended family member, to intervene in the adoption proceeding commenced by a non-Indian family.[141] Further, the Montana Supreme Court held that on remand the competing petitions for adoption of the child must be considered in light of ICWA's placement preference.[142]

In another positive response to ICWA, in *In re M.R.D.B.*, the Montana Supreme Court held that the tribal court retains exclusive jurisdiction of a minor child, who is a ward of the tribal court, and that the parent may not prevent the transfer.[143] More importantly, the Montana Supreme Court rejected the family bond argument and properly deferred the determination of the best interest of the child to the tribal court.[144] In a specially concurring and dissenting opinion, however, Justice Weber expressed shock at the disregard for the due process rights of the mother in establishing the child as a ward of the tribal court.[145] Justice Weber also expressed concern that the United States Supreme Court opinion in *Holyfield* held the interests of the Indian tribe superior to the interests of the parents.[146]

Unfortunately, Justice Weber's opinion reflects the all-too-common non-Indian's misunderstanding of the Indian community. Initially, ICWA forces Indian tribes into an adversary role if the tribe wishes to invoke the procedural and substantive requirements of ICWA.[147] Indian tribes are viewed as placing the rights of the child secondary to the desires of the tribe.[148] When

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140. *In re* M.E.M., Jr., 223 Mont. 234, 725 P.2d 212 (1986).

141. *Id.* at 236, 725 P.2d at 213.

142. *Id.* at 236, 725 P.2d at 214; *see* 25 U.S.C. § 1915(a) (1988).

143. *In re* M.R.D.B., 241 Mont. 455, 462, 787 P.2d 1219, 1223 (1990) (responding to situation in which mother initially consented to tribal jurisdiction, but later attempted to prevent transfer to tribal court by withdrawing her consent); *see also* 25 U.S.C. § 1911(a) ("Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.").

144. *M.R.D.B.*, 241 Mont. at 463, 787 P.2d at 1224 (expressing full confidence that tribal court will consider the best interest of all parties). In fact, the White Mountain Apache Tribal Court, persuaded by the adoptive parents' commitment to the child's heritage, allowed the non-Indian couple from Colorado to adopt the seven-year-old girl. The Associated Press, *Apaches OK Girl's Adoption by Anglos*, ARIZONA REPUBLIC, Mar. 20, 1991, at B4.

145. *M.R.D.B.*, 241 Mont. at 464, 787 P.2d at 1224. *But see* Tribal Children's Code, *supra* note 45, at VI-5(r) (referring to ward as "protected child").

146. *M.R.D.B.*, 241 Mont. at 464, 787 P.2d at 1225.

147. 25 U.S.C. § 1911(c) (1988) (granting Indian tribe right to intervene at any point in state court proceeding).

148. Ester C. Kim, Mississippi Band of Choctaw Indians v. Holyfield: *The Con-*

a parent relinquishes the right to raise the child, however, the tribe has not only an interest, but an obligation to protect the best interests of the child.[149] Anglo society places the rights of an individual over the rights of the community.[150] Society considers the right to raise one's child an essential and basic civil right. In contrast, the Indian community focuses on the collective rights of the community as a large cultural group and not on individual rights.[151]

Again demonstrating resistance to tribal jurisdiction, in *In re T.S.*, the Montana Supreme Court refused to transfer a child custody proceeding of an Indian child to an Alaskan tribal court, claiming the transfer would not be in the best interests of the child.[152] A child custody proceeding involving an Indian child may remain in state court if the Indian tribe declines jurisdiction or either parent objects to the transfer to tribal court.[153] In addition, the state court may avoid tribal court jurisdiction if the court finds "good cause to the contrary" exists to refuse transfer of the proceeding. Unfortunately, a state court is free to use its discretion to create a definition of "good cause" to prevent transfer to tribal court.[154]

For example, in *In re T.S.*, the Montana Supreme Court considered the BIA Guidelines which interpret "good cause to the contrary" not to transfer a proceeding to tribal court.[155] The

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templation of All, the Best Interests of None, 43 RUTGERS L. REV. 761 (1991) (claiming that the goals of the ICWA—to protect the best interests of the Indian child and promote stability and security for Indian tribes—are unattainable).

149. MYERS, *supra* note 1, at 48 (emphasizing that the accomplishment of objectives of ICWA is the responsibility of Indian tribes, Indian organizations and Indian parents).

150. Donna J. Goldsmith, *Individual vs. Collective rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1, 7-8 (1990).

151. *Id.*

152. *In re* T.S., 245 Mont. 242, 250, 801 P.2d 77, 82 (1990), *cert. denied*, 500 U.S. 917 (1991).

153. 25 U.S.C. § 1911(b). In *T.S.*, the mother and the Indian tribe sought transfer to tribal court. 245 Mont. at 244, 801 P.2d at 79.

154. Connelly, *supra* note 67, at 483.

155. *See* BIA Guidelines, *supra* note 47, at 67,591:

> §C.3 Determination of Good Cause to the Contrary
>
> (a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.
>
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exist:
>
> (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

court did not, however, fashion a "good cause" remedy to avoid transfer under the BIA Guidelines. Rather, the court defeated ICWA's preference for tribal court jurisdiction using the vaguely defined "best interest of child" factor created in an earlier ICWA case.[156] The Montana Supreme Court refused to transfer jurisdiction out of concern that the Alaskan tribal court would remove the child from the longest, most stable and protected environment she had ever known.[157] Attempting to justify this decision, the Montana Supreme Court noted that the Indian child resided in a home with a Native American foster mother who was fully capable and willing to teach the child about "her Indian heritage."[158] As the dissent reveals, it is doubtful the culture of the Eskimo tribe of the King Island Native Community compares to the Plains Indian Tribe of the foster mother.[159]

In *Holyfield*, the United States Supreme Court cautioned state courts to limit review in jurisdictional proceedings to the determination of who should make the custody determination pursuant to ICWA, not what the outcome of the determination should be.[160] Nevertheless, in *In re T.S.* the Montana Supreme Court confused the legal issue of jurisdiction with the determina-

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(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-Economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

156. *In re* T.S., 245 Mont. 242, 247, 801 P.2d 77, 79 (citing *In re* M.E.M., 195 Mont. 329, 336, 635 P.2d 1313, 1317 (1981)). Noting that the primary responsibility for interpreting the ICWA lies with the state court, the Montana Supreme Court, citing the BIA Guidelines, claimed the legislative history of the ICWA used the term "good cause" to provide state courts with flexibility to determine the disposition of a child custody proceeding involving an Indian child. *T.S.* at 246, 801 P.2d at 80.

157. *Id.* at 249, 801 P.2d at 81.

158. *Id.* at 248, 801 P.2d at 81. In *Holyfield*, the United States Supreme Court stressed that the Indian Placement preference is the most important substantive requirement imposed on state courts. 490 U.S. at 36-37.

159. *T.S.*, 245 Mont. at 251, 801 P.2d at 83 (Sheehy, J., dissenting).

160. *Holyfield*, 490 U.S. at 53 ("We have been asked to decide the legal question of *who* should make the custody determination . . . not what the outcome of that determination should be.").

tion of the child's placement.[161] The Montana Supreme Court boldly declared that the United State Supreme Court decision did not control because, unlike *Holyfield*, the Indian child in this case was not domiciled on the reservation.[162] In addition, *In re T.S.* advocated the "existing Indian family" exception, not to avoid the application of ICWA, but to avoid tribal court jurisdiction. The court claimed:

> When the child has been domiciled on the reservation and has significant contacts with the Tribe it is reasonable to assume that jurisdiction should be transferred to the Tribe. In this case we have the opposite circumstance which § 1911(b) is meant to address. T.S. has never lived on the reservation, is not a member of the Tribe and has never had any contact whatsoever with the Tribe. The record demonstrates a total absence of evidence demonstrating that it is in T.S.'s best interest that jurisdiction be transferred to the Tribe.[163]

The Montana Supreme Court's analysis reflects a lack of faith in the actions of tribal court. The Montana Supreme Court implied that it, rather than the Alaskan tribal court, knew the best interests of an Indian child.[164] Furthermore, *In re T.S.* reveals the need for educating courts and agencies regarding the policy and application of ICWA.[165] The court's application of ICWA in this case fails on at least three points. First, the Montana Supreme Court did not defer to the Indian tribe seeking jurisdiction of one of its own tribal members.[166] Second, the Montana Supreme Court used a procedural rule to refuse considering the Indian Child Welfare specialist's recommendation to transfer jurisdiction to the tribal court. Lastly, the guardian ad litem expressed misgivings about ICWA.[167] The trial court admonished the guardian ad litem that his thoughts about ICWA

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161. *T.S.*, 245 Mont. at 248-49, 801 P.2d at 80-81.

162. *Id.* at 250, 801 P.2d at 82.

163. *Id.* at 250, 801 P.2d at 82.

164. Connelly, *supra* note 68, at 487. *See also* BIA Guidelines, *supra* note 47, at 67,591 (providing recommendations for implementing 25 U.S.C. § 1901-63 and stating that in most cases state courts should not determine whether or not a child's contacts with a reservation are so limited that a case should not be transferred).

165. "State courts seem to believe that Tribal Courts eat Indian children. Tribal Court determines the best interest of the Indian child when jurisdiction is returned." Lecture by Evelyn Stevenson, Managing Attorney, Confederated Salish and Kootenai Tribes, Univ. of Montana, School of Law (May 12, 1994).

166. T.S. was eligible for membership in the King Island Native Community. *T.S.*, 245 Mont. at 244, 801 P.2d at 78.

167. *Id.* at 251, 801 P.2d at 83.

were irrelevant, but it is doubtful that an individual with apprehension of ICWA will promote the Act. Similar to pre-ICWA cases, the Montana Supreme Court still appears willing to subordinate the Indian tribe's interests to what it perceives as the best interest of the Indian child.[168]

VI. MONTANA'S LEGISLATIVE RESPONSE TO ICWA

When state and federal law conflict in a child custody proceeding involving an Indian child, federal law controls.[169] However, whenever state law provides a higher standard of protection than ICWA, application of state law is appropriate.[170] Some states have enacted legislation to improve the protection of Indian children in state court proceedings.[171] Generally, the state ICWA only applies in a proceeding if the federal ICWA is also applicable.[172] The state of Montana has not enacted a state Indian Child Welfare Act and the Montana Code fails to reference ICWA in sections dealing with child custody proceedings. For example, the factors considered in the adoption policy, to ensure that the best interest of the child is met, do not refer to ICWA requirements.[173] Further, a court ordered investigation into an adoption proceeding does not include a finding of whether ICWA applies or if efforts were made to comply with ICWA.[174] For private adoption organizations arranging adoption placements, the Montana Code fails to provide notification

168. Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 387-88 (1991-92) (analyzing state courts' Anglo best interest test in discretionary application of ICWA).

169. 25 U.S.C. § 1921 (1988).

170. 25 U.S.C. § 1921.

171. Some states have enacted a State Indian Child Welfare Act. *See, e.g.*, NEB. REV. STAT. §§ 43-1501 to 43-1516 (1993); OKLA. STAT. TIT. 10 §§ 40 - 40.9 (1987 & Supp. 1995). Other states annotate or reference the ICWA. *See, e.g.*, ALASKA STAT. §§ 25.23.060, 25.23.173, 25.24.150, 47-10.080 (1994); ARIZ. REV. STAT. ANN. § 8-525.01 (1994); KAN. STAT. ANN. §§ 38-1110, 38-1503, 59-2128 (1993 & Supp. 1994); MINN. STAT. §§ 257.0651, 259.57 *et seq.* (1995); NEV. REV. STAT. §§ 125A.050 *et seq.* (1993); N.M. STAT. ANN. §§ 32A-1-8 *et seq.* (Michie 1993); OR. REV. STAT. §§ 109.309 *et seq.*; 418.627, 419A.002 *et seq.* (1994); S.C. CODE ANN. § 27-16-80 (Law. Co-op 1993); S.D. CODIFIED LAWS ANN. §§ 26-7A-2; 26-7A-43, 26-7A-44 (1994); WASH. REV. CODE ANN. §§ 13.70.100 *et seq.*, 26.33.040 *et seq.* (West 1995); WIS. STAT. §§ 48.028, 48.48, 48.981 (1994).

172. *In re* Adoption of Baby Boy D., 742 P.2d 1059 (Okla. 1985), *cert. denied* 484 U.S. 1072 (1988).

173. MONT. CODE ANN. § 40-8-114 (1993).

174. MONT. CODE ANN. § 40-8-122 (1993). *Cf.* N.M. STAT. ANN. § 32A-4-32(B)(6)(c) (Michie 1993).

procedures to Indian tribes for child custody proceedings involving Indian children.[175] Finally, the General Index of the Montana Code under adoption of children does not refer to ICWA or Indian children.[176]

In 1987, however, in a more enlightened move, the legislature created the Indian Child Welfare specialist position.[177] This position is a unique measure of Montana's commitment to ICWA. The specialist acts as a liaison with Indian tribes and the state.[178] The position requires a thorough knowledge of ICWA and Montana Tribes, as well as superior negotiation and conflict management skills.[179]

The duties of the specialist include:

> (1) developing Indian foster homes and other Indian placement resources;
> (2) providing technical advice to tribal, state and county agencies and district courts on matters pertaining to Indian child welfare;
> (3) providing assistance in negotiating cooperative agreements to provide foster care services to Indian children;
> (4) conducting training seminars on implementing ICWA;
> (5) applying for and accepting grants and other funds for Indian child welfare activities;
> (6) developing and maintaining a list of attorneys to represent indigent parents and Indian custodians in Indian child welfare proceedings;
> (7) making recommendations to the department on legislation and rules concerning Indian child welfare matters; and
> (8) performing other duties concerning Indian child welfare

175. MONT. CODE ANN. § 40-8-108 (1993) (entitled "Who may place a child for adoption"); MONT. CODE ANN. §§ 52-2-401 to -407 (1993) (setting forth requirements for child adoption agencies). However, note that section 41-3-108 of Montana Code provides for child protective teams to assess the needs and treatment plans for child and family. In 1989, the Montana Legislature amended the statute to include "[I]f an Indian child or children are involved, someone, preferably an Indian person, knowledgeable about Indian culture and family matters [should be included in the team]." *See also* MONT. CODE ANN. § 41-5-525 (1993) (detailing youth court proceedings). Likewise MONT. CODE ANN. § 41-3-205(i) the exceptions to the confidential nature of case reports concerning children include "an agency of an Indian tribe or the relatives of an Indian child if disclosure of the records is necessary to meet requirements of the federal Indian Child Welfare Act."

176. Statutes involving Indian Tribes or Indian people are generally listed under "Indians" in the General Index of the Montana Code.

177. MONT. CODE ANN. § 52-2-117 (1993).

178. Telephone Interview with Shirley Brown, Administrator, Department of Family Services, Helena, Mont. (Apr. 22, 1994).

179. *Id.*

matters as determined by the director.[180]

The responsibilities and goals of the specialist include:

a. improving the IV-E foster care contracts with reservations by monitoring each contract annually;
b. negotiating new IV-E contracts as requested by the tribe;
c. maintaining current IV-E State/Tribal Agreements;
d. coordinating training on Native American cultural issues and ICWA;
e. improving the knowledge of Department of Family Services' staff about ICWA through clarification and interpretation;
f. informing the legislature, agencies and the public about Indian child welfare issues; and
g. other duties and responsibilities such as representing the department on ICWA related committees, task forces and other work groups; coordinating intra/interagency linkages and activities to promote mutual understanding and service planning and clarifying policies and resolving conflicts; promoting awareness of Indian Child Welfare Services through public appearances and written documents as requested by the supervisor.[181]

To successfully achieve the goals of the Indian Child Welfare specialist, however, the state should consider hiring more than one individual to fulfill these numerous duties. As demonstrated in *In re T.S.*, the district court may disregard the specialist's recommendation. In that case, the specialist had not reviewed the entire file or interviewed the child, her mother or foster parents.[182] Nonetheless, the court should have at least considered the specialist's recommendation as an expert on the policy of ICWA.[183]

In addition, the state is installing a new computer system to centralize information regarding placement of Indian children.[184] Available in 1996, the Child and Adult Protective Ser-

180. S.B. 217, 54th Sess. (1995) (amending MONT. CODE ANN. § 52-2-217 (1993) to include: 1) a requirement that the secretary of state send a copy of this section to each of the seven Montana reservations and to the tribal chairperson of the Little Shell Band and 2) to allow the director of the Department of Family Services (DFS) to appoint an individual who is not an employee of the DFS as the specialist).

181. Department of Family Services Employee Performance Appraisal Form, State of Montana, Helena, Mont. (1994).

182. *In re* T.S., 245 Mont. 242, 250, 801 P.2d 77, 82 (1990).

183. S.B. 217, 54th Sess. (1995) (amending MONT. CODE ANN. § 52-2-217(2) (1993)).

184. Telephone Interview with Francis A. Kromkowski, Department of Family Services, Helena, Mont. (Apr. 22, 1994).

vices (CAPS) system will track both state and tribal cases and provide the state with complete statistical information regarding ICWA issues.[185] CAPS will require state social workers to immediately identify whether the child involved is an Indian child. In addition, CAPS will provide information to assist the social worker in locating an available Indian home for preferred placement as required under ICWA.[186]

In August, 1994, the state issued a memorandum of understanding establishing the Indian Advisory Council consisting of representatives from the Department of Family Services, Bureau of Indian Affairs, each of the seven Indian tribes in Montana and two urban Indian organizations. The Council meets quarterly to discuss social services issues and address problems arising due to the lack of education regarding ICWA.[187] For example, ICWA provides that when a final decree of adoption of an Indian child is vacated or set aside, the biological parent may petition for return of custody.[188] Unfortunately, county attorneys representing the Department of Family Services may not be familiar with ICWA and do not often consider the biological parent as a placement resource in this situation.[189] Furthermore, the biological parents do not realize they have a right to petition under ICWA.[190]

Acknowledging that many Indian children are placed in non-Indian homes, the state is attempting to expand its pool of available Indian homes by employing the assistance of Native American organizations to recruit Indian parents for foster care and adoptive placements.[191] For example, the Department of Family Services, in partnership with one Indian tribe, has hired a tribal member to recruit Indian homes for placements on that reservation.[192] Indian tribes of Montana should recruit qualified members of their community to participate in state foster care and adoptive placements and to coordinate information with the

185. Telephone Interview with Trudy Flamand Miller, *supra* note 96.

186. *Id.*

187. *Id.*

188. 25 U.S.C. § 1916(a) (1988).

189. Telephone Interview with Trudy Flamand Miller, *supra* note 96 (noting that the social worker in many cases is the expert on the law regarding child custody proceedings in cases involving Indian children).

190. *Id.*

191. *Id.* (noting that 25% of state foster care placements are Indian children and many of these children are placed in non-Indian homes).

192. *Id.* (identifying Great Falls, Montana as a target area for recruitment and a partnership agreement with the Northern Cheyenne Indian Reservation to recruit Indian placement homes).

state.[193]

Montana's creation of an Indian Child Welfare specialist position is a positive effort to implement ICWA. However, continued efforts are necessary to achieve the goals designated by the legislature. The Indian tribes of Montana should coordinate their efforts with the Montana Indian Child Welfare specialist to educate the public, attorneys and state officials regarding ICWA. In addition, the legislature should amend all child custody proceeding statutes in the Montana Code with references to ICWA.[194] Amendments or annotations to child custody proceeding statutes would alert Montana practitioners to the potential for federal pre-emption of state law and may prevent delays and misunderstandings in child custody proceedings involving Indian children.[195]

VII. THE COMMITMENT OF CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION TO ICWA

The Confederated Salish and Kootenai Tribes of the Flathead Reservation (CS & KT or Tribes) is a progressive nation in terms of self-governance.[196] The Flathead Reservation is located in Montana's northwest region, consisting of 1.24 million acres.[197] On October 28, 1935, the CS & KT adopted a Tribal Constitution and Bylaws, the first Indian tribe to do so under the Indian Reorganization Act.[198] The CS & KT is committed to self-governance and has seriously considered its role in the implementation of ICWA.[199]

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193. Lack of an Indian home may constitute "good cause to the contrary" not to place the child pursuant to the ICWA.

194. The enactment of a state ICWA in Montana is a debate for another day. Some of the greatest loopholes in the ICWA are created in a state with a state Indian Child Welfare Act. *See, e.g.*, OKLA. STAT. TIT. 10, § 40.3 (1987 & Supp. 1995) (listing exceptions making the ICWA inapplicable); *In re* Adoption of Baby Boy W., 831 P.2d 643, 648 (Okla. 1992) (requiring that child is part of an existing Indian family before finding the ICWA applicable); *In re* S.C., 833 P.2d 1249 (Okla. 1992) (determining that *Holyfield* did not invalidate existing Indian family exception).

195. A Montana ICWA case is referenced in Title 2. Government Structure and Administration Chapter 1. Sovereignty and Jurisdiction Part 3. Jurisdiction on Indian Lands. MONT. CODE ANN. § 2-1-304 (annotating *In re* M.E.M., 223 Mont. 234, 725 P.2d 212 (1986), which demonstrates the right to intervene in the adoption of an Indian child. That section is entitled Rights, privileges and immunities). The *M.E.M.* annotation may be more helpful in the adoption section of the Montana Code.

196. LOPACH ET AL., *supra* note 92, at 153.

197. LOPACH ET AL., *supra* note 92, at 157.

198. LOPACH ET AL., *supra* note 92, at 157. For an excellent analysis of the tribal courts in Montana see Brown & Desmond, *supra* note 110.

199. For more information regarding the history of the Confederated Salish and

A. *Tribal Children's Code*

In 1986, the CS & KT adopted the Tribal Children's Code.[200] The Tribal Children's Code recognizes and honors the customs and traditions of an Indian child's particular Tribe;[201] it is consistent with the Indian Civil Rights Act,[202] and with the needs and realities of the tribal members living on the Flathead Reservation. The purpose statement of the Tribal Children Code demonstrates the CS & KT's commitment to ICWA:

> The Confederated Salish and Kootenai Tribes have adopted this Tribal Children's Code, recognizing that Tribal children are the Tribes' most important resource and their welfare is of paramount importance to the Tribes. It is the purpose of this Code to provide and assure that each Tribal child within the jurisdiction of the Tribal Court shall receive the care and guidance needed to prepare such children to take their places as adult member (sic.) of the Tribes; to prevent the unwarranted breakup of Indian families by incorporating procedures that recognize the rights of the children and parents or other custodial adults, and, where possible, to maintain and strengthen the family unit; to preserve and strengthen the child's individual, cultural, and Tribal identity. Wherever possible, family life shall be strengthened and preserved, and the primary efforts will be toward keeping the child with his or her family, and if this is not possible, then efforts shall be made toward maintaining the child's physical and emotional ties with the child's extended family and with the Tribal community.[203]

The Tribal Children's Code provides a speedy and effective procedure for processing referrals under ICWA,[204] because trib-

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Kootenai Tribes see Flathead Culture Committee, A BRIEF HISTORY OF THE FLATHEAD TRIBES (2d ed.; St.Ignatius, Montana: Confederated Salish and Kootenai Tribes, 1979).

200. THE LAW AND ORDER CODE OF THE CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBES OF THE FLATHEAD RESERVATION, MONTANA, Ch. VI, § 1 (1986) [hereinafter LAW AND ORDER CODE].

201. Even though the Tribe is confederated, the Salish and Kootenai people have separate and distinct cultures. *See* LOPACH ET AL., *supra* note 92, at 154.

202. Indian Civil Rights of 1968 (codified as amended at 25 U.S.C. § 1301 *et seq.* (1988)).

203. LAW AND ORDER CODE *supra* note 200, ch. VI, § 1(2) (1986).

204. LAW AND ORDER CODE, *supra* note 200, ch. VI, § 5. This section entitled "Referrals Under the Indian Child Welfare Act," provides:

> The purpose of this Section is to provide for the speedy and effective procedures for the processing of referrals under the Indian Child Act of 1978 from State or Tribal Courts, in order to best protect the interests of the child of the Confederated Salish and Kootenai Tribes and the interest of

al courts seeking transfer of jurisdiction have limited time to petition after receiving notice.[205] The Tribal Children's Code designates the chief tribal judge as responsibile for ensuring a proper investigation is conducted and determining whether a transfer is in the best interest of the child.[206] In considering whether the transfer of the case is in the best interest of the child, the court may consider the following factors:
(1) past and present residences of the child;
(2) the child's or child's family ties with the Tribes or the Tribal community;
(3) special conditions of the child and the Tribal or reservation facilities to deal with such conditions;
(4) when jurisdiction should be taken—before or after the adjudication stage of the proceedings;
(5) consider the location of the witnesses and other evidence and any process limitations of Tribal jurisdictions;
(6) continuing the child's surroundings and emotional contact; and
(7) the wishes of the child's immediate or extended family and other interested persons.[207]

Contrary to the state of Montana's concern, the CS & KT does not decline jurisdiction of an ICWA referral on the basis of difficulty or expense of a case.[208] Considering all circumstances,

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the Tribes. It is intended that the Tribes will investigate cases referred to them, and will act to transfer to the Tribal Court those cases in which transfer is in the best interest of the child. The procedures found in this Section are aimed at producing a thoughtful and wise decision in the matter of transfers.

205. 25 U.S.C. § 1912(a) (1988) provides that:

No foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to 20 additional days to prepare for such proceeding.

206. LAW AND ORDER CODE *supra* note 200, ch. VI, § 5, ¶ 5(e). In addition, the Tribal Children's Code definition section is more extensive than the ICWA providing definitions for "expert witness" and "tribal member" lacking in the ICWA. *Compare* LAW AND ORDER CODE *supra* note 196, ch. VI, § 1, ¶ 6(j), (w) *with* 25 U.S.C. § 1903 (1988).

207. LAW AND ORDER CODE *supra* note 200, ch. VI, § 5, ¶ 5(e)-(g).

208. "[T]ribal courts may pick and choose those Indian children over which they will exercise jurisdiction, however State courts are allowed no choice. One potential result, of course, is that tribal courts will waive jurisdiction in all difficult or expensive cases while State courts . . . will have no choice but to accept those cases." H.R. REP. NO. 1386, 95th Cong., 2d Sess. 44 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7566 (dissent to passage of the ICWA by Richard A. Weber, Staff Attorney, Office of Legal Affairs, Montana Dep't of Soc. and Rehab. Serv. sent to Montana Rep. Ron

common sense best determines whether to request a transfer of a proceeding from a state court.[209] If the CS & KT decides not to petition for transfer of an ICWA case, the Tribes will file a Notice of Tribal Intervention in the state court requesting to monitor the proceedings.[210] The jurisdiction remains in state court but the intervention allows the Tribes to monitor the proceedings and ensure that the state court complies with ICWA.[211] In addition, the CS & KT retains an interest in the child even if he or she is placed off the reservation. Many times a child will return to the CS & KT for information regarding his or her background.[212] The CS & KT is in a better position to assist those children through a continued involvement with the child.

As the Tribal Children's Code demonstrates, the CS & KT's interest is not a competing interest with its tribal members. The tribal court balances the interests of the family and the child, with the CS & KT's interest of sovereignty and self-governance, to determine the best interests of the child.

B. Foster Care Handbook

In addition to the Tribal Children's Code, the CS & KT enacted regulations for foster care homes. The Tribal Family Assistance Program has also prepared a handbook on the role of the parent to assist foster care families.[213] The CS & KT's policy stresses the importance of keeping the family together. However, the Tribe also recognizes the need for Indian homes in which to place children.[214] The Montana Department of Family Services recognizes tribal licensing of foster care homes on the Flathead Reservation.[215] The CS & KT's effort to find suitable foster care

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209. Interview with Chief Tribal Judge W. Joseph Moran, Confederated Salish and Kootenai Tribes, Tribal Court, in Pablo, Mont. (Mar. 17, 1994).

