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## Debating the Field Civil Code 105 Years Late

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## DEBATING THE FIELD CIVIL CODE 105 YEARS LATE

**Andrew P. Morriss,\* Scott J. Burnham\*\* and Hon. James  
C. Nelson\*\*\***

In 1895, Montana adopted a version of the Field Civil Code – a massive law originally drafted by New York lawyer David Dudley Field in the early 1860s. The Civil Code (and its companion Political, Penal, and Procedural Codes) were adopted without debate, without legislative scrutiny, and without Montanans having an opportunity to grasp the enormity of the changes the Codes brought to the Montana legal system. In sponsoring this debate over whether to repeal the Civil Code, the Montana Law Review is finally giving Montana the opportunity to examine the merits of the Civil Code that she was denied 105 years ago.

### THE NINETEENTH CENTURY CODIFICATION MOVEMENT

Early in the Nineteenth Century, a vigorous legal reform movement sprang up in Europe and soon spread to the Americas.<sup>1</sup> At the forefront of this movement was the English

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Andrew P. Morriss authored the introductory material to this article and he also served as the moderator of the Field Code Debate. All material preceding the transcribed remarks of the two Field Code debaters, Scott J. Burnham and Hon. James C. Nelson, is attributable to Andrew P. Morriss.

\*\* Professor of Law, The University of Montana School of Law. Scott J. Burnham participated in the Field Code Debate and argued in favor of repealing the Montana Field Code. Scott J. Burnham's transcribed remarks from the Field Code Debate appear in this article after the introductory material by Andrew P. Morriss.

\*\*\* Associate Justice of the Montana Supreme Court. The Hon. James C. Nelson participated in the Field Code Debate and argued against repealing the Montana Field Code. The Hon. James C. Nelson's transcribed remarks from the Field Code Debate appear in this article after the introductory material by Andrew P. Morriss.

1. The general history of codification described in this section is based on Andrew P. Morriss, *Codification and Right Answers*, 74 CHIC.-KENT L. REV. 355 (1999). Those interested in detailed footnotes should refer to that article. Where my previously published works are the basis for my statements, I will cite to them rather than to

philosopher Jeremy Bentham, who coined the verb “to codify” during his lengthy campaign to reduce the common law to a set of statutes. Bentham tried to gain a commission to codify English law and American law. He wrote President James Madison, for example, in 1811 to volunteer to produce a complete code at no cost to free America from “the yoke of the wordless, as well as boundless, and shapeless shape of common, alias unwritten law . . . [which] remains still about your necks.”<sup>2</sup> Not having done much research on America, Bentham was unaware that—then at least—the states, rather than the federal government, were the source of most law, which explains why he wrote first to Madison instead of to the states’ governors.

The War of 1812 and the burning of Washington prevented an immediate reply from Madison. In the interim Bentham learned about the state-based nature of common law in the United States and promptly wrote all the state governors with the same offer. Only the New Hampshire governor expressed any interest, an interest not shared by the legislature. Although no one accepted Bentham’s offers, he did help create an intellectual climate favorable to codification in the United States.

The combination of Bentham’s efforts, including his extensive writings on the subject,<sup>3</sup> and the popularity of the French Code Napoleon, led many Americans to advocate codification throughout the early Nineteenth Century. Many of the best legal minds of the century wrote on codification, including Joseph Story, who wrote a report on the subject for Massachusetts in the 1830s.<sup>4</sup> One enthusiastic convert was a New York lawyer named David Dudley Field, who embraced codification as a lifelong passion. Indeed, he chose to mark his

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original sources. For quotations, I will provide citations to the original sources. Those interested in the codification movement should also consult the excellent biography of David Dudley Field: DAUN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* (1986) and the comprehensive review of the pre-Civil War codification American movement: CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (1981).

2. Letter from Jeremy Bentham to President James Madison (Oct. 30, 1811) in 8 JEREMY BENTHAM, *THE CORRESPONDENCE OF JEREMY BENTHAM* 182, 182 (Stephen Conway ed., 1988).

3. These are collected in JEREMY BENTHAM, *‘LEGISLATOR OF THE WORLD’: WRITINGS ON CODIFICATION, LAW AND EDUCATION* (Philip Schofield and Jonathan Harris, eds. 1998).

4. See JOSEPH STORY, *Codification of the Common Law*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 698 (William W. Story, ed., Charles C. Little & James Brown, 1852).

grave with the notation of his efforts at codification.

Field was not simply any lawyer. As the century wore on he became one of the wealthiest lawyers in the United States, earning over \$75,000 a year during the late 1860s and 1870s, representing controversial and wealthy clients like Jay Gould and Boss Tweed. Indeed, Field helped spark the development of the modern bar association and legal ethics rules in reaction to his tactics.

Field and two others were appointed in 1857 to draft codes of laws governing civil, criminal, and political matters for New York. Field had already participated in drafting a procedure code to govern civil actions. The code commissioners' mission was wide ranging: not to simply collect the law and reduce it to the form of a statute, but also to improve upon it. Field attacked his work with great gusto, creating a complete set of multiple codes by 1865 covering virtually every aspect of law – criminal, civil, organization of government, and procedure in courts.

The codes met with little interest in New York, however, and disappeared for the time being there. They resurfaced in the 1880s and twice passed both houses of the New York Legislature, being vetoed both times by the governor. Field fought for adoption throughout the 1880s, making yearly pilgrimages to Albany, but never succeeded.

The draft codes did catch the attention of the bench and bar of Dakota Territory; the Civil Code was adopted in the Dakota Territory in 1866, all four codes in California in 1872, all four in Dakota Territory in 1877, and finally all four in Montana in 1895.

During the long debate in New York, Field and his allies had three main arguments in favor of codification. First, codification would enable people to know the law, a necessary part of the rule of law.<sup>5</sup> The common law was too difficult to understand and lawyers were monopolists of access to the system, preventing the common people from properly understanding the law. A typical version of this argument was the often-reprinted story of how French shopkeepers could simply pull down their copies of the Code Napoleon and resolve commercial disputes among themselves without reference to lawyers or courts.<sup>6</sup>

Second, the proliferation of case reports made the practice of

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5. Justice Nelson makes a similar point, *infra*.

6. Justice Nelson gives a more modern version of this argument, *infra*.

law too expensive and time consuming and reduction to a single, scientifically arranged volume<sup>7</sup> of the tens of thousands of volumes of case reports would greatly ease the burdens of lawyers and judges.<sup>8</sup>

Third, nonlawyers who were part of the government, such as justices of the peace, would find the clear writing of the codes more comprehensible than the technicalities of the common law and so administer the law more fairly and correctly.<sup>9</sup>

Field was opposed in New York by an equally prominent lawyer, James Coolidge Carter and virtually the entire state bar. Carter and the other anti-codifiers made four main counter arguments. First, Field's claim that lay individuals would be able comprehend the codes was simply wrong. Many would be unable to read at all and others would not be able to understand the codes even if they could read. Even those who could both read and understood the codes might neglect to do so. Moreover, there were plenty of books written on particular areas of the law that synthesized the law so that it was comprehensible.<sup>10</sup>

Second, the increase in case reports was not a bad thing, but the result of progress: greater understanding of the principles of the law led naturally to an increase in the number of decisions explaining those principles.<sup>11</sup>

Third, the "precise formulas"<sup>12</sup> of the codes were actually less comprehensible to lay readers than the principles of justice which formed the basis of the common law. Reducing those principles to a code would undercut administration of the law.<sup>13</sup>

Most importantly, Carter argued that codification was impossible. Without knowing the facts of future transactions, the codifier could not frame the correct rule. Even if a complete set of rules could be written down today, it would freeze the law and so prevent the development of rules needed tomorrow,

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7. As Professor Burnham points out, *infra*, this arrangement is no longer present in Montana's statute law.

8. Justice Nelson elaborates on this argument, *infra*.

9. Justice Nelson discusses this point, *infra*.

10. Professor Burnham provides a compelling example illustrating this point, *infra*.

11. Professor Burnham addresses this point, *infra*. Justice Nelson offers an interesting counter-example in support of the Code being more flexible, *infra*.

12. JAMES C. CARTER, *THE PROVINCES OF WRITTEN AND UNWRITTEN LAW* 20-21 (New York & Albany, Banks & Bros. 1889).

13. Professor Burnham presents an interesting elaboration on this point, *infra*. He also raises the issue of clear versus muddled rules, *infra*, a distinction that I do not believe the Nineteenth Century code proponents and opponents articulated.

losing the common law's ability to evolve.

As this short summary suggests, the debate over codification in New York and elsewhere was intense and thorough. Code proponents and opponents sparred repeatedly across the country and across the century over the relative merits of the common law and the codes.

### THE MONTANA "DEBATE"

In 1895, Montana became the fourth state to adopt a set of codes based on Field's drafts and the sixth state to adopt a civil code – Georgia and Louisiana have codes not based on Field's. In forty-two days that year, the Fourth Legislature adopted more than 170 pounds of laws, an estimated 784,000 words, a record that I suspect remains unsurpassed even by the state's Legislature today.

