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Nathan M. Crystal

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CODIFICATION AND THE RISE OF THE RESTATEMENT MOVEMENT

Nathan M. Crystal*

I. INTRODUCTION

In 1923 the elite of the bar formed the American Law Institute (ALI) for the purpose of preparing Restatements of the common law.¹ The Restatements have been criticized by scholars for simply declaring existing doctrine and failing, therefore, to assist courts in the creative development of the law.² The restaters themselves have been ridiculed for their excessive concern with certainty.³ More recently, Grant Gilmore and Lawrence Friedman have characterized the Restatement project as a reactionary attempt by the legal establishment to maintain the common law system against the attacks of the legal realists and the threat of codification.⁴

This article first critically examines and disputes the theses of Professors Gilmore and Friedman. It then presents an argument that the Restatement movement was, in fact, sympathetic to the goals of codification and, far from being a reaction to the challenge of realism, originated before realism developed as a coherent position. Both the Restatement movement and the codification movement of the late nineteenth and early twentieth centuries attempted to solve the prob-

* Assistant Professor of Law, University of South Carolina; B.S., 1968, University of Pennsylvania; J.D., 1971, Emory University; L.L.M., 1976, Harvard University.

1. Attendance at the meeting which formed the ALI was by invitation only from the Committee on the Establishment of a Permanent Organization for the Improvement of Law. 1 ALI PROCEEDINGS, pt. II, at 6-7 (1923). For a list of the individuals who were invited and the positions which they held, see *id.* at 8-19. See Part IV-A *infra* (discussion of the history of the formation of the ALI).

2. Henry Hart and Albert Sacks, in their famous unpublished materials, criticize several decisions made by the restaters. First, the Institute adopted the policy of stating only existing law rather than advocating change in legal doctrine. For example, the ALI inserted "caveats" in the notes when the legal status of an issue was unclear rather than state what the members thought the law should be. Second, it sought to influence the courts by its prestigious membership rather than by its analysis. Third, the Institute failed to develop any theory of *stare decisis* or of the responsibility of the courts for the creative development of the law. Hart and Sacks argue that the restaters never made it clear whether they considered the common law as a body of received doctrine or as a method of reasoning, but that the form of the Restatements seemed to commit them to the former. H. HART & A. SACKS, *THE LEGAL PROCESS* 758-66 (tent. ed. 1958).

3. T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 51 (5th ed. 1948).

4. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 582 (1973); G. GILMORE, *THE DEATH OF CONTRACT* 58-59 (1974).

lems of uncertainty, complexity, and consequent delay which plagued the legal system after the Civil War. Both were instituted, in substantial part, by the same segments of the bar, professional law teachers and corporate lawyers. The Restatement project originated in part because of the failures of the earlier codification movement. Only after the Restatement project was well under way did a new wave of realist codifiers challenge its goals.

II. THE GILMORE AND FRIEDMAN INTERPRETATIONS OF THE RESTATEMENT MOVEMENT: THE RESTATEMENTS AS A REACTION BY THE LEGAL ELITE TO THE THREATS OF CODIFICATION AND LEGAL REALISM

In *Death of Contract*, a widely reviewed series of lectures, Grant Gilmore traces the emergence and decline of a general theory of contract law which he labels "objectivism."⁵ The three protagonists of Gilmore's presentation are Christopher Columbus Langdell, Oliver Wendell Holmes, Jr., and Samuel Williston. Gilmore declares that the central tenet of their jurisprudential thought was that the law should be concerned only with a person's external manifestations. A person's subjective state of mind was considered irrelevant.⁶ The law which was to be applied to these objectively verifiable facts could be discovered in the case law and "scientifically" arranged into a pure doctrinal scheme. Building on Langdell's "almost inadvertent"⁷ discovery of the idea of a general theory of contract law, Holmes developed the substance of the new theory: liability, as a deviation from the natural state of things, should be as limited and as certain as possible.⁸

Gilmore interprets the Restatement movement, which was sponsored by supporters of objectivism such as Williston, as an effort to protect objectivism from destruction by a new school of legal thought, realism. The realists challenged the ideas that legal doctrines could be used mechanically and that there were correct and unchanging definitions of legal concepts.⁹ Gilmore suggests:

[T]he Restatement project can be taken as the almost instinctive re-

5. G. GILMORE, *supra* note 4, at 41.

6. *Id.* at 14.

7. *Id.* at 12.

8. *Id.* at 14-15. This held true for both contract law, in which liability was limited by the concept of consideration, and for tort law, in which liability was limited by the concept of duty.