210. LAW AND ORDER CODE, *supra* note 200, ch. VI, § 5, ¶ 5(i).

211. Interview with Chief Tribal Judge W. Joseph Moran *supra*, note 209.

212. A Tribe may request either a record of placement from the State or, upon the request of the adopted Indian child over the age of eighteen, disclosure of information for enrollment. 25 U.S.C. §§ 1915(e), 1951(b) (1988).

213. FAMILY ASSISTANCE PROGRAM, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, THE ROLE OF THE FOSTER PARENT: A HANDBOOK (1989).

214. The Tribal Social Service Department advertises in the C.S. & K. Tribe's weekly newspaper for foster care homes. CHAR-KOOSTA NEWS (Pablo, Mont.), Mar. 3, 1995, at 10.

215. MONT. CODE ANN. § 52-2-722(2) (1993) (allowing applications by Indians on an Indian reservation for foster care licensing to be made through the tribal government).

and adoption placement on the Reservation is evidence of its commitment to the policy of ICWA.

Pursuant to ICWA and the State-Tribal Cooperative Agreements Act,[216] the parties have entered into an agreement regarding Indian children on the Flathead Reservation. The State of Montana and the CS & KT share jurisdiction over child abuse and neglect proceedings involving Indian children residing on the Flathead Reservation. The agreement provides that the CS & KT shall investigate reports involving children residing on the reservation who are enrolled members of any federally recognized Indian tribe, or who possess one-quarter Indian blood quantum, regardless of the tribal affiliation. The state investigates all other referrals concerning children residing on the reservation. The agreement provides for reciprocal reporting and notification procedures between state and tribal agencies.[217]

C. Tribal Court Administration

ICWA recognizes that tribal courts are the best forum to decide an Indian child custody proceeding.[218] Due to a lack of understanding, state courts and non-Indian individuals may perceive tribal courts as inferior systems.[219] To correct this misconception, ICWA requires state and tribal courts to give full faith and credit to an Indian tribe's public acts, records, and judicial proceedings in Indian child custody proceedings.[220] Furthermore, as one state court recognized:

> [The] relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic

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216. MONT. CODE ANN. § 18-11-101 (1993).

217. Child Welfare Agreement Between the Department of Family Services and the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, (1991). The agreement was originally intended to remain in effect until June 30, 1992; however, the agreement's duration was extended to Feb. 1, 1994. (on file with the Montana Law Review).

218. 25 U.S.C. § 1911 (1988). Unfortunately, tribal court involvement is curtailed until the state court notifies the parent or Indian tribe of the child custody proceeding. 25 U.S.C. § 1912(a) (1988); *see also* Robert J. McCarthy, *Indian Tribes and the Custody of Indian Children*, THE ADVOCATE 8, 10 (1993) (noting that Indian parents receive notice of child custody proceedings in only 65% to 70% of the cases under state jurisdiction).

219. INDIAN CHILD WELFARE ACT OF 1978: "A LAW FOR OUR CHILDREN" (Am. Indian Law. Training Program) III-6 to III-7 (1979). *But see* MONT. CODE ANN. § 40-8-103(6) (1993) (defining "court" as a Montana district court or a tribal court of a Montana Indian reservation).

220. 25 U.S.C. § 1911(d) (1988).

> cultures found in the United States. . . . It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of [a child] custody [proceeding].[221]

The CS & KT strongly exemplifies a system that allows an Indian tribe to effectively pursue and implement the policy of ICWA. First, the CS & KT Council appoints its tribal court judges.[222] To ensure a sensitivity to the CS & KT's culture, a tribal court judge must be a member of the Confederated Salish and Kootenai Tribes, unless approved otherwise.[223] Next, the CS & KT contributes sufficient financial resources to effectively implement ICWA. For example, funds are available for a representative of the CS & KT to appear at the child custody hearings.[224] The CS & KT's legal services department is available to represent the interests of a parent or Indian child. The Tribal Court employs an in-house social worker to investigate ICWA cases and report directly to the court. The state employs one Indian Child Welfare Specialist, with the assistance of legal staff, to serve the seven Indian reservations regarding ICWA. In comparison, the CS & KT employs a team of experts (attorneys, judges, social workers) with a personal self-interest in the protection of their Indian children and the survival of the Tribe.[225]

In many aspects, the stronger tribal court systems resemble the Anglo system. The similarity may reduce the non-members' fear of a tribal system created by the lack of understanding and ignorance of the Indian Tribes' motives to govern its own people. Unfortunately, few Indian tribes have the resources to develop a system such as the CS & KT. Congress did not provide funding

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221. *In re* Adoption of Halloway, 732 P.2d 962, 969-70 (Utah 1986).

222. Each judge of the Tribes is appointed by the Tribal Council for four years. LAW AND ORDER CODE, *supra* note 200, ch. 1, § 3, ¶¶ 2-3. Tribal judges are not required to hold a juris doctorate; however, the current chief tribal judge of the Tribes is a licensed attorney. The appointed judges continually participate in judicial training throughout their judicial career.

223. LAW AND ORDER CODE, *supra* note 200, ch. 1, § 3, ¶ 4.

224. The Tribe may send a tribal attorney, the tribal court social worker, or both to the state court proceedings virtually anywhere in the United States. Interview with Evelyn S. Stevenson, Managing Attorney, Legal Services Department, Confederated Salish and Kootenai Tribes, in Pablo, Mont. (Mar. 30, 1995).

225. Confederated Salish and Kootenai Tribes, Ordinance 84A: (Apr. 1984) (establishing the Tribal Legal Department to provide responsive and competent legal counsel for the Tribal Government in fulfillment of self-government and self-determination goals).

for Indian tribes to effectively participate in ICWA proceedings, so Indian tribes must find alternative resources.[226] Of course, Indian tribes have a concern for the best interest of their children; however, many tribes lack funding to adequately enforce their concern.[227] As the CS & KT's system illustrates, adequate funding empowers an Indian tribe to employ attorneys and social workers, to develop codes and policies for tribal agencies, to monitor the welfare of Indian children, and to timely intervene in state court proceedings.

VIII. CONCLUSION

The ICWA was enacted in response to the culture bias found in state court child custody proceedings involving Indian children.[228] In *Holyfield*, the United States Supreme Court demonstrated a great deal of faith in tribal courts to adjudicate a proper remedy in child custody proceedings. However, state courts continue to show a distrust of tribal courts by attempting to limit the application of ICWA. The result is delay in adjudication of a custody proceeding when courts are forced to follow the mandates of ICWA. The ultimate consequence is misunderstanding and bitterness toward Indian tribes who pursue enforcement of ICWA. The United States Supreme Court confirmed that an Indian tribe's interest is unique in a child custody proceeding involving an Indian child. If the child resides off the reservation, state courts should defer jurisdiction and allow the tribal court to determine the factors of forum, personal jurisdiction, and the availability of its resources to transfer the case to tribal court. The state of Montana should follow the broad and liberal interpretation of *Holyfield* when handling ICWA cases. It is doubtful an Indian tribe will pursue jurisdiction of a case for any reason other than seeking to protect the best interest of the child.

Centuries of paternalistic attitudes have sought to require

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226. Jesse C. Trentadue & Myra A. DeMontigny, *The Indian Child Welfare Act of 1978: A Practitioner's Perspective*, 62 N.D. L. REV. 487, 501 (1986).

227. *See* Dorsay et al, *supra* note 15, at 182 (citing *In re* Birdhead, 331 N.W.2d 785 (Neb. 1983); *In re* T.R.M., 489 N.E.2d 156 (Ind. Ct. App. 1986), *vacated*, 525 N.E.2d 298 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989); *In re* Robert T., 246 Cal. Rptr. 168 (Cal. Ct. App. 1988)). Dorsay notes that some state courts are basing decisions on Indian tribe's financial inability to participate in ICWA proceedings and penalizing Indian tribes for their failure to participate. *Id.*

228. 25 U.S.C. § 1901 (1988); *see also* Robert J. McCarthy, *The Indian Child Welfare Act: In the Best Interests of the Child and Tribe*, CLEARINGHOUSE REV. 864 (Dec. 1993).

the Indian community to conform to Anglo norms. The ICWA attempts to preserve Indian heritage and culture by providing an Indian child the opportunity to learn his or her cultural identity which is in the best interest of the child. Instead of challenging the mandates of ICWA, practitioners and courts should learn the policy of ICWA, and accept that Indian tribes provide the best forum to determine the future of Indian children. Clearly, ICWA is in the best interest of the Indian child, family and tribe.

REFINING FEDERAL CIVIL JUSTICE REFORM IN MONTANA

Carl Tobias*

I re-evaluated the experimentation that the Montana Federal District Court and additional districts have performed under the Civil Justice Reform Act (CJRA) of 1990 in the most recent issue of this journal.[1] I reported that civil justice reform at the national level had been relatively quiescent since I canvassed national developments in the previous issue of the Montana Law Review.[2] All ninety-four federal districts were continuing to experiment with mechanisms for decreasing cost and delay in civil litigation and were continuing to assess the efficacy of those procedures.[3] I correspondingly discussed the Judicial Amendments Act of 1994 that extended for a year the CJRA's deadlines for the Judicial Conference to submit a report to Congress and the RAND Corporation to complete a study on the pilot program whereby ten districts experimented with six litigation management and cost and delay reduction procedures prescribed by the statute.[4]

I also reported that Chief Judge Paul Hatfield sought the views of the CJRA Advisory Group and the Local Rules Committee on the possible revision of the court's local rules. After con-

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* Professor of Law, University of Montana. I wish to thank Jerry Lynch and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. I am especially grateful to Ann and Tom Boone for their generous gift which recognizes the value of scholarship. I serve on the Advisory Group that the United States District Court for the District of Montana has appointed under the Civil Justice Reform Act of 1990; however, the views expressed here and errors that remain are mine.

1. *See* Carl Tobias, *Re-evaluating Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 307 (1995) [hereinafter Tobias, *Re-evaluating*]. This is the most recent installment of a series of articles that document and analyze developments in federal civil justice reform in Montana. *See* Carl Tobias, *Evaluating Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 449 (1994) [hereinafter Tobias, *Evaluating*]; Carl Tobias, *Recent Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 235 (1994); Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357 (1993); Carl Tobias, *Updating Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 89 (1993); Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239 (1992); Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992); Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433, 438-51 (1991).

2. *See* Tobias, *Re-evaluating*, *supra* note 1, at 308-11; *see also* Tobias, *Evaluating*, *supra* note 1, at 451-53.

3. *See* Tobias, *Re-evaluating*, *supra* note 1, at 308-09.

4. *See* Tobias, *Re-evaluating*, *supra* note 1, at 309-10; *see also* 28 U.S.C. § 473(a) (Supp. V 1993).

sultation with both entities, the Chief Judge decided that the Montana district should prepare a complete set of local rules amendments in light of the 1993 Federal Rules revisions.[5] Chief Judge Hatfield, therefore, finalized proposals to amend the local rules and circulated them to Judge Charles Lovell and Judge Jack Shanstrom in November. I suggested that the district intended to publish the proposed local rules revisions for public comment in early 1995.

Since I last reported on civil justice reform, two important developments have occurred. The House of Representatives passed three bills—the Attorney Accountability Act (AAA), the Securities Litigation Reform Act (SLRA), and the Common Sense Product Liability and Legal Reform Act (PLLRA).[6] None of these measures directly modifies the CJRA, although the bills could significantly affect civil justice reform. The second important development is that the Montana Federal District Court formally proposed the local rules revisions for public comment. This essay undertakes the evaluation of these new developments in civil justice reform.

The essay first provides an update of pertinent developments respecting civil justice reform nationally and in the Montana district. The essay emphasizes House passage of three important measures relevant to civil justice reform and the proposed local rules amendments which the Montana district issued. The piece then affords a look into the future.

I. CIVIL JUSTICE REFORM UPDATE

A. National Developments

Virtually no new developments in federal civil justice reform at the national level that involve the district courts have occurred since I last reported on reform.[7] All thirty-four Early Implementation District Courts (EIDC), including the Montana district, and the remaining sixty districts that are not EIDCs

5. *See* Tobias, *Re-evaluating*, *supra* note 1, at 314; *see also* United States District Court for the District of Montana, Proposed Amendments to Local Rules (Oct. 1994).

6. *See* Attorney Accountability Act, H.R. 988, 104th Cong., 1st Sess. (1995); Common Sense Product Liability and Legal Reform Act, H.R. 956, 104th Cong., 1st Sess. (1995); Securities Litigation Reform Act, H.R. 1058, 104th Cong., 1st Sess. (1995). These effectively comprise the Common Sense Legal Reforms Act, H.R. 10, 104th Cong., 1st Sess. (1995), the ninth tenet in the Republican Party's Contract with America.

7. *See* Tobias, *Re-evaluating*, *supra* note 1, at 308-09.

have continued experimenting with mechanisms for decreasing cost and delay and have continued to assess those procedures' effectiveness.[8] In the latest issue of the *Montana Law Review*, I explained that the CJRA required the Judicial Conference to submit to Congress by December 31, 1995 a report on the demonstration program[9] and that Congress had not extended this deadline in the 1994 Judicial Amendments Act.[10] Legislation was recently introduced in the Senate that would extend the deadline for a year.[11]

During the week of March 6, the House of Representatives passed the AAA, the SLRA, and the PLLRA.[12] This legislation could significantly affect federal civil justice reform, but it is unclear whether Congress will enact any of the bills. They, therefore, warrant brief treatment here. Section 2 of the AAA would modify the settlement offer provision in current Federal Rule of Civil Procedure 68 by prescribing fee-shifting in diversity cases.[13] Section 3 of the legislation would change Federal Rule of Evidence 702 in ways that limit expert testimony, ostensibly to increase "honesty in testimony."[14] Section 4 would alter the 1993 revision of Federal Rule of Civil Procedure 11 by eliminating safe harbors, making the provision applicable to discovery, and making sanctions' imposition mandatory and compensatory.[15]

The SLRA would modify securities litigation in numerous ways. Most important to the issues treated here, the legislation would impose special pleading and class action requirements in securities cases and would require losing parties to pay prevailing litigants' attorney's fees in certain of those actions.[16] The PLLRA would institute a number of important changes in prod-

8. All districts had to issue civil justice expense and delay reduction plans by December 1993. *See* Civil Justice Reform Act, Pub. L. No. 101-650, § 103(b)(1), 104 Stat. 5096 (1990).

9. The program requires that the Western District of Michigan and the Northern District of Ohio experiment with systems of differentiated case management and that the Northern District of California, the Northern District of West Virginia and the Western District of Missouri experiment with various methods of reducing cost and delay, including alternatives to dispute resolution (ADR). *See* Civil Justice Reform Act, Pub. L. No. 101-650, § 104(b)(1)-(2), (d), 104 Stat. 5097 (1990).

10. *See* Pub. L. No. 103-420, § 4, 108 Stat. 4343, 4345 (1994).

11. *See* S. 464, 104th Cong., 1st Sess. (1995).

12. I rely substantially in the remainder of this subsection on Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

13. *See* H.R. 988, *supra* note 6, § 2; *see also* FED. R. CIV. P. 68.

14. *See* H.R. 988, *supra* note 6, § 3; *see also* FED. R. EVID. 702.

15. *See* H.R. 988, *supra* note 6, § 4; *see also* FED. R. CIV. P. 11.

16. *See* H.R. 1058, *supra* note 6, §§ 2-4.

ucts liability law. The legislation would restrict seller liability in numerous instances, permit punitive damages awards only upon proof of actual malice by clear and convincing evidence, and require that punitive damages be capped.[17] The bill would also impose several defenses to products liability cases and a special Rule 11 that covers frivolous products suits.[18] The measure prohibits strict liability actions for commercial loss, includes a statute of repose, and limits the liability of health care providers and drug manufacturers.[19]

B. Montana Developments

On March 30, the Montana district issued proposed amendments to its local rules and sought public comment on the proposals.[20] Most of the proposals are inconsequential or involve style, but several are significant and substantive. One modification would essentially reinstate the automatic disclosure procedure that the district instituted in April 1992.[21] The proposed amendment also provides that sanctions "may be imposed for violation of Rule 200-5(a) [and] shall be imposed in accordance with the prescriptions" of Federal Rules 11 and 37.[22]

The other important modification implicates the provision for the co-equal assignment of civil suits with the opportunity to opt out and have Article III judges hear cases that were initially

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17. *See* H.R. 956, *supra* note 6, §§ 102, 201.

18. *See* H.R. 956, *supra* note 6, §§ 104-105.

19. *See* H.R. 956, *supra* note 6, §§ 101, 106, 201, 203. When this essay went to press in May, the Senate had passed a streamlined version of H.R. 956. *See* S. 565, 104th Cong., 1st Sess. (1995). That legislation did not include the provisions in H.R. 988 and H.R. 1058, and the Senate had not passed legislation that was analogous to either H.R. 988 or H.R. 1058. However, the Senate did seem likely to pass legislation that is analogous to H.R. 1058. *See* S. 240 104 Cong., 1st Sess. (1995).

20. United States District Court for the District of Montana, Proposed Amendments to Local Rules (Apr. 1995) [hereinafter 1995 Proposals].

21. *See* 1995 Proposals, Rule 200-5, *supra* note 20, at 18-20. *Compare* D. MONT. R. 200-5(a) *with* United States District Court for the District of Montana, Order in the Matter of Local Rules of Civil Procedure 2-3 (Jan. 25, 1994). The new proposal makes two minor modifications in the 1992 version of subsections (iii) and (iv) of Rule 200-5. The proposal replaces "identity" with more precise requirements that the disclosing party provide the "name, and, if known, the address and telephone number of each individual known or believed to have discoverable information about the claims or defenses, and a summary of that information." 1995 Proposals, Rule 200-5(a)(iii), *supra* note 20, at 19. The proposal also provides that the disclosing party may provide a copy of documents instead of a description. *See* 1995 Proposals, Rule 200-5(a)(iv), *supra* note 20, at 19.

22. *See* 1995 Proposals, Rule 200-5(a)(4), *supra* note 20, at 19.

assigned to magistrate judges.[23] The proposal would require that litigants exercise the option to request an Article III judge "not later than twenty days from the date notification of assignment to the magistrate judge is filed by the Clerk of Court."[24] The district has solicited the views on these proposed amendments of the Montana Bar and the public, and these comments were supposed to be "received by the Clerk of Court no later than May 8."[25]

II. A GLANCE INTO THE FUTURE

A. National

All 94 districts will continue applying numerous measures that are intended to decrease cost or delay. More conclusive determinations regarding the procedures' effectiveness will have to await additional experimentation, principally in the courts that are not EIDCs. If Congress extends demonstration district experimentation, the Federal Judicial Center and the Judicial Conference should capitalize on the extra time. Congress should reject those aspects of the AAA, the SLRA and the PLLRA that govern procedure and fee shifting because they will disrupt normal procedural revision processes or CJRA experimentation or will improperly restrict federal court access.[26] If Congress is not persuaded that the legislation will have these impacts or decides to proceed for other reasons, Congress should at least delete those provisions that will disrupt continuing reform initiatives, such as CJRA experimentation.

B. Montana

The Montana district's consultation with the CJRA Advisory Group and the Local Rules Committee before proposing amendments in the local rules was advisable. The proposed revision in automatic disclosure could cause confusion.[27] The proposal would essentially revert to the 1992 articulation after less than

23. *See* 1995 Proposals, Rule 105-2(d), *supra* note 20, at 2-3.

24. *See* 1995 Proposals, Rule 105-2(d), *supra* note 20, at 3.

25. United States District Court for the District of Montana, Notice, Proposed Amendments to the Rules of Procedure of the United States District Court for the District of Montana (Mar. 30, 1995).

26. For more analysis of this legislation and suggestions for treating it, see Tobias, *supra* note 12.

27. *See supra* notes 21-22 and accompanying text.

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

eighteen months of experience with a disclosure provision premised more closely on the 1993 Federal Rule amendment.[28] Because both the new proposal and the 1994 enunciation provide advantages and impose disadvantages, it may be preferable to retain the 1994 provision, which at least contributes to national procedural uniformity.

The proposed amendment's inclusion of a specific sanctioning provision may be unnecessary and confusing.[29] The 1993 amendments of Federal Rules 26(g) and 37 expressly prescribe sanctions for disclosure violations.[30] The reference to Federal Rule 11 in the Montana District's proposal fosters complication because Rule 11's 1993 amendment includes numerous procedural requirements, such as safe harbors, that differ from those in Rules 26(g) and 37.[31] Moreover, the 1993 amendment of Rule 11(d) expressly states that the rule does "not apply to disclosures and discovery requests, responses, objections and motions that are subject to the provisions of Rules 26 through 37."[32]

The proposed amendment's change in the opt-out provision, which specifically provides a twenty-day period for requesting assignment to an Article III judge, could avoid the problem of demands that were exercised rather late in litigation after a magistrate judge had handled the case to that point.[33] The judges in the district may want to institute measures which avoid any perception that they might unfavorably view the assertion of any such demands.[34]

III. CONCLUSION

Every district, including Montana, is continuing to experiment with cost and delay reduction measures and evaluating their effectiveness. Congress may extend the deadlines for completing the study of, and report and recommendations on, the demonstration program. An extension should enhance their accuracy. Congress might also pass legal reform legislation, although

28. *See* Tobias, *Re-evaluating*, *supra* note 1, at 314.
29. *See supra* note 22 and accompanying text.
30. *See* FED. R. CIV. P. 26(g), 37.
31. *See* FED. R. CIV. P. 11.
32. *See* FED. R. CIV. P. 11. Because the Montana District's provision for disclosure is stricter than Federal Rule 26(a), it could be argued that disclosure in the district is not "subject to the provisions of Rules 26 through 37" and, therefore, that special provision for sanctioning through Rule 11 is appropriate.
33. *See* Tobias, *Re-evaluating*, *supra* note 1, at 314-15.
34. *See* Tobias, *Re-evaluating*, *supra* note 1, at 315.

enactment would be unwise. The Montana district has proposed amendments of the local rules, and the judges are now considering the public comments on these proposed revisions.

AN UPDATE ON THE 1993 FEDERAL RULES AMENDMENTS AND THE MONTANA CIVIL RULES

Carl Tobias*

One year ago in the pages of the *Montana Law Review*, I reported that the Montana Advisory Commission on Rules of Civil and Appellate Procedure was considering whether to recommend that the Montana Supreme Court adopt for application in the Montana state courts thorough amendments in Federal Rule of Civil Procedure 11, which covers sanctions, and Federal Rule 26, which prescribes mandatory pre-discovery or automatic disclosure.[1] The changes in these two provisions, which took effect on December 1, 1993, were the most controversial components of the most ambitious group of modifications in the Federal Rules of Civil Procedure during their fifty-seven year history.[2]

The 1993 amendment in Rule 11 significantly altered the 1983 version of the Rule, an amendment which was the most controversial change ever promulgated. The 1993 modification substantially reduced the incentives for invoking Rule 11. For instance, the 1993 amendment prescribes safe harbors, whereby parties who are notified that they may have violated the Rule are afforded twenty-one days to withdraw or alter the allegedly offending paper.[3] The 1993 revision correspondingly entrusts to judicial discretion the imposition of sanctions when litigants or lawyers contravene Rule 11 and admonishes judges that the principal purpose of sanctions is deterrence, while suggesting that monetary sanctions should rarely be levied.[4] Some attorneys and additional interests opposed the amendment principally because they believed that it would undermine the 1983 revision's effect as a deterrent to frivolous litigation.[5]

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* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. *See* Carl Tobias, *The 1993 Federal Rules Amendments and the Montana Civil Rules*, 55 MONT. L. REV. 415 (1994).

2. *See* Supreme Court of the United States, Amendments to the Federal Rules of Civil Procedure and Forms, *reprinted in* 146 F.R.D. 402 (1993).

3. *See* FED. R. CIV. P. 11(c)(1)(A), *reprinted in* 146 F.R.D. at 421-23; *see also* Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1784-85 (1992).

4. *See* FED. R. CIV. P. 11(c)(2), *reprinted in* 146 F.R.D. at 421-23; *see also* Carl Tobias, *supra* note 3, at 1783-88.

5. *See* Supreme Court of the United States, Amendments to the Federal Rules of Civil Procedure and Forms, Dissenting Statement, *reprinted in* 146 F.R.D. 402,

The 1993 change in Rule 26, providing for automatic disclosure, was the most controversial proposal to amend the Federal Rules of Civil Procedure in the Rules' half-century history. The 1993 modification requires that plaintiffs and defendants divulge, prior to discovery, "discoverable information relevant to disputed facts alleged with particularity in the pleadings."[6]

Nearly all elements of the organized bar and a number of other interests strongly opposed the disclosure revision.[7] These attorneys and interests were uncertain about what they must disclose, thought that the amendment would impose an additional layer of discovery and believed that disclosure might conflict with certain aspects of the American judicial process that depends on "adversarial litigation to develop the facts before a neutral decisionmaker."[8] The 1993 change authorizes each of the ninety-four federal districts to alter or reject completely the Federal Rule amendment and quite a few courts, including the Montana District, have done so.[9]

Several factors led me to suggest that the Montana Supreme Court incorporate into the Montana Rules of Civil Procedure the 1993 revision in Federal Rule 11. First, the 1993 modification in Rule 11 represents a significant improvement in the 1983 amendment and constitutes a workable compromise.[10] Promulgation of the 1993 federal amendment would foster intrastate

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507-09 (1993) (Scalia, J., dissenting) [hereinafter Dissenting Statement]. Justice Clarence Thomas joined this dissent.

6. *See* FED. R. CIV. P. 26 (a)(1), *reprinted in* 146 F.R.D. 431-32 (1993); *see also* Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 35-39 (1992).

7. *See* Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1612-13 (1994).

8. Dissenting Statement, *supra* note 5, at 510-11.

9. *See* FED. R. CIV. P. 26(a)(1), *reprinted in* 146 F.R.D. at 431-32; *see also* Letter from Paul G. Hatfield, Chief Judge, U.S. Dist. Ct. for the Dist. of Mont., to Members of the Federal Bar (Jan. 25, 1994) (on file with author) (advising bar that court has temporarily modified automatic disclosure provision prescribed in April 1992 civil justice plan to conform more closely with federal amendment); Carl Tobias, *Refining Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 539 (1995) (indicating that court has proposed reverting to 1992 disclosure rule).

Arizona is the only state which prescribed automatic disclosure before the Federal amendment became effective. *See Symposium: Mandating Disclosure and Limiting Discovery: The 1992 Amendments to Arizona's Rules of Civil Procedure and Comparable Federal Proposals*, 25 ARIZ. ST. L.J. 1 (1993); *see also* Alaska Supreme Court, Final Draft Discovery and Disclosure Rules (adopting disclosure procedure which will become effective on July 15, 1995). *See generally* Jill S. Chanen, *States Considering Discovery Reform*, A.B.A. J., Apr. 1995, at 20.

10. I rely substantially here on Carl Tobias, *The Transmittal Letter Translated*, 46 FLA. L. REV. 127 (1994).

consistency between Federal and Montana Rule 11. Moreover, Montana has prescribed many of the Federal Rules amendments promptly after their adoption in the federal courts.