Here is the short version of the story, which is set out in greater detail elsewhere.<sup>14</sup> Montana was afflicted by a horribly confused set of laws almost from its beginnings as a legal entity. When the Idaho Territory, which included present day Montana, was organized out of the Washington Territory, there were no copies of Washington's statutes in the Idaho Territory. When Sidney Edgerton arrived in Montana in the mid-1860s on his way to be Attorney General of the Idaho Territory, he was struck by the vast size of the Territory. After wintering in Bannack, Edgerton headed back to Washington, D.C. to get Montana made into a territory of its own, with him as its governor. Things were a bit better for the fledgling Montana bar than they had been for the Idaho bar: when Montana Territory was organized, the new Territory's lawyers at least had one copy of the Idaho Territorial statutes to share. The assembled bar, a relatively small group, decided these would apply until they got their own Legislature organized.

Montana at that time had a large population of Southern sympathizers. These were often men who were sympathetic with the Confederacy only up to a point – they had not been sympathetic enough, for example, to pass up a chance to get rich mining for gold to fight for the South. Edgerton, and his son-in-law Wilbur F. Sanders, who plays a role in this story later, were

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14. The account of Montana's adoption of the Field Codes given here is based on Andrew P. Morriss, *"This State Will Soon Have Plenty of Laws"—Lessons from One Hundred Years of Codification in Montana*, 56 MONT. L. REV. 359 (1995) and Andrew P. Morriss, *Decius S. Wade's 'The Common Law'*, 59 MONT. L. REV. 225 (1998).

both Republicans, as one would expect of Federal appointees. Edgerton and the Democrat-dominated Legislature almost immediately got into a dispute about redistricting, and the Legislature adjourned without passing a redistricting plan. This left a legal vacuum because the organic act establishing the Territory required a redistricting plan to be passed in the first session.

Edgerton took off for Washington, D.C., in part to get paid, as the distractions of the Civil War had led to a delay in sending funds. (Edgerton had been paying for the Territory's government out of his own pocket -- not exactly what he envisioned when he took the patronage job.) The governor's departure left Thomas Meagher, his secretary, in charge. Meagher had been an Irish revolutionary, sentenced to death, exiled to Australia, and had eventually worked his way to the United States where he wangled the appointment as Territorial Secretary. (His statue sits outside the Montana Capitol today.)

As Acting Governor, however, Meagher's sympathies shifted to the Democrats, whom he thought would elect him Senator when the Territory became a state. Meagher called a new session of the Legislature to pass a redistricting plan. Sanders and the rest of the Republicans were outraged. They successfully had the "illegal" Legislatures' acts overturned by Congress. The Legislature retaliated by redistricting the judges to the wilder parts of the Territory. Edgerton also arranged a Congressional repeal of all laws passed by these Legislatures, although not until after the Fourth Legislature had met.

The result of all this was a disaster—portions of statutes were repealed, words added to now legally non-existent statutes, and so forth. Montana never really recovered from this before statehood in 1889. There were attempts at clearing things up, but those attempts usually just made things worse.

Thus, when what turned out to be the last Territorial Legislature met in 1889, codification seemed like a good idea for at least two reasons. First, the statutes were a mess and the idea of a rational, organized body of law was appealing. Second, due to partisan wrangling in Congress, Montana was long overdue to become a state. Codification was a chance to show how "modern" a state Montana would be—like California and New York, Montana would tackle the law as a problem to be rationalized. Unlike New York, Montana would succeed. At a time when Montana was still almost literally putting itself on the map, this was an appealing argument.

The last Territorial Legislature therefore authorized a code commission to draft a civil code, covering private law subjects like contracts, torts, and property; a civil procedure code, covering the rules of courts; a political code, covering the organization of the governments of the state; and a penal code. Prominent lawyers, judges, and politicians were appointed and the three member commission got down to work. They started with the version of the Field Codes adopted in California and worked from there, making relatively few changes. Everyone cheered, with both the Democratic and Republican press lauding the appointments, a rather unusual event.

In February 1892, the commission reported the four codes. In 1893, the Legislature convened but did not pass the codes -- not because of any particular objection, although there was a flurry of complaints from some lawyers and mayors -- but because it was too busy trying to pick Montana's senators. Because the Third Legislature was divided among three parties and because the Democrats, who had a plurality, were themselves divided, the daily balloting for a senator was never successful. A move was made to get a special session for the codes, but the governor refused because he thought a special session would be too short to consider the codes fully.

In 1894, the Republicans swept to power in Montana, riding a wave of disenchantment with Grover Cleveland and the popularity of the Republicans' support for silver. The House in the Fourth Legislature appointed a special committee to handle the codes, interestingly made up primarily of people from Southwest Montana, as was the Senate Judiciary committee that handled them in the Senate. Many members proposed amendments to the commission's drafts but the bar and committee members were united in the need to pass the codes unchanged. The code proponents argued that the Legislature must pass the codes first and take up amendments later, lest the amendments bog the whole enterprise down and prevent passage.

The code proponents largely succeeded in steering the codes through without amendment. Only two sets of amendments made it into the codes before passage. The livestock industry managed to get one set of amendments through. Interestingly, the other major amendments fixed concerns held by members of the Legislature. As drafted, the codes removed a rich set of



what a newspaper called “boodle”<sup>15</sup> by having school texts chosen by the superintendent of schools instead of the Legislature, and barring perks like free rail passes given annually by railroads to members of the Legislature. Both provisions were changed.

To pass the codes, the proponents argued that they were simply collections of existing rules and that there was little new in them. This was either the result of ignorance or dishonesty, since after passage people discovered all sorts of things in the codes that were not only new but quite importantly different from previous Montana law. One newspaper summed up the passage through the Legislature as the codes having been bolted like a “dose of castor oil.”<sup>16</sup>

After passage, the Legislature had to figure out how to physically create the new laws. The normal procedure was to have the bills that passed copied by the clerks of the House Committee on Enrollment into a clean copy. Because of the codes’ physical size, this posed a serious problem.

The problem was made more severe by the fact that a House committee was about to issue a report labeling eleven of twenty-six existing clerks as incompetent. Worse, the report attacked a fundamental part of the patronage system that allowed members to have their friends and constituents appointed to these jobs by centralizing clerks into a central pool.

Happily for the Legislature, the codes offered a solution to this political problem. Having the massive bills copied out by hand would take more clerks, not fewer. The Legislature quickly tabled the investigative report and proceeded to hire more clerks. It did so despite letters from the governor and other officials pointing out that there was no real need to copy these massive bills out by hand, since there had been almost no amendments made during the debate. And, by the end of the session, more than 88 clerks had been hired, at \$5 per day—a pretty good wage in 1895.

Montana’s adoption of the Field Civil Code thus sprang out of a number of particular events in her history as a Territory and state, and out of a strong current of legal reform that spread across the world and across the United States during the nineteenth century from the Code Napoleon to the Montana Civil Code.

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15. *Present Outlook*, DAILY MISSOULIAN, Jan. 27, 1895, at 1.

16. *Code Bills Passed*, DAILY INDEPENDENT (Helena), Jan. 26, 1895, at 5.

One thing that did not happen in Montana in 1895, however, was a real debate over the codes before they were adopted. Montana newspapers and their accounts reveal almost no discussion of the adoption of the four codes and surprisingly little legislative attention. Compared, for example, to the enormous amount of time Montana legislators devoted to adjusting county boundaries or choosing school text books, there was a stunning lack of commentary or discussion. The debate here is, in part, an attempt to rectify that omission.

### THE DEBATE TODAY

For this debate, the Montana Law Review chose a format built around several questions, to which each of the debaters will respond. These questions were drawn from Nineteenth Century writers on codification and are questions that might have been asked, had Montanans had the opportunity to debate the Civil Code in 1895. The questions are:

- Is Montana law, code and common law together, more accessible to the general public because of the Civil Code?
- Is the hybrid nature of Montana's legal system (since the code is added to a common law system) better or worse than a "pure" common law system?
- Does the Civil Code make Montana's law more "settled, harmonious and fixed?"
- Has the Montana Civil Code reduced the volume of the law? Should it?
- Would Montana's law be capable of better adapting to local conditions or changing conditions without the Civil Code's constraints?<sup>17</sup>

The following paragraphs briefly discuss the background to each of these questions. However, no background is provided for the question of whether the Civil Code has reduced the volume of law.