9. W. RUMBLE, *AMERICAN LEGAL REALISM* 48-55, 63-66 (1968).

action of the legal establishment of the time to the attack of the so-called legal realists. What the realists had principally attacked, savagely and successfully, was the essentially Langdellian idea that cases can be arranged to make sense—indeed scientific sense. . . . But in the 1920's there was still hope that the revolution could be put down, that unity of doctrine could be maintained and that an essentially pure case law system could be preserved from further statutory encroachment. The radical solution to the breakdown of the case law system, which the realists had perceived, would, no doubt, have been statutes all around—a universal, Benthamite codification. The conservative response, which, looked on as a delaying action, was remarkably successful, was the provision of Restatements of Contracts, Torts, Property and the like.¹⁰

In Gilmore's view, however, the Restatement project itself reflects the decline of objectivism. The general theory of objectivism claimed that all cases, other than a few anomalies, embodied the idea that liability should be as limited and as certain as possible. Accordingly, the restaters adopted a very restrictive definition of contractual consideration.¹¹ However, critics of objectivism, principally Arthur Corbin, pointed to a significant number of cases, especially ones decided by Justice Cardozo, in which courts expanded contractual liability.¹² As a result, the Restatement included section 90,¹³ which allows a court to enforce a promise even without consideration if necessary to avoid injustice.¹⁴ This sort of functional jurisprudence was, of course, completely at odds with the objectivists' position.

Gilmore concludes that objectivism simply reflected certain attitudes of the late nineteenth and early twentieth centuries: laissez-faire economic theory, a narrow conception of social duty, the desire within legal circles for uniformity, and distrust of the jury. Because of

10. G. GILMORE, *supra* note 4, at 58–59 (footnotes omitted). Gilmore's views of the relationship between codification, legal realism, and the Restatements seem to have changed. In his previous work, Gilmore, *Legal Realism: Its Cause and Cure*, 70 *YALE L.J.* 1037 (1961), to which he refers, he describes the Restatements as much like a code: "They were, however, producing something new under the sun: a common law in statutory form, distinguishable from statute or code only in that it lacked the legislative sanction." *Id.* at 1044. Similarly, he did not view the Restatements as a response to the theoretical attack of realism but as a way of dealing with a spontaneous breakdown of the common law system. *Id.* at 1041. The thesis of this article is much closer to Gilmore's earlier views, although it argues that the relationship between codification and the Restatements is more direct than Gilmore implies and that realism developed much later and partially in response to the Restatement movement.

11. G. GILMORE, *supra* note 4, at 60–61.

12. *Id.* at 62–63.

13. *Id.* at 60–61.

14. RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

change in these attitudes, the theory is being abandoned.¹⁵ Modern courts have broadened rather than restricted liability.

In *A History of American Law*, Lawrence Friedman discusses the law reform movement which took place in the last quarter of the nineteenth century. He argues that law reform, including both the Restatement and codification movements, was a masquerade by which the legal profession attempted to preserve its social and political position and ward off the threat of more fundamental reform.¹⁶ Although Friedman considers both law reform movements conservative, he is more critical of the Restatement movement:

At any rate, the Code was modernity itself compared to the restatements of the law, perhaps the high-water mark of conceptual jurisprudence. Work began in the late 1920's, under the sponsorship of the American Law Institute (founded in 1923). The proponents were hostile to the very thought of codification. They wanted to head it off, and save the common law, by reducing its principles to a simpler but more systematic form.¹⁷

Friedman regards the Restatements as generally sterile, logical spectacles of scientific orderliness created by scholars unconcerned with the social and economic consequences of their work.¹⁸ Together, Gilmore and Friedman present a picture of the Restatement movement as an attempt to preserve the common law system against the threat of legal realism and its program for reform, codification.

A. *The Anticodification Charge Refuted*

The Restatement movement cannot accurately be considered a reaction to the threat of codification for three reasons: (1) the originators of the Restatements also supported codification; (2) the institutional sponsor of the Restatements, the ALI, promoted codification as well; and (3) the Restatements themselves have a codelike purpose and format.

The advocates of the Restatement movement supported codification of the common law. The Restatement project was sponsored by two groups in the legal profession, professional law teachers and an elite group of lawyers associated with the American Bar Association

15. G. GILMORE, *supra* note 4, at 95-100.

16. L. FRIEDMAN, *supra* note 4, at 354-55, 582.

17. *Id.* at 582.