I also suggested that Montana Rule 11's actual operation in practice should be relevant. It appeared that considerably less formal Rule 11 activity had occurred under the Montana Rule 11 than the federal analogue, but it has been uncertain exactly how much and what kind of informal activity, such as threats to employ the Rule, have occurred.[11] A significant amount of the most damaging behavior that involved the 1983 revision to Federal Rule 11 implicated its informal invocation.[12] The Montana Supreme Court and the state district courts have not construed and applied Montana Rule 11 with complete consistency, and there has been some satellite litigation under the Montana Rule.[13]

I suggested as well that the manner in which jurisdictions other than Montana have handled Rule 11 might be relevant. Quite a few states have now subscribed to the 1993 Federal Rule revision.[14] It is also important to remember that a small number of jurisdictions had altered their counterparts of the 1983 federal provision before that amendment was changed.[15]

I ultimately concluded that the issues critical to prescribing the Federal revision for the Montana state courts were whether the increased clarity and decreased incentives to rely on that provision were greater than the possible loss in terms of deterring frivolous lawsuits. I found that the heightened clarity of the Federal modification, the amendment's limitation of incentives for its invocation, and the more balanced approach suggested that the Montana Supreme Court promulgate the federal change.

I determined that numerous considerations complicate the question of whether the Montana state court system should prescribe the Federal Rule 26 disclosure revision. One important

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11. Cynthia Ford, *Unraveling Rule 11*, MONT. LAW. 3, 4-6 (Jan. 1993) [hereinafter *Unraveling*]; Cynthia Ford, MONT. LAW., *Rule 11 is Working Well in Montana* 9 (Feb. 1993).

12. *See* Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 861-65 (1992).

13. *See Unraveling*, *supra* note 11.

14. *See, e.g.*, MO. R. CIV. P. 55.03; WYO. R. CIV. P. 11; *see also* Joel L. Selig, *The 1994 Amendments to the Wyoming Rules of Civil Procedure*, 30 LAND & WATER L. REV. 151, 156-62 (1995) (analyzing amendment to Wyoming Rule 11).

15. *See, e.g.*, ALASKA R. C. P. 11; WASH. SUP. CT. CIV. R. 11. A few states never adopted provisions similar to the 1983 Federal Rule 11 because they seemingly thought that its disadvantages outweighed its benefits. *See, e.g.*, MASS. CIV. R. 11; N.Y. CPLR 2105, 3020 (McKinney 1990 & Supp. 1992); *see also* MD. R. 1-311.

factor was the difficulty of ascertaining whether any of the automatic disclosure procedures would be efficacious and, if so, which would be most effective. A tiny number of the some twenty districts which have been experimenting with disclosure for the longest time employed mechanisms similar to the federal amendment.[16]

I found some anecdotal evidence indicating that a number of Early Implementation Districts Courts (EIDCs) which have been applying disclosure have encountered little difficulty implementing it.[17] Disclosure apparently operates best in rather routine, simple litigation or when the disclosure is relatively general.[18] Additional anecdotal material suggests that counsel are less critical of automatic disclosure after they have acquired familiarity with the measure.[19]

I recommended several ways in which the Montana Supreme Court could treat automatic disclosure. One approach was to wait for more definitive conclusions from the ongoing experimentation with disclosure in the federal district courts. I also suggested that the Montana state courts might implement an experimental program. For example, the Montana Supreme Court could have identified several districts for experimentation with disclosure techniques which have proved most promising in the federal system.[20] Moreover, the Montana Supreme Court might have revised Montana Rule 26 to require some form of automatic disclosure. I ultimately recommended that the lack of informa-

16. The districts based disclosure on the Advisory Committee's preliminary draft. *See* Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 144-45 (1993). Even these courts have not experimented with or assessed disclosure for sufficient time to derive conclusive determinations about its effectiveness. Most of the Early Implementation District Courts under the CJRA only instituted disclosure during 1992, and few have rigorously evaluated its efficacy. *See id.* at 144-45.

17. These are the Northern District of California and the Districts of Arizona, Massachusetts, and Montana. This evidence is premised on conversations with many individuals, including advisory group reporters and members, court personnel, and practitioners, who are familiar with civil justice reform in those districts. *See generally supra* note 16 and accompanying text.

18. Unfortunately, discovery presents the most significant complications and demands the most efficacious reform in complex litigation, such as civil rights class actions and products liability cases, and when parties need relatively specific information.

19. This idea is premised on the conversations, *supra* note 17. Numerous lawyers apparently have found that disclosure principally requires attorneys and their clients to participate in certain activities—especially document retrieval and labelling—earlier in litigation. This idea is based on the conversations, *supra* note 17.

20. *See* Carl Tobias, *In Defense of Experimentation with Automatic Disclosure*, 27 GA. L. REV. 665, 666-71 (1993); *see also* H.R. 2814, 103d Cong., 1st Sess. (1993).

tion about how automatic disclosure in fact functions and about which of the disclosure procedures is most workable meant that the Montana Supreme Court should probably await the conclusion of experimentation that is now proceeding in a number of federal districts.

The Montana Advisory Commission on Rules of Civil and Appellate Procedure has not yet submitted its recommendation regarding the 1993 Federal Rules revisions to the Montana Supreme Court.[21] There is apparently little inclination on the part of the members of the Commission or of the Montana Supreme Court to adopt the 1993 amendments. The Commission and the Court seem to have premised their determinations on the controversial nature of the 1993 modifications in Rule 11 and in Rule 26 and on uncertainty about how the new provisions would actually operate, believing that it is preferable to see how the procedures will function.

The positions of the Advisory Commission and of the Montana Supreme Court have much to commend them, and are defensible, although I partly disagree with the decisions of the Commission and the court. I believe that the 1993 Federal Rule amendment in Rule 11 substantially improves the 1983 revision which was extremely controversial. The 1993 version includes phrasing that is clearer, while it reduces incentives to invoke the provision. The determinations of the Commission and the court regarding Rule 11 are more justifiable because Montana Rule 11 has apparently fostered comparatively little satellite litigation and has been invoked rather infrequently, at least in formal settings. The limited use of the provision is probably attributable to the restraint and good judgment of judges, lawyers and parties who participate in civil litigation in the Montana state courts. Nevertheless, I think that amendment is now warranted, and I urge the Commission and the court to reconsider their decisions.

The decisions of the Advisory Commission and of the Montana Supreme Court respecting automatic disclosure are more defensible. Rule 26(a) remains quite controversial at the federal level, and fewer than a majority of the ninety-four districts have subscribed to the Federal Rule amendment.[22] None of the vari-

21. I rely substantially in this paragraph on telephone conversations with Randy Cox, Boone, Karlberg & Haddon and member of Montana Advisory Commission on Rules of Civil and Appellate Practice (Dec. 5, 1994, Feb. 2, 1995 & May 23, 1995).

22. *See* Memorandum from Alfred W. Cortese & Kathleen L. Blaner, *Mandatory Disclosure Rule 26(a)(1): Not the Rule of Choice* (Oct. 28, 1994) (on file with author);

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

ous forms of automatic disclosure with which courts have been experimenting has clearly emerged as very efficacious. The application of disclosure in the Montana Federal District Court has apparently worked rather well, but much of this can probably be ascribed to the ingenuity and goodwill of the small, comparatively collegial federal bar. Only a few states have adopted disclosure, and many seem to be awaiting the results of federal experimentation before proceeding. The determinations of the Advisory Commission and of the Montana Supreme Court to delay the adoption and implementation of disclosure, therefore, seem advisable at this juncture.

CONCLUSION

The Montana Supreme Court should adopt the 1993 Federal Rule amendment to Rule 11 for application in the Montana state court system. The controversial nature of the revision in Rule 26 means that the court should probably continue to defer that provision's prescription while awaiting the results of experimentation in the federal districts and the tiny number of states which have adopted the procedure.

Donna Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Mar. 24, 1995).

COMMENT

CONFLICT OF LAWS: THE RECENT HISTORY OF MONTANA'S RULES FOR CONTRACTS

Robert C. Lukes*

The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution.[1]

Courts often confront facts that require them to consider the application of another jurisdiction's laws. For example, if a tort occurred or a contract were entered into in state A, but the action is brought in state B, the court of state B may find that the proper law to apply is that of state A.

When the facts presented to a court may invoke the laws of more than one jurisdiction, the court must determine which substantive law will control the case. However, if the laws of the different jurisdictions are equivalent, there is no conflict and the issue is moot.[2] Although jurisdictional issues are a subset of the conflict of laws subject, the determination regarding the substantive law that a court should apply in a case is a different question. Jurisdictional questions involve whether a court can exercise power over a party or subject. On the other hand, substantive conflict of law questions pertain only to the law that a court will apply to the case and arise after it has established jurisdic-

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* In Memory of Robert J. Lukes, M.D. (1922-1994).

1. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971).

2. *See, e.g.*, Gitano Group, Inc. v. Kemper Group, 31 Cal. Rptr. 2d 271, 275 (Cal. Ct. App. 1994).

tion.[3]

A court determines the applicable substantive law by utilizing "conflict of laws" or "choice of law" rules. Although this results in a substantive determination, the process is procedural in character. Traditionally, this determination is made without regard to the actual substance of the laws which are in conflict. A court applies the rules to the facts and reaches a conclusion. The court's choice of the applicable law is crucial to the outcome of many cases because it determines which jurisdiction's substantive law will be applied.

Conflict of laws often arise in contractual disputes. When parties enter into a contract in one state, and then disputes involving that contract arise in another, the laws of the two states may conflict. When these conflicts arise, courts apply a variety of rules, nearly all of which are judge-made common law rules.[4] The conflict of law rules, like many other procedural rules of court, have evolved throughout the history of American jurisprudence.

In Montana, the conflict of law cases concerning contracts took a new direction beginning in 1979. The Montana Supreme Court's decisions since that time are inconsistent and have created confusion regarding the rules for conflict of laws. This Comment will examine these decisions and discuss the inconsistencies in the law to help clarify the current status of Montana's conflict of law rules for contracts.

In part one, this Comment reviews the history of the more significant conflict of laws theories. Part two turns the discussion to a Field Code statute which has gained recent prominence in Montana's conflict of laws analysis.[5] Part three focuses on three Montana conflict of law cases which rely on the Field Code statute. Part four compares these Montana decisions with cases from other Field Code jurisdictions. In part five, the most recent Montana Supreme Court conflict of laws case, *Casarotto v. Lombardi*,[6] is juxtaposed with the court's prior decisions. In conclusion, this Comment presents several alternatives to the currently applied rules which should help improve Montana's conflict of law rules for contracts.

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3. For a brief discussion which clarifies this basic distinction, see ROBERT A. LEFLAR, THE LAW OF CONFLICT OF LAWS § 4 (1959).

4. Robert A. Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080, 1080 (1981).

5. *See* MONT. CODE ANN. § 28-3-102 (1993).

6. 268 Mont. 369, 886 P.2d 931 (1994).

I. HISTORICAL BACKGROUND

In the 1800s, Joseph Story propounded the first predominant conflict of laws theory in American jurisprudence.[7] Based on comity, his theory encouraged the recognition of a foreign jurisdiction's laws in the general interest of justice and sought to ensure that the presiding forum's laws would be applied reciprocally by other jurisdictions.[8] Story's theory remained prominent throughout the states during the later half of the 1800s and had considerable influence in Europe as well.[9]

In the early part of this century, scholars extensively criticized Story's approach to the conflict of laws. Joseph Beale's vested rights theory thereafter gained prominence.[10] In 1934, Beale was the reporter for the original Restatement of the Conflict of Laws [hereinafter First Restatement], which substantially incorporated his views.[11] The First Restatement dictates that the law of the place where the contract was made controls the validity and interpretation of the contract, whereas the law of the place of performance controls issues concerning performance.[12] Beale essentially took the older rule of *lex loci contractus*, or the law of the place where the contract was entered, and expanded it to distinguish issues of validity and performance.

The First Restatement became the most influential theory adopted by courts during the first half of this century,[13] despite widespread criticism by academics.[14] Although a small number of jurisdictions continue to apply the rules of the First Restatement, courts and scholars generally recognize it as too rigid and mechanical, often leading to unjust results.[15] Commentators

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7. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (1865).

8. *Id.* § 38, at 34.

9. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 2.4, at 12-13 (1982).

10. *See* Scoles & Hay, *supra* note 9, at 13; *see also* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).

11. Scoles & Hay, *supra* note 9, at 13-15.

12. John G. Hanlin, *The Choice of Law in the Interpretation of Insurance and Reinsurance Contracts*, 2 MD. J. CONTEMP. LEGAL ISSUES 15 (1991); *see also* RESTATEMENT OF THE CONFLICT OF LAWS, §§ 311-76 (1934). Historically, the prominence of this rule in American jurisprudence may be traced back to Scudder v. Union Nat'l Bank, 91 U.S. 406 (1875).

13. Scoles & Hay, *supra* note 9, at 15.

14. *See generally* ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 1, at 1-2 (3d ed. 1977).

15. *See generally* James A. McLaughlin, *Conflict of Laws: The Choice of Law Lex Loci Doctrine, the Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L.

have characterized Montana as one of the states that still clings to the even older rule of *lex loci contractus*.[16] Yet, the Montana Supreme Court has denied this characterization.[17]

General criticisms of the First Restatement and several influential New York cases[18] led to a second Restatement on the Conflict of Laws [hereinafter Restatement Second] in 1971. The Restatement Second abandoned Beale's doctrine of vested rights and adopted the "most significant relationship" test for the conflict of laws. Section 188 of the Restatement Second lists a number of factors that a court should weigh in contract situations to determine which jurisdiction's law will apply.[19] This balancing test from section 188 intends that the law of the jurisdiction with the most substantial connections to the contract shall control the case.

The modern conflict of laws debate has generated several other doctrines in addition to the one enunciated in the Restatement Second, some of which have been adopted by other jurisdictions.[20] The amount of scholarship in this area is remarkable,[21]

REV. 957 (1991) (claiming that even the certainty strived for in these older rules was unachieved in implementation).

16. *See* Hanlin, *supra* note 12, at n.11; *see also* Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1172, 1093-94 (1987) (providing an analysis of conflict of law rules for all United States jurisdictions and classifying Montana under "First Restatement Rules").

17. Kemp v. Allstate Ins. Co., 183 Mont. 526, 531, 601 P.2d 20, 23 (1979) (declaring that the Field Code statute relied upon by the court states the rule of *lex loci solutionis*, or "the law of the place of performance").

18. Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963); Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954).

19. The factors are:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971).

20. For a discussion of these theories and a survey of jurisdictions adopting them, see Smith, *supra* note 16. Smith claims that the modern era of conflicts law began around 1963 and since that time courts have wrestled with these doctrines, often reaching markedly inconsistent results. *Id.* at 1041.

21. *See, e.g.*, Paul E. McGreal, *Conflict of Laws*, 47 SMU L. REV. 865 (1994); Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975 (1994); Symeon C. Symeonides, *Louisiana Conflicts Law: Two "Surprises"*, 54 LA. L. REV. 497 (1994); Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949 (1994); Thomas H. Day, *Solution for Conflict of Laws Governing Fraudulent Transfers: Apply the Law that was Enacted to Benefit the Creditors*, 48 BUS. LAW. 889 (1993); Kirt

with the complexity and confusion engendered by this subject apparent from the different types of rules that courts use. The foregoing discussion provides a limited synopsis of the history of the conflict of laws and places Montana's current rules in a larger context.

II. MONTANA'S FIELD CODE STATUTE

In 1865, David Dudley Field submitted an enormous body of codified laws—the Field Code—to the New York legislature.[22] The Field Code was part of the movement to reform the system of laws in the United States during the 1800s and was intended as a comprehensive body of law that would entirely supplant the common law.[23] Although Field's home state of New York never adopted the substantive portions of the Code,[24] five western states adopted it in the late 1800s, including Montana.[25] These states abandoned the general purpose behind Field's creation however, and adopted the Code *in addition to* the existing common law.

The Montana statute on conflict of laws, adopted verbatim from the Field Code, is found at section 28-3-102 of the Montana

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O'Neill, *Contractual Choice of Law: The Case for a New Determination of Full Faith and Credit Limitations*, 71 TEX. L. REV. 1019 (1993); Dennis J. Tuchler, *A Short Summary of American Conflicts Law: Choice of Law*, 37 ST. LOUIS U. L.J. 391 (1993); Russel J. Weintraub, *An Approach to Choice of Law that Focuses on Consequences*, 56 ALB. L. REV. 701 (1993); Brian N. Eisen, *Cross Training: Sports Litigation and the Conflict of Laws*, 3 SETON HALL J. SPORT L. 41 (1993); James A. McLaughlin, *Conflict of Laws: The New Approach to Choice of Law: Justice in Search of Certainty, Part Two*, 94 W. VA. L. REV. 73 (1991); Ethan Glaubiger, *Using Principles of Conflict of Laws to Chart the Murky Waters of Contractual Indemnity:* Angelina Casualty Co. v. Exxon Corp., USA, 15 TUL. MAR. L. J. 411 (1991); Richard J. Bauerfeld, *Effectiveness of Choice-of-law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659 (1982).

22. Roscoe Pound, *David Dudley Field: An Appraisal*, *in* FIELD CENTENARY ESSAYS 3, 9 (Allison Reppy ed., 1949).

23. THE CIVIL CODE OF THE STATE OF NEW YORK § 6 (Proposed Draft 1865). Field's declared purpose was not to create new laws for the state, but simply to codify the then existing common law of his time. Rodolfo Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799, 801 (1986).

24. Pound, *supra* note 22, at 10. New York adopted a Code of Civil Procedure between 1876 and 1880 which was largely based on Field's work, but the remainder of his work was never adopted by the state which had originally commissioned the work. *Id.* at 9-10.

25. Joseph M. Cormack, *Conflict of Laws in Regard to Contracts in Field Code States Other than California*, 12 S. CAL. L. REV. 362, 363 (1939). For a history of Montana's adoption of the Field Codes and their impact, see Andrew P. Morriss, *This State Will Soon Have Plenty of Laws: Lessons From One Hundred Years of Codification*, 56 MONT. L. REV. 359 (1995).

Code [hereinafter the Field Code statute]. This statutory rule for the conflict of laws remains unchanged since its enactment in 1895 and reads:

> WHAT LAW AND USAGE TO GOVERN INTERPRETATION. A contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.[26]

The Field Code statute is a rule of interpretation for contracts. Although historically commentators distinguished between the interpretation of a contract and its construction, it is now generally accepted that the interpretation includes both the construction and the legal effect of the contract's words.[27] Problematic to the application of the Field Code statute is the court's ability to distinguish an issue involving the interpretation of a contract from one involving a contract's validity. The Field Code statute technically applies only in cases where the issue concerns interpretation.

The Restatement of Contracts states: "Interpretations of words and of other manifestations of intention forming an agreement, or having reference to the formation of an agreement, is the ascertainment of the meaning to be given to such words and manifestations."[28] Unfortunately, the interpretation of a contract is often inexorably tied to its validity, and many of these distinctions ultimately appear to be a matter of legal semantics.[29] As the Field Code statute is founded upon distinguishing

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26. MONT. CODE ANN. § 28-3-102 (1993).

27. JOHN D. CALAMARI & JOSEPH M. PERILLO, *The Law of Contracts*, §§ 3-9 (3d ed. 1987). Although the distinction between interpretation and construction is still advocated by some commentators, even they recognize that (1) in many cases it is impossible to draw a line between the interpretation and construction; and (2) courts have generally ignored the distinction. *See, e.g.*, Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 837 (1964). Professor Patterson has defined the interpretation of a contract as "the process of endeavoring to ascertain the meaning or meanings of symbolic expressions used by the parties." *Id.* at 833. On the other hand, Patterson claims construction "is a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context." *Id.* at 835. This lack of clarity concerning the definition of interpretation creates significant problems for applying Field Code statute. For the purpose of this Comment on Montana conflict of laws, and in line with the modern view, the word "interpretation" is taken to include construction. *See also* E. ALLAN FARNSWORTH, CONTRACTS § 7.1 (1982).

28. RESTATEMENT OF CONTRACTS § 226 (1932). *See also*, Calamari & Perillo, *supra* note 27, §§ 3-9.

29. Calamari & Perillo, *supra* note 27, §§ 3-9. "It is even difficult to tell

issues of interpretation, its application becomes uncertain and enigmatic.

In juxtaposition to the interpretation of a contract stands its validity. If a contract fails basic questions of validity, issues of interpretation are rendered moot. As the Field Code statute governs only issues of interpretation, it does not apply as a conflict of laws rule when the issue concerns the validity of the agreement.

However, when issues of interpretation arise, the Field Code statute is a strict rule based on performance. In these cases, the court should determine whether it can ascertain a place of performance from the contract, and if so, the court should apply the law from that place of performance. During the past fifteen years the Montana Supreme Court has used the Field Code statute as a platform to invoke a general rule distinguishing between issues of validity of a contract and issues of interpretation.[30] Beginning in 1979[31]—with one major exception—the court has relied upon the Field Code statute to determine its conflict of law rules for contracts.[32]

III. THE MONTANA CASES

In older cases involving the conflict of laws, the Montana Supreme Court largely avoided the subject for nearly half a century and never recognized the import of the Field Code statute in this arena.[33] Although travel and commerce during the early part of this century were more limited and the potential for interstate conflict thereby reduced, the early cases on point avoided any discussion of potential conflicts.[34] In 1931, the Montana Supreme Court first discussed the conflict of laws: the court employed the rule of *lex loci contractus* without any reference to

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whether the Restatement definition of interpretation refers to interpretation or construction or both." *Id.*

30. *See infra* part III.

31. Kemp v. Allstate Ins. Co., 183 Mont. 526, 601 P.2d 20 (1979).

32. *See infra* text accompanying notes 42-79. *But cf.* State Farm Mut. Auto. Ins. Co. v. Estate of Braun, 243 Mont. 125, 793 P.2d 253 (1990). *See infra* text accompanying notes 81-85.

33. *See* Shelton R. Williams, *Conflict of Laws: Does R.C.M. 1935, Section 7537 Require the Conclusion that the "Place of Performance" Governs the Essential Validity of a Contract?*, 2 MONT. L. REV. 74 (1941) (claiming that as of publication, the Montana courts had yet to discuss the Field Code statute).

34. *E.g.*, Capital Fin. Corp. v. Metropolitan Life Ins. Co., 75 Mont. 460, 243 P. 1061 (1926); United States Fidelity & Guar. Co. v. Bourdeau, 64 Mont. 60, 208 P. 947 (1922).

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

the Field Code statute.[35] Yet, in a later case decided during the 1950s, the Montana Supreme Court put insurance companies on notice that they will be subject to the rule of *lex fori*, or the law of the forum.[36] This meant that the court would always apply Montana law, regardless of other factual considerations.[37]

Prior to the Montana Supreme Court's most recent decision in *Casarotto*, the seminal case in Montana for conflicts law was *Kemp v. Allstate Insurance Co.* from 1979.[38] The only notable conflict of laws case before *Kemp* is *In re Estate of Dauenhauer*,[39] in which the court determined a child's legitimacy for purposes of inheritance. Confronted with a conflict of laws issue, the court in *Dauenhauer* did not rely upon Montana case law or statutory law, but relied instead upon the First Restatement and the Restatement Second.[40] Because *Dauenhauer* did not involve a contract situation, the Field Code statute did not apply. However, the case is important in this context for the Montana Supreme Court's recognition of the general applicability of the Restatements when conflict of law questions arise. Moreover, in 1980 the Ninth Circuit looked to *Dauenhauer*, not to *Kemp*, for guidance to determine Montana's conflict of law rules in a contractual situation and applied "the most significant relationship" test from the Restatement Second.[41] Thus, both the Montana Supreme Court and the federal court applying Montana law employed the Restatement in a narrow area of the conflict of laws in the past.

In 1979, the Montana Supreme Court for the first time recognized the import of the Field Code statute in *Kemp v. Allstate Insurance Co.*[42] *Kemp* is important for several reasons. First, it

35. Styles v. Byrne, 89 Mont. 243, 296 P. 577 (1931). The doctrine of *lex loci contractus* demands the law of the place where the contract was entered into shall control the case.

36. Trammel v. Brotherhood of Locomotive Firemen and Enginemen, 126 Mont. 400, 409, 253 P.2d 329, 334 (1953) (applying Montana law and public policy to include a divorced wife within the insurance contract's meaning of "dependent").

37. Note that regardless of the conflict of laws rule that Montana applies, this is very often the result. *See infra* note 72.

38. 183 Mont. 526, 601 P.2d 20 (1979).

39. 167 Mont. 83, 535 P.2d 1005 (1975).

40. *Dauenhauer*, 167 Mont. at 86, 535 P.2d at 1006.

41. Energy Oils, Inc. v. Montana Power Co., 626 F.2d 731, 734 n.6 (9th Cir. 1980) (holding that Montana law applied to the construction of assignments of oil and gas leases). The federal court appears to assume that Montana's recognition of the Restatement Second as valid authority in *Dauenhauer* made it a legitimate source for any conflict of laws issue. The Field Code statute is not discussed in the federal court's opinion. *Id.*

42. 183 Mont. 526, 531, 601 P.2d 20, 23 (1979).

signals a departure from the prior cases in its recognition of the Field Code statute as determinative in conflict of laws for contracts. Second, in recognizing the efficacy of the Field Code statute in *Kemp*, the Montana Supreme Court acknowledged that statutory law will control court rules which in other jurisdictions are generally judge made. Finally, the court in *Kemp* attempted to augment the statutory rule to cover situations beyond the interpretation of contracts, thus providing a more complete conflict of laws rule for Montana.

In *Kemp*, the plaintiff's car accident in Montana was covered under two insurance policies: one entered into in New York and one in Vermont.[43] The court recognized a conflict between the laws of these states and Montana concerning the possibility of "stacking" the uninsured motorist coverage.[44]

Allstate argued that Montana followed *lex loci contractus* and therefore, the law of Vermont should apply to the policy entered into in Vermont, while New York law should apply to the New York policy.[45] If the court in *Kemp* applied the laws of these other jurisdictions, it would have precluded the "stacking" of the plaintiff's policies and denied an increased recovery. Unlike New York and Vermont, Montana permits the insured to stack uninsured motorist polices.[46] Therefore, under Montana law a dramatically different recovery would result.

In contrast, the plaintiff urged the court to renounce *lex loci contractus* as "archaic," and to apply the most significant relationship test from the Restatement Second.[47] The court did not follow either argument, declaring that "[n]either party has correctly interpreted the affect in this case" of the Field Code statute.[48] The court interpreted the statute to prescribe the rule of *lex loci solutionis*, or the law of the place of performance.[49] The court stated:

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43. *Id.* at 528, 601 P.2d at 21.

44. *Id.* at 528-35, 601 P.2d at 21-24. "Stacking" laws concern the ability of the insured to add separate uninsured motorist policies together for greater coverage. Because of the contradictory positions of many jurisdictions, the issue of stacking is notably present in many recent conflict of law cases. *E.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); California Casualty Indem. Exch. v. Pettis, 239 Cal. Rptr. 205 (Cal. Ct. App. 1987).

45. *Kemp*, 183 Mont. at 530-31, 601 P.2d at 22-23.

46. *See* Bennett v. State Farm Mut. Auto. Ins. Co., 261 Mont. 386, 862 P.2d 1146 (1993).

47. *Kemp*, 183 Mont. at 531, 601 P.2d at 23.

48. *Id.*

49. *Id.* This is the correct characterization of the Field Code statute as a rule based on performance.

> Under the statute, it is only when the contract does not indicate a place of performance that the interpretation would fall under the rule of lex loci contractus. In this situation, we look to the contract to determine if there is a place of performance indicated; if there is, the law of the place of performance controls under our statute, and there is no need to determine the law of the place where the contract was made . . . .[50]

The *Kemp* court then examined the insurance policies for indications of place of performance, noting that the policies were both valid in the United States and Canada. The court concluded that Montana, as part of the United States, was a contemplated place of performance.[51] Once this determination was made, the court applied the Field Code statute and held that Montana law applied.[52] Thus, the stacking of the policies was permitted which increased the plaintiff's recovery.

The Montana Supreme Court's interpretation of place of performance under the Field Code statute in *Kemp* was enormously broad.[53] Because the contract was valid anywhere in the United States or Canada, the court held that the parties had therefore designated Montana as *the* place of performance. This is quite a stretch. If this broad standard was consistently applied, one is hard pressed to create a realistic hypothetical where Montana law would not control a contractual dispute.