*Is Montana law, code and common law together, more accessible to the general public because of the Civil Code?*

An important issue in the Nineteenth Century debate was whether a code would make the law more accessible to the

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17. These questions are based in part on the analysis in Morriss, *Codification*, *supra* note 1.

average citizen. The *New York Times* editorialized in favor of codification in 1888: "We can put the argument for the code into three words: Publish the law."<sup>18</sup> A man not noted for using three words where thirty would do, Montana code proponent Wilbur F. Sanders, later argued along the same lines:

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 [him] the knowledge of his own mother tongue; this Book of the Law [the Civil Code], to show him his rights as a member of civilized society; and the good old Family Bible to teach him his duties to God and to man.<sup>19</sup>

Code opponents rejected this argument for several reasons. First, they thought few people would bother to read codes. Even if they did, the opponents argued, they would not understand it. New York lawyer John Strong put it this way in an 1881 pamphlet:

Let any gentleman not versed in the law read a part of this Code, and ask himself if he feels any more of a lawyer after he gets through; will he think that there is good meat in the nut, after he has cracked it, or that it is, as far as he is concerned, a hollow humbug? . . .

. . . [W]ho but a lawyer, and he an astute and learned lawyer, can attach their signification to those mysteriously suggestive but mute sections?<sup>20</sup>

Once again we have the benefit of one hundred and five years of experience with the Civil Code to answer the question of whether or not it has promoted accessibility of the law.

*Is the hybrid nature of Montana's legal system (since the code is added to a common law system) better or worse than a "pure" common law system?*

Montana, and the other western states that adopted versions of the Field Code, never went as far as Field wanted -- he wanted to do away with the common law as much as possible, leaving it only to fill the gaps where the Code was silent. Montana, California and the Dakotas chose not to -- either formally, by modifying or dropping Field's provision that the Code preempted the common law entirely, or informally, by

18. *A Reproach to the Bar*, N. Y. TIMES, Mar. 22, 1888, at 4.

19. Henry M. Field, *THE LIFE OF DAVID DUDLEY FIELD* 92 (New York, Charles Scribner's Sons 1898) (quoting Wilbur F. Sanders.)

20. John R. Strong, *AN ANALYSIS OF THE REPLY OF MR. DAVID DUDLEY FIELD TO THE BAR ASSOCIATION OF THE CITY OF NEW YORK* 4-6 (New York, Henry Bessey 1881).

treating the Code as a collection of statutes rather than as a civil code in the European sense.

We can hardly blame them for doing so -- American judges, after all, were not trained to be civil law judges -- but we can ask whether the hybrid that resulted is better or worse than either pure system might be. How does the Civil Code function today -- is it the source of clear principles that resolve disputes? Or is it a trap for the unwary, with statutory provisions lying dormant, waiting to snare those who do not comb it for possible applicable provisions?

*Does the Civil Code make Montana's law more "settled, harmonious and fixed?"*

Code proponents argued that the common law was uncertain because of the mass of conflicting precedent. Codes, on the other hand, would bring stability and clarity to the law, and provide a vehicle for reconciling inconsistencies in the law. In part this rested on criticism of case law. For example, the *Albany Law Journal*, a leading pro-code legal journal in New York, commented on the testimony of New York code opponent James C. Carter that "When Mr. Carter asserted that the common law is reasonably well settled, easily accessible, harmonious and fixed, he fairly took our breath away. Every lawyer at the table knew that it is no such thing, but that it is obscure, contradictory, inconveniently scattered and fluctuating."<sup>21</sup> In part this argument also rested on a notion that statutory law would be more organized, more consistent, and more coherent than the common law.

Code proponents thought they were undertaking a great work to clarify the law. California codifier Charles Lindley argued in 1874, for example, that:

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

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21. *Current Topics*, 35 ALB. L.J. 81, 82 (1887).

necessary in one, five or twenty centuries.<sup>22</sup>

Thus, a question for our debaters is whether Montana's experience with the Civil Code suggests that the code proponents or the code opponents were right about the impact of the code.

*Would Montana's law be capable of better adapting to local conditions or changing conditions without the Civil Code's constraints?*

The common law advocates who opposed codification claimed one major advantage for the common law over codes – the common law was flexible and better able to adapt to change and local conditions than an inflexible statutory code. James C. Carter, the leading American common law partisan and code opponent in the Nineteenth Century, told the American Bar Association in his 1895 presidential address that code proponents:

do not always sufficiently remember that so far as respects the ordinary doctrines of the common law, an innumerable host of cultivated human intellects, many of them of transcendent ability, have been studying and reflecting for a thousand years upon what is just, fit and expedient in all the ordinary affairs of life. The final conclusions reached by this process are not likely to be amended by the work of a few revisers giving comparatively brief attention to each particular topic.<sup>23</sup>

"Nonsense," replied the code proponents – often echoing Bentham's biting critique of the common law: "Do you know how Judges make the common law? Just as a man makes laws for his dog. When your dog does anything you want to break him of you wait till he does it, and then beat him for it. This is the way the Judges make law for you and me."<sup>24</sup>

Montana is not New York, California, or one of the Dakotas. Yet Montana shares with California and the Dakotas a large amount of law designed in the 1860s for New York. (For works-in-progress, I have conducted line-by-line comparisons of the Montana Civil Code with the New York drafts and the California 1872 version. What is most noticeable is how few substantive changes there are from either.) Thus, another question for the debaters is how has the Civil Code adapted to

22. 1 CHAS. LINDLEY, CALIFORNIA CODE COMMENTARIES app. V. (F. Sterrett 1874).

23. James C. Carter, ADDRESS OF JAMES C. CARTER AT THE ANNUAL MEETING, DETROIT, MICHIGAN, AUGUST 27, 1895, at 24 (Philadelphia, Dando Press 1895).

24. *Common Law Fetichism*, N.Y. TIMES, Apr. 19, 1886, at 4.

Montana's differences from the source states?

### BETTER LATE THAN NEVER

Debating Montana's Civil Code 105 years late might seem a little like closing the barn door after the horse has escaped. It is not. Thinking about the form and structure of our law is an important exercise, one engaged in all too infrequently by academics, practitioners, and judges. The history of Montana's Civil Code is more than a good story (although it is a pretty good story!) – it raises important issues about the role law plays in our society and how legislatures and courts should treat the law.

Even after our debate, it seems unlikely to me that the Montana Legislature is going to be debating the repeal of the Civil Code anytime soon. But the Montana Legislature might benefit from considering whether it is repeating the experience of the Third Legislature as it debates proposed laws. And it might benefit from considering whether the 1895 Montana proponents of the Field Civil Code delivered what they promised – did they make Montana a better place? If not, why not?

David Dudley Field failed to convince most Americans to abandon the common law. Even in Montana, California, and the Dakotas, where he succeeded in persuading legislatures to adopt versions of his Civil Code, he could not break Americans' attachment to the common law. The obscurity of the history of the Field Civil Code today makes clear how far from Field's ideal even the code states are. Occasionally, thinking about why that is should be high on every lawyer's list of "things to do."

**RESOLVED: THE MONTANA FIELD CODE (STATUTES IN COMMON LAW AREAS SUCH AS CONTRACTS, TORTS AND PROPERTY) SHOULD BE REPEALED**

With this background information in mind, the two debaters, Professor Scott J. Burnham and the Honorable James C. Nelson, addressed the questions surrounding the Montana Field Code. Andrew P. Morriss, author of the immediately preceding introductory material, served as the debate's moderator. The remainder of this part of the Montana Field Code section contains the transcribed remarks from the April 7, 2000 debate entitled "Resolved: The Montana Field Code (statutes in common law areas such as contracts, torts and property) Should be Repealed."

*Is Montana law, code and common law together, more accessible to the general public because of the Civil Code?*

PROF. BURNHAM: Thank you, Andy. I want to thank the Law Review for making this debate possible. When I was asked to debate on the Field Code, I wasn't aware that we were going to be replicating the debate that took place in the 19<sup>th</sup> century, and I've been amazed at how relevant the arguments that were made at that time are today. As Andy mentioned, it was argued then that people would not read the Code, and if they did read it, they wouldn't understand it.<sup>25</sup> I think this argument is borne out today.

First of all, is the Code really accessible? Does anyone know it's there? I'm sure Justice Nelson could tell you about all the briefs he reads where the attorneys make their arguments oblivious to the Code sections on point, but he probably won't tell you about all the court opinions that do the same thing.<sup>26</sup> This question about the accessibility of the Code came home to me a couple of years ago when I was asked to speak at a training conference for Montana Justices of the Peace, who are by and large not lawyers. In fact, Mary Ann, you may have been there at that time.<sup>27</sup> I was asked to teach them all they needed to

25. See JAMES C. CARTER, THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW 19-20 (1889), cited in Morriss, *Plenty of Laws*, *supra* note 14, at 370.