18. *Id.*

(ABA).¹⁹ In the 1880's the ABA debated the merits of codification and passed a resolution supporting codification of the common law.²⁰ A few years later the ABA helped organize and support the National Conference of Commissioners on Uniform State Laws, which engaged in partial codification of the common law through preparation of uniform acts on such subjects as sales and negotiable instruments.²¹

Law school professors also supported both codification and the Restatement movement. Influential teachers such as Samuel Williston and James Barr Ames were actively involved in the uniform state law movement.²² Williston described the Restatement project as a step in the transition from a common law to a code system:

[I]s it not possible to secure some at least of the advantages of a Code—for there are obvious advantages in reducing to a narrower compass the rules of law that we have—without the disadvantages?

That is what it seems to me we are trying to do in the work of the American Law Institute.²³

The second basis for rejecting the idea that the Restatement movement was in opposition to codification is the sponsorship by the ALI of the preparation of a code of criminal procedure shortly after it adopted the Restatement plan. After debate,²⁴ the Council of the Institute, which functioned like a board of directors, commissioned a study on the administration of criminal justice in the United States.²⁵ In 1925 the committee's report criticized the system of criminal procedure in most states as antiquated and the criminal law as uncertain and inconsistent. The committee recommended that the Institute undertake a Restatement of criminal law.²⁶ While it concluded that a code of criminal procedure should be prepared, the report recommended against this project because it was legislative and the Institute had not been formed to engage in such work.²⁷ Despite this recom-

19. See Part IV—A *infra*.

20. 9 A.B.A. REP. 73-74 (1886).

21. See Part III—C-2 *infra*.

22. Williston drafted several uniform acts. See 30 A.B.A. REP. 205 (1906). Ames served as a reporter for the Uniform Partnership Act. See 28 A.B.A. REP. 732 (1905).

23. Williston, *Written and Unwritten Law*, 17 A.B.A.J. 39, 41 (1931). See also Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367 (1934).

24. See 1 ALI PROCEEDINGS, pt. II, at 63-88 (1923).

25. *Id.* at 40-41.

26. 3 ALI PROCEEDINGS 488 (1925).

27. *Id.* at 490-93.

mendation, the Council voted to prepare a code of criminal procedure,²⁸ which was completed in 1935.²⁹

The third indication that the restaters did not oppose codification is that the Restatements themselves were drafted in codelike form. The report on which the Restatement project was based declared that the "statement of principles should be made with the care and precision of a well-drawn statute, though it will not be necessary and may often not be advisable to adopt language appropriate for statutory enactment."³⁰ Like codes, the Restatements consisted of black letter rules followed by comments and illustrations.³¹ The equivalence of the Restatements and codes was recognized by both supporters and critics of the work. Warren Seavey, the reporter for the Restatement of Agency, stated: "The original Restatement was intended as a code, in the old form, a set of rules stated with little explanation."³² Similarly, Hessel Yntema, a critic of the project, commented that the "Restatement is, in substance and purpose, if not in sanction and mode of promulgation, a Code."³³ If the restaters had opposed codification, they probably would have employed the traditional device used by supporters of the common law system, the treatise.³⁴

The decision simply to restate the common law and to oppose legislative enactment of their work³⁵ does not reveal hostility to an authoritative, detailed statement of the law, which is the essence of a code.³⁶ First, the proponents of the project thought that legislation was unnecessary because they believed that they could achieve the chief benefit of legislation, authoritativeness, by making the project the work of a permanent organization which represented the American

28. *Id.* at 78-79.

29. 12 ALI PROCEEDINGS 220 (1935).

30. 1 ALI PROCEEDINGS, pt. I, at 19 (1923).

31. Seavey, *The Restatement, Second, and Stare Decisis*, 48 A.B.A.J. 317, 318 (1962).

32. *Id.*

33. Yntema, *The Restatement of the Law of Conflict of Laws*, 36 COLUM. L. REV. 183, 198 (1936). See also Goodrich, *Restatement and Codification*, in FIELD CENTENARY ESSAYS 241, 243-45 (A. Reppy ed. 1949). Judge Goodrich notes that the Restatements and codification had two major ideas in common: first, the notion that rules of law did exist and second, the idea that there were leading rules which could be reduced to a written form. *Id.*

34. Hart and Sacks make this suggestion. H. HART & A. SACKS, *supra* note 2, at 769-71. See also R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 152 (1938) (discussion of the treatise tradition in American law and its anticodification aspects).