Not only did the court in *Kemp* provide the broadest possible interpretation in its determination of the place of performance, but in its reliance upon the Field Code statute, it neglected to mention that the statute would only apply in questions regarding interpretation. As the previous quote from *Kemp* indicates, the court implied that if any place of performance is decipherable from the contract, the law of that place must be applied. The court's language in *Kemp* is markedly forceful, mandating considerations that make the place of performance primary. A reader relying upon *Kemp* could easily conclude that so long as a contract was valid and performable in Montana, the court would

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50. *Id.*

51. *Kemp*, at 531-32, 601 P.2d at 23. *But see* Rhody v. State Farm Mut. Ins. Co., 771 F.2d 1416 (10th Cir. 1985). Under facts similar to *Kemp*, the federal court in *Rhody* sharply criticizes the Montana Supreme Court for determining that the policy language intended Montana as a place of performance. The court in *Rhody* held that no place of performance was indicated by such contractual language and looked instead to where the contact was formed. *Id.* at 1419-20 & n.3.

52. *Kemp*, 183 Mont. at 533-34, 601 P.2d at 24-25.

53. *See supra* note 51 and comments concerning *Rhody*.

apply Montana law to the case.

Later in its opinion, the *Kemp* court turned to alternative sources to justify its resurrection of the heretofore idle Field Code statute. The court cited an older California case for "the longstanding rule [the *Blair* rule] that the law of place of performance of an insurance contract controls as to its legal construction and effect, but the law of the place where the contract was made governs on questions of execution and validity."[54] When the court relied upon the *Blair* rule, it expanded the scope of its conflict of law rules beyond that of the Field Code statute. In addition to conflict rules for the interpretation of contracts, the *Blair* rule encompasses considerations of what law should apply concerning issues of validity and execution. Thus, the breadth of the Field Code statute grew to potentially become a complete conflict of laws rule for contracts.

Indeed, in later cases in Montana, the *Blair* rule superseded the implementation of Field Code statute.[55] The Montana Supreme Court would cite to the Field Code statute, but then quote or follow the *Blair* rule's interpretation of the statute. Although the *Blair* rule's first appearance in *Kemp* is dicta, later cases relied heavily upon it as the final word on Montana's conflict of law rules for Montana.

The court's expansion of the Field Code statute with the *Blair* rule essentially augmented the rule of performance with the doctrine of *lex loci contractus* to cover issues of execution and validity. The main distinction in the *Blair* rule between execution and validity versus interpretation are similar to the First Restatement, yet the application of this distinction achieves a diametrically opposed result. The First Restatement assigns questions of interpretation to the law of *the place where the contract was formed*; whereas the *Blair* rule, as it includes the mandate of the Field Code statute, applies the law of *the place of*

54. *Kemp*, 183 Mont. at 533, 601 P.2d at 24 (citing Blair v. New York Life Ins. Co., 104 P.2d 1075 (Cal. Ct. App. 1940)). The court also claimed that the ruling is in accord with section 206 of the Restatement Second concerning "issues relating to details of performance of a contract." Yet, section 206 clearly refers to minor "details" of a contract, such as "manner, method and time" of performance. Comment b to this section explicitly contains a caveat stating that "this Section is applicable only to details of performance and not to those matters which substantially affect the nature and extent of the obligations imposed by the contract." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 206, cmt. b (1971).

55. *See* Omaha Property and Casualty Co. v. Crosby, 756 F. Supp. 1380 (D. Mont. 1990); Youngblood v. American States Ins. Co., 262 Mont. 391, 866 P.2d 203 (1993).

performance to questions of interpretation.

Because the *Blair* rule is based on distinctions similar to the those relied upon by the First Restatement, it consequently suffers from many of the same deficiencies. First, it is a rigid rule, providing little flexibility for a court to weigh the specific factors of a case. Second, as noted previously, many factual situations defy any clear distinction between interpretation and validity: often both elements are at issue.[56] Furthermore, *Kemp*'s introduction of the *Blair* rule without any discussion as to how it differed from or expanded the scope of the Field Code statute generated additional confusion. The rule that emerges from *Kemp* is not only antiquated and rigid but suffers from a serious lack of clarity.

The next case concerning the conflict of laws in Montana arose in the federal district court. In *Omaha Property and Casualty Company v. Crosby*,[57] the issue presented was whether a parent had an insurable interest in an automobile insurance contract. In *Crosby*, a parent purchased an automobile insurance policy in Montana and the son was later in an accident in Alaska.[58] Initially, the court addressed whether the law of Alaska or Montana would control the validity of the insurable interest.[59] The court treated the conflict of law issue in summary fashion, relying entirely upon the direction provided by the Montana Supreme Court in *Kemp*.

In its reliance on *Kemp*, the federal court cited the Field Code statute, then noted the *Kemp* interpretation of the statute which pronounced the *Blair* rule.[60] The *Crosby* court distinguished between the "legal construction and effect" and the "execution and validity" of the contract; it then concluded that since the validity of the agreement was at issue, the law of the place where the contract was formed would control.[61] The court correctly recognized that under the *Blair* rule the insurable interest involved a question of validity of the contract and therefore, the location specified for performance in the contract was immaterial.[62] Because no interpretation of the contract was necessary,

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56. Patterson, *supra* note 27.

57. 756 F. Supp. 1380 (D. Mont. 1990) (opinion by United States Circuit Judge Pregerson of the Ninth Circuit, sitting by designation as a United States District Court Judge for the District of Montana).

58. *Id.* at 1381.

59. *Id.* at 1381-82.

60. *Id.* at 1382-83.

61. *Id.* at 1383.

62. *Crosby*, 756 F. Supp. at 1383. Some commentators claim that the distinction

the Field Code statute did not apply and only the broader *Blair* rule from *Kemp* was relevant. The federal court accordingly applied Montana law and determined that the insurable interest was valid.[63]

Following *Crosby*, the conflict of laws issue was again presented to the Montana Supreme Court in *Youngblood v. American States Insurance Co.*[64] *Youngblood* involved an insurance policy issued in Oregon and a subsequent accident that occurred in Montana.[65] The main issue in the case was whether the subrogation clause in the policy would enable the insurance company to recoup from the plaintiff medical payments made on her behalf after she settled with the tortfeasor.[66] The court quoted the *Blair* rule from *Kemp*, but did not actually state whether the issue of the case revolved around the interpretation or the validity of the contract.[67] The court applied the rule without making this prerequisite distinction.

In *Youngblood*, the court identified language in the policy that "requires American States to pay whatever damages are required in Montana; that is, the contract is to be performed in Montana."[68] Although unclear, it appears that the court must have concluded that the issue concerned the interpretation of the contract and applied the performance aspect of the *Blair* rule. If the subrogation clause's applicability involved *the validity* of the contract, the court should have applied the law where the contract was entered into, i.e. Oregon. Under Oregon law, subrogation clauses are valid.[69]

The *Youngblood* decision extended further the conflict of law rules in Montana. The court supplemented its analysis, as based on the rules from *Kemp*, with additional considerations primary

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between validity and interpretation is simply an escape method for the courts to apply the law achieving their desired result. *See* Smith, *supra* note 16, at 1043 n.12; *see also* Joseph M. Cormack, *California Conflict of Laws in Regard to Contracts*, 12 S. CAL. L. REV. 335, 337 (1939) ("The validity of a contract in its every aspect determines every detail of performance . . . whether and how a contract is to be performed will completely determine the nature of its validity. Thus from a legal standpoint the execution and performance aspects of a contract cannot be separated.").

63. *Crosby*, 756 F. Supp. at 1383-84.

64. 262 Mont. 391, 866 P.2d 203 (1993).

65. *Youngblood*, 262 Mont. at 393-94, 866 P.2d at 204.

66. *Id.*

67. *Id.* at 394, 866 P.2d at 205.

68. *Id.* One can only infer that again, as in *Kemp*, the court has taken general policy language describing geographic limits on the validity of the policy and employed these to determine Montana as the place of performance.

69. *Id.* at 395, 866 P.2d at 205.

to conflict of law rules in contracts.[70] First, the opinion noted that Montana recognizes choice-of-law provisions within contracts as a valid expression of the parties intention to select the law that will govern all questions concerning a contract.[71] Second, *Youngblood* concluded that Montana is not bound to uphold a clause within a contract, even if bargained for, if it is repugnant to the public policy of the state.[72]

These additional rules account for the somewhat confusing analysis in the *Youngblood* opinion. After recognizing that the insurance policy indicated Montana as the place of performance, thereby determining Montana as the applicable law, the court recognized that the contract included a choice-of-law provision.[73] This provision indicated that Oregon law controlled the application of the subrogation clause.[74] After noting that such clauses are enforceable and valid under Oregon law, the court applied

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70. *Youngblood*, 262 Mont. at 395, 866 P.2d at 205. The majority of conflict of law rules require a court to consider the facts to procedurally determine which jurisdiction's law should be applied. However, one should note that some of these conflict rules do concern choices of "internal law," where the court goes beyond the mere facts of the case to compare the possible substantive laws and determine the result of their application in the case. As we shall see, this is the type of factor that the Montana court includes with its considerations of public policy in *Youngblood*.

71. *See also* Steinke v. Boeing Co., 525 F.Supp. 234 (D. Mont. 1981). The general rule in American jurisprudence recognizes the freedom of the parties to contract to choice of law. Hanlin, *supra* note 12, at 16. *Cf.* Casarotto v. Lombardi, 268 Mont. 369, 886 P.2d 931 (1994).

72. *Youngblood*, 262 Mont. at 395, 866 P.2d at 205. *See also* Steinke v. Boeing Co., 525 F. Supp. 234, 236 (D. Mont. 1981); Hein v. Fox, 126 Mont. 514, 254 P.2d 1076 (1953).

Although *Youngblood* has characterized the imposition of public policy as part of contract law (which it undoubtedly is), in this context it is more often recognized as the final stage in the conflict of laws determination. That is, once the determination of a foreign jurisdiction's law is reached, this law can be compared to the public policies of the forum state to ensure that no injustice is permitted through the hands of the presiding court. For further discussion, see generally, Michael G. Guajardo, Note, *Texas' Adoption of the Restatement (Second) of Conflict of Laws: Public Policy is the Trump Card, But When Can it be Played?*, 22 TEX. TECH. L. REV. 837 (1991).

The reader should note the Montana Supreme Court's tendency to apply Montana law. This is not atypical of other jurisdictions. The flexibility provided by the current confusion in conflict of law rules has created a situation where the court would be free to choose a rule which achieved a particular outcome, if it so desired. Additionally, the application of Montana public policy by the court can easily be seen as the final trump, which can be exercised by the court on any given occasion to select Montana law.

73. *Youngblood*, 262 Mont. at 394-95, 866 P.2d at 205.

74. *Id.* at 395, 866 P.2d at 205. The agreement states that "the Company shall be entitled to reimbursement or subrogation in accordance with the provisions of [Oregon Revised Statutes] 743.825." *Id.*

Montana public policy to invalidate the clause.[75] To reiterate: the court first recognized the applicability of Montana law because of the *Blair* rule, but retracted it because of the choice-of-law provision in favor of Oregon law, then finally reinstated Montana law because of public policy considerations.[76] Thus in *Youngblood*, public policy considerations trumped all other conflict of law factors.

The conflict of law rules from *Kemp* through *Youngblood* are very unclear. *Kemp* recognized the authority of the Field Code statute as a rule of performance for conflict of laws in contractual situations.[77] The *Kemp* court, in dicta, then augmented the statute with the *Blair* rule. The federal court in *Crosby* utilized the *Blair* rule, correctly distinguishing between issues of validity and those of interpretation.[78] The Montana Supreme Court in *Youngblood* next cited the *Blair* rule from *Kemp*, operated *de facto* under a determination of place of performance, but neglected to address whether the issue concerned one of validity or interpretation. Despite *Youngblood*'s affirmation of Montana's recognition of choice-of-law provisions in contracts, the court used Montana public policy as a final trump in the conflict of laws analysis to eviscerate the choice-of-law provision.[79]

IV. CRITICISMS OF THE *KEMP* ERA

The conflict of law rules, as stated and followed by the Montana Supreme Court during the *Kemp* era, are problematic for four reasons. First, as noted above, the court's strong language in *Kemp* concerning the Field Code statute leads the practitioner to believe that courts should follow indications of the place of performance in all circumstances. Second, the court expands the Field Code statute in dictum without adequately discussing the concepts of validity or interpretation of a contract. The court in *Kemp* should have alerted the practitioner that this initial distinction is necessary and prescribed some guidelines for this task.

The third reason that the conflict of law rules during the *Kemp* era are problematic is that, even with a complete under-

75. *Id.*
76. *Id.*
77. Kemp v. Allstate Ins. Co., 183 Mont. 526, 531, 601 P.2d 20, 23 (1979).
78. Omaha Property & Casualty Co. v. Crosby, 756 F. Supp. 1380, 1382-83 (D. Mont. 1990).
79. Youngblood v. American States Ins. Co., 262 Mont. 391, 395, 866 P.2d 203, 205 (1993).

standing of the distinction between validity and interpretation, it is nearly impossible to distinguish between these two issues in many cases. As noted, many times both elements are at issue.[80] The result is a rule that is based upon an unclear distinction which creates an arbitrary conclusion.

Fourth, even when clearly defined and implemented, the *Blair* rule, like many of the older conflict of law rules, is antiquated and poorly suited for a modern court. The world has changed since the nineteenth century. Commerce and travel are now international. Litigation is no longer centered around technical rules of pleading. The modern conflict of law rules have likewise evolved markedly since the creation of the Field Code statute and the *Blair* rule, generally reflecting the other changes in law and society since that time. Most courts have adopted modern rules to provide greater flexibility in weighing the diverse interests and contractual situations which are brought before them. Courts found the older conflict of law rules, such as the *Blair* rule, to be too rigid in their application, resulting in unjust verdicts for the litigants.

Beyond these enumerated problems, Montana's conflict of law rules from the *Kemp* era suffer from other more general inadequacies. For example, one primary rule of contracts that all courts attempt to follow is to fulfill the intentions of the parties. To discern these intentions, courts will often carefully scrutinize a contract or admit extrinsic evidence. In cases involving the conflict of laws in contracts, courts generally have this same purpose. With the modern complexity of contracts, commerce and laws, it is difficult to imagine that a court can ascertain the intentions of the parties simply by determining a place of performance or through often arbitrary discernment of validity and interpretation.

A good example of the potential inflexibility and harshness of the older rules is evident from the facts in *State Farm Mutual Automobile Insurance Co. v. Estate of Braun*,[81] a recent Montana case. In *Braun*, a Montana resident was in a fatal car accident in Canada, and Canadian law drastically restricted the recovery available under his insurance policy.[82] The main issue

80. This is demonstrated by *Youngblood*. Does the issue in *Youngblood* relate to whether the subrogation clause is valid, or does the issue involve the clause's interpretation, its legal effect requiring repayment?

81. 243 Mont. 125, 793 P.2d 253 (1990).

82. *Braun*, 243 Mont. at 126, 793 P.2d at 253-54. Imposition of Canadian law would have limited the damages to funeral expenses only. *Id.* at 132, 793 P.2d at

in *Braun* was whether Canadian law would operate to limit the damages available under the insurance contract. As an issue of interpretation, under the Field Code statute and the court's broad conception of "place of performance" from *Kemp*, a court applying the statute should have concluded that Canada was a place of performance as indicated in the policy and applied Canadian law. This interpretation would have reduced the available recovery under the policy from $200,000 as permitted by Montana law, to simply the costs of funeral expenses, as provided for by Canadian law.[83]

Nevertheless, the court in *Braun* claimed that "[t]he question of whether Montana law or Canadian law should govern the measure of damages available to Appellants is a conflict of laws question regarding *tort* law."[84] It is unclear from the opinion why the court distinguished these facts from *Kemp* or *Crosby*, which applied *contractual* rules for conflict of laws. The Montana Supreme Court does not mention the Field Code statute or the *Blair* rule from *Kemp*. Perhaps the strangest element of the *Braun* opinion is the court's declaration that neither party had argued that Canadian law should apply to the contract,[85] when that appeared to be the main issue in the case.

The court in *Braun* did little to clarify Montana conflict of law rules and the decision perhaps best serves as an example of just how confused this area of the law has become in Montana. Because the dispute in *Braun* involved how much recovery the insurance contract permitted, the issue can best be characterized as one of interpretation. In Montana, the Field code statute applies to issues of interpretation. Without the availability of the public policy exception provided for in *Youngblood*, the court

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257 (Weber, J., dissenting). Justice Weber's dissent would have limited Braun's recovery to this amount on basic contract theory. The insurance policy contained a clause which stated that the policy limited damages to those "legally entitled to collect from the owner." *Id.* at 131, 793 P.2d at 257 (Weber, J., dissenting).

83. *Id.* at 131-32, 793 P.2d at 256-57 (Weber, J., dissenting).

84. *Id.* at 127, 793 P.2d at 254 (emphasis added). The court states that "no question exists that Montana law governs the interpretation of the insurance contract at issue here." *Id.* For this reason, and given other inconsistencies in the opinion, this Comment has treated *Braun* as an anomaly. Thus, it was not included in the substantive analysis on Montana's conflict of law rules.

Although conflict of law rules regarding torts are rarely addressed by the Montana Supreme Court, it appears that even under these rules, the court should have applied Canadian law in *Braun*. Prior case law indicates that Montana follows the rule that "the law of the place of the injury controls." Lewis v. Reader's Digest Ass'n, Inc., 162 Mont. 401, 406, 512 P.2d 702, 705 (1973).

85. *Braun*, 243 Mont. at 127-31, 793 P.2d at 254-56.

under the Field Code statute would have been forced to apply Canadian law and essentially remove any insurance recovery after a wrongful death. Those would have been harsh results indeed, and it is no surprise that the court in *Braun* refused to permit it.

In *Kemp* and its progeny, the Montana Supreme Court recognized the rigidity of the Field Code statute. As previously noted, the court's recognition of the rigidity and incompleteness of the Field Code statute accounts for its modification of the statute in *Kemp* with the *Blair* Rule and the imposition public policy considerations in *Youngblood*. Yet, these modifications have only made an old and mediocre law more confusing and arbitrary. Unlike the federal court in *Crosby*, both Montana Supreme Court cases fail to discuss the necessary distinction between interpretation and validity. Furthermore, the public policy exception created in *Youngblood* could be interpreted to lead to the doctrine of *lex fori*, or the law of the forum. Many of the modern conflict of law rules do provide for public policy considerations, but at least they attempt to delineate the scope and application of public policy.

However, the court has altered Montana's rules for conflict of laws since *Youngblood*. In its most recent case, *Casarotto v. Lombardi*,[86] the Montana Supreme Court has abruptly moved away from the *Kemp* rules without resolving any of the prior confusion or indicating for the future whether the court will return to *Kemp* and its progeny. Indeed, time may prove that the court has discarded the Field Code statute and *Kemp*. However, at the present time *Casarotto* still leaves the door open on this older line of cases. Yet before turning to *Casarotto*, it is necessary to first complete the analysis of the *Kemp* era and the Field Code statute, for despite *Casarotto*, there is a strong possibility that the court may resurrect the Field Code statute at any time. With this in mind, the following discussion of how the courts of other Field Code jurisdictions have operated should be instructive. In the late nineteenth century, California, North Dakota, South Dakota and Oklahoma also adopted the same Field Code statute on the conflict of laws as Montana.[87] The discussion now turns to the courts of these other jurisdictions and their conflict of law rules under the Field Code statute.

86. 268 Mont. 369, 886 P.2d 931 (1994).
87. *See* Cormack, *supra* note 25, at 362.

V. OTHER FIELD CODE JURISDICTIONS

A. California[88]

In California, despite earlier recognition of the efficacy of the Field Code statute,[89] the courts have recently applied the statute inconsistently, demonstrating a definite tendency for California to depart from the application of the rule based on performance.[90] One should initially note that California departed from the strict application of the Field Code statute by augmenting it with the *Blair* rule, which the Montana Supreme Court later followed in *Kemp*.[91] Although a recent California case indicates in dicta that the Field Code statute entirely controls the conflict of laws in California,[92] what this recent case espouses has not been historically practiced by the court.[93]

A large exception to the application to the Field Code statute was created by the California Appellate Court in *Henderson v. Superior Court*.[94] In *Henderson*, the court stated that "where the application of [the Field Code statute] is obscure, California courts are guided by the factors set out in Restatement, Conflict of Laws 2d, section 188, in determining what law to apply to the contract."[95] The courts in several cases since *Henderson* have employed this exception to use the Restatement Second for the conflict of law analysis instead of relying upon the Field Code statute.[96] Consequently, *Henderson* provides an easy escape from the application of the Field Code statute.

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88. The Field Code statute in California is CAL. CIV. CODE § 1646 (West 1993).

89. *E.g.*, *In re* Grace's Estate, 200 P.2d 189, 193 (Cal. Ct. App. 1949) ("The law of the place determines the manner and method as well as the legality of the acts required for performance.").

90. *E.g.*, California Casualty Indem. Exch. v. Pettis, 239 Cal. Rptr. 205, 208-14 (Cal. Ct. App. 1987) (ignoring the Field Code statute and applying the Restatement Second test of most significant relationship).

91. Blair v. New York Life Ins. Co., 104 P.2d 1075, 1078 (Cal. Ct. App. 1940).

92. Gitano Group, Inc. v. Kemper Group, 31 Cal. Rptr. 2d 271, 275, n.4 (Cal. Ct. App. 1994) (ruling that no true conflict was presented between the laws of the alternate jurisdictions, so the determination of which law controlled was moot).

93. *See* Shippers Dev. Co. v. General Ins. Co. of America, 79 Cal. Rptr. 388, 396 (Cal. Ct. App. 1969) (finding that the *Blair* rule should be followed "unless the terms of the contract provide otherwise or the circumstances indicate a different intention").

94. 142 Cal. Rptr. 478 (Cal. Ct. App. 1978) (ruling on a contract similar to a common law marriage).

95. *Henderson*, 142 Cal. Rptr. at 483.

96. *See, e.g.*, American Re-Ins. Co. v. Insurance Comm. of State of Cal., 527 F. Supp. 444, 450-51 (C.D. Cal. 1981); Kracht v. Perrin, Gartland & Doyle, 268 Cal. Rptr. 637 (Cal. Ct. App. 1990).

The federal courts have also noted the progression of the California's conflict of law rules and the general supplementation of the Field Code statute. Even before *Henderson*, the Ninth Circuit noted that "[u]nder the leadership of former Chief Justice Roger Traynor, the California law moved away from a mechanical choice of law process to employ the 'governmental interest analysis' approach."[97] Although California does not rely solely upon the Field Code statute, its case law on the subject is somewhat unclear. The court has incorporated the conflict of law rules from the Restatement Second, but has failed as yet to disentangle itself from a confused history of precedent. This is quite similar to the current situation in Montana. The Field Code statute still looms in the background of California case law, permitting continued confusion and threatening to raise its head without warning again in the future.

B. North Dakota[98]

In the early 1970s, the North Dakota Supreme Court heard a case which questioned the interest charges on a payable note in a sister state (Montana) as usurious and therefore unenforceable.[99] The court recognized that the interest charges were illegal according to the law of North Dakota. However, because of the constraints of the Field Code statute, the court was compelled to find that the laws of Montana controlled the question.[100] The opinion of Judge Paulson made the court's disdain for the statutory limitations on its conflict of laws choice clear, yet the court nevertheless followed the Field Code statute to determine that Montana law should control.[101]

In the following year, responding to the court's candid decision, the North Dakota Legislature repealed its Field Code statute.[102] In two cases decided since the statute has been re-

97. Strassberg v. New England Mut. Life Ins. Co., 575 F.2d 1262, 1263-64 (9th Cir. 1978). The "governmental interest analysis" considers the stake that the concerned states have in the litigation to determine which law should be applied. Although originally designed for application in the tort area of conflict of laws, the federal court in *Strassberg* claims that the rule is "applied to contracts cases as well as the more familiar tort context." *Id.* at 1264.

98. The North Dakota Field Code statute was at N.D. CENT. CODE § 9-07-11 (1993) (repealed).

99. First Nat'l Bank v. Dreher, 202 N.W.2d 670 (N.D. 1972).

100. *Dreher*, 202 N.W.2d at 671-72.

101. *Id.* at 672.

102. *See* Apollo Sprinkler Co., Inc. v. Fire Sprinkler Suppliers & Design, Inc., 382 N.W.2d 386, 389, n.2 (N.D. 1986).

pealed, the parties agreed to employ the "most significant contacts" test as described by Professor Leflar.[103] This test provides for "choice-influencing considerations" in a process somewhat similar to that adopted by the Restatement Second.[104] The North Dakota Supreme Court has now clearly adopted this test, and has applied it in several recent cases.[105]

C. South Dakota[106]

Unlike its sister state to the North, South Dakota retains its Field Code statute on the conflict of laws. The state has recently undergone a drastic revision of its conflict of law rules in tort, but a corresponding revision is lacking in contracts.[107] Although in the past, the South Dakota court has ignored the Field Code statute and applied the general doctrine of *lex loci contractus*,[108] the statute has regained its full import.

The Supreme Court of South Dakota's correction of a lower court ruling in *Anderson v. Taurus Financial Corporation*[109] makes this very clear. In *Anderson*, the trial court applied the "most significant contacts" test to determine which law applied in an action claiming usury interests and deceptive advertising.[110] However, on appeal the Supreme Court of North Dakota relied entirely upon the Field Code statute, determining that since the contract provided for payments to be made in California, it was the place of performance of the contract and therefore the governing law.[111] The court specifically noted that the lower court had "erred in using the theory of significant contacts to

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103. Vigen Constr. Co. v. Millers Nat'l Ins. Co., 436 N.W.2d 254 (N.D. 1989); *Apollo*, 382 N.W.2d 386 (N.D. 1986).

104. Robert A Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966). The main factors that Professor Leflar focuses on are: 1) predictability of results; 2) maintenance of interstate and international order; 3) simplification of the judicial task; 4) advancement of the forum's general interests; and 5) application of the better rule of law. *Id.* at 282.

105. American Family Mut. Ins. Co. v. Farmers Ins. Exch., 504 N.W.2d 307 (N.D. 1993); Plante v. Columbia Paints, 494 N.W.2d 140 (N.D. 1992).

106. South Dakota's Field Code statute is located at S.D. CODIFIED LAWS ANN. § 53-1-4 (1994).

107. *See* Owen v. Owen, 444 N.W.2d 710 (S.D. 1989); *see also*, Charles M. Thatcher, *Choice of Law in Multi-State Tort Actions After Owen v. Owen: The Less Things Change . . .* , 35 S.D. L. REV. 372 (1990).

108. *E.g.*, Briggs v. United Serv. Life Ins. Co., 117 N.W.2d 804, 806-07 (S.D. 1962).

109. 268 N.W.2d 486 (S.D. 1978).

110. *Anderson*, 268 N.W.2d at 488.

111. *Id.*

determine what law should apply."[112] Furthermore, the higher court applied the Field Code statute as written and refused to apply public policy considerations to invalidate the allegedly usurious interest.[113]

Despite the revision regarding tort rules for conflicts previously noted, South Dakota has not had revisited the conflict of laws in contracts since the time of *Anderson*. However, a federal court sitting in South Dakota applied a provision in the state's Uniform Commercial Code to determine which law would apply to the breach of a contract for the sale of sugar beet pulp.[114] Because the Uniform Commercial Code has limited application, the Field Code statute presumably retains its preeminence under South Dakota law as declared in *Anderson*.