26. For example, MONT. CODE ANN. § 28-2-801, which defines consideration, has been cited 22 times since 1979. In that same time period, the court failed to cite the statute in 12 other cases where consideration was at issue. See *Rickett v. Doze*, 184 Mont. 456, 603 P.2d 679 (1979); *Keil v. Glacier Park, Inc.*, 188 Mont. 455, 614 P.2d 502 (1980); *Naylor v. Hall*, 201 Mont. 59, 651 P.2d 1010 (1982); *Carroccia v. Todd*, 189 Mont. 172, 615 P.2d 225 (1980); *City of Cut Bank v. Glacier County*, 270 Mont. 355, 891 P.2d 1174 (1995); *Ragland v. Sheehan*, 256 Mont. 322, 846 P.2d 1000 (1993); *Westlake v. Osborne*, 220 Mont. 91, 713 P.2d 548 (1986); *Edgar v. Hunt*, 218 Mont. 30, 706 P.2d 120 (1985); *Kephart v. Portmann*, 259 Mont. 232, 855 P.2d 120 (1993); *Dobbins, DeGuire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, 218 Mont. 392, 708 P.2d 577 (1985); *Tindall v. Konitz Contracting, Inc.*, 240 Mont. 345, 783 P.2d 1376 (1989); *Nimmick v. Hart*, 248 Mont. 1, 808 P.2d 481 (1991).

Similarly, MONT. CODE ANN. § 28-2-409, defining mistake, has been cited by the Montana Supreme Court 15 times since 1979. In that same time period, the Court failed to cite the statute in 11 cases where mistake was an issue. See *Gray v. City of Billings*, 213 Mont. 6, 689 P.2d 268 (1984); *Morrison v. Higbee*, 204 Mont. 515, 668 P.2d 1025 (1983); *Silva v. McGuinness*, 189 Mont. 252, 615 P.2d 879 (1980); *Woodahl v. Matthews*, 196 Mont. 445, 639 P.2d 1165 (1982); *Hartfield v. City of Billings*, 246 Mont. 259, 805 P.2d 1293 (1990); *Wiley v. Iverson*, 295 Mont. 511, 985 P.2d 1176 (1999); *Johnson v. Estate of Shelton*, 232 Mont. 85, 754 P.2d 828 (1988); *Wright v. Blevins*, 217 Mont. 439, 705 P.2d 113 (1985); *South v. Transportation Ins. Co.*, 275 Mont. 397, 913 P.2d 233 (1996); *Wray v. State Compensation Ins. Fund*, 266 Mont. 219, 879 P.2d 725 (1994); *Mitchell v. Boyer*, 237 Mont. 434, 774 P.2d 384 (1989).

27. Mary Ann Ries, a second-year law student at the time of the debate, was

know about contracts and I was given 45 minutes to do it. I first thought, "This will be easy. I'll give them Title 28 of the Montana Code Annotated, which contains the Field Code provisions on contracts, and we'll work our way through it." But then I thought, "They won't learn anything from that in 45 minutes. Instead, I'll teach them a few principles of contract law and they can apply those principles to most situations."

The first principle is freedom of contract—the agreement is for the parties to make. This principle does not appear in the Field Code, even though David Dudley Field said:

In the execution of this vast undertaking, the commissioners have endeavored to bring together and arrange in order, all the general rules known to our law upon the subjects contained within the scope of such a Code, rejecting those which are obsolete or unsuitable to our present condition, and adding such others as appeared necessary or desirable.<sup>28</sup>

Yet he left out this ultimate principle of contracts!

He also left out principle number two: Parties and judges must do what is reasonable and prudent. If the parties haven't created a rule for themselves, the rule of contracts is do what is reasonable in the circumstances. That has been the common law rule for centuries. That's the process that judges used in England hundreds of years ago, and it's the rule today. I told the Justices of the Peace that if you simply follow that guide, do what's reasonable and prudent, you will come up with the right result 95% of the time.

Principle number three deals with the other 5%: Follow a statute when it has mucked up the common law. This is where the Code is most pernicious, because by reducing the common law to a bunch of rules, it makes the law seem regulatory, and the common law of contracts is not regulatory, it's facilitory. Its function is to facilitate people's conduct of their business, not to regulate it. If we got rid of all those Code sections that just state the reasonable common law rules, what would we be left with? The exceptions, those instances where we are truly trying to regulate. But in the Code it can be hard to find those provisions that are regulatory because they are commingled with all the reasonable provisions derived from the common law.

Secondly, if you do find a relevant Code section, is it really so easy to understand? I'm going to demonstrate this point with

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formerly a Justice of the Peace for Pondera County.

28. Report from David Dudley Field & Alex W. Bradford to the Legislature of the State of New York (Feb. 13, 1865), in *Civil Code of the State of New York*, at v (1865).



a couple of Code sections. Suppose you wonder what a contract is. Well, the Code tells you: "A contract is an agreement to do or not to do a certain thing."<sup>29</sup> Gee, that sure was helpful. By the way, since you're getting CLE credit for attending this debate, I must do a little bit of educating and point out the meaning of all this gobbledygook you see in the Montana Code Annotated following the Code section under the word *History*. What you find is the history of the enactment of this particular code section, although not in chronological order. For example:

**28-2-101. Contract defined.** A contract is an agreement to do or not to do a certain thing.

History: En. Sec. 2090, Civ. C. 1895; re-en. Sec. 4965, Rev. C. 1907; re-en. Sec. 7467, R.C.M. 1921; Cal. Civ. C. Sec. 1549; Field Civ. C. Sec. 744; re-en. Sec. 7467, R.C.M. 1935; R.C.M. 1947, 13-101.

Here is that same information in chronological order:

Field Civ. C. Sec. 744 - Source of the California Civil Code

Cal. Civ. C. Sec. 1549 - Source of the Montana Civil Code

En. Sec. 2090, Civ. C. 1895 - Enacted in the Montana Civil Code, 1895

re-en. Sec. 4965, Rev. C. 1907 - Re-enacted in the Revised Code, 1907

re-en. Sec. 7467, R.C.M. 1921 - Re-enacted in the Revised Code of Montana, 1921

re-en. Sec. 7467, R.C.M. 1935 - Re-enacted in the Revised Code of Montana, 1935

R.C.M. 1947, 13-101 - [Re-enacted in the] Revised Code of Montana, 1947

This history tells you that Montana Code Annotated Section 28-2-101 originated with Field Civil Code Section 744; it was then enacted in California, as Andy mentioned, in Civil Code Section 1549; it was enacted by the Montana Legislature in 1895; and then it was re-enacted by the Montana Legislature in 1907, 1921, 1935, 1947 and then in the MCA in 1979. So that's how you can tell from the *History* after the MCA sections which ones are from the Field Code.

Okay, back to whether a Code section is easy to understand, let's look at the next one, Section 28-2-102, the essential elements of a contract:

**28-2-102. Essential elements of a contract.** It is essential to the existence of a contract that there be:

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29. MONT. CODE ANN. § 28-2-101 (1999) (derived from FIELD CIV. C. § 744).

- (1) identifiable parties capable of contracting;
- (2) their consent;
- (3) a lawful object; and
- (4) a sufficient cause or consideration.<sup>30</sup>

The first three elements aren't so surprising—identifiable parties, consent, and lawful object—but number (4) says to have a contract you have to have “a sufficient cause or consideration.” Everybody knows you have to have consideration. But has anybody in the 150 years since the Code was written ever argued that you can have *cause* for a contract rather than consideration? Some lawyer is eventually going to read this thing and argue that to the Montana Supreme Court, but this concept of *cause* comes from Justinian and the Roman Codes, and it's never been argued in the 150 years of California or Montana history—yet there it is in the Code.<sup>31</sup>

Another example of sections that are hard to understand are the maxims of equity. It's ironic that the maxims of equity are codified in Montana. One of my favorites, Section 1-3-220 was the subject of a Peanuts cartoon a number of years ago that showed Snoopy as a lawyer carrying a sign that said, “That which ought to have been done is to be regarded as done, in favor of him to whom and against him from whom performance is due.”<sup>32</sup> Well, I'm glad we have a statute on that point to help give us guidance. My other favorite is Section 1-3-228, which says in total, “Superfluity does not vitiate.”<sup>33</sup>

On the other extreme, we have some Field Code provisions on contracts for sale. This is an interesting sequence, very logical order. Section 30-11-103, derived from the Field Code, tells us that “An agreement for sale is either: (1) an agreement to sell; (2) an agreement to buy, or (3) a mutual agreement to sell and buy.”<sup>34</sup> Then it tells us what an agreement to sell is. This one reminds me of the sound of one hand clapping, because it tells us that “An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing.”<sup>35</sup> That's an agreement to sell. Now here comes the other hand clapping, an agreement to buy: “An agreement to buy is a

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30. MONT. CODE ANN. § 28-2-102 (1999) (derived from FIELD CIV. C. §§ 745, 748).

31. See generally William Noel Keyes, *Cause and Consideration in California – A Re-Appraisal*, 47 CAL. L. REV. 74 (1959).

32. MONT. CODE ANN. § 1-3-220 (1999) (derived from FIELD CIV. C. § 1984).

33. MONT. CODE ANN. § 1-3-228 (1999) (derived from FIELD CIV. C. § 1992).

34. MONT. CODE ANN. § 30-11-103 (1999) (derived from FIELD CIV. C. § 857).

35. MONT. CODE ANN. § 30-11-104 (1999) (derived from FIELD CIV. C. § 858).

contract by which one engages to accept from another and pay a price for the title to a certain thing.”<sup>36</sup> If anybody can explain to me how you can have an agreement to sell without an agreement to buy, or an agreement to buy without an agreement to sell, I would really like to know, and unfortunately Mr. Field is no longer available to tell us. But, finally, Section 30-11-106 does put it all together: “An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor.”<sup>37</sup> There we have the sound of the two hands clapping. A real handy and useful definition of an agreement to sell and buy.