35. 1 ALI PROCEEDINGS, pt. I, at 23 (1923). The ALI discussed the possibility of enacting the Restatements into law with the weight of common law precedent. *Id.* at 24.

36. See Stone, *A Primer on Codification*, 29 TUL. L. REV. 303, 305-06 (1954-1955) (discussion of the concept of codification).

bar.³⁷ Second, the history of codification in the late nineteenth century made the restaters skeptical of the ability of any legislature to engage in the scientific effort necessary to prepare a quality code.³⁸ Finally, legislation was inconsistent with the goals of the project. The Restatements were a detailed formulation of the fundamental principles of the common law intended to eliminate uncertainty and confusion.³⁹ Because uncertainty and complexity resulted in part from social change, legal doctrine needed to be flexible. The restaters worried that the flexibility of the common law would be lost, that courts would be bound simply to follow the statute and “injustice would result in many cases presenting unforeseen facts.”⁴⁰

B. Restatement as Reaction to Realism: The Anachronism Exposed

Gilmore claims that the Restatements were the “almost instinctive reaction” of the legal establishment to the attack of the legal realists, who criticized the idea that the common law could be arranged to make scientific sense. The chronology of events does not support his view.

Scholars who played a prominent role in the realist movement did not criticize the commencement of the Restatement project. Herman Oliphant and Karl Llewellyn,⁴¹ for instance, expressed cautious optimism, rather than criticism, of the project. At a 1923 symposium before the American Academy of Social Science, Oliphant praised the plan for drafting Restatements as a proper balance between enthusiasm for change and sound judgment of what was realistic.⁴² Oliphant depicted the project as departing from the deductive approach which had previously dominated the field of jurisprudence and embarking

37. See Part IV—*B infra*.

38. At the first meeting of the Institute, John W. Davis remarked, “None of us here, I fancy, certainly none of those who are familiar with Congress or the forty-eight legislatures of our States, anticipate that this labor shall be committed to their charge.” Address by John W. Davis, First Meeting of the ALI (Feb. 23, 1923), reprinted in 1 ALI PROCEEDINGS, pt. II, at 112 (1923).

39. 1 ALI PROCEEDINGS, pt. I, at 24 (1923).

40. *Id.* This last concern reflects precisely the principal attitude of the realists: the law should be a tool to achieve justice and not a scientific formulation.

41. Llewellyn disputes that there was a “school” of realists, but, applying a commonly accepted definition of “realist,” included both himself and Oliphant in his list of realists in 1931. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1226–27 n.18 (1931).

42. Oliphant, *The Relation of Current Economic and Social Problems to the Restatement of the Law: The Problems of Logical Methods from the Lawyers’ Point of View*, 10 ACAD. OF POL. SCI. PROC. 323 (1923).

upon a new inductive method of formulating legal doctrine. For him, the Restatement would establish no "general principles" but only "experimental rationalizations of our previous experiences . . . [which] cannot contain the inevitable solution to *new* problems."⁴³ Oliphant expressed his opposition to codification, which represented rigidity and unreasonable certitude in doctrinal questions.⁴⁴ Llewellyn had a similar attitude toward the Restatement project. He argued that law needed to change more rapidly in order to facilitate the growth of business because of the business environment of the twentieth century. Llewellyn believed that the Institute should develop the legal tools necessary for this growth.⁴⁵

The participation of the realist Arthur Corbin⁴⁶ in the drafting of the first Restatements is further evidence that the Restatements were not a response to the attack of legal reformers. Gilmore recognizes that this fact is inconsistent with his thesis. He asks, "Why was [Corbin] not outside on the barricades leading the revolutionary troops with Llewellyn, perhaps, as his principal aide?"⁴⁷ Gilmore suggests that perhaps Corbin was part of an "in-between generation," that he was closely attached personally to Williston and that he believed more could be accomplished by working from the inside.⁴⁸ But to say this is to concede that the restaters were not drawn merely from the ranks of the objectivists and that some participants saw the project as potentially reformative.

In the beginning, therefore, the Restatement movement was not aligned with either realism or objectivism. The first evidence of any alignment occurred in 1925, when Walter Wheeler Cook expressed objection to the concept of "domicile" in the Restatement of Conflicts.⁴⁹ The reporter, Joseph Beale, sought to draft a single definition which would apply throughout the Restatement and hopefully to other Restatements as well.⁵⁰ Cook argued that a single definition was not possible because the meaning of the word "domicile" varied de-

43. *Id.* at 325-26.

44. *Id.* at 327.