In contrast to the application of the Field Code statute in Montana, South Dakota courts apply the statute in a straightforward method, without the assistance of the *Blair* rule, or other interpretive devices.[115] The location of performance is often determined by the last act or place of payment of a contract.[116] Although the Federal Court of Appeals in the Eighth Circuit has criticized South Dakota's reliance upon this analysis, these rules nearly always ensure that the place of performance of a contract is discoverable.[117]

Thus, the Field Code statute is alive and well in South Dakota. The court in *Anderson* resolutely applied the rule. The court created no additional flexibility through public policy considerations. Although South Dakota may be criticized as operating under an antiquated or unfair conflict of laws rule, its rule is relatively straightforward and does not suffer from the lack of clarity that attends Montana case law.

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112. *Id.* at 488.

113. *Id.* at 488-89.

114. Golden Plains Feedlot, Inc. v. Great W. Sugar Co., 588 F. Supp. 985, 987-89 (W.D.S.D. 1984). The UCC provision recognizes the parties may agree to apply any state or nation's law so long as that jurisdiction bears a reasonable relation to the transaction. Although there was no election by the parties to choose any jurisdiction's law, the court held that because of the Field Code statute's preference for place of performance, Nebraska, as the place of delivery, satisfied the "appropriate relation" test. The court applied Nebraska law. *Id.* at 990-91.

115. *See Anderson*, 268 N.W.2d at 488.

116. *Id.*

117. *See* American Serv. Mut. Ins. Co. v. Bottum, 371 F.2d 6, 9, n.2 (8th Cir. 1967).

D. Oklahoma[118]

The Oklahoma legislature adopted the Field Code statute in 1890. Although the Oklahoma court has used the Field Code statute to aid in determining the content of terms in an ambiguous contract,[119] the statute has more recently been the center of discussion involving conflict of laws in contracts. In 1990, the Oklahoma Supreme Court in *Panama Processes v. Cities Service Co.*[120] acknowledged that the Field Code statute controls conflict of laws for contracts in Oklahoma.[121] The court determined that "the contract was to be performed in major part in Brazil" and therefore applied Brazilian law.[122] The court clearly was not comfortable in its reliance upon the Field Code statute and in support of its conclusion supplemented its analysis by applying the Restatement Second's test to reach the same result.[123]

Only a year after *Panama Processes*, the Oklahoma Supreme Court was again confronted with a conflict of laws issue and moved further from its reliance upon the Field Code statute. In *Bohannan v. Allstate Insurance Co.*,[124] the court acknowledged that the reasons previously enunciated for abandoning *lex loci delictus* for tort conflicts in favor of the Restatement Second test were "equally compelling for abandoning and rejecting the *lex loci contractus* rule in contract law."[125] The court elaborated up-

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118. The Oklahoma statute is located at OKLA. STAT. ANN. tit. 15 § 162 (West 1993).

119. *See* Samson Resources Co. v. Quarles Drilling Co., 783 P.2d 974 (Okla. Ct. App. 1989). In Montana, see MONT. CODE ANN. § 1-4-106 (1993) for a statute that is designed to limit the interpretation of the language in the contract to its colloquial meaning. Although the wording of this statute is somewhat similar to the Field Code statute, it has never been relied upon by the Montana courts for either any limitation of a word or any issue of interpretation. The use of the term "language" in the statute indicates that it was not designed as a conflict of laws provision, but as a rule of contracts in general.

120. 796 P.2d 276 (Okla. 1990).

121. *Panama Processes*, 796 P.2d at 287. The court correctly noted that the Field Code statute states the rule of *lex loci solutionis* and not *lex loci contractus*. "It is only when there is *no indication in the contract* where performance is to occur that the interpretation would apply the *lex loci contractus rule*." *Id.* Although correctly describing the internal function of the statute, the Oklahoma Supreme Court failed to emphasize that the statute is applicable only in disputes over interpretation. This is precisely the same error the Montana Supreme Court has made.

122. *Id.* at 288.

123. *Id.* The court notes that it already applies the Restatement Second test with regards to conflict of laws in torts. *Id.* at 288, n.50.

124. 820 P.2d 787 (Okla. 1991).

125. *Bohannan*, 820 P.2d at 795 (relying upon their reasoning in Brickner v. Gooden, 525 P.2d 632 (Okla. 1974)). One should note how frequently the courts have mischaracterized the Field Code statute as stating the rule of *lex loci contractus*.

on the inadequacy of the Field Code statute, declaring, "[N]either the *lex loci contractus* rule, nor the *lex loci solutionis* rule allows full consideration of the statutes and public policies of the several states in motor vehicle insurance disputes."[126] The court applied the test of the Restatement Second to determine the applicable law in the case.[127]

The Oklahoma Supreme Court is clearly moving away from the application of the Field Code statute as a conflict of laws rule. The court in *Bohannan* has effectively removed the Field Code statute from application when there is an insurance dispute with competing state statutes and public policies. As noted above, this is one of the areas in which conflict of laws most frequently arises.[128] The Oklahoma court has indicated its dissatisfaction with the Field Code statute, and in the future it will probably apply the test of the Restatement Second in all contractual conflict of law cases.

In contrasting these other Field Code jurisdictions with Montana, we find some similarities as well as some differences in the manner that the courts have applied the statute. In California, the courts have used the statute in the past, but are now largely freed from its constraints. North Dakota has repealed the statute, and the court now uses a test similar to the Restatement Second. The courts of South Dakota strictly apply the statute, with no augmentation. Finally, in Oklahoma, the court has moved away from the application of the Field Code statute, and has indicated a strong preference for the rules of the Restatement Second. To complete the picture on how these jurisdictions differ from Montana, this Comment must now turn to the most recent conflict of laws case in Montana, and the Montana Supreme Court's apparent acceptance of the Restatement Second.

VI. BEYOND THE FIELD CODE: *CASAROTTO V. LOMBARDI*

A. Determining the Law

In the most recent Montana case involving the conflict of laws, the Montana Supreme Court has ventured into new grounds, without attempting to resolve the confusion created in the not so distant past. In *Casarotto v. Lombardi*,[129] the plain-

126. *Id.*
127. *Id.*
128. *See* cases cited *supra* footnote 44.
129. 268 Mont. 369, 886 P.2d 931 (1994).

tiffs entered into a franchise agreement to open a Subway sandwich shop in Great Falls, Montana; the store later failed when another franchise opened in a more desirable location in the town.[130] The Casarottos claimed a breach of a verbal agreement providing that they could move their store to an alternate location if one became available.[131] Yet, the contract included a choice of law provision selecting the application of Connecticut law and an arbitration clause requiring the Montana plaintiff to submit to arbitration in Connecticut.[132] The District Court stayed further judicial proceedings in Montana pending the arbitration in Connecticut.[133]

On appeal, the plaintiff subsequently argued that the arbitration clause was invalid because Montana law requires that the clause be conspicuously displayed on the first page of the contract.[134] The defendant contended that the choice of law provision in the contract, indicating that Connecticut law controlled the validity of the agreement, resolved any such dispute. The court identified the first issue as whether, "[b]ased on conflict of law principles, is the franchise agreement entered into between the Casarottos and [the defendants] governed by Connecticut law or Montana law?"[135]

To determine the governing conflict of law rules, the court looked neither to *Kemp* and the Field Code statute, nor to *Youngblood* for guidance. The court unpredictably relied on *Emerson v. Boyd*.[136] In *Emerson*, the issue was whether an Indian tribe's exercise of jurisdiction preempted the district court's jurisdiction.[137] The court in *Emerson* relied on the Restatement Second to determine if a contract had sufficient connection to the reservation for the tribal court to assume jurisdiction over the case.[138] The court weighed the different factors from section 188(2) of the Restatement Second and determined that a sufficient connection existed between the contract and the tribal

130. *Casarotto*, 268 Mont. at 371, 886 P.2d at 932-33.
131. *Id.*
132. *Id.* at 372, 886 P.2d at 933.
133. *Id.*
134. *Casarotto*, 268 Mont. at 372, 886 P.2d at 933 (relying on MONT. CODE ANN. § 27-5-114(4) (1993)). The arbitration clause was on page nine of the agreement.
135. *Casarotto*, 268 Mont. at 373, 886 P.2d at 933.
136. 247 Mont. 241, 805 P.2d 587 (1991) (relying on R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979 (9th Cir. 1983)).
137. *Emerson*, 247 Mont. at 242, 805 P.2d at 588.
138. *Id.* at 242-43, 805 P.2d at 588.

reservation so as to preempt the district court's jurisdiction.[139]

The main problem with the court's reliance upon *Emerson* in *Casarotto* stems from the fact that jurisdictional questions differ from questions involving the substantive law determination under conflict of law rules in contracts.[140] The conflicts issue in *Casarotto* involved a contract dispute and, therefore, logically followed *Kemp* and its progeny. Even in the Restatement Second, jurisdictional matters are treated under entirely different rules than contractual conflict of laws.[141] As Justice Gray pointed out in her dissent to *Casarotto*, the court's encapsulation of *Emerson* was correct, yet the application of the conflict of law rules from the analogy resulted in an "inapplicability of that decision to the case before [the court]."[142] Regardless of any incompatibility between the cases, the results of the analogy to *Emerson* are clear: the court in *Casarotto* did not rely on the Field Code statute or the *Blair* rule, but instead applied the rules of the Restatement Second to decide the conflict of laws issue.

B. Applying the Law

Casarotto is factually difficult to discuss without creating confusion. As noted above, the contract between the parties had both a choice of law provision *and* an arbitration clause.[143] If the choice of law provision was valid and Connecticut law applied, the court would have enforced the arbitration clause. However, if the choice of law provision were invalidated, then the court must determine which jurisdiction's laws would apply; the court would have decided this by employing the conflict of law rules for Montana. Then, in applying that substantive law, the court could have discovered whether the arbitration clause was valid.

The Montana Supreme Court in *Casarotto* tested the validity of the choice of law provision by employing a two step process: first, the court made a determination whether Montana law would apply "absent an 'effective' choice of law by the parties;" second, upon determining Montana law applied, the court investigated whether the "application of Connecticut law was contrary

139. *Id.*
140. *See supra* text accompanying note 3.
141. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).
142. *Casarotto v. Lombardi*, 268 Mont. 369, 392, 886 P.2d 931, 945 (1994) (Gray, J., dissenting).
143. *Id.* at 372, 886 P.2d at 933.

to a fundamental policy" of Montana.[144] In essence, the first part ensured that the court's application of conflict of law rules did not already indicate Connecticut law, thus rendering reliance upon the choice of law provision in the contract moot. The second part of the court's test ensured if the choice of law provision was recognized and yet Montana had a materially greater interest, that this recognition of Connecticut law did not offend the public policies of Montana.[145]

This two step process was taken from the Restatement Second, section 187(2). The court properly ignored part (1) of section 187, because it only arises when the parties have no connection to the chosen forum or the choice is arbitrary.[146] The comments to the Restatement Second indicate that as the materiality of the local forum's interest increases, the fundamental character of the public policy required to trump the choice of law lessens.[147] Accordingly, the analysis in *Casarotto*, which determined that Montana had the most significant relationship to the contract, reduced the weight required of the public policy needed to override the choice of law. As a result, upon a finding that Montana had the most significant relationship, the entire choice of law provision may be invalidated if the recognition of Connecticut law would offend any Montana law or policy.[148] Thus, once a sufficient connection to Montana was established, public policy was again the trump.

To bolster its heavy reliance upon public policy considerations in conflict of law determinations, the Montana Supreme Court relied upon *Youngblood*: "[T]his state's public policy will ultimately determine whether choice of law provisions in con-

144. *Id.* at 375, 886 P.2d at 935.

145. *See id.* .

146. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1971).

147. *Id.* at § 187 cmt. g.

148. But see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g, stating:

> The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law. Application of the chosen law will be refused only (1) to protect a fundamental policy of the state which, under the rule of § 188, would be the state of the otherwise applicable law, provided (2) that this state has a materially greater interest than the state of the chosen law in the determination of the particular issue.

This is basically the test that the court used in *Casarotto*. The only departure of the court from this analysis is found in the court's historical deference to discover in *any* Montana law a fundamental public policy. *See, e.g.*, Trammel v. Brotherhood of Locomotive Firemen and Enginemen, 126 Mont. 400, 253 P.2d 329 (1953) (holding that a public policy of the state is created by legislative enactment).

tracts are 'effective'."[149] The court quoted extensively from *Youngblood* and included a recitation of that case's reliance upon *Kemp* and the Field Code statute. Although it relied on *Youngblood* for the imposition of public policy, ironically, all available legal authority concerning the conflict of law rules from the past fifteen years of Montana precedent was presented in the quote, with no clear direction on how it all applied. The court relied upon public policy from *Youngblood* and its analysis under the Restatement Second to invalidate the choice of law provision in the contract.

C. Casarotto as Precedent for Conflict of Law Rules

In light of the difficulties present in conflict of law rules in Montana during the *Kemp* era, the court's decision in *Casarotto* to use the Restatement Second is somewhat understandable. In attempting to discard the rigidity of the Field Code statute and the *Blair* rule, the Montana Supreme Court is trying to remove these historical restraints on its conflict of law rules. However, the court's reliance upon the Restatement Second in *Casarotto* to resolve the conflict of laws issue leaves many questions unanswered. Most importantly, what is the current state of the law?

In this context, a hypothetical evaluation of the facts from *Casarotto* without the choice of law provision is instructive. Turning to *Kemp* and the Field Code statute as precedent, one would first determine whether the issue was one of interpretation. Because the validity of the arbitration clause was the main issue, no interpretation of the contract was at stake, and therefore, the Field Code statute would not apply. If the *Blair* rule was applied—as extracted from the dictum in *Kemp*—again one initially would determine whether the dispute involved a question of validity or interpretation. Because the issue concerned validity, under the *Blair* rule, the law of the place where the contract was formed would control. Ironically in this case, neither Montana nor Connecticut law would govern, for the contract was entered into in New York.[150] Thus, under the *Blair* rule, the court would apply New York law to determine if the arbitration clause was valid. This is another example of how rigid and sometimes arbitrary these older conflict of law rules can be.

Yet, the Montana Supreme Court did not follow the rules

149. Casarotto v. Lombardi, 268 Mont. 369, 374, 886 P.2d 931, 934 (1994).
150. *Id.* at 375, 886 P.2d at 935.

from *Kemp* and its progeny. Instead, the court turned to the Restatement Second for guidance in the conflict of laws. In the court's reliance upon *Emerson* for its acceptance of the Restatement Second, the court has left an entire line of cases hanging in a void.

Kemp and its progeny are still good law in Montana. The *Youngblood* decision, which the court relied upon for imposing Montana public policy in *Casarotto*, was also the most recent reiteration of the court's continued reliance upon the Field Code statute and the *Blair* rule. The court in *Casarotto* appears to have extracted part of the fruits from *Youngblood*, but has refrained from importing the remainder of the tree, threatening to cut it off at the roots.

Ultimately, the Montana Supreme Court must resolve the inconsistent precedent by chopping this tree down in a more effective and comprehensive manner.[151] The present status of the conflict of laws in Montana is far too confused to continue effectively without further clarification from the authoritative judicial body of the state. The ruling in *Casarotto*, although helping to extract Montana jurisprudence from historically antiquated rules, unfortunately also added to the confusion. The Montana rules for conflict of laws currently appear to include the Field Code statute, the *Blair* rule, the Restatement Second and the public policy trump as enunciated in *Youngblood*. It is unclear which of these rules, or combination thereof, the Montana Supreme Court will apply in the future.

The minimum repair required of the court is to clarify which rule will be used. The present panoply of applicable rules is not consistent with the predictability that practitioners require to determine the law prior to trial. During the past several decades, many aspects of the judicial system have undergone revision to encourage the parties in litigation to settle before trial. Yet, when basic determinations cannot be accurately predicted, such as which law will be applied to a case, it becomes difficult to narrow the settlement range to a mutually agreeable compromise. The current confusion in the law actually encourages a trial, for it increases the difficulty of the practitioner to realistically predict an outcome to the litigation and thereby discourages settlement by the parties.

151. For a fine example of the Montana Supreme Court cutting off inconsistent precedent to eliminate confusion in the law, see Estate of Shaw, 259 Mont. 117, 855 P.2d 105 (1993).

VII. CONCLUSION

In *Kemp*, the Montana Supreme Court acknowledged the applicability of the Field Code statute to decide conflict of law issues. The court's augmentation of the statute through reliance upon the *Blair* rule has failed to clarify the important distinction between validity and interpretation. The federal court in *Crosby*, citing *Kemp*, did not use the Field Code statute, but relied on the *Blair* rule. Later, in *Youngblood*, the Montana Supreme Court recognized that regardless of which law applied to a contract, a contract or parts of it could be invalidated if it conflicted with the public policies of Montana. Finally, in *Casarotto*, the court largely ignored *Kemp* and its progeny, and employed the rules from the Restatement Second—while reasserting public policy considerations—to decide a conflict of laws issue.

One may claim that the Field Code statute binds the court to certain rules.[152] Ideally, the legislature should repeal the Field Code statute, recognizing it as an outdated and incomplete rule that leads to arbitrary results inconsistent with the intention of the contracting parties. The court could serve as a catalyst to achieve this goal by announcing its objections to the Field Code statute in its next opinion, as recently accomplished by the North Dakota Supreme Court. With the statute repealed, the court could adopt the Restatement Second as its guide with no possible friction from a statutory directive.

As noted above, the conflict of law rules are largely procedural in character, and the court should enjoy the freedom to choose its rules of operation. The Restatement Second provides an excellent source of authority in this area. It offers both the practitioner and judge a flexible doctrine, based on modern principles, which is clearly documented with comments and annotations. Numerous jurisdictions have adopted the Restatement Second and the Montana Supreme Court looks upon it with favor. An announcement by the court that the Restatement Second is the authoritative guide for the resolution of conflict of law issues in Montana would solve the confusion that now exists. If the court in *Casarotto* intended to accomplish this, it has not fully achieved its goal.

The Montana Supreme Court should resolve the present uncertainty and confusion in the conflict of laws for contracts. The combination of inconsistent precedent and conflicting reli-

152. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. a (claiming that a state must apply its local statutory provisions directed to conflict of laws).

ance upon statutory law creates a situation which fosters confusion in an important area. It is a problem that can be easily fixed: the court simply needs to recognize the problem and state clearly which rule will apply in the future.

NOTES

TONACK V. MONTANA BANK: PREEMPTION, INTERPRETATION, AND OLDER EMPLOYEES UNDER MONTANA'S WRONGFUL DISCHARGE FROM EMPLOYMENT ACT

M. Scott Regan

I. INTRODUCTION

In 1987, the Montana Legislature enacted the Wrongful Discharge From Employment Act (WDFEA) primarily as a response to two forces: First, employers and insurance companies sought to "reduce the pot of gold at the end of the rainbow" in order to eliminate unreasonably large wrongful discharge awards and marginal wrongful discharge claims.[1] Second, due to the Montana Supreme Court's unpredictable interpretation of the implied covenant of good faith and fair dealing, the drafters of WDFEA sought to provide certainty to employment discharge law in Montana.[2]

To effectuate its objective of reducing wrongful discharge claims and awards, the legislature made the WDFEA the exclu-

1. *Summary of H.B. 241*, 50th Mont. Leg. (Mar. 10, 1987); *Statement of Legislative Intent Concerning the Damage Limitation Contained in Section (5) of H.B. 241, Senate Judiciary Comm.*, 50th Mont. Leg. (Mar. 10, 1987) [hereinafter *Legislative Intent*]; *Montana State Senate Judiciary Comm. Minutes of the Meeting*, 50th Mont. Leg. (Mar. 10, 1987) (statement of Rep. Spaeth); LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 108-09 (1990); Telephone Interview with LeRoy Schramm, Chief Legal Counsel for the Montana University System (Oct. 13, 1994).

2. *See* Leonard Bierman & Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge From Employment Act: A Preliminary Analysis*, 53 MONT. L. REV. 53, 56 (1992); Schramm, *supra* note 1, at 106-09.

sive remedy for wrongful discharge[3] and capped the amount recoverable for a wrongful discharge at four years of lost wages and fringe benefits.[4] The drafters of the WDFEA intended the four-year damage limitation to represent a reasonable compromise between the competing interests of the employer and the discharged employee.[5] That compromise was to protect employers from unreasonably large damage awards and adequately compensate discharged employees during their search for new employment. Further, in order to ensure that the WDFEA provides the exclusive remedy for wrongful discharge, the legislature created a preemption provision. The preemption provision prevents discharge claimants from pursuing a WDFEA remedy when another state or federal statute provides a remedy or procedure for contesting the dispute.[6]

Prior to the recent case of *Tonack v. Montana Bank*,[7] Montana courts inconsistently applied the preemption provision,[8] and employers and employees did not yet know how the four-year damage limitation would affect wrongfully discharged employees.[9] In *Tonack*, the Montana Supreme Court provided a procedure for courts to follow when plaintiffs file concurrent claims under the WDFEA and another state or federal statute. Moreover, the holding in *Tonack* illustrated a fear shared by many drafters of the WDFEA—that the four-year damage limitation of the WDFEA does not represent a reasonable compromise between the competing interests of the employer and the wrongfully discharged older employee.

This Note discusses the *Tonack* court's interpretation of the preemption provision and how that decision and the four-year damage limitation affect wrongfully discharged older employees. Part II of this Note discusses the historical and legislative background of the WDFEA and preemption provision. Part III describes *Tonack's* facts, procedure, and holding. Part IV analyzes the holding of *Tonack* and how the preemption provision of the WDFEA might be interpreted in the future. Lastly, Part V concludes by suggesting that the WDFEA does not provide a reason-

3. MONT. CODE ANN. § 39-2-902 (1993).
4. MONT. CODE ANN. § 39-2-905(1) (1993).
5. *See Legislative Intent*, *supra* note 1.
6. MONT. CODE ANN. § 39-2-912(1) (1993).
7. 258 Mont. 247, 854 P.2d 326 (1993).
8. *Compare* Vance v. ANR Freight Systems, Inc., 9 Mont. Fed. Rpts. 36 (D. Mont. 1991); Higgins v. Food Servs. of Am., 9 Mont. Fed. Rpts. 529 (D. Mont. 1991) *with* Deeds v. Decker Coal Co., 246 Mont. 220, 805 P.2d 1270 (1990).
9. *See infra* part V.

able compromise for wrongfully discharged older employees and calls for legislative reform.

II. HISTORY

A. *Enactment of the WDFEA*

The Montana Legislature enacted the WDFEA partially in response to the Montana Supreme Court's unpredictable interpretation of the implied covenant of good faith and fair dealing.[10] The WDFEA was enacted to provide certainty to employers and employees by specifically delineating the elements of a wrongful discharge.[11]

The WDFEA provides that a discharge is wrongful if it was not for good cause or in retaliation for an employee's refusal to violate public policy.[12] The WDFEA also codified the principle that a discharge is wrongful if it violates the express provisions of the employer's written personnel policies.[13] In adopting the written personnel policy provision, the Montana Legislature sought to discourage wrongful termination suits "by establishing clear policies and guidelines for employment and discharge."[14] Employee actions for wrongful discharge based on an employer's violation of written personnel policies were carried over from the common law in *Nye v. Department of Livestock*.[15] In *Nye*, the Montana Supreme Court held that an employer's violation of written personnel policies may provide a basis for a wrongful termination claim.[16] Prior to the enactment of the WDFEA, the court in *Gates v. Life of Montana Insurance Co.*[17] allowed a plaintiff to recover for an employment termination in violation of the implied covenant of good faith and fair dealing.[18] In *Gates*, the Montana Supreme Court applied the covenant of good faith and fair dealing to written personnel policies and stated:

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10. *See* Schramm, *supra* note 1, at 95, 108.

11. MONT. CODE ANN. § 39-2-905(1) (1993); Meech v. Hillhaven W., Inc., 238 Mont. 21, 51, 776 P.2d 488, 506 (1989); Bierman & Youngblood, *supra* note 2, at 56.

12. MONT. CODE ANN. § 39-2-904(1)-(2) (1993).

13. *See* MONT. CODE ANN. § 39-2-904(3) (1993).

14. *Rationale of Proposed Amends. to H.B. 241, Senate Judiciary Comm.*, Proposed Amend. No. 7, First Reading, 50th Mont. Leg., at 3 (Mar. 10, 1987). This was the purpose of the provision, at least according to the *ad hoc* committee.

15. 196 Mont. 222, 639 P.2d 498 (1982); *see also* Schramm, *supra* note 1, at 109-10.

16. *Nye*, 196 Mont. at 228, 639 P.2d at 502.

17. 196 Mont. 178, 638 P.2d 1063 (1982).

18. *Id.* at 184, 638 P.2d at 1067.

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

> The employer later promulgated a handbook of personnel policies establishing certain procedures with regard to terminations. . . . The employee, having faith she would be treated fairly, then developed a peace of mind associated with job security. If the employer has failed to follow its own policies, the peace of mind of its employee is shattered and injustice is done.[19]

The court applied the covenant of good faith and fair dealing "upon objective manifestations by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly."[20] Therefore, an employee had a cause of action when her reasonable expectations of job security or fair treatment were violated. Often, the employee's expectations were based on the employer's written personnel policies.

After *Gates*, the Montana Supreme Court expanded the scope of remedies and persons protected under the covenant of good faith and fair dealing.[21] Then, beginning in 1985, the court began to "refine" and "moderate" its former decisions premised on the holding in *Gates*. The court's expansion and contraction of the covenant of good faith and fair dealing created unpredictability in the employment discharge law in Montana.[22] This unpredictability, coupled with what employers perceived as unreasonably large awards to wrongful discharge claimants, led Montana employers and insurance companies (who paid the employment discharge awards) to seek legislative reform.[23] The Montana Legislature responded with the WDFEA. By enacting the WDFEA, the legislature was able to significantly limit the scope of remedies previously available under the covenant of good faith and fair dealing.[24]

B. The Section 912(1) Preemption Provision

Section 912(1) of the WDFEA preemption provision provides that the WDFEA will not apply when a discharge is subject to any state or federal statute that provides a procedure or remedy

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19. *Id.*
20. Dare v. Montana Petroleum Mktg., 212 Mont. 274, 282, 687 P.2d 1015, 1020 (1984).
21. Schramm, *supra* note 1, at 95.
22. Schramm, *supra* note 1, at 95.
23. Schramm, *supra* note 1, at 108; *Legislative Intent*, *supra* note 1.
24. Schramm, *supra* note 1, at 95.

for contesting the dispute.[25] The WDFEA was designed to give statutory protection to those wrongfully discharged employees who otherwise would not have protection under a contract or other statutory scheme.[26] The legislature did not intend to provide a discharged employee with a WDFEA cause of action when the employee had a remedy under another federal or state statute.[27] Similarly, the WDFEA will not apply when a discharged employee is covered by a collective bargaining agreement or a written contract for a specific term.[28] Thus, in addition to limiting the amount recoverable for a wrongful discharge, the legislature also limited the scope of persons protected by the WDFEA.

Despite the language of the preemption provision, in 1991, two federal district courts in *Vance v. ANR Freight Systems, Inc.*[29] and *Higgins v. Food Services of America, Inc.*,[30] held that when the facts of a discrimination claim were separate and distinct from those of a wrongful discharge claim, the WDFEA preemption provision would not apply. Thus, under *Vance* and *Higgins*, discharged employees were not foreclosed from pursuing a remedy under both a federal discrimination statute and the WDFEA.[31] However, two years later in *Tonack v. Montana Bank*, the Montana Supreme Court declined to follow *Vance* and *Higgins* and held that the section 912(1) preemption provision prevented the plaintiff from maintaining a concurrent age discrimination and wrongful discharge claim.[32] The holding in *Tonack* resumed a course true to the language of the section 912(1) preemption provision, and demonstrated the WDFEA's impact upon wrongfully discharged older employees.