In conclusion, I find that these Code sections are neither accessible, nor when you do access them, are they understandable.

JUSTICE NELSON: One of the three primary arguments for the codification of the common law, as previously noted, was that the common law was difficult for individuals, particularly non-lawyers, to ascertain and this prevented them from learning the law. In his April 5<sup>th</sup>, 1894 address to the Helena Bar Association, Chief Justice Decius S. Wade, a proponent of codification, eloquently stated:

There is no person in our country, however learned he may be, who knows all the law, but there is no person, however ignorant he may be, even though he never saw a law-book and cannot read or write, who is not presumed to know all the law and to regulate his conduct accordingly. He is charged with knowledge he does not possess and cannot acquire; he must observe rules that he cannot see, and obey commands that he cannot hear.

Not only is he charged with a knowledge of that small fraction of the law which is contained in our constitutions and statutes, but with the whole body of the common law, which, when not in conflict with the written law, is, as to our country, the law of the land.<sup>38</sup>

Professor Burnham glossed over an important point: the only way to know the law was to pour over statute books and through tens of thousands of reported cases. For the most part, these statutes and reported cases were written in legalese and scattered across thousands of volumes. Once located—and

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36. MONT. CODE ANN. § 30-11-105 (1999) (derived from FIELD CIV. C. § 859).

37. MONT. CODE ANN. § 30-11-106 (1999) (derived from FIELD CIV. C. § 860).

38. Decius S. Wade, *Necessity for Codification* 2 (Helena Bar Association Apr. 5, 1894), reprinted *infra*.

usually only lawyers or judges could even find these materials — a person would then have to try to understand and decipher a cognizable rule from the multitude of cases reported on a given point. This, obviously, was all but an impossible task for anyone not formally trained in the law and without access to an extensive law library. Thus, learning the law was an impossible task for nearly everyone.

As David W. Field noted: “[t]hey who are required to obey the law should have the opportunity to know what they are. These laws are now sealed in books . . . They can be opened by codification and only by codification.”<sup>39</sup> The whole idea of codification was to make the law knowable and accessible by reducing the common law to clearly written principles, putting those principles into an organized framework, and then publishing those principles in a few volumes that could be obtained, read and understood by all persons—especially those untrained in the law.

I would submit that to a great extent the codification effort, commencing with the Civil Code, has been successful in achieving this goal. While the four hand-written volumes of the Field Code as adopted by Montana in 1895 have now increased to some 10 volumes with 99 titles, those codes and the laws passed by each successive session of the legislature are readily available to all persons. Every lawyer’s office has, or should have, a current set of the Montana Code; county law libraries have a set; public libraries in the State of Montana have a set; and, with the advent of the Internet and the availability of a multitude of legal websites, any man or woman who wants to know the law has ready access to it. Not only are the civil laws easily accessible, but so are the criminal laws, the procedural laws, the Constitution, and all the statutes and administrative regulations.

The same is true as regards the common law and court interpretations of statutes and code provisions. In the past decade, and especially in the last three to five years, the ability of non-lawyers to research court decisions has been dramatically enhanced by the advent of the Internet and web-based legal research engines and data bases. In fact, at no time in the history of American Anglo-Jurisprudence has the law been more accessible, more researchable, and thus, more knowable than at

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39. David Dudley Field, *Codification*, reprinted in 3 DAVID DUDLEY FIELD, SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD (Titus Munson Coan ed., New York, D. Appleton & Co. 1890).

this time in our history. I would submit to you that the beginnings of this accessibility, this great accessibility and researchability and knowability that we now enjoy in the law, can be traced directly to the Field Codes adopted in Montana.

*Is the hybrid nature of Montana's legal system (since the code is added to a common law system) better or worse than a "pure" common law system?*

JUSTICE NELSON: Thank you, Mr. Morriss. Again, one needs to remember the three principles advanced for codification. One, the common law was uncertain because of the mass of conflicting precedent on many points. Two, the common law was difficult for individuals, particularly non-lawyers, to ascertain, and this prevented them from learning the law. And three, the common law inappropriately made judges into legislators.

Codification made the law certain by reducing well-settled and often-articulated principles of common law into a written set of easily understood and logically organized codes, which provided a right answer for most recurring legal problems, questions or relationships. In writing these codes, the law, thus, became more accessible, more researchable and more knowable to all persons, as we have already discussed. Finally, codification took the writing of the law out of the hands of judges and put this task into the hands of the people's representatives—the legislature. In this way, traditional notions of separation of powers were enhanced.

By the same token, in those areas of the law where there were no codes written, where the gaps in the Codes left unanswered a particular question of law, or where the codes were in conflict, the "common law system" of case-by-case, judge-made law was alive, well and fully capable of filling in or taking up where the effort to codify failed.

I submit that our present "hybrid" system works better than either a "pure code" or a "pure common law" system for these same reasons. Montana's codes do not, and probably never will, cover all legal problems, questions and relationships that occur in a modern, diverse and technically complex society. Where our system of codes and statutes do not provide a clear direction or answer, courts and judges still have a wealth of precedent -- not only from the common law, but from decisions interpreting statutes and from other codes -- on which to fashion appropriate remedies and relief and on which to resolve legal conflicts. I

submit that such a hybrid system provides the best of both worlds: the certainty of the codes and, when needed, the flexibility provided by case-specific analysis and resolution. Not only is there a correct “code” answer for most legal problems, there is also a correct answer for legal questions not answered by the code.

**PROF. BURNHAM:** In the sense that Field intended it, where the Code was the only law, we do have a hybrid system. If you look at that 1895 Montana Code, you’ll see that the Civil Code is all contained in one volume. Today we have 12 Volumes of the Montana Code Annotated with many titles and the Field Code itself has been broken up and splintered and scattered throughout it. You’ll find parts of the Field Code in Title 1, Title 28, Title 30, Title 70, and so forth.

Furthermore, a person in Montana today rarely looks at the basic unifying principles of Field’s Code, which are contained in Title 1 of the Montana Code Annotated. If you go back to Title 1, you’ll find some very interesting stuff. Let me show you a couple of examples. Section 1-1-108 states Field’s ideal: “In this state there is no common law in any case where the law is declared by statute.”<sup>40</sup> Statute is it. “But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.”<sup>41</sup> Fair enough. But what is that common law that Field would have us look at? Look at Section 1-1-109:

**1-1-109. Common law of England—when rule of decision.**

The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, is the rule of decision in all the courts of this state.<sup>42</sup>

That statute is still on the books in the year 2000, so presumably according to this, if you don’t find a statute on point, you’re supposed to cite the common law of England. By the way, we have it there at the end of this row of books. I think you’ll find some of the spines of those books have never been cracked.

40. The statute provides in full:

**1-1-108. Common law—applicability of.** In this state there is no common law in any case where the law is declared by statute. But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.

MONT. CODE ANN. § 1-1-108 (1999) (derived from C. CIV. PROC. § 1895).

41. *Id.*

42. MONT. CODE ANN. § 1-1-109 (1999) (derived from CAL. POL. C. § 4468).

It was an illusion on Field's part to think that the statutes could ever replace the common law, for the Code itself is largely a codification of the common law, and it only makes sense in the context of the common law. Furthermore, a statement of the common law can explain that context in a way that the naked Code provisions can't.<sup>43</sup> My worthy opponent exaggerates when he says we have two choices: thousands of books from which to distill the rule from the common law, or the simple statement of the Code. He exaggerates because entrepreneurs have always been willing to synthesize the common law for us in handy, single-volume editions. This is of course what Coke<sup>44</sup> did, what Blackstone<sup>45</sup> did, and what Farnsworth<sup>46</sup> and the Restatements of Law<sup>47</sup> do today. So the rules are easy to find. The Restatements are very respectable versions of common law principles that contain a rich context of history and example to put the rule in perspective so the user can better understand its meaning.

Unfortunately, the Code provides no such context and this can lead to misleading interpretations. An example is Section 28-1-1403, from the provisions on accord and satisfaction:

**28-1-1403. When part performance extinguishes obligation.**

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

An accord, you all remember, is an agreement where a creditor agrees to accept less than the full payment of a debt in return for discharge of that debt. There's no requirement that an accord be in writing. Common law didn't require it; the Code doesn't require it. But, like other contracts, an accord does have to have consideration, and according to the common law, you couldn't discharge an obligation by the payment of less because there was no consideration. In other words, suppose you loaned me \$500, and I asked you, "Will you take \$300 to discharge the

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43. Two second-year law students who attended the debate, Judith Albright and Cathleen Sohlberg, pointed out to me that this problem is exacerbated by electronic research, where a person may find the Code section torn from even the context of other Code sections.