45. Llewellyn, *The Restatements from the Point of View of the Economic and Business Man*, 10 ACAD. OF POL. SCI. PROC. 331 (1923).

46. Llewellyn, *supra* note 41, at 1226 n.18.

47. G. GILMORE, *supra* note 4, at 60.

48. *Id.*

49. Remarks of Walter Wheeler Cook, Third Annual Meeting of the ALI (May 2, 1925), *reprinted in* 3 ALI PROCEEDINGS 226 (1925).

50. Remarks of Joseph H. Beale, Third Annual Meeting of the ALI (May 2, 1925), *reprinted in* 3 ALI PROCEEDINGS 224-25 (1925).

pending on the context in which it was used.⁵¹ Austin W. Scott, the assistant to Beale, responded that the reporters had carefully analyzed the cases and concluded that the term had a core meaning which applied regardless of context.⁵² In this criticism Cook was expressing in a tentative manner a basic tenet of the realist position, that law was instrumental rather than conceptual.⁵³

When the final versions of the Restatements were published the alienation of the realists was complete. Thurman Arnold, for example, criticized the organization of the Restatement of Trusts. He argued that classification should be based on the function of the trust device, rather than on the rational reformulation of old categories such as active trust, passive trust, and resulting trust.⁵⁴ Charles Clark condemned the Restatement of Contracts for its use of black letter statements of legal doctrine and accused the restaters of "seeking the force of a statute without statutory enactment."⁵⁵ Leon Green similarly objected that the Restatement of Torts ignored the need for legal doctrine which could be used as a tool of justice.⁵⁶

The realists' growing opposition to the Restatement movement was the result of their increasing awareness of their own position rather than a gradual recognition of the true nature of the project. Although the proposed Restatement project was perhaps ambiguous on several points,⁵⁷ one idea was clear: the Restatements would be detailed black letter statements of legal rules.⁵⁸ In the early 1920's, when the Restatement movement got under way, realism was only beginning to develop as a coherent body of thought. Historians of legal realism regard the movement as a product predominantly of the late 1920's and the 1930's.⁵⁹ Until that time there was little fervor and few members

51. Remarks of Walter Wheeler Cook, *supra* note 49, at 225-29.

52. Remarks of Austin W. Scott, Third Annual Meeting of the ALI (May 2, 1925), reprinted in 3 ALI PROCEEDINGS 229-31 (1925).

53. See W. RUMBLE, *supra* note 9, at 51-55.

54. Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800, 813 (1931).

55. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 654 (1933).

56. Green, *The Torts Restatement*, 29 ILL. L. REV. 582, 584 (1935).

57. The topics which would be undertaken, the degree to which the Institute would engage in law reform, the nature of the supporting treatises, and the procedure for the accomplishment of the work were all somewhat unclear.

58. The report on which the Restatements were based was specific on this. 1 ALI PROCEEDINGS, pt. I, at 19-22 (1923).

59. See W. RUMBLE, *supra* note 9, at 5. See also Address by Benjamin N. Cardozo, Fifty-Fifth Annual Meeting of the New York State Bar Association (Jan. 22, 1932) (commenting on recent ferment), reprinted in 55 N.Y. ST. B.A. REP. 263, 264 (1932); Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1933-34). Fuller suggested:

The realist movement in American legal thought may be said to have reached its

in the realist circle. Realism was not generally recognized as a significant force in the legal community until the famous debate between Roscoe Pound and Karl Llewellyn in 1931.⁶⁰ Thus, if anything, the Restatement project seems more the occasion for the formation of the realist movement than the reverse.

III. THE LATE NINETEENTH CENTURY CODIFICATION MOVEMENT

One important theme of realist criticism of the Restatement project was that the Restatements presented legal doctrine as a series of general principles, like a statute. What the realists perceived, in fact, reflected a continuity between the late nineteenth century codification movement and the Restatement movement. The late nineteenth century codification movement was fostered by two structural changes in the legal system which occurred after the Civil War. First, the common law system suffered to a greater extent from the problems of delay, uncertainty, and complexity when compared to the earlier part of the century. Second, two new groups which emerged within the legal profession, professional law teachers and corporate lawyers, strove to solve these problems.