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25. MONT. CODE ANN. § 39-2-912(1) (1993).

26. *See* MONT. CODE ANN. § 39-2-912(1)-(2) (1993).

27. *See* MONT. CODE ANN. § 39-2-912 (1993); *see also* Meech v. Hillhaven W., Inc., 238 Mont. 21, 776 P.2d 488 (1989). The court in *Meech* stated:

> The Act exempts from its provisions causes of action for discharge governed by other state or federal statutory procedures for contesting discharge disputes. For example, the Act exempts from its provisions, discriminatory discharges, and actions for wrongful discharge from employment covered by written collective bargaining agreements or controlled by a written contract for a specific term.

Id. at 25, 776 P.2d at 490.

28. *See* Irving v. Sch. Dist. No. 1-1A, 248 Mont. 460, 813 P.2d 417 (1991); Fellows v. Sears, Roebuck & Co., 244 Mont. 7, 795 P.2d 484 (1990).

29. 9 Mont. Fed. Rpts. 36 (D. Mont. 1991).

30. 9 Mont. Fed. Rpts. 529 (D. Mont. 1991).

31. *See Vance*, 9 Mont. Fed. Rpts. at 39-40; *Higgins*, 9 Mont. Fed. Rpts. at 530.

32. *Tonack*, 258 Mont. at 254-55, 854 P.2d at 331.

III. *TONACK V. MONTANA BANK*

A. The Facts

The Montana Bank of Sidney hired Betty Tonack (Tonack) as a bank teller in 1981.[33] The Sidney bank promoted Tonack to teller supervisor[34] and, in 1988, Tonack learned of an opening with an affiliated bank in Billings—the Montana Bank of Billings (Bank).[35] The Bank interviewed Tonack and offered her the position of Financial Services Representative (FSR).[36] Tonack accepted the position with the Bank as FSR,[37] moved to Billings, and began work in October of 1988.[38]

In January 1990, Tonack's supervisors evaluated Tonack's performance as FSR "as fully satisfactory [and] 'more toward the excellent side.'"[39] Due to Tonack's favorable evaluation for her performance as FSR, the Bank gave her a pay raise and the additional responsibilities of "Customer Service Representative" and "Teller Supervisor" (CSR/Teller Supervisor).[40]

On May 1, 1990, Lynette Kiedrowski became president of the Bank and Tonack's direct supervisor.[41] Ten days later, Kiedrowski evaluated Tonack's performance and concluded that Tonack was an "Employee Progressing at Standard."[42] Soon however, a series of events compromised Tonack's assent at the Bank[43] and eventually lead to her termination. Tonack's trou-

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33. *Id.* at 250, 854 P.2d at 328.

34. *Id.*

35. Respondent's Brief at 5, Tonack v. Montana Bank, 258 Mont. 247, 854 P.2d 326 (1993) (No. 92-343).

36. *Id.*

37. In district court, Judge Filner concluded that "Tonack was given a job description for her position as FSR which specifically set forth her duties and responsibilities, as well as the performance expectations of Defendant Bank." Tonack v. Montana Bank, No. DV 91-070, Findings of Fact and Conclusions of Law (June 3, 1992), Finding of Fact No. 7, at 3 [hereinafter Findings of Fact].

38. *Tonack*, 258 Mont. at 250, 854 P.2d at 326.

39. *Id.*

40. *See id.* at 250, 854 P.2d at 328. *See also* Findings of Fact, *supra* note 37, No. 10, at 4. Incidentally, the Bank did not give Tonack "a job description outlining her new job duties and responsibilities or the performance expectations of the Defendant Bank (as was done when Tonack began her job in 1988 as FSR)." Findings of Fact, *supra* note 37, No. 10, at 4.

41. *Tonack*, 258 Mont. at 250, 854 P.2d at 328; *see also* Findings of Fact, *supra* note 37, No. 16, at 6.

42. Findings of Fact, *supra* note 37, No. 17, at 6.

43. During Kiedrowski's review of Tonack on May 10, 1990, Kiedrowski noted: "[Tonack's] next opportunity is to Financial Services Executive. Once CSR and FSR are consistently at satisfactory levels that option can be explored." Respondent's Brief

bles began in August of 1990 when the Bank conducted an internal audit and discovered two discrepancies: Someone within the Bank had embezzled five hundred dollars in travelers checks and improperly issued a certificate of deposit without obtaining payment from the customer.[44] Despite the fact that Tonack was not responsible for auditing travelers checks and was away on vacation when the thefts occurred,[45] Kiedrowski blamed Tonack for the discrepancies.[46] As a result, Kiedrowski, in violation of the Bank's written personnel policies, placed Tonack on thirty days probation and stripped Tonack of all her duties except those of FSR.[47]

During Tonack's probationary period, Kiedrowski instructed Tonack to cross-train Rhonda Kreamer, a substantially younger Bank employee, as a "backup" FSR.[48] Tonack discovered that the Bank had ordered business cards bearing the name Rhonda Kreamer with the title of FSR, despite the fact that the Bank only had one FSR position—that occupied by Tonack.[49] During

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at 8, *Tonack* (No. 92-343).

44. Appellant's Brief at 5, Tonack v. Montana Bank, 258 Mont. 247, 854 P.2d 326 (1994) (No. 92-343).

45. Judge Filner found that the "defalcation" discovered during the audit was not Tonack's fault because of the lack of an "approved job description" that would sufficiently hold a CSR/Teller Supervisor responsible for deficiencies in the "Travelers Check area." Findings of Fact, *supra* note 37, No. 22, at 7-8. The position of CSR/Teller Supervisor had not existed for an extended period of time before Tonack was given the position. Findings of Fact, *supra* note 37, No. 12, at 4-5. After the Bank gave Tonack the job, Kiedrowski requested Tonack to draft her own job description. Tonack drafted the job description (which excluded auditing responsibilities in general and in the traveler checks area) and delivered it to Kiedrowski; Kiedrowski apparently did not find any deficiencies with the job description because she indicated no intent to alter the document as drafted by Tonack. *See* Findings of Fact, *supra* note 37, No. 19, at 6-7.

46. The Bank maintained that the discrepancies occurred in areas under the supervision of Tonack and "the embezzlement was made possible because tellers supervised by Tonack did not keep an accurate inventory of travelers checks." Appellant's Brief at 5, *Tonack* (No. 92-343). However, the district court found that the discrepancy was not Tonack's responsibility because of the absence of a job description for CSR/Teller Supervisor and the fact that the Bank had specifically retained auditing responsibilities in the operations department of the Bank. Findings of Fact, *supra* note 37, No. 22, at 7-8.

47. *Tonack*, 258 P.2d at 250, 854 P.2d at 328. The Bank's written personnel manual explicitly stated: "[p]robation is usually for a period of [90] days and the employee should be carefully observed for improvement during this period." Findings of Fact, *supra* note 37, No. 23, at 8. During Tonack's 30 day probationary period, an employee in the operations area of the Bank confessed to the "theft" of the travelers checks, and yet, Tonack still remained on probation. Findings of Fact, *supra* note 37, No. 25, at 8-9.

48. *Tonack*, 258 Mont. at 251, 854 P.2d at 328.

49. *Id.*

the week Tonack was supposed to cross-train Kreamer, the individual who was scheduled to replace Kreamer during the training failed to show up for work.[50] Kiedrowski was out of town for the week and, because the replacement had not shown up, Tonack decided to postpone the cross-training of Kreamer.[51] Kiedrowski returned from vacation and promptly fired Tonack "as a result of her failure to correct deficiencies in the CSR/Teller Supervision area and her inability to work with others."[52] At the time of her termination, Tonack was forty-nine years old and had worked for the Bank for almost ten years.[53]

B. Procedure & Holding

Tonack filed a wrongful discharge action against the Bank under the WDFEA. Shortly after filing the complaint in district court, Tonack's counsel contacted Gary Nichols, Tonack's supervisor before Kiedrowski and vice president of the Bank. Tonack's counsel discovered age discrimination to be the underlying reason for Tonack's termination.[54] Nichols told Tonack's counsel that George Balback, president of the holding company for the Bank, "wanted Ms. Tonack terminated because of her age and background."[55] Balback expressed discontent that the former and current presidents of the bank could not manage to terminate Tonack, but was confident Kiedrowski could "get it handled."[56]

As a result of Nichols' information, Tonack filed an age discrimination claim with the Montana Human Rights Commission and the Equal Employment Opportunity Commission. She also amended her district court action to include violations under the ADEA.[57] At trial, the court found that the Bank violated both the ADEA and the WDFEA in terminating Tonack.[58] The court awarded Tonack four years of future lost wages and benefits—the maximum allowed under the WDFEA—and also awarded damages under the ADEA (calculated from the last date of

50. *Id.* at 251, 854 P.2d at 329.
51. *Id.*
52. Findings of Fact, *supra* note 37, No. 29, at 10; *see also Tonack*, 258 Mont. at 251, 854 P.2d at 329.
53. *Tonack*, 258 Mont. at 250-51, 854 P.2d at 328-29.
54. Respondent's Brief at 14, *Tonack* (No. 92-342).
55. Findings of Fact, *supra* note 37, No. 14, at 5.
56. *Tonack*, 258 Mont. at 252, 854 P.2d at 329-30.
57. Respondent's Brief at 15-16, *Tonack* (No. 92-343).
58. *Tonack*, 258 Mont. at 251, 854 P.2d at 329.

damages under the WDFEA until Tonack's expected date of retirement).[59]

On appeal, the Bank claimed that the district court incorrectly interpreted or misapplied the provisions of the WDFEA.[60] The Bank contended that the WDFEA preemption provision prevented Tonack from pursuing both the ADEA and WDFEA claim. The Montana Supreme Court, with one dissent,[61] agreed with the Bank and held that the WDFEA preemption provision precluded Tonack from recovering damages under the WDFEA.[62]

IV. ANALYSIS

A. Tonack & Concurrent Claims Under the WDFEA

The issues raised by Tonack's complaint created a quandary for the Montana Supreme Court. On one hand, the district court found that Tonack's employer violated the WDFEA by breaching its personnel policies and terminating Tonack without good cause.[63] On the other hand, the district court concluded that Tonack's employer also engaged in age discrimination.[64] However, despite the discharge without good cause and the importance of the personnel policy provision of the WDFEA,[65] the preemp-

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59. *Id.*

60. *Id.* at 250, 854 P.2d at 328.

61. Justice Trieweiler agreed with the holdings in *Vance* and *Higgins*, arguing that the preemption provision should not apply to Tonack because she alleged "separate and independent reasons why her termination from employment was unlawful." *Id.* at 256, 854 P.2d at 332 (Trieweiler, J., concurring in part and dissenting in part). Justice Trieweiler also argued that the preemption provision should not apply because no other statute provided a remedy for Tonack's written personnel policy claim. *Id.*

62. *Tonack*, 258 Mont. at 254-55, 854 P.2d at 331.

63. The Bank violated its written personnel policy by failing to give Tonack a warning prior to being on placed on probation; furthermore, the written policy stated that the usual probationary period was 90 days. Kiedrowski placed Tonack on a 30 day probationary period. Findings of Fact, *supra* note 37, No. 23, at 8. The Bank terminated Tonack without good cause by failing to provide evidence of Tonack's deficient performance. Findings of Fact, *supra* note 37, No. 36, at 11.

64. Findings of Fact, *supra* note 37, No. 38, at 12.

65. *See supra* part II.A. Two recent decisions by the Montana Supreme Court illustrate the importance of the written personnel policy provision of the WDFEA: Miller v. Citizens State Bank, 252 Mont. 472, 830 P.2d 550 (1992), and Kearney v. KXLF Communications, Inc., 263 Mont. 407, 869 P.2d 772 (1994). In *Kearney* (decided after *Tonack*), the court held that an express written personnel policy may exist despite its absence from an employee handbook. In *Kearney*, the plaintiff argued that his employer's express written personnel policy existed in the form of pre-printed evaluation forms used to evaluate all employees and a memo from a supervisor stat-

tion provision prevented Tonack from maintaining concurrent claims under the ADEA and WDFEA.[66]

The Montana Supreme Court reversed the district court's award to Tonack under both the ADEA and WDFEA and outlined the following procedure to be utilized when a plaintiff files concurrent claims under the WDFEA and another state or federal statute:

> Whether a discharge will ultimately be "subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute" is not immediately known when a claim is filed. This must be determined before it is known whether the Wrongful Discharge Act may be applied. It is established only when a finder of fact has made that determination or when judgment on the claim has otherwise been entered. Therefore, we conclude that claims may be filed concurrently under the Wrongful Discharge Act . . . but if an affirmative

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ing that "[e]ach person should get an evaluation of their performance at least one time per year." 263 Mont. at 418, 869 P.2d at 778. By allowing express written personnel policies to exist in forms other than the employer's handbook, the *Kearney* court seems to be broadly interpreting the scope of the written personnel policy provision. This broad interpretation of the provision is consistent with prior Montana Supreme Court decisions on the issue. *See, e.g.*, Buck v. Billings Mont. Chevrolet, Inc., 248 Mont. 276, 284-85, 811 P.2d 537, 542 (1991) (holding that a termination in light of a written personnel policy that "assured [the plaintiff's] continued employment if his job performance and economic circumstances remained satisfactory" may be actionable when the plaintiff continued to produce for his financially stable employer); *see also* Bierman & Youngblood, *supra* note 2, at 71-73 ("The Montana Supreme Court in *Buck* appears to be giving a fairly wide range of latitude to the language contained in section 904(3) of the WDFEA.").

In *Miller*, the plaintiff sued under the WDFEA, alleging her employer terminated her without "good cause" and in violation of its written personnel policies. The plaintiff alleged that her employer violated its personnel policies by failing to provide her with a "formal" warning that "her continued substandard performance would result in dismissal." *Miller*, 252 Mont. at 475, 830 P.2d at 552. In a rather brief opinion, the Montana Supreme Court held that in addition to an unfavorable written evaluation, the employer warned the plaintiff on at least three occasions that her poor performance would result in termination. *Id.* at 475, 830 P.2d at 551-52. The court held that the plaintiff was unable to prove a wrongful discharge because the employer carefully followed its own written personnel policies. *Id.* at 475, 830 P.2d at 552. The court did not, however, state whether an unwritten oral warning would constitute a "formal" warning consistent with the employer's written personnel policies. The decision in *Miller* nonetheless demonstrates the court's dedication to the legislative and historical directive to encourage employers to follow their own express written personnel policies. Therefore, as demonstrated by *Kearney* and *Miller*, the Montana Supreme Court broadly determines what constitutes an employer's express written personnel policies; however, once it finds those policies, the court—consistent with the legislative intent and pre-WDFEA case law—is stringently holding both the employer and the employee to the terms of those policies.

66. *Tonack*, 258 Mont. at 254-55, 854 P.2d at 331.

determination of the claim is obtained under such other statutes, the Wrongful Discharge Act may no longer be applied.[67]

B. Modification of Deeds v. Decker Coal Co.

The *Tonack* court held that since the district court made the factual determination that the ADEA "applied" to Tonack's discharge, Tonack was not able to recover under the WDFEA.[68] The court departed from its previous interpretation of the preemption provision in *Deeds v. Decker Coal Co.*[69]

In *Deeds*, the Montana Supreme Court held that the National Labor Relations Act (NLRA), a federal statute, did not preempt the WDFEA because the National Labor Relations Board (NLRB) had not yet filed a formal complaint under the NLRA.[70] In *Deeds*, employees working for the Decker Coal Company (Decker) went on strike after their collective bargaining agreement had expired.[71] Decker allowed 80 employees to return to work, but discharged the remaining 152 due to allegations of "serious strike misconduct."[72] As a result, the discharged employees filed unfair labor charges with the NLRB, alleging that they were terminated in retaliation for protected union activities.[73]

The discharged employees then filed a claim under the WDFEA. The district court granted Decker's motion for summary judgment, holding that the preemption provision of the WDFEA preempted the plaintiffs state claim.[74] The Montana Supreme Court reversed, holding "[s]hould the NLRB eventually decide to enter into the dispute by filing a complaint on behalf of the discharged employees, a 'procedure or remedy for contesting the dispute' would be set in motion, and the statutory [preemption provision] would apply."[75] Thus, if the NLRB had filed a formal

67. *Id.* at 255, 854 P.2d at 331.

68. *Id.*; *see* Meech v. Hillhaven W., Inc., 238 Mont. 21, 25, 776 P.2d 488, 490 (1989) (stating that the WDFEA "exempts from its provisions causes of actions for . . . discriminatory discharges").

69. 246 Mont. 220, 805 P.2d 1270 (1990). The court in *Tonack* stated: "To the extent that this conclusion modifies our holding in Deeds, that opinion is so modified." *Tonack*, 258 Mont. at 255, 854 P.2d at 331.

70. *Deeds*, 246 Mont. at 223, 805 P.2d at 1271-72.

71. *Id.* at 222, 805 P.2d at 1271.

72. *Id.*

73. *Id.*

74. *Id.* at 222, 805 P.2d at 1271.

75. *Deeds*, 246 Mont. at 223, 805 P.2d at 1271.

complaint on behalf of the employees, the federal law would have preempted the WDFEA claim. However, since the NLRB had not filed a formal complaint, the *Deeds* court determined that, in order to ensure the plaintiffs a forum, proceedings had to be stayed at the district court level pending NLRB action.

The readily distinguishable facts of the two cases raise questions as to how *Tonack* actually modified *Deeds*. *Deeds* involved potential conflicting statutes: the plaintiffs filed a wrongful discharge claim while the NLRB investigated the unfair labor practices charge.[76] In *Tonack*, however, the plaintiff filed two actions—one federal, one state—which, although allegedly distinct in nature, related to the same discharge.[77] The *Tonack* decision suggests that a court[78] will be charged with the responsibility of determining whether another state or federal statute applies (and thus whether that statute preempts the WDFEA) only when a plaintiff files concurrent claims under the WDFEA and another state or federal statute.[79] The holding in *Deeds* complicates the issues and permits alternative conclusions based on two plausible interpretations of *Tonack*.

Under the first interpretation of *Tonack*, a court would ignore the number of formal claims filed; it would apply the literal language of *Tonack* by factually determining in every WDFEA claim if the discharge is subject to any other state or federal statute providing a remedy or procedure for contesting the dispute. The WDFEA would no longer apply if a wrongfully discharged employee filed only a WDFEA claim, but a court nonetheless determined that the discharge applied to another state or federal statute. Therefore, if the holding in *Tonack* was applied

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76. *Id.* at 222, 805 P.2d at 1271.

77. *Tonack*, 258 P.2d at 247, 854 P.2d at 331.

78. The use of the word "court" in this context means the finder of fact *or* the trial judge. The *Tonack* court held that a plaintiff will be entitled to a WDFEA remedy "only when a finder of fact has made that determination or when judgement on the claim has otherwise been entered." *Id.* at 255, 854 P.2d at 331. Thus, the court seems to be inviting motions for summary judgment and jury instructions to determine whether the WDFEA will apply when a plaintiff files concurrent claims.

79. This conclusion is supported by the facts of *Tonack* and the language of the decision: "[The court] conclude[s] that claims may be filed concurrently under the Wrongful Discharge Act and other state or federal statutes described in § 39-2-912, MCA, but if an affirmative determination of the claim is obtained under such other statutes, the Wrongful Discharge Act *may no longer be applied.*" *Tonack*, 258 Mont. at 255, 854 P.2d at 331 (emphasis added). The court's use of the word "may" is troubling. By definition, "may" means permissive, although the court does not seem to be permitting a choice when another statute applies to the WDFEA. Certainly, the ultimate holding in *Tonack* or the plain language of the § 912(1) preemption provision does not suggest a choice.

to the factual situation in *Deeds*, the result in *Deeds* would be different, the NLRA would preempt the state wrongful discharge claim, and the plaintiffs would not be guaranteed a forum.

Under the second interpretation, *Tonack* would modify *Deeds*, the result in *Deeds* would not change, and the plaintiffs would still be guaranteed a forum. A court utilizing this interpretation would determine if another state or federal statute applied to the discharge *only* when a plaintiff filed *concurrent* claims under the WDFEA and another state or federal statute.[80] Then, if a court determined that the federal or state statute applied to the plaintiff's discharge, the WDFEA claim would be preempted.

The facts of *Tonack* illustrate why the second interpretation is the more logical of the two. If Nichols, the former vice president of the Bank, had not told Tonack's attorney that the Bank's termination of Tonack was based on considerations of age, Tonack would never have filed an ADEA claim. If Tonack had no knowledge that her termination was age-motivated, her ADEA claim would exist only in theory. However, under the first interpretation, the Bank could assert that the ADEA preempted Tonack's WDFEA claim, even if she did not file an ADEA claim. Certainly, the drafters of the WDFEA did not envision such a narrow interpretation of the preemption provision.[81]

The second interpretation would modify *Deeds* only to the extent that *Tonack* established a procedure to be followed when a plaintiff files concurrent claims under the WDFEA and another state or federal statute. If the Montana Supreme Court applied the second interpretation of *Tonack* to the factual situation in *Deeds*, the result in *Deeds* would not change and the proceedings would be stayed at the district court level pending NLRB action.

Future Interpretation of the Preemption Provision

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80. *See supra* text accompanying note 67.

81. If, however, the wrongfully discharged employee's complaint clearly suggests that the proper remedy was under another state or federal statute, then the WDFEA would no longer apply. *See, e.g.*, Harrison v. Chance, 244 Mont. 215, 797 P.2d 200 (1990). In *Harrison*, after the plaintiff's employer made several unwanted sexual advances and demanded that the plaintiff either "put out or get out," the plaintiff resigned and filed a claim alleging tortious battery, intentional infliction of emotional distress, wrongful discharge, the tort of outrage, and breach of the implied covenant of good faith and fair dealing. *Id.* at 218, 223, 797 P.2d at 202, 205. The defendant employer asserted that the plaintiff's proper remedy was the Human Rights Act, which provided the exclusive remedy for sexual harassment. *Id.* at 219, 797 P.2d at 202. The Montana Supreme Court agreed, holding that since the plaintiff's tort theories were "based" upon and "ar[o]se" from sexual harassment, her tort claims were preempted by the Human Rights Act. *Id.* at 223, 797 P.2d at 205.

Arguments over the two interpretations of *Tonack* may be less important than how the Montana Supreme Court will interpret the preemption provision in the future. Since the facts before the *Tonack* court involved concurrent claims—and not the dilemma raised in *Deeds*—the proper question may be how the court will interpret the preemption provision when plaintiffs file concurrent claims. The holding in *Tonack* will make it extremely difficult, if not impossible, for wrongful discharge claimants to maintain concurrent WDFEA and discrimination claims.

The *Tonack* court declined to "completely follow" the decisions in *Vance v. ANR Freight Systems, Inc.*[82] and *Higgins v. Food Services of America, Inc.*,[83] holding that Tonack's wrongful discharge and age discrimination claims "relate[d] to one discharge from employment at the bank."[84] The court held that the ADEA preempted Tonack's wrongful discharge claim because the district court found that the ADEA "applied" to Tonack's discharge from employment.[85] Apparently, the Montana Supreme Court presumed that because the district court found that the Bank had a discriminatory motive for discharging Tonack, the ADEA "applied" to Tonack's discharge.[86] Thus, the court suggests that any time a trial court determines that an employer had a discriminatory motive for discharging an employee, the discrimination statute will "apply." As a result, *Tonack* will make it very difficult for future wrongful discharge claimants to establish a separate and distinct factual predicate for a wrongful discharge and discrimination claim. In other words, wrongful discharge claimants will likely be unable to successfully make future *Vance* and *Higgins* arguments.

The Montana Supreme Court's refusal to follow *Vance* and *Higgins* is consistent with the legislature's attempt to provide discharged employees with only one statutory remedy.[87] Moreover, the court's holding may have the practical effect of compelling wrongful discharge claimants to choose between the WDFEA and the applicable discrimination statute when faced with multiple claims. Those claimants who do choose to file concurrent claims under the WDFEA and another state or federal statute risk losing their WDFEA claim. Consequently, if a wrongfully

82. 9 Mont. Fed. Rpts. 36 (D. Mont. 1991).
83. 9 Mont. Fed. Rpts. 529 (D. Mont. 1991).
84. *See Tonack*, 258 Mont. at 254, 854 P.2d at 331.
85. *Id.* at 255, 854 P.2d at 330.
86. *See* Findings of Fact, *supra* note 37, Nos. 37-38, at 12.
87. *See supra* note 27 and accompanying text.

discharged employee does choose to pursue only a WDFEA claim,[88] the employee will be able only to recover four years of lost wages and fringe benefits—a limitation particularly significant for the wrongfully discharged older employee.[89]

V. WRONGFULLY DISCHARGED OLDER EMPLOYEES AND THE FOUR-YEAR DAMAGE LIMITATION

The drafters of the WDFEA recognized that the four-year damage limitation might be insufficient for wrongfully discharged older employees and attempted to exempt them from the limitation.[90] The legislature adopted the exemption in the Committee of the Whole but killed it late in the amendment process in Conference Committee.[91] The failure of the legislature to exempt wrongfully discharged employees from the four-year damage limitation illustrates that the legislature disregarded the fact that, for wrongfully discharged older employees, the WDFEA does not represent a reasonable compromise between the competing interests of the employer and employee.[92]

The four-year damage limitation within the WDFEA seems logical when applied to most employees, but the limitation does not properly account for the significant barriers faced by older workers in the job market. When the drafters of the WDFEA created the four-year limitation for lost wages and fringe benefits, they rationalized that the limitation was a "reasonable period of time for a discharged employee to become resituated in the labor market."[93] The legislature further stated that the four-year limitation "will act as an incentive for a discharged employee to find alternate employment that puts the employee's talents

88. A wrongfully discharged older employee may choose not to sue under a discrimination statute because the employee may not be aware of or have sufficient evidence to pursue such claim. Recall that Tonack did not know of her ADEA claim until after she filed her WDFEA claim when the former vice-president of the Bank told her she was terminated because of her age.

89. *See* discussion *infra* part V.

90. *See infra* pp. 16-17 and note 103.

91. *See Committee of the Whole Amend.*, 50th Mont. Leg. (Mar. 27, 1987); *Conference Committee Report*, 50th Mont. Leg. (Mar. 20, 1987).

92. *See Legislative Intent*, *supra* note 1; *see also* Meech v. Hillhaven W., Inc., 238 Mont. 21, 50, 776 P.2d 488, 506 (1989) (upholding the constitutionality of the WDFEA, and holding that classifications created by WDFEA are rationally related to a legitimate state interest because the statute creates greater certainty to both employers and employees and "provide[s] 'a reasonably just substitute for the common law causes it abrogate[s]'").

93. *Legislative Intent*, *supra* note 1.

to best use."[94] The reasoning used to support the limitation makes sense for most younger discharged employees who are able to re-train and find other employment; however, the same reasoning is not persuasive when applied to older workers simply because older workers, once unemployed, remain unemployed longer than any other age group.[95] Furthermore, wrongfully discharged older employees generally have very little time to become "resituated in the labor market."

Older workers are unable to re-enter the work-force as quickly as younger workers; they are often unprepared for personnel interviews, employment tests, and competition with younger workers.[96] Additionally, older individuals are often unable to work at a pay level equal to that of their former employment.[97] "Once out of work, [the] older worker will confront greater difficulties than younger counterparts in finding new employment."[98] In a recent congressional hearing entitled "Age Discrimination in the Workplace: A Continuing Problem for Older Workers," Congress found that despite the ADEA, employers still turn away older workers in favor of younger workers due to incorrect assumptions about age and job performance.[99]

During legislative consideration of the WDFEA, an *ad hoc* committee, comprised of attorneys who practiced in employment termination law,[100] recognized the potential inadequacy of the four-year damage limitation as applied to wrongfully discharged older employees. The committee proposed an amendment to the statute that excluded from the damage limitation persons within the protected age class[101] who had been employed for ten or more years with their employer.[102] The committee gave the following rationale for the exclusion:

> This amendment, while recognizing the [four year] limitation

94. *Legislative Intent*, *supra* note 1.