44. See EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* (1642).

45. See WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (William Draper Lewis ed., Rees Welsh & Co. 1900) (1765).

46. See E. ALLAN FARNSWORTH ON CONTRACTS (3d. 1999).

47. See RESTATEMENT (SECOND) OF CONTRACTS (1981).

debt?" If you said, "Yes," that does not make a good contract. You are giving up \$200, but because I am giving you nothing that I didn't already owe you, there is no consideration. But as a practical matter, a legal system might want to allow people to do this, to have a final settlement of their disputes. So California added such a practical rule which made its way into our Code as Section 28-1-1403. The intention of that statute, which is clear only from the common law history, is that a writing is a substitute for consideration. It tells us that part performance of an obligation, when accepted by a creditor in writing discharges an obligation that otherwise wouldn't be discharged because of the consideration problem. In other words, if I say to you, "Will you take \$300 to discharge the \$500 debt?" and you respond in writing, "Yes, I will," then the payment of that \$300 does discharge the debt.

Then the Montana Supreme Court came along, took this statute out of context, and concluded that a writing is required for all accords.<sup>48</sup> In other words, if I do provide some consideration, such as when I say to you, "I'll give you \$300 and a hawk or a robe for your return promise to discharge the debt," and you agree, according to the court, that agreement needs to be in writing. That was a mistake that occurred only because the Code provision was taken out of its common law context, which again provided that the writing was required only as a consideration substitute.

In conclusion, if we repealed Code provisions and had a purely common law system, a mistake like that would not be made because one would read the entire meaning of the common law provision in context. And then, as I mentioned earlier, the statutes would contain only exceptions, provisions in derogation of the common law. So our hybrid system doesn't work because we have Code provisions that state the common law but state it incompletely. What we need is to go back to a common law system with statutes that provide exceptions to the common law rules.

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48. See *Geissler v. Nelson*, 222 Mont. 409, 722 P.2d 632 (1986). Professor Scott Burnham was particularly disappointed by this decision, because just before it came out, he had clarified the law of accord and satisfaction in Montana in his article, Scott J. Burnham, *A Primer on Accord and Satisfaction*, 47 MONT. L. REV. 1 (1986).



*Does the Civil Code make Montana's law more "settled,  
harmonious and fixed?"*

PROF. BURNHAM: Why do we need a rule of law in civil areas? To predict an outcome, so we have predictability and certainty. But as we all know, outcomes are not just a function of the rule. They are a function of the rules *and* the facts, which is why rules are easy to state but hard to apply. In addressing rules, codes don't give you any of those facts, but the common law provides a rich, factual context for understanding the rules. I like my rules a little muddy; Justice Nelson likes them crystal clear.<sup>49</sup> It's probably no coincidence that I prefer rules like "Drive at a speed that is reasonable and proper,"<sup>50</sup> while my worthy opponent prefers "75."<sup>51</sup>

I think a Code provision rarely answers a legal question, in spite of its alleged clarity. For example, what is the rule on how long an offer remains open? If the Code says an offer is open for a reasonable time, that's not very helpful. We need the common law to figure out what is reasonable under different facts and circumstances. If instead, the Code says an offer is open for 24 hours, then it's harmful. Imagine what a rule like that would do to the New York Stock Exchange.

Professor Natelson tried to find empirical evidence on this issue of whether the Code made Montana's law more settled, harmonious and fixed when he wrote an article on restrictive covenants and how the Code provisions on restrictive covenants have fared in Montana.<sup>52</sup> He states in a footnote:

Of course, one could argue that the Field Code has not proved unsuccessful because the existence of statutory provisions prevented many cases from being litigated and answered many

49. See generally for terminology Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

50. MONT. CODE ANN. § 61-8-303 (1997) provided in pertinent part:

**Speed restrictions—basic rule.** (1) A person operating or driving a vehicle of any character on a public highway of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation.

51. See *State v. Stanko*, 292 Mont. 214, 974 P.2d 1139 (1998) (a majority of the court, including Justice Nelson, held that the basic rule was unconstitutional). MONT. CODE ANN. § 61-8-303 (1999) now provides in pertinent part:

**Speed restrictions.** (1) Except as provided in 61-8-309, 61-8-310, 61-8-312, and subsection (2) of this section, the speed limit for vehicles traveling:

(a) on a federal-aid interstate highway outside an urbanized area of 50,000 population or more is 75 miles an hour at all times . . .

52. See Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17 (1990).

questions otherwise unanswerable. This is a negative proposition of the kind difficult to prove or disprove. I did, however, undertake a search of appellate cases on the subject in Colorado, an otherwise comparable jurisdiction with a larger population. Not only has the volume of Colorado litigation been smaller, but as a former Colorado practitioner, I can testify that Colorado's law of running covenants, embodied exclusively in the cases, is at least as clear and predictable as that of Montana. Thus, we return to the fact that the present state of Montana covenant law is not at all what the codifiers had in mind.<sup>53</sup>

In fact, I believe the Code can make matters *less* settled, because by taking a Code provision out of context, a lawyer or a court can construct an argument around it that couldn't be argued under the common law. My favorite example of this occurred in the Montana case of *Miller v. Fallon County*,<sup>54</sup> where the issue was the enforceability of an exculpatory clause. An exculpatory clause is a contractual provision where one party agrees not to hold the other party liable for their acts of negligence. The common law approach to exculpatory clauses has always been to enforce them between parties who negotiated them in areas of private concern, but not to enforce them in non-negotiated areas of public concern.<sup>55</sup> In fact, Montana employed that common law analysis before *Miller* came along,<sup>56</sup> but in *Miller* the court discovered Section 28-2-702, a Field Code provision which provides:

**28-2-702. Contracts which violate policy of the law—exemption from responsibility.** All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.<sup>57</sup>

Section 28-2-702 tells us that you can't excuse another person's fraud, willful injury, or violation of law. The court had no trouble saying that if you agree the other person won't be held liable for fraud, that shouldn't be enforced. And if you agree that the other person shouldn't be held liable for willful injury, that shouldn't be enforced. But then it asked, what is violation of law, and it answered that law is everything,

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53. *Id.* at 87 n.312.

54. 222 Mont. 214, 721 P.2d 342 (1986).

55. *See, e.g.,* Tunkl v. Regents of the University of California, 32 Cal. Rptr. 33, 383 P.2d 441 (1963).

56. *See* Haynes v. County of Missoula, 163 Mont. 270, 279, 517 P.2d 370, 376 (1973), (*citing* Tunkl v. Regents of the University of California, 383 P.2d 441 (Cal. 1963)).

57. MONT. CODE ANN. § 28-2-702 (1999) (derived from FIELD CIV. C. § 828).

including the duty not to be negligent.<sup>58</sup> Therefore, the court concluded, under Section 28-2-702, which says you can't agree to exempt anyone from responsibility for violation of law, you can't agree with someone not to hold them liable for their own negligence.

The conclusion is that exculpatory clauses are *never* enforceable, a result that was reached because of interpretation of Section 28-2-702. I want to be clear here that I'm not complaining about the result of the case, that exculpatory clauses were held not enforceable. What I'm complaining about is the reasoning, the jurisprudence. That is, whether exculpatory clauses should be enforceable is a difficult question, and in answering that question, common law jurisprudence would force us to weigh competing policies, but Code jurisprudence, as in this case, merely leads us to find the rule by extracting language from the Code without any consideration of *why* it's the rule or whether it *should be* the rule. In conclusion, I think Montana's Code jurisprudence is not only not settled, but a less desirable jurisprudence.

JUSTICE NELSON: I think my worthy opponent makes a good case for keeping judges out of the interpretation of the law. Actually, Chief Justice Wade made somewhat the same point in his 1894 address. In his address, Chief Justice Wade stated:

[w]hen we look into these volumes—into this great reservoir of the common law, that law which we have been taught to revere as the perfection of human reason—that law which not very long ago authorized the settlement of legal controversies by wager of battle; which, far into the present century denied to persons accused of crime the benefit of counsel; and which authorized capital punishment for larceny and one hundred and sixty other crimes—we find decisions contradictory and irreconcilable; decisions overruling, modifying, limiting or enlarging other decisions; right decisions supported by wrong reasons, and wrong decisions supported by good reasons, by technicalities or by no reason at all; verbose and involved decisions, obscured by *obiter dicta* and speculative theories; broad and learned decisions, and narrow and ignorant ones; and decisions that decide the same thing over and over again.

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58. The court stated: "Law consists of constitutions, Wickham v. Grand River Dam Authority (1941), 189 Okl. 540, 118 P.2d 640, 643; statutes and case law, Erie Railroad Co. v. Tompkins (1938), 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188, 1194; as well as common law, Fenn v. Holme (1859), 62 U.S. 481, 486, 21 How. 481, 486, 16 L.Ed. 198, 200." *Miller*, 222 Mont. at 221, 721 P.2d at 346-47. Not surprisingly, in defining *law*, the court did not look to the definitions of the term in the Montana Code Annotated. See MONT. CODE ANN. §§ 1-1-101 to -109.