95. *Age Discrimination in the Workplace: A Continuing Problem for Older Workers: Hearing Before the House Select Comm. on Aging*, 102d Cong., 1st Sess. 11 (1991) [hereinafter *Hearing*] (statement of The Honorable William J. Hughes).

96. ANDREW W. RUZICHO & LOUIS A. JACOBS, LITIGATING AGE DISCRIMINATION CASES 41 (1991).

97. RUZICHO & JACOBS, *supra* note 96, at 41; *Hearing*, *supra* note 95, at 66-70.

98. *Hearing*, *supra* note 95, at 69.

99. *Hearing*, *supra* note 95, at 68.

100. *Proposed Amends. to H.B. 241, Senate Judiciary Comm.*, Proposed Amend. No. 8, First Reading, 50th Mont. Leg. (Mar. 10, 1987).

101. The ADEA sets the protected age class at 40. 29 U.S.C § 631 (Supp. IV 1992).

102. *Proposed Amends. to H.B. 241, Senate Judiciary Comm.*, Proposed Amend. No. 8, First Reading, 50th Mont. Leg. (Mar. 10, 1987).

> on back-pay for younger employees who have better ability to become re-employed following a wrongful discharge, allows for recognition of employees who are [forty] years or more of age and who have been employed for more than [ten] years. The example situation is an employee [fifty-seven] years of age who has worked for the employer for [thirty] years. An employee who has reached that age, and has limited his employment to the specialized needs of his employer, should be allowed to show that is unlikely that he can become re-employed at age [fifty-seven] in a similar job, if that is the evidence presented. The amendment would still allow the jury to consider whether that is a legitimate claim, and to offset other earnings. However, the legislation as written is patently unfair to older and more vulnerable employees who frequently are unable to re-enter the job force on the pay level previously earned. They should at least have the opportunity to present a legitimate claim for economic losses that extend beyond the [three]-year period.[103]

The Committee of the Whole adopted the exemption for older employees but, without explanation in the legislative history, killed it in Conference Committee.[104] One possible reason the Conference Committee killed the amendment is the same reason employers, insurance companies, and legislators desired the WDFEA in the first place: to eliminate high damage awards and marginal wrongful discharge claims.[105] In the eyes of the insurance companies and employers who sought statutory protection from increasing wrongful discharge actions and large monetary awards, the older person amendment was merely a back door to the undesired and unpredictable status of the Montana employment discharge climate that existed prior to enactment of the WDFEA.[106] Nevertheless, by refusing to adopt the older person amendment, the legislature did not follow its own legislative commitment to balance the competing interests of the employer and the discharged employee. The legislature ultimately chose to disregard the fact that older workers face greater difficulties in finding new employment than younger workers.[107] To

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103. *Rationale of Proposed Amends. to H.B. 241, Senate Judiciary Comm.*, Proposed Amend. No. 8, First Reading, 50th Mont. Leg. (Mar. 10, 1987).

104. The legislative history does not reveal what compelled the legislature to adopt the amendment so late in the process and what compelled the Conference Committee to kill the amendment.

105. *See supra* part II.A.

106. *See supra* part II.A.

107. *See supra* notes 95-99 and accompanying text.

remedy the situation, the Montana Legislature should do as the *ad hoc* committee recommended and pass legislation relieving wrongfully discharged older employees from the four-year damage limitation of the WDFEA.

VI. CONCLUSION

The Montana Supreme Court's holding in *Tonack v. Montana Bank* raises questions of exactly how the court modified *Deeds* and how the preemption provision might be interpreted in the future. The court should adopt the second interpretation of *Tonack* and determine that the section 912(1) preemption provision applies only when a wrongfully discharged employee files concurrent claims under the WDFEA and another state or federal statute.

The potentially adverse impact the WDFEA damage limitation has upon wrongfully discharged older employees was first recognized by the drafters of the WDFEA and was recently illuminated by the *Tonack* court's refusal to follow the reasoning in *Vance* and *Higgins*. If the WDFEA is truly a balancing of interests, as it has been suggested to be, then the Montana Legislature should, as a matter of public policy, enact legislation that recognizes the unique difficulties faced by wrongfully discharged older employees in the labor market.

EXCLUSION OF DAMAGES DERIVED FROM PERSONAL INJURY SETTLEMENTS: TAX-PLANNING CONSIDERATIONS IN LIGHT OF *MCKAY V. COMMISSIONER*

Jon O. Shields

I. INTRODUCTION

Following a jury verdict in an employment dispute, an attorney negotiates a large settlement award for a client. The pleadings alleged theories grounded in both tort and contract. The settlement agreement and jury award did not specify which claims were satisfied by the payment—only that the payment satisfied all claims against the defendant. The client now wants to know whether the proceeds from the settlement award are subject to federal income tax and should be included in gross income on the client's tax return for that year. In these circumstances the answer will depend largely on whether express language found in the settlement agreement is supported by the facts and circumstances surrounding the agreement. Under the recent Tax Court decision in *McKay v. Commissioner*,[1] and decisions preceding it, the answer could well be that the settlement award is taxable. However, awareness of the relevant case law and proper planning by the practitioner throughout the litigation process could change that answer.

McKay v. Commissioner, together with other decisions discussed in this Note, demonstrate the broad interpretation given by courts to section 104(a)(2) of the Internal Revenue Code excluding damages received "on account of personal injuries."[2] Analysis of these decisions also reveals traps that can be avoided through proper planning, thereby leading to favorable tax treatment of a client's damage award.

This Note identifies the factors the Tax Court has examined to determine whether the section 104(a)(2) exclusion will apply to certain allocations of damages made in settlement. Part II of

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1. 102 T.C. 465 (1994).

2. I.R.C. § 104(a)(2) (1988 & Supp. I 1989). For a thorough analysis of the broad reach of the § 104(a)(2) exclusion, particularly with regard to non-physical, employment-related personal injuries, see J. Martin Burke & Michael K. Friel, *Tax Treatment of Employment-Related Personal Injury Awards: The Need For Limits*, 50 MONT. L. REV. 13 (1989) [hereinafter *Limits*]. The author gratefully acknowledges the analytical assistance and insights of University of Montana School of Law Professor and former Dean J. Martin Burke.

this Note examines *McKay*, recounting the facts and comparing the Tax Court's reasoning in that case with *Robinson v. Commissioner*,[3] another pivotal case dealing with settlement agreement allocations. Part III provides historical background and analysis of the decisions that established the factors applied in *McKay* and a critique of the *McKay* decision. Finally, Part IV summarizes *McKay*'s significant effect on tax consequences of damages received on account of personal injury.

II. *McKAY V. COMMISSIONER*

A. The Facts

In 1976, Ashland Oil, Incorporated (the Company), recruited taxpayer Bill E. McKay (McKay)[4] because of his experience in and specialized knowledge of the petroleum industry. When the Company first approached McKay, he was reluctant to accept a position based on his awareness that the Company allegedly had made questionable payments to domestic and foreign officials to secure oil during the 1960s and 1970s and had also made several illegal political contributions during the Watergate era. Nevertheless, he accepted employment, eventually handling all of the Company's crude oil supply acquisitions.[5]

In December of 1980, Orin Atkins (Atkins), the Company's Chief Operating Officer and McKay's superior, made arrangements for payment of a $1.35 million bribe to Yehia Omar (Omar), an official of the Sultanate of Oman, for the purchase of his government's crude oil. Atkins insisted that McKay arrange the transfer of funds, but McKay refused as it was his belief that such a payment would violate the Foreign Corrupt Practices Act (FCPA) as well as a 1975 consent decree that the Company had made with the Securities and Exchange Commission (SEC). Despite McKay's persistent efforts to prevent it, the payment was made. Subsequently McKay learned of the Company's attempt to retrieve the bribe from Omar, but only by making another payment to Omar as an incentive to rescind the earlier deal. McKay also objected to this payment and attempted to

3. 102 T.C. 116 (1994).

4. McKay filed a 1988 joint income tax return with his wife Lana S. McKay. 102 T.C. at 465. Their joint return was the subject of the deficiency action brought by the Service and which is the subject of this Note. However, for the purposes of this Note, only McKay will be referred to as the taxpayer.

5. *Id.* at 468.

prevent it as well.[6]

In September of 1981, Atkins was replaced by John Hall (Hall). Hall assured McKay that the Company's disguised payments and bribes would stop. Despite Mr. Hall's assurances, the Company continued to make such payments.[7]

McKay's opposition to the payments to Omar tainted his employment relationship with the Company. As a result, McKay retained legal counsel to represent him in negotiating a satisfactory termination of his employment with the Company. McKay and the Company, however, were unable to reach a mutually acceptable termination agreement.[8]

During October and November of 1982, the Internal Revenue Service (the Service) contacted McKay and requested his response to inquiries known as the "Five Questions." These questions all pertained to the Company's questionable business transactions. The Company pressured McKay to sign responses favorable to its position, and similar to responses already submitted by Hall to the Service. McKay refused to sign the responses since he believed the statements contained therein to be false. McKay instead gave answers which were significantly different than the Company's predetermined responses.[9]

In May of 1983, the SEC subpoenaed McKay to testify regarding the Company's disguised payments and his responses to the Service's Five Questions. Shortly thereafter, the Company officially terminated McKay's employment.[10]

B. The Legal Proceedings

One year after his termination, McKay initiated a civil action against the Company in a United States district court asserting claims for wrongful discharge, breach of employment agreement, violations of the Racketeer Influenced and Corrupt Organizations (RICO) statutes, and for punitive damages. The jury found that the Company breached its employment agreement with McKay and wrongfully discharged him in violation of public policy.[11]

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6. *Id.*
7. *Id.* at 469.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 470. The case was entitled McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988)(the wrongful discharge action). McKay's wrongful discharge action was consolidated for discovery and trial with a suit brought against Ashland by an-

On the basis of it findings at trial, the jury awarded McKay $1,602,103 as damages for lost compensation. The jury also awarded McKay "future" damages of $12,846,209. Due to the Company's RICO violations the damages were trebled to more than $43 million. Finally, the jury awarded McKay punitive damages for wrongful, malicious, and oppressive acts in the amount of $500,000 from the Company, and $750,000 from Hall.

Following the jury award and judgment, counsel for both sides met to negotiate a settlement. While the negotiations were hostile, the parties were nonetheless able to reach a settlement agreement whereby the Company agreed to pay McKay $16,744,300.[12] The settlement agreement allocated $12,250,215 of that amount to payment of the wrongful discharge tort claim, and $2,044,085 to payment of the breach of contract claim.[13] The remaining $2,450,000 were allocated as partial reimbursement by the Company of McKay's legal expenses.[14]

Throughout the negotiations, the Company refused to agree on the allocation of any part of the settlement to either the RICO claim or punitive damages. By contrast, McKay desired that a portion of the settlement proceeds be allocated to the RICO claim in order to publicize the Company's unlawful activity. McKay reluctantly agreed to settle without such allocations because of both the risks he would face on appeal and the fact that the Company threatened to prolong the litigation for fifteen to twenty years. The settlement agreement therefore expressly stated that none of the settlement proceeds were being paid pursuant to

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other former employee of the Company named Harry D. Williams (Williams). Williams' case was entitled Williams v. Hall, 683 F. Supp. 639 (E.D. Ky. 1988)(the Williams case).

12. *McKay*, 102 T.C. at 471.

13. *Id.* at 472.

14. *Id.* at 473. With regard to the parties' allocations, the settlement agreement provided:

> G. Based upon the nature and origin of each Claim, Ashland and McKay have agreed that:
>
> (1) The sums allocable to the Wrongful Discharge Tort Claim, representing compensatory damages payable on account of an alleged tort-type invasion of rights that McKay is granted by virtue of being a person in the sight of the law, are properly excludable from McKay's gross income under [§] 104(a)(2), . . . and
>
> (2) The sums allocable to the Contract Breach Claim, representing compensatory damages payable on account of Ashland's alleged breach of McKay's employment contract, constitute gross income to McKay within the meaning of [§] 61 . . . .

Id. at 472.

RICO or for punitive damages.[15]

The United States district court judge presiding over McKay's wrongful discharge action concluded that the allocations in the settlement agreement were reasonable and fairly reflected the relative value of McKay's claims. McKay included the amount of the settlement proceeds he and the Company allocated to the breach of contract claim ($2,044,085) in gross income on his 1988 federal income tax return.[16] However, he excluded the entire amount of settlement proceeds allocated to the wrongful discharge tort claim ($12,250,215). The Service determined that the entire amount of settlement proceeds McKay received from the Company constituted compensation to him during 1988, and therefore should have been included in his gross income for that year.[17]

C. The Holding

The United States Tax Court held that McKay could exclude from gross income the amount of settlement proceeds he and the Company allocated to the wrongful discharge claim in their settlement agreement.[18] The court based this holding on its findings that the settlement agreement resulted from bona fide, arm's length negotiations between adversarial parties[19] and that the allocations accurately reflected the substance of the claims settled by McKay and the Company.[20] Accordingly, the $12,250,215 payment allocated to the wrongful discharge claim represented a payment for compensation of a tort-type personal injury excludable under section 104(a)(2) of the Internal Revenue Code.[21]

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15. *McKay*, 102 T.C. at 473.

16. McKay also included the settlement proceeds allocated as partial reimbursement of legal expenses from Ashland ($2,450,000). McKay's inclusion of this amount in gross income is not, however, germane to the analysis in this Note.

17. *Id.* at 474.

18. *Id.* at 487.

19. *Id.* at 483-84.

20. *McKay*, 102 T.C. at 484.

21. *Id.* at 487. The tax court ruled on several other issues that are not applicable to the analysis in this Note. First, the tax court held that McKay could deduct legal expenses that the settlement agreement with Ashland allocated to his expenses in a shareholder's derivative suit against him, but could deduct his remaining legal expenses (which were allocated to the wrongful discharge action) only to the extent of wrongful discharge settlement proceeds. *Id.* at 487-94.

Second, the Tax Court held that McKay could not deduct payments made to the law firm representing him, amounts claimed as "other legal expenses," maintenance and storage expenses for business records, or expenses incurred as a consul-

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

D. The Court's Analysis

The starting point for the court's reasoning in *McKay* was the relationship of the relevant sections of the Internal Revenue Code.[22] Section 61 states that "all income from whatever source derived" must be included in gross income.[23] Section 104(a)(2) adds that "the amount of any damages received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal injuries" may be excluded from gross income.[24] The court noted that the Treasury Regulations broadly interpret the language of section 104(a)(2) to include damages received "through prosecution of a legal suit or action based on tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution."[25] The court noted that the section 104(a)(2) exclusion encompasses damages received for both physical and non-physical (i.e., mental or emotional) injuries.[26]

The court explained that in personal injury cases, it must make a factual inquiry to determine the true substance or nature of the settled claim. The court will therefore examine all the facts and circumstances surrounding the settlement in the following ways:

(a) if no lawsuit was initiated the court must consider relevant documents, letters, and testimony;

(b) in a case where a lawsuit was filed but not settled, or if settled but no express allocations were made among the various claims in the settlement agreement, then the court must consider the pleadings, jury awards, or any court orders or judgments;

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tant for a corporation because such claims were not substantiated. *Id.* at 494.

Third, McKay was denied a deduction for interest that accrued on money he borrowed to pay legal expenses for the action against Ashland. The Tax Court found that this was personal interest even though it related to McKay's trade or business since he was in the trade or business of being an employee. McKay could, however, deduct 40% of his interest for the taxable year 1988 because of a four-year phase-in of a disallowance of his personal interest deduction. *McKay*, 102 T.C. at 494-95.

Finally, the court held that McKay was liable for a failure-to-file penalty. *Id.* at 496-98. In support of its holding on this issue, the Tax Court found that McKay's intentional delay in filing, designed to prevent the Company from gaining access to his tax returns in order to determine whether he could withstand protracted litigation, did not constitute reasonable cause for failure to file.

22. *Id.* at 481.

23. I.R.C. § 61(a) (1988).

24. I.R.C. § 104(a)(2) (1988 & Supp. I 1989).

25. *McKay*, 102 T.C. at 481 (citing Treas. Reg. § 1.104-1(c) (as amended in 1970)).

26. *Id.* at 481 (citing United States v. Burke, 112 S. Ct. 1867 (1992)).

and

(c) if (like *McKay*), the taxpayer's claims were settled and express allocations among the various claims are contained in the settlement agreement, the court must carefully consider the various claims.[27]

The Service argued that, contrary to the express statements in the settlement agreement, the entire amount of settlement proceeds was attributable to McKay's breach of contract claim. Thus, the proceeds were not excludable under section 104(a)(2) but rather constituted gross income.[28]

The Service supported its overall position with three specific arguments. First, the Service argued that since the Company could claim a section 162 business expense deduction on any payments for damages, the Company was not actually adverse to any particular allocation scheme. Section 162 provides that taxpayers may deduct the cost of "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business."[29] The section 162 deduction encompasses civil damages. Therefore the Company's settlement payments to McKay could indeed be deducted.

Second, the Service argued that the character of the claims in the settlement agreement must be based on the character of the claims litigated against the Company. McKay plead four claims at trial: wrongful discharge, breach of contract, RICO violations, and punitive damages. However, the settlement agreement included only two claims: tort and contract.

Third, the Service argued that all of the settlement proceeds should be included in gross income because the jury awarded treble damages derived from McKay's RICO claim, which was based on injury to McKay's business or property. Since business and property damages are outside the scope of the 104(a)(2) exclusion, the proceeds from those claims would be properly includable in gross income.[30]

By arguing that the Company could deduct any payments made to McKay, the Service attempted to dispel the notion that

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27. *Id.* at 482-83.

28. *Id.* at 481.

29. I.R.C. § 162 (1988).

30. The Service also advanced two alternative arguments in the *McKay* case: First, that all of the settlement proceeds should be included in McKay's gross income because they represented an accession to wealth—not a return of capital. Second, since the claims in the Williams case were based on a contract theory and were litigated contemporaneously with McKay's case, the two cases should reflect similar claims. *McKay*, 102 T.C. at 484-487.

the Company and McKay were adverse with respect to the tax consequences of the settlement.[31] The court disposed of that argument noting that while deductibility of the payor's payment might be one factor to be considered in a determination of whether the parties were adverse to their allocation, it is not controlling.[32]

In making the argument that the character of settled claims must reflect litigated claims, the Service focused on the jury's award of back and future pay in its contention that McKay's claims were purely contractual under Kentucky law. The court rejected those assertions, thereby refusing to disregard the express language of the settlement agreement since the agreement was consistent with Kentucky law, which recognizes both contract and tort claims in employment dispute litigation.[33]

The court quickly dismissed the Service's third argument that since the jury awarded treble damages for McKay's RICO claim, which was based on injury to McKay's business or property, all of the settlement proceeds should have been included in gross income. The court stated that since the parties had not expressly allocated any damages to RICO, the settlement agreement would control.[34]

The *McKay* court further dismissed the Service's first alternative argument—that the entire settlement proceeds should be included in McKay's gross income because such proceeds represented an accession to wealth.[35] The court explained that the

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31. *Id.* at 485; Concord Control, Inc. v. Commissioner, 78 T.C. 742, 745 (1982); Black Indus., Inc. v. Commissioner, T.C. Memo. 1979-61. The Service cited these two cases in support of its argument. The court distinguished these cases on their facts by pointing out that both cases involved allocations made in the purchase price of a business, while the instant case dealt with hostile litigation—two sets of circumstances that were altogether different.

32. *McKay*, 102 T.C. at 485.

33. *Id.* at 486.

34. *Id.* at 486-87.

35. *Id.* Two theories have emerged with regard to the taxability of damages awarded for personal injury: the return of capital theory and the accession to wealth theory. Under the return of capital theory, damages awarded are intended to compensate the injured party for injuries to one's personal rights and attributes (although this theory is difficult to support given that under ordinary tax principles, to apply the return of capital theory, one must establish an investment of capital in the asset in question—a basis). The accession to wealth theory posits that taxpayers who receive damages with no discernible basis realize gain to the extent of the damage award. Taxpayers who receive punitive damages are generally regarded as having acceded to wealth since punitive damages are not meant to compensate the injured party. For an extensive discussion of the history and underlying tax policy of those two theories and the § 104(a)(2) exclusion generally, see Douglas A. Kahn, *Compensatory and Punitive Damages for a Personal Injury: To Tax or Not to Tax?*, 2

Service had failed to recognize *Burke* for the proposition that damages received on account of a tort or tort-like personal injury are excludable under section 104(a)(2).[36] The court also dispelled the Service's second alternative argument, that the court should compare McKay's claims with those of McKay's co-plaintiff, Williams. The court stated that it failed to see why Williams' claims, which were based upon a different legal theory than McKay's claims, should affect the instant case.[37]

Taking the opposite position, McKay argued that the allocations in the settlement agreement should be respected and that the settlement proceeds expressly allocated to his wrongful discharge tort claim should be excludable under section 104(a)(2). The court accepted McKay's argument that the settlement agreement was entered into by adverse parties at arm's length. The court noted that, similar to previous decisions, the most important factor bearing on the question of whether a payment was made on account of tortious injury for purposes of exclusion under section 104(a)(2) is the express language in the settlement agreement itself.[38] The *McKay* court, relying heavily on *Robinson v. Commissioner*,[39] stated that it would not be bound by any "factor or factors that are inconsistent with the true substance of the taxpayer's claim" nor by express allocations in the document itself if the parties did not "engage in bona fide, arm's length, adversarial negotiations."[40]

In *Robinson*, the Tax Court considered the circumstances under which it would disregard specific allocations of settlement proceeds made in a written agreement. *Robinson* involved an action initiated by the taxpayers (the Robinsons) in state court against a Texas bank (the Bank) for failure to release a lien on the Robinsons' property. Following a jury verdict of approximately sixty million dollars in the Robinsons' favor—including six million dollars for lost profits, $1.5 million for mental anguish, and fifty million dollars in punitive damages—the parties set-

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FLA. TAX REV. 327 (1995).

36. *McKay*, 102 T.C. at 485 (citing United States v. Burke, 112 S. Ct. 1867, 1870 (1992)).

37. *Id.* at 487.

38. *Id.* at 482 (citing Byrne v. Commissioner, 90 T.C. 1000 (1988), *rev'd* and *remanded*, 883 F.2d 211, 89-2 U.S. Tax Cas. (P-H) ¶ 9500, 64 A.F.T.R.2d 89-5430 (3d Cir. 1989); Bent v. Commissioner, 87 T.C. 236 (1986), *aff'd*, 835 F.2d 67, 88-1 U.S. Tax Cas. (P-H) ¶ 9101, 61 A.F.T.R.2d 88-301 (3d Cir. 1987); Glynn v. Commissioner, 76 T.C. 116 (1981), *aff'd without published opinion*, 676 F.2d 682 (1st Cir. 1982)).

39. 102 T.C. 116 (1994).

40. *McKay*, 102 T.C. at 482.

tled. The settlement agreement provided that the Bank pay the Robinsons ten million dollars in consideration for the release of the Bank from further liability. A final judgment was entered allocating ninety-five percent of the ten million dollar settlement payment to mental anguish and five percent to lost profits.[41]

The Robinsons reported $246,758 on their 1987 Form 1040 as miscellaneous income.[42] The Service brought a deficiency action against the Robinsons arguing that only five percent of the settlement proceeds was excludable from gross income.[43] The Tax Court rejected the allocation in the final judgment because it was uncontested, nonadversarial and entirely tax-motivated and therefore did not accurately reflect the underlying claims.[44]

Since the allocations in the *Robinson* settlement agreement were so disproportionate to the jury's damage award and because the settlement agreement did not provide adequate evidence of the Bank's intent in making its payments, the court looked to other facts and circumstances to determine the Bank's intent. Specifically the court analyzed the Bank's interests in characterizing the proceeds as either tort or contract damages and whether the Bank intended that the settlement proceeds be allocated to the tort and contract claims in the proportions that they were. Regarding these questions the court noted that the Bank's interests were adverse to those of the Robinsons only to the extent of the negotiations regarding the amount of the settlement and that the Bank did not intend to "settle one claim to the exclusion of another."[45] Since the Bank evidently was indifferent to the allocation of the settlement between the contract and tort claims, the court further found that the Bank did not intend the allocations as they appeared in the settlement agreement. The *Robinson* court therefore concluded that the settlement negotiations between the Robinsons and the Bank could in no way be characterized as arm's length or adversarial with regard to the characterization of the settlement proceeds.[46]

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41. *Robinson*, 102 T.C. at 118-24.

42. Of the $10 million in settlement proceeds the Bank paid out, the Robinsons received $4,935,151.72. The balance of $5,064,848.28 went to the Robinsons' attorneys. The $246,758 the Robinsons reported was five percent of the total of the $4,935,151.72. *Id.* at 124.

43. *Id.* at 117.

44. *Id.* at 133-34.

45. *Id.* Although it is not stated, the Tax Court presumably took note of the fact that the bank could deduct its payment as a § 162 trade or business expense. I.R.C. § 162 (1988).

46. *Robinson*, 102 T.C. at 129.

The *McKay* court distinguished the *Robinson* decision on the grounds that the parties in *McKay* were "hostile adversaries with respect to the allocations made in the settlement agreement,"[47] while the payor Bank in *Robinson* "was not concerned with the allocation among the taxpayers' various claims."[48] The court characterized McKay's interests in the negotiations as "want[ing] the settlement award to be as high an amount as possible to compensate him for his losses and want[ing] [the Company] to be punished for its behavior."[49] The Company's interests in the negotiations, on the other hand, were "to minimize the amount it needed to pay petitioner as well as avoid making any payment on account of petitioner's RICO claim."[50] The court further pointed out that the Company adamantly refused to settle if any of the damages were to be allocated to RICO claims.[51] Because the parties expressly memorialized this understanding in the settlement agreement, the *McKay* court found that evidence bearing on the questions of hostile or adverse negotiations and on the intent of the payor could be found in the settlement agreement itself.[52]

Ultimately the court accepted the parties' express allocations in the settlement agreement and held that the $12,250,215 payment allocated to the wrongful discharge tort claim represented a payment for a tort-type personal injury. The court therefore allowed McKay to exclude the payment from his gross income under section 104(a)(2).

III. ANALYSIS

A. Background

Prior to initiating lawsuits involving a personal injury, practitioners should carefully analyze the potential tax consequences of a jury or settlement award in their clients' cases. *Robinson* and *McKay* apply a number of principles developed in previous cases dealing with the section 104(a)(2) exclusion,[53] and identify

47. *McKay*, 102 T.C. at 484.
48. *Id.* at 483.
49. *Id.* at 484.
50. *Id.*
51. *McKay*, 102 T.C. at 484.
52. *Id.* at 483-84.
53. The author relies substantially on analysis of the relevant case law decided prior to *Robinson* and *McKay* as developed in *Limits*, *supra* note 2, at 38-40. In *Limits* the authors concluded that the proceeds of most employment disputes are derived from non-physical personal injuries and should logically be taxable. *Id.* If

distinct factors that courts will consider when determining whether to respect the allocation of damages or settlement awards tax purposes. As the case law interpreting section 104(a)(2) reveals, taxpayers have met both success and failure in their efforts to characterize payments as "damages on account of personal injury." The results of those efforts provide a helpful map to practitioners who seek the safe harbor of section 104(a)(2) exclusion for damages awards.

Only damages or compensation received on account of personal injury or sickness are excludable from gross income under section 104(a)(2). The Service and the courts have allowed taxpayers to exclude damages for both physical personal injuries, and non-physical personal injuries.[54] Because most of the recent case law in the area of non-physical personal injury has emanated from the employment arena, the issue that frequently arises in tax litigation is whether the action was based on tort or tort-like rights, or, instead, was contractual in nature.

In employment cases, the Service has regularly focused on the nature of damages claimed rather than on the nature of the injury. The United States Supreme Court settled that issue in *Burke*, concluding that the proper inquiry into the character of jury or settlement awards for damages focuses on the nature of the injury.[55] The Service nonetheless persists in arguing that damages awarded by a jury or agreed upon in a settlement agreement are based on contractual rather than tort or tort-like rights, as it did in *McKay*.[56]

When courts decide whether to respect a settlement based on tort or tort-like rights for purposes of section 104(a)(2), the most important determination is whether the payor intended the award to satisfy tort or tort-like claims. The court will therefore analyze evidentiary factors found both inside and outside the settlement agreement to determine the payor's intent. The most important factor bearing on the question of the payor's intent is the express language contained in the settlement agreement.[57] In the absence of an express allocation in the settlement agree-

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that were the state of the law, *McKay* would not have been litigated, since the compensatory damages from McKay's settlement with the Company were derived from non-physical personal injuries and would be includable in gross income.

54. Threlkeld v. Commissioner, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81, 88-1 U.S. Tax Cas. (P-H) ¶ 9370, 61 A.F.T.R.2d 88-1285 (6th Cir. 1988).

55. United States v. Burke, 112 S. Ct. at 1871 n.6 (1992).

56. McKay v. Commissioner, 102 T.C. 465, 485 (1994).

57. See *supra* note 42 and accompanying text.

ment, the court will analyze the surrounding facts and circumstances to determine the payor's intent. However, the *McKay* decision indicates that even if express allocation language appears in the agreement, the court will analyze the underlying facts and circumstances to determine if the settlement allocations are meaningful. Evidentiary factors that courts have examined in such a determination include pleadings and other court documents,[58] correspondence between parties,[59] insurance contracts,[60] and a payor's issuance of a Form 1099 to a taxpayer.[61]

If a settlement agreement lacks express allocation language and the underlying facts and circumstances do not convincingly indicate the payor's intent to extinguish tort or tort-like claims, the result will be fatal to a taxpayer's case. In *Agar v. Commissioner*,[62] the Second Circuit held that the plaintiff-taxpayer could not exclude amounts received from his employer upon the employee's resignation from the company. In that case, the court concluded the evidence did not indicate that the company intended its payments to satisfy tort or tort-like claims. Some evidence indicated that the taxpayer had resigned because of accusations and criticisms leveled against him, but the settlement agreement was devoid of any reference to those matters.[63] The settlement agreement only indicated that the taxpayer was leaving his employment because of a desire to return to public accounting.[64] The record further showed the employer intended its payments to be a form of severance pay rather than compensation for any possible defamation claims that the taxpayer may have had.[65] The *Agar* court thus emphasized that the taxpayer failed to demonstrate that the company intended to compensate the taxpayer for tort or tort-like claims. The court noted the lack of any express language in the settlement agreement allocating proceeds to compensation for specific types of injury.[66]

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58. Knuckles v. Commissioner, T.C. Memo. 1964-33, 23 T.C.M. (CCH) 182 (1964), *aff'd*, 349 F.2d 610, 65-2 U.S. Tax Cas. (P-H) ¶9629, 65 A.F.T.R.2d 5515 (10th Cir. 1965).

59. Seay v. Commissioner, 58 T.C. 32 (1972).

60. Madson v. Commissioner, T.C. Memo. 1988-325, 57 T.C.M. (P-H) 1615 (1988).

61. Ray v. United States, 25 Cl. Ct. 535, 92-1 U.S. Tax Cas. (P-H) ¶ 50,187, 69 A.F.T.R.2d 92-953 (1992), *aff'd*, 989 F.2d 1204 (1993).

62. 290 F.2d 283, 61-1 U.S. Tax Cas. (P-H) ¶ 9457, 7 A.F.T.R.2d 61-1423 (2nd Cir. 1961), *aff'g*, T.C. Memo. 1960-21, 19 T.C.M. (CCH) 116 (1960).

63. 290 F.2d at 284.

64. T.C. Memo. 1960-21, 19 T.C.M. (CCH) at 118.

65. 290 F.2d at 284.

66. *Id.*

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

As it became clear to the taxpayers in *McKay* and *Robinson*, a court's findings of fact on the payor's intent is crucial. Because the *McKay* court respected the express language in the settlement agreement in its findings, McKay won his case on the issue of allocation. If, like *Robinson*, the court refuses to respect the allocations in the settlement agreement, the taxpayer will lose the case. Therefore, an ideal settlement agreement would contain, among other provisions, specific allocations of damages in compensation for tort or tort-like injuries alleged and a specific statement indicating that the payor intends to compensate the plaintiff for the injuries alleged.

The importance of initiating a lawsuit with pleadings that raise tort or tort-like causes of action was made clear in *Knuckles v. Commissioner*.[67] In that case, a life insurance company fired an employee for allegedly mismanaging the company. The taxpayer sued the company for breach of contract.[68] The taxpayer and his counsel apparently overlooked the importance of section 104(a)(2) from the outset, since they did not plead a personal injury. Only after a settlement was reached, allocating compensation to the contract claim, did the taxpayer introduce such a theory.[69] Not surprisingly, after securing a settlement without admitting liability for a tort or tort-type act, the company refused to later acknowledge liability for the benefit of the taxpayer.[70] Since the settlement agreement did not require the company to admit liability for a tortious act, the company had no reason to admit liability later simply to allow the taxpayer to avoid tax on his damages award. On the basis of the content of the settlement agreement and the company's refusal to acknowledge liability for any wrongdoing, both the Tax Court and the Tenth Circuit determined that the company intended the settlement proceeds only as compensation for breach of contract.[71]

The *McKay* court analyzed McKay's pleadings and other court documents and found that they supported McKay's claim that the action primarily raised the tort claim of wrongful discharge, although breach of contract violations were alleged as well.[72] Because it found that the pleadings reflected the sub-

67. T.C. Memo. 1964-33, 23 T.C.M. (CCH) 182 (1964), *aff'd*, 349 F.2d 610, 65-2 U.S. Tax Cas. (P-H) ¶9629, 65 A.F.T.R.2d 5515 (10th Cir. 1965).
68. T.C. Memo. 1964-33, 23 T.C.M. (CCH) at 182.
69. *Id.* at 184.
70. *Id.*
71. *Id.*
72. *See supra* notes 21, 27-28 and accompanying text.

stance of the allocations in the settlement agreement, the court respected the allocations.[73] The jury did not specify the proportion of damages it allocated to either theory of recovery.[74] In assessing the allocations in the settlement agreement, the court relied on McKay's pleadings at trial. Absent guidance from the jury, the court had no precise way of independently analyzing the parties' allocations. Since McKay allocated a reasonable portion of settlement proceeds to the contract theory, the court willingly accepted his allocations.

The presence of tort or tort-like theories of recovery in McKay's pleadings proved to be one of the factors that legitimized the parties' allocations. In the *Robinson* decision, however, the court ignored the causes of action in the Robinsons' pleadings, finding that the claims were unsupported by the surrounding facts and circumstances. The *Robinson* court, in contrast to the *McKay* court, focused its analysis on the proportion of damages allocated to the various claims in the jury verdict at trial.[75] That court concluded that the allocations in the settlement agreement should reflect the allocations made by the jury in its verdict.[76] Thus, the *Robinson* decision stands for the proposition that taxpayers who are too greedy in their allocations to tort or tort-like claims in a settlement document will not succeed in the Tax Court when challenged. The allocations in the document should be reasonably proportionate to the litigated claims, particularly when the jury specifies its allocations. The *Robinson* court, based on the proportions in the jury verdict, allowed an exclusion of 37.331% of the settlement amount.[77] The Robinsons claimed that ninety-five percent of their settlement attributable to tort or tort-like theories.[78] By making such a disproportionate claim, the Robinsons invited a challenge from the Service.

Practitioners initiating lawsuits on behalf of injured clients should carefully consider the initial theories they will plead. This is particularly important in cases where damages such as lost

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73. *McKay*, 102 T.C. at 484.

74. *Id.* at 471.

75. *Robinson*, 102 T.C. at 134.

76. *Id.* at 134. The percentages of the allocations in the jury verdict are listed *infra* note 106. The *McKay* court likely gave the parties more discretion with respect to the proportion of allocations in the agreement since the jury's damages verdict did not allocate with specificity between the tort and contract claims. Thus it follows that a verdict which does not specifically allocate damages to claims should give taxpayers more leeway than one with specific allocations.

77. *Robinson*, 102 T.C. at 135.

78. *Id.* at 123.

wages can be characterized either as tort or contract damages. A successful recovery raising claims only in contract will yield a taxable damage award to the plaintiff. Thus, practitioners should think expansively when selecting theories. However, when the claims are drafted into pleadings, the cases indicate that pleadings which contain a clear tort component accompanied by a clear contract component generate more credibility for the taxpayer.

In this regard, practitioners should not ignore their ethical obligations to accurately and honestly portray the nature of the claim. Nonetheless, the scope of the term "personal injury" is quite broad, allowing ample opportunity for counsel to characterize injuries as "personal" in appropriate cases. Thorough and thoughtful lawyering, combined with prudent strategy and diligent research, may yield both a tort and a contract claim applicable to the factual circumstances.

In *Seay v. Commissioner*,[79] the taxpayer successfully convinced the Tax Court that part of a settlement he received from his former employer constituted compensation for injury to his personal reputation. The *Seay* decision reveals the importance of securing a *meaningful* statement that the tortfeasor-payor intended to pay damages on account of personal injury. In *Seay*, the taxpayer's position as a corporate president was terminated when a dispute arose between the taxpayer and the owners of the corporation.[80] The taxpayer refused to vacate his position; consequently, the owners brought a highly-publicized trespass action against him.[81] The taxpayer felt his personal reputation was damaged by the publicity.[82] The settlement agreement reached between the owners and the taxpayer provided for payment of one year's salary plus $45,000 for any damages caused by the newspaper publicity.[83] An agreement in a letter specifically stated that the $45,000 was intended as "compensation for such personal embarrassment, mental and physical strain and injury to health and personal reputation in the community" that the taxpayer suffered.[84] The court in *Seay* found the evidence indicated that the owners made the $45,000 payment to the taxpayer to compensate him for any personal injuries suffered—a

79. 58 T.C. 32 (1972).
80. *Id.* at 33.
81. *Id.* at 33-34.
82. *Id.* at 34.
83. *Id.* at 34-35.
84. *Id.* at 33-35.

tort or tort-like claim.[85] The taxpayer therefore qualified for the benefits of the 104(a)(2) exclusion.[86] Even if, as in *Seay*, the statement appears in a letter or document outside the settlement agreement, the statement itself could provide significant evidence that allocations made in a settlement agreement truly reflected the payor's intent.

In contrast to the taxpayer in *Seay*, the taxpayers in *Robinson* failed to convince the court that their settlement agreement contained a meaningful statement of the payor's intent.[87] The Bank knew that the Robinsons wanted to allocate any settlement proceeds in a manner that would minimize their taxes, that the Bank did not care about the manner of allocation, and that the Bank allowed the Robinsons to allocate the settlement proceeds in any manner they desired. Thus, the *Robinson* court found no facts or circumstances that rendered the taxpayers' allocation of damages in the final judgment meaningful.[88] None of the evidence indicated that the allocations were reached as a result of arm's length negotiations. Instead, the court found:

> Petitioners . . . were given . . . the unfettered discretion to allocate the settlement proceeds in any manner they desired in order to minimize their Federal income tax liability. We find that petitioners deliberately and unilaterally arrived at the allocations contained in the final judgment solely with a view to Federal income taxes, and not to reflect the realities of their settlement.[89]

On the other hand, the *McKay* court found that "the settlement agreement provides the clearest embodiment of the payor's intent . . . ."[90] The court made that determination based on the surrounding facts and circumstances, which supported the parties' statements in the settlement agreement. Those facts and circumstances included the hostile nature of the parties' negotiations regarding the RICO claim, the nature of the claims in the initial pleadings, the entire court record, and the trial judge's involvement in the negotiations.[91] The *McKay* court's finding on the Company's intent shows that even a somewhat vague statement[92] explaining why the parties allocated settlement proceeds

85. *Id.* at 40.
86. *Id.*
87. Robinson v. Commissioner, 102 T.C. 116 (1994).
88. *Id.* at 128-29.
89. *Id.* at 129.
90. McKay v. Commissioner, 102 T.C. 465, 484 (1994).
91. *Id.*
92. In its determination of the Company's intent, the *McKay* court focused on

as they did may lead a court to find the payor's intent sufficiently demonstrated, provided the other facts and circumstances surrounding the allocations render that statement meaningful.

In *Madson v. Commissioner*,[93] the Tax Court considered evidence of a tortfeasor's intent found in an insurance contract to allow the taxpayer's exclusion of his settlement award. There, the taxpayer argued for the exclusion of his entire settlement in an action against the City of Green Bay, Wisconsin, for forcing him to retire at age sixty from his position as police chief.[94] Following a trial, the state court found that Green Bay had violated the taxpayer's right to equal protection and had also breached its employment contract with the taxpayer. The court awarded damages on the basis of lost earnings, loss of state retirement, and loss of social security benefits. The court also determined that the amount of damages would have been equal under both the contract or equal protection causes of action.[95] During an appeal by Green Bay, the parties agreed to settle the dispute for $41,000.[96] The Tax Court found that the payment compensated for the taxpayer's equal protection claim.[97] The court reasoned that because Green Bay's insurer paid the $41,000 and because the insurance contract specifically excluded payments for breach of contract, Green Bay must have intended to pay the taxpayer for violation of the taxpayer's equal protection rights, a tort-type injury.[98] Therefore, the 104(a)(2) exclusion was appropriate.

One might argue that determining a tortfeasor/payor's intent, based on the language in an insurance contract, is somewhat artificial. Provided that other facts and circumstances render the statement or language meaningful, however, the *McKay* and *Madson* decisions together indicate that the court will find the payor's intent sufficiently demonstrated even with a less than direct statement from the parties. The *McKay* court accepted the vague reference to estimates of appellate success in much

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the following language in the settlement agreement: "Ashland and McKay have both relied upon their appellate counsel[s'] consensus estimate of McKay's probability of appellate success with respect to [the wrongful discharge tort claim and the breach of contract claim]." *Id.* at 484. Therefore, in similar situations, if taxpayers memorialize their estimates of appellate success and if the facts and circumstances surrounding the allocation to the various claims render that statement meaningful, those precautions should be sufficient to determine the intent of the payor.

93. T.C. Memo. 1988-325, 57 T.C.M. (P-H) 1615 (1988).
94. *Id.* at 1615.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

the same way that the *Madson* court accepted the payor's intent as discerned from the terms of the insurance contract. In other words, both courts stretched to find that the payors intended their payments to compensate for personal injuries.

Regardless of the language employed or whether the statement of the payor's intent is found in a settlement document, letter, or elsewhere, both the *Robinson* and *McKay* decisions show that a court will analyze the underlying facts to determine if the statement is meaningful. Therefore, such a statement should be a concise explanation of the tort or tort-like injury for which the taxpayer is being compensated. Again, the statement must be meaningful because it could cause a court to deny the payor's intent.[99] Practitioners should demand that a settlement document contain both express allocation language specifying that payments will extinguish tort or tort-like claims and a specific statement of the payor's intent in doing so. Leaving one or the other out of an agreement could expose settlements to unnecessary judicial scrutiny.

The importance of express language in the settlement agreement and careful attention to the consequences of bargaining was highlighted in *Ray v. United States*.[100] In *Ray*, the Singer Company settled a labor dispute arising from the closure of one of its manufacturing plants. The union filed a complaint against Singer for breach of the collective bargaining agreement and sought injunctive relief, based on the allegation that Singer had engaged in misrepresentation and fraud.[101] The federal district court refused to enjoin Singer, but found that Singer had breached its collective bargaining agreement and indicated that it would award monetary damages. The parties ultimately agreed to a monetary settlement and the documents indicated that all claims of the union were released and discharged.[102] After paying them, Singer issued each of the settlement distributees a Form 1099.[103] Finding no express language in the settlement agreement allocating settlement proceeds to personal injury and considering Singer's intent as indicated by the issuance of Form 1099, the Claims Court held section 104(a)(2)

99. It is worth noting that the taxpayer carries the burden of proving that the settlement allocations were made in good faith. *See Robinson*, 102 T.C. at 128 n.19.

100. 25 Cl. Ct. 535, 92-1 U.S. Tax Cas. (P-H) ¶ 50,187, 69 A.F.T.R.2d 92-953 (1992), *aff'd*, 989 F.2d 1204 (1993).

101. 25 Cl. Ct. at 536-37.

102. *Id.*

103. *Id.* at 541.

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

inapplicable.[104] Based on its holding on the collective bargaining agreement, the court never had to reach the issues of fraud and misrepresentation.[105]

Ray suggests the importance of drafting settlement agreements carefully. Because the complaint alleged tortious actions (fraud and misrepresentation) on Singer's part, it would appear that the union gave up an excellent opportunity to negotiate for the allocation of at least part of the settlement proceeds to personal injury. No such effort was made, however. Unlike the *McKay* court,[106] the *Ray* court found no evidence of negotiation or discussion between the parties regarding the tax implications of the awards made to the employees.[107] *Ray* also suggests that the issuance of a Form 1099 by a payor will, almost without exception, demonstrate to the court that the payor intended that the payment constitute income to the taxpayer. Practitioners should therefore negotiate, as part of the settlement, that either no Form 1099 be issued, or that it be issued with the qualification that the settlement compensates for tort-like injuries.

B. The McKay Court's Liberal Application of Section 104(a)(2)

The *Robinson* and *McKay* decisions were decided within one month of each other and reflect the application of the principles established in earlier 104(a)(2) cases. However, the *McKay* decision appears to be more generous to the taxpayer. The *McKay* court, like the *Robinson* court, applied the standard that express allocations in settlement agreements will be respected for tax purposes if they are entered into in an adversarial context, at arm's length, and in good faith.

Unlike the *Robinson* court, the *McKay* court found that the parties involved negotiated adversarially in allocating damages between tort and contract theories. However, the court relied on vague language in the settlement agreement to support that finding and to demonstrate the intent of the Company. The McKay settlement agreement referred to the wrongful discharge

104. *Id.*

105. *Id.* at 540.

106. *McKay*, 102 T.C. at 472. The *McKay* finding is arguably suspect if one closely examines the primary focus of the Company-McKay negotiations, which appear to have been on the RICO claims, and the overall amount of the settlement as opposed to the characterization of the proceeds as derived from either tort or contract claims.

107. 25 Cl. Ct. at 541.

and breach of contract claims only as "the two other claims."[108] With the exception of the following statement: "[The Company] and McKay have both relied upon their appellate counsel[s'] consensus estimate of McKay's probability of appellate success with respect to the two other claims,"[109] the court referred to no other express allocation language that might explain how the parties arrived at the allocation of damages to tort or contract theories.

The opinion contains few facts that would clearly support a finding that the tort and contract allocation negotiations were adversarial. Instead, the court seemed to apply the adversarial negotiation context of the RICO claim to the negotiations on tort and contract allocations. The court noted that "Ashland wanted to minimize the amount it needed to pay [McKay] as well as avoid making any payments on account of [McKay's] RICO claim."[110] Regardless of the amount, the Company would not have benefitted by allocating damages to the contract claim instead of the tort claim. Under either allocation scenario, the Company could have claimed a section 162 ordinary and necessary business expense deduction for its payment of tort or contract damages. The *McKay* court responded to the Service's same argument, noting that the Bank in *Robinson* "was not concerned with the allocation among the taxpayers' various claims."[111] The court concluded that "[a]lthough the deductibility of the payor's payment might be [one] factor to consider in deciding whether the parties are adverse to their allocations, it is not controlling."[112]

The Company resisted any mention of RICO violations in the settlement document because it wished to avoid negative publicity. A wrongful discharge tort claim or a breach of contract claim would have generated little, if any, negative publicity to the Company. Therefore publicity considerations probably had little impact on the Company's negotiation posture with regard to tort and contract allocations.

It is reasonable to conclude that once the Company and McKay had agreed to exclude any mention of RICO violations in the settlement agreement, the only issue remaining was the amount of damages the Company would pay for the wrongful

108. *McKay*, 102 T.C. at 484.
109. *McKay*, 102 T.C. at 484; *see also supra* note 88.
110. *McKay*, 102 T.C. at 484.
111. *Id.* at 483.
112. *Id.* at 485.

discharge and breach of contract claims. In footnote nineteen, the *McKay* court noted that although the court did not decide the issue, if the Company had in fact made a settlement payment on account of RICO, "the deductibility of such a payment to [the Company] could be uncertain,"[113] an assertion that seems altogether irrelevant to the issue properly before the court: whether the tort and contract allocation negotiations were actually adverse or not.

Although the statements in the settlement agreement were somewhat indirect as to the Company's intent, other persuasive facts and circumstances clearly affected the *McKay* court's decision. First, the court noted that, unlike Judge Evins in *Robinson*, the presiding trial judge in *McKay* played a primary role in the negotiations process between the Company and McKay.[114] In fact, the trial judge encouraged the settlement figure upon which the parties eventually agreed.[115] Although the court did not explicitly state it, presumably the trial judge would have had an opportunity to independently review the allocations in the *McKay* settlement agreement.

Second, the *McKay* court noted that "the allocations in the settlement agreement are consistent with the entire record in that petitioner's pleadings and jury verdict reflect a lawsuit sounding primarily in tort."[116] Similarly, a comparison of the proportions of the jury verdicts in *Robinson* and *McKay* reveals that the *McKay* allocations were far closer to the proportions allocated by the jury than those in *Robinson*. In *Robinson*, the jury awarded 2.76 percent of damages to the tort claim of mental anguish,[117] yet the parties allocated ninety-five percent to mental anguish in the settlement agreement. In *McKay* the jury did not clearly allocate between the tort or contract theories of recovery, but the aggregate amount of the verdict derived from the tort and contract theories closely paralleled that in the *McKay* settlement agreement.[118] The court specifically stated that the pleadings and other court documents reflected a case sounding primarily in tort with a contract component.[119] Also, the trial

113. *Id.*
114. *McKay*, 102 T.C. at 484.
115. *Id.*
116. *Id.*
117. The Robinsons' jury awarded $1,500,000 of a total verdict of $54,260,000 for past and future mental anguish. *Robinson*, 102 T.C. at 121, 123. The author calculated the percentage as follows:1,500,000/54,260,00 = 2.76%.
118. *McKay*, 102 T.C. at 471-72.
119. *Id.* at 484.

judge would presumably have noted an inappropriate allocation to one theory over another.

Third, the language McKay's counsel used in the pleadings and settlement agreement indicates that they clearly understood the relevant case law under section 104(a)(2). Although there may be some question as to how adversarial the settlement negotiations on allocation of damages to tort or contract theories actually were, McKay's counsel presented the court with a finely tailored settlement agreement and set of facts that supported a favorable ruling.

C. A Well Concealed Punitive Damage Award

The *McKay* ruling was quite favorable to McKay from another perspective. While the court respected the damage allocations, the size of the total damages award seemed directly connected to the treble punitive damages the jury assigned to the RICO claim.[120] According to the court, McKay's slim chance of preserving his entire jury award on appeal influenced the settlement agreement.[121] Since the parties' allocation of damages closely paralleled the jury allocation to tort and contract claims, the parties appeared to project that the appellate court would reverse the punitive damage award and leave the entire compensatory award untouched. The *Robinson* court reasoned that "the jury verdict . . . should be taken into account in our apportionment of th[e] settlement."[122] Following this rationale, the *McKay* court should have made a similar comparison of the proportion of damages in the settlement agreement to original theories alleged at trial. Under other circumstances, the estimate may have been reasonable, but the evidence of the Company's RICO violations and the jury's findings on the RICO claim indicate that an appellate award would have allocated some damages based on the Company's blatant RICO violations. The estimate of the proportion of appellate damages found in the settlement agreement, and the court's subsequent acceptance of those estimates, therefore appears contrived.

The importance of this issue lies in the fact that punitive damages do not generally qualify for the section 104(a)(2) exclusion from gross income. Only punitive damages derived from

120. *Id.* at 471.
121. *See supra* note 88.
122. *Robinson*, 102 T.C. at 134.

physical injury qualify for the exclusion.[123] If the parties had allocated the settlement proceeds in proportion to reduced appellate damages on tort, contract, RICO, and punitive theories of recovery, only damages allocated to the tort theory would have been excluded. If damages had been allocated in the settlement agreement in proportion to the jury award allocations on the four theories of tort, contract, RICO and punitive damages, and the court had held such a RICO/punitive component includable in gross income, approximately 67.6 percent of the settlement proceeds would have been taxable income to the McKays. Under the court's holding, however, approximately 14.3 percent of the aggregate amount of proceeds allocated to the tort and contract claims in the settlement agreement were included in gross income.[124] Ultimately, the entire amount of the compensatory component of the jury award was preserved in the settlement agreement. Clearly one could not overstate the significant tax benefit which accrued to McKay as a result.

IV. CONCLUSION

Ultimately, any case involving the issue of exclusion of settlement awards under section 104(a)(2) will be a fact—specific inquiry into the circumstances surrounding litigation and settlement negotiations. *McKay* demonstrates that the court will respect express language in settlement documents if the evidence shows that the parties negotiated in an adversarial context and at arm's length with regard to allocation of damages to personal injury claims. *McKay* shows that the prime hurdle of the 104(a)(2) exclusion—intent of the payor—can be overcome if the facts show that the express allocation language of settlement

123. For settlements taking place after July 10, 1989, § 104(a) excepts punitive damage awards in cases not involving physical injury or physical sickness from the exclusion provisions of § 104(a)(2). I.R.C. § 104(a) (1988 & Supp. I 1989). Prior to July 10, 1989, the issue of whether any punitive damages were deductible was very much in doubt. For an excellent example of the arguments in favor and against the exclusion of punitive damages, compare the majority opinion and Judge Trott's dissenting opinion in Hawkins v. Commissioner, 30 F.3d 1077 (1994) with the majority opinion and Judge Trott's concurring
opinion in Schmitz v. Commissioner, 34 F.3d 790 (1994). For an in-depth discussion of the case law background and an analysis of the effect of the 1989 amendment on punitive damage recoveries, see Margaret Henning, *Recent Developments in the Tax Treatment of Personal Injury and Punitive Damage Recoveries*, 45 TAX LAW. 783 (1992). *See also* James D. Ghiardi, *The Federal Taxation of Punitive Damage Awards*, 11 J.L. & COM. 1 (1991).

124. These percentages were calculated by the author using the figures found in *McKay*, 102 T.C. at 471-74.

agreements is bona fide.

Taxpayers can rest assured that in light of decisions like *Robinson* and *McKay*, the Service will continue to contest the exclusion of settlement proceeds under section 104(a)(2) in similar circumstances. Therefore, a practitioner wishing to avail an injured client of the benefits of 104(a)(2) should be fully informed of the factors courts focus on in allowing the exclusion. The lessons provided by previous taxpayer efforts provide a useful recipe to practitioners. Those lessons should be carefully studied and applied from the opening of a case file, through the litigation stage, and into the settlement phase if necessary. Properly applied, the principles elicited from *McKay* and prior personal injury exclusion cases could well lead a taxpayer to the safe harbor of the section 104(a)(2) exclusion.

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(From Volumes 1 Through 56:2)

TABLE OF MONTANA CASES

(Discussed in Volumes 1 Through 56:2)

TABLE OF NON-MONTANA CASES

(Discussed in Volumes 1 Through 56:2)

SUBJECTS

(Discussed in Volumes 1 Through 56:2)

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 1