Common law judges and lawyers are very much influenced and controlled by precedent. They spend their lives in searching for decisions that will determine the question in hand, but as precedents may generally be found on both sides of the question, the law is rendered doubtful and uncertain as to the most learned, and as to those who by intuition are presumed to know it in all its length and breadth, with its thousand variations and exceptions, it is a dark and insoluble mystery.<sup>59</sup>

The Chief Justice was right. Unfortunately, to the extent that we still rely on judges to interpret the codes and statutes; to the extent that we still decide cases based on the common law; and to the extent that we still argue legal principles on the basis of decisional authority and precedent, many, if not all, of Chief Justice Wade's observations are as true today as they were in 1894. Many cases are still decided in contradictory and irreconcilable fashion, as my worthy opponent has noted. Many precedents still conflict. Many opinions are result-oriented and are decided for wrong reasons, on technicalities or on no rationale at all. The law's devotion to the principle of *stare decisis* tends to cause the perpetuation of these errors.

Where principles of the common law have, over the course of generations and a multitude of court cases and opinions, become settled beyond reasonable dispute, the reduction of these principles to a Civil Code, clothed in plain and understandable language, has settled, harmonized and fixed these undisputed rules. As to a given code provision, each person who reads it knows what the law is; his or her neighbor reads the same law and knows the same thing. If formerly there were case decisions on this common law point—one decision for, the other against—the code harmonizes and fixes the rule for all to know.

Doubtless, our modern society could not function without codes of laws. In point of fact, the National Conference of Commissioners on Uniform State Laws—a national organization that has been in existence from before the time that Montana became a state—has been highly successful in writing comprehensive codes on given subjects for adoption by state legislatures with a view of settling, harmonizing and fixing the law not only within an adopting state but, as well, from state-to-state throughout the nation. These uniform laws and acts have in many ways taken up and succeeded where David W. Field failed. These uniform laws cover a multitude of areas of the law—from commercial transactions to organ donations; from

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59. See Wade, *supra* note 38, at 3.

marriage and divorce to determining parentage; from prescribing rules of evidence to probating wills and estates; from regulating sports agents to governing transactions in the world of business that is rapidly becoming a paperless one. Montana has been a leader in enacting uniform laws as they have been promulgated by the Uniform Law's Commission. Again, Montana early on recognized the benefits of codification. Montana early on recognized how subtle principles of the law could be harmonized and fixed for all to know. And much to its credit, Montana has continued this tradition into the present time.

*Has the Montana Civil Code reduced the volume of the law?  
Should it?*

JUSTICE NELSON: I look at this question as primarily a practical one, and I will answer the second question first. Should codification reduce the volume of the law? I submit that the answer is obvious: yes, it should. In 1894, Chief Justice Wade quoted Judge Dillon for the proposition that already, at the turn of the century, the "law" was an "unwieldy mass of reports," numbering in the tens of thousands and expected to grow without ceasing.<sup>60</sup>

I submit that to the extent that every point of law did not have to be decided anew via case-specific analysis, the sheer volume of case reports must necessarily decrease. Codification provided this benefit. The Civil Code, for example, in setting forth in plain terms the various well-settled principles of the common law, made it unnecessary to decide every case via a court opinion. The codification effort made it possible to determine, in advance, what law governed a particular situation without resort to the courts.

One can only imagine what would be the sheer volume of case books in today's modern law library if there were no codes; if every legal dispute had to be resolved by resort to the courts instead of to the code book; if the multitude of obsolete, conflicting and repetitious cases that Judge Dillon decried even at the turn of the century were increased exponentially at the pace with which litigation has increased in this century. The adoption of the Civil Code, in my view, has undoubtedly reduced the volume of law because the code dictates the outcome of

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60. See Wade, *supra* note 38, at 5.

disputes in advance and lessens the necessity to rely on the courts.

To question whether this is a laudable result, one only need recognize that increasingly law libraries, law firms and practitioners are literally running out of room and space in which to store and maintain the case reporters that still exist today. Moreover, the costs attendant to maintaining these collections is beyond the reach of all but the most wealthy law firms or governments. I would submit to you that this volume/cost problem is, to some extent, being alleviated by electronic databases, computer search engines and electronic storage and access. Book libraries are not the necessity that they once were, and I hope that our electronic capabilities continue to alleviate the volume/cost problem.

So, has the Montana Civil Code reduced the volume of law? In my view, it has. Should it? Absolutely.

PROF. BURNHAM: As I mentioned earlier, I have no problem with codes that exist for the purpose of regulation, but we're talking about codes that supposedly displace the common law. What are most civil disputes about? In tort, they often involve the expansion of liability. In contract, they often involve interpretation. In property, they often involve the legal effect of actions or writings. These questions aren't answered by the Codes, and even if they were, it would rarely occur that a lawyer is going to look at one of those code sections and say, "Well, that decides that case, that's the end of it." We've all become experts at manipulating statutes, and an argument can be made either about the application of the rule to the facts or about the interpretation of the Code language. Therefore the Code will not reduce the volume of the law.

*Should* the Code reduce the volume of the law? You'll find many important principles absent from the Code. For example, in contracts, important principles such as reliance and restitution are not mentioned in the Code. It would certainly reduce the volume of law if we ignored those principles, but it would also reduce the volume of justice. What *would* reduce the volume of law? As I mentioned, I can't imagine a lawyer concluding he or she was foreclosed from making an argument because of a Code provision. On the other hand, I will admit that a lawyer may not feel foreclosed by a common law decision on point either, because he or she is likely to find a conflicting common law decision. So what is likely to reduce the volume of law? I have great respect for my worthy opponent, Justice

Nelson, for the kind of opinions he has been writing for the court, where he collects the precedents, identifies the better rule, and distinguishes the cases that have followed the better rule from those that have not.<sup>61</sup> This kind of analysis, by seeing the rule and the facts in a larger setting than the present dispute, provides the kind of certainty and predictability that may well reduce the volume of the law. But it is not a Code analysis, it is a common law analysis.

*Would Montana's law be capable of better adapting to local conditions or changing conditions without the Civil Code's constraints?*

PROF. BURNHAM: Montanans seem to think that everything bad in Montana comes from California, and now we know the origin of that sentiment. It started with the Field Code. And the Field Code, in fact, has the double whammy of coming to California from New York, the other source of our misery. Field himself thought that flexibility was no virtue, that the law should be fixed. He said, "To say that a law is expansive, elastic or accommodating, is as much as to say that it is no law at all."<sup>62</sup> He did not want the law to be flexible. Professor Natelson, in his article on covenants running with the land, found that the Montana Supreme Court got the law right not because of the Code, but in spite of it. He states that "the Montana codifiers failed to sense the difficulties inherent in importing foreign law."<sup>63</sup> I admit that examples demonstrating the problems that arose from importing foreign law are thin. For example, one example is that Montanans were quite upset to find that in the criminal code, stealing a horse or a cow was merely petty theft.<sup>64</sup>

I found another example in the area of contracts, where there is a strong emphasis running through the Code on written contracts. This troubles me because I always thought that in the West your word was your bond, but under the Code you'd better get it in writing. One example is Section 28-2-1602, which states, "A contract in writing may be altered by a contract

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61. See, e.g., *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995); *State v. Siegal*, 281 Mont. 250, 934 P.2d 176 (1997).

62. DAVID DUDLEY FIELD, *THE CIVIL CODE OF THE STATE OF NEW YORK*, at xxi (1865).

63. Natelson, *supra* note 52, at 91.

64. See Morriss, *Plenty of Laws, supra* note 14, at 411 n.277.

in writing or by an executed oral agreement, and not otherwise.”<sup>65</sup> In other words, you can’t modify a written contract with an oral modification. We had a case in Montana on point where a consumer had borrowed money from a bank to buy a car and gave the bank a security interest in the car.<sup>66</sup> The writing said that the consumer would pay on the first of the month. One month the consumer called the bank and said, “I’m a little short of cash this month. Is it okay if I pay on the 15<sup>th</sup>?” The bank said, “Sure, no problem.” On the 12<sup>th</sup>, the bank declared the debt in default and repossessed the car. The consumer called the bank and asked, “What about the agreement that I could pay on the 15<sup>th</sup>?” The bank said, “Ha Ha, you didn’t get it in writing.” That modification doesn’t count under the Code.

Common law contracts doesn’t care about writings, so I always wondered why the Code was so insistent on getting everything in writing. One day it came to me—that’s the philosophy of the Code with respect to the law. Since the codifiers were always attacking unwritten law, that is the common law, why shouldn’t they carry the same view over into private law, where parties make the law that governs themselves in a contract? The reason they shouldn’t is because private law is a function of customs and culture, but the Code leaves no room for customs and culture. One size has to fit all, whether in New York or California or Montana.

Furthermore, the Code does not accommodate change. In California, the legislature frequently updates, modernizes, and corrects the Code. This happens rarely in Montana, so our law is essentially frozen, not just in 1895, when it was adopted, but in 1865, when it was written. Here’s a couple of examples of how our Code is frozen in time. One is in the area of mental illness. Section 28-2-203 of the Code contains the common law rule that mental illness is a defense to the formation of a contract.<sup>67</sup> Everybody knows that, but it’s one of those rules that is easy to state and hard to apply. The reason it’s hard to apply is that it’s hard to come up with a definition of what it means to be of unsound mind. Field had no problem with that. He defined it in Field Code Section 13, which provided, “Persons of unsound mind within the meaning of this codes are idiots, lunatics, imbeciles and habitual drunkards.” That is one of the

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65. MONT. CODE ANN. § 28-2-1602 (1999) (derived from CAL. CIV. C. § 1698).

66. Baird v. Norwest Bank, 255 Mont. 317, 843 P.2d 327 (1992).

67. See MONT. CODE ANN. § 28-2-203 (1999) (derived from FIELD CIV. C. § 21).



few Field Code statutes that's been repealed in Montana.<sup>68</sup> There's now no definition in the Code of what it means to be of unsound mind, and that's the way it should be. That's exactly the kind of area where the common law is best suited to apply a definition that reflects changing understanding of the nature of mental illness.

Here's another example of where the Code has not accommodated change. Section 30-11-210 is in a sales provision, and it may surprise you. It says, "**No implied warranty in mere contract of sale.** Except as prescribed by this part, a mere contract of sale or agreement to sell does not imply a warrantee."<sup>69</sup> We all know that's not the rule of the Uniform Commercial Code,<sup>70</sup> which has displaced this part of the Code, but it has only displaced it with respect to the sale of goods, the area of Article 2 of the Uniform Commercial Code.<sup>71</sup> So if you have a sale outside the sale of goods, a merchant seller would not be giving an implied warranty of merchantability. That seems to me not the correct result under modern thinking, which would probably analogize to the Uniform Commercial Code, and say that if in the area of the sale of goods merchant sellers impliedly give a warranty of merchantability, so they should in areas outside the sale of goods.<sup>72</sup>

Another area where the Code got it wrong and the courts have gotten it right is Section 28-2-409, which provides:

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

- (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or
- (2) belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which has not existed.

This section has to do with the mistake defense to formation

68. 1979 Mont. Laws Ch. 119 § 35.

69. MONT. CODE ANN. § 30-11-210 (1999) (derived from FIELD CIV. C. § 878).

70. See MONT. CODE ANN. § 30-2-314(1) (1999).

71. See MONT. CODE ANN. § 30-11-224 (1999) ("**Uniform Commercial Code overrides.** This part shall not apply to sales subject to the Uniform Commercial Code.>").

72. The Montana Supreme Court used exactly that reasoning in applying the Uniform Commercial Code principle of unconscionability to a lease of goods, which at the time was not a UCC transaction. See *All-States Leasing Company v. Top Hat Lounge, Inc.*, 198 Mont. 1, 649 P.2d 1250 (1982). Unconscionability is now applied to leases of goods by virtue of MONT. CODE ANN. § 30-2A-108(1) (1999).

of a contract. When it tells us that “Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake,” it is describing *unilateral* mistake. But everybody knows that the common law rule is that to avoid a contract you have to have *mutual* mistake. The Montana Supreme Court consistently gets it right. And how does the Montana Supreme Court get it right? By ignoring the Code. What does that teach us about respect for law when the only route to a correct conclusion is to ignore the Code? In conclusion, the Code does not assist us in our understanding of law because it is not flexible and it does not adapt to modern circumstances.

JUSTICE NELSON: I'll begin with a quote from Chief Justice Wade:

The common law has grown up out of particular instances and cases. Hence, its growth has lacked symmetry and regularity. Unsettled questions and principles, made so by contradictory or doubtful decisions, have had to wait the uncertain and accidental coming of a case whose decision would settle and put to rest the doubt and uncertainty. Case-made law does not anticipate. It is for the case at hand. It does not provide for the future, except by leaving precedents, sometimes contradictory and antagonistic, for its guide. And so the growth of the law has been irregular, and to a certain extent accidental, depending upon the uncertainty of the coming of the right kind of case to add anything to its substance. Codification, while it will not impede, will harmonize and make symmetrical this development of the law.<sup>73</sup>

Again, I submit that Chief Justice Wade was correct. Case-made law does not anticipate; it decides the case at hand and is reactive to the fact situation at issue. Case-made law relies on precedent and the growth of the law is, therefore, slow, irregular, and typically behind the times. While one may argue that the Civil Code “constrains” the growth and development of the law, it is more true that the Civil Code can be easily changed and modified from legislative session to legislative session in order to accommodate changing social and economic conditions. I am immediately reminded of Montana’s 1995 legislative session when it came to the attention of the Legislature that there was, apparently, a problem of men being “turgid” in public. The Legislature jumped into the fray immediately and proposed legislation to prohibit “public turgidity.” Fortunately, the law did not pass, but this serves as an example of just how quickly the Legislature can respond to “pressing” social issues.

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73. See Wade, *supra* note 38, at 5.

Seriously though, how effective would case law have been in addressing national environmental problems that did not even exist during the development of the common law. How long, if at all, will it take the courts to effectively deal, on a case-by-case basis, with issues such as the privacy of genetic information, with issues of assisted reproduction, with contract issues involving gestation and surrogacy. The answer is obvious: the common law is unsuited to deal with these complex issues. In fact, the only way to effectively control, regulate and govern modern legal relationships and modern legal problems spawned by today's technologies and globalization is via the adoption of well-written, comprehensive codes. I would submit to you that Field's Civil Code is the precursor to these modern legal codes.

### *Concluding remarks*

PROF. BURNHAM: In conclusion, I would say we get by with the Code largely by ignoring it when it suits our purposes. For example, in that case involving the bank that agreed to accept a late payment,<sup>74</sup> did the court follow the Code provision? Of course not. So you have a lose-lose situation under the Code. If you follow it, you get a wrong result. If you don't follow it, you're not showing respect for the rule of law. Field was a true believer and he was incredulous that anyone could question his god, the Code. In fact, he wouldn't have approved of this debate because he said, "The question whether a Code is desirable is simply a question between written and unwritten law. That this was even debatable is one of the most remarkable facts in the history of jurisprudence."<sup>75</sup> He didn't think he even needed to debate that issue, it was so obvious.

By the way, I learned from Professor Morriss that I do have one thing in common with Field. He mentioned that on his grave, Field wanted inscribed something about his Codes. I've often said that because I want my students to remember the rule, I want inscribed on my grave, "The U.C.C. applies to all sale of goods, not just to merchants." That inscription may help you remember that.<sup>76</sup> But to some extent, Field has carried the day. As Justice Nelson has alluded to, the Uniform Laws may

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74. *Baird*, 255 Mont. 317, 843 P.2d 327.

75. *Field & Bradford*, *supra* note 28, at vii.

76. See generally Scott J. Burnham, *Why Do Law Students Insist That Article 2 of the Uniform Commercial Code Applies Only to Merchants and What Can We Do About It?* 63 BROOK. L. REV. 1271 (1997).

be part of his legacy, and while I approve of many Uniform Laws, they unfortunately create a demand for law to be created in the form of Codes. For example, I hear people saying “Oh, we have to have a law for the Internet, we have to have a law for electronic commerce, what are we going to do?” Well, you are a voice crying in the wilderness if you say as I say, “We *have* a law for the Internet. We *have* a law for electronic commerce. It’s called the common law.” Where do we find it? Again, we find it in accessible well-written sources, those syntheses of the common law such as *Farnsworth on Contracts* and the *Restatement*, and if we got rid of the Code as a source in Montana, we’d have fine jurisprudence by using these documents as sources.

There is harm in the Code in that it makes rules look like regulations. I mentioned that without the Code, the common law rules of contract might be seen again as default rules, rules that can be changed by the parties. Without the Code, we would have decisions based on the application of principles and policies, rather than that mechanical jurisprudence that comes from blindly following a statute that may never have been appropriate for Montana’s needs.

JUSTICE NELSON: The central question that we were asked to debate and address today was whether or not the Montana Field Code, encompassing statutes in common law areas such as contracts and property, should be repealed. I think that, if anything, this debate has demonstrated that the Montana Field Codes should not be repealed. Certainly, the codes are not perfect, and certainly courts’ interpretations of those codes are not perfect. I suggest to you that the codes have centralized, have elucidated, have fixed, and have harmonized a few central premises of the common law and a few well-recognized, well-articulated principles of the common law. Further, Montana’s case law has very effectively built on these central common law premises and principles. If you want to see a real mess, repeal the Montana Field Codes and turn the courts loose. Montana courts and judges have already been accused of being “terrorists in black robes.” Unless you are a proponent of terrorism, you should want to retain the Montana Field Codes.