A. The Problems of the Legal System After the Civil War and the Failure of Traditional Solutions

After the Civil War, lawyers became keenly aware of the delay, uncertainty, and complexity which plagued the legal system. The Supreme Court, as well as most state courts, suffered from a large and increasing backlog of cases.⁶¹ Because of delay in the Supreme Court, the ABA debated proposals either to restructure the Court or create

flower within the past five years. There were, to be sure, premonitions of it as early as the beginning of the present century. The realist himself likes to consider his movement as taking its origin in an address delivered by Justice Holmes in 1897. As early as 1912 there existed a systematic formulation of the realist view, however little it may have been noticed. These beginnings should suffice to confer at least a semblance of historical respectability on the realist movement. It is not a mere upstart without roots in the past. Yet it is only recently that the realist view has begun to fire the imaginations of legal scholars, that it has provoked men to concerted and sustained "vocal behavior,"—that it has become, in a word, a movement.

Id. at 429-30 (footnotes omitted).

60. Llewellyn, *supra* note 41; Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

61. *Report of the Special Committee Appointed to Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can Be Lessened, and If*

courts of appeal.⁶² An ABA special committee reported that the use of arbitration in large cities had increased because of delay in the legal system.⁶³ The *Virginia Law Journal* commented on the slowness of the criminal system.⁶⁴

Evidence indicates that uncertainty of the law was a significant problem. Statistics gathered by the ABA showed that approximately fifty percent of the cases which reached appellate courts were reversed.⁶⁵ Some judges and writers complained that it was difficult to determine what the law was.⁶⁶ Others complained that the legal system was unnecessarily complex. States differed on questions such as the formation of contracts by mail, grounds for divorce, and procedures governing default on negotiable instruments.⁶⁷

So, By What Means, 8 A.B.A. REP. 323, 325-31 (1885) [hereinafter cited as *1885 Special Committee Report*].

62. See, e.g., 6 A.B.A. REP. 62-64 (1883).

63. *1885 Special Committee Report*, *supra* note 61, at 324. See also Remarks of W. Morton Grinnell, Ninth Annual Meeting of the ABA (Aug. 19, 1886), reprinted in 9 A.B.A. REP. 22-25 (1886).

64. *A Consequence of the Law's Delay*, 11 VIRGINIA L.J. 638 (1887) (editorial), quoted in *The Law's Delay*, 21 AM. L. REV. 965-66 (1887).

65. *1885 Special Committee Report*, *supra* note 61, at 329-31.

66. For example, Judge Arnold, eulogizing the late Justice Mercur, Chief Justice of the Pennsylvania Supreme Court, stated that the day of the great judge might be disappearing because of the growing mass of judicial decisions coupled with the heavy workload. Address by Judge Arnold (1887), reprinted in 21 AM. L. REV. 605 (1887). A contributor to the *Albany Law Journal* expressed a similar complaint about legal uncertainty:

The uncertainty of the common law has long since become a proverb. There is hardly a legal question that has not been decided in every conceivable way until fixed by statute. On many of the commonest principles of law there is even at this day the greatest conflict of adjudication among the various States of our country; nay, even in the same State, in the same court, and with the very same judge As it now stands, not only is it uncertain what the law is, but it is uncertain what it will be when a case gets to the ultimate court. The law is continually fluctuating, and although courts talk much about *stare decisis*, the only decisions they invariably stick to are those which ought never to have been made, and which have nothing but precedent to recommend them.

The Codes and the Governor, 19 ALB. L.J. 348, 348 (1879). See also note 69 *infra*.

67. See Jones, *Uniformity of Laws Through National and Interstate Codification*, 28 AM. L. REV. 547, 552-55 (1894); Merrill, *An American Civil Code*, 14 AM. L. REV. 652 (1880). Jones remarked:

Since the people of the whole country have come to have daily and hourly dealings with each other, they have found great inconveniences arising from diversities in legislation and in common law rules. Conflicting laws tend to hinder interstate trade, to render contracts uncertain and to occasion needless litigation. This diversity of law is a serious impediment to the prosperity of the country. It hampers ordinary mercantile transactions with countless trifling distinctions and forms. It leads to contradictory judgments upon a person's domestic relations, making them to vary with a change of his domicile. While our country is large, there is, with ex-

Three factors produced these problems: increased legislation, a growing number of reported decisions, and greater interstate travel and commerce. The presidents of the ABA, who devoted their annual addresses to summarizing major legislative developments during the year, frequently remarked on the quantity of legislation.⁶⁸ The literature of the period abounds with complaints about the problems caused by increased legislation and adjudication.⁶⁹ Similarly, writers remarked that the vast increase in interstate travel and commerce was creating problems for the legal system.⁷⁰

Although similar complaints had been made earlier,⁷¹ these problems intensified in the last quarter of the century because of the failure of the methods by which the legal system traditionally met new

ceptions that need not be considered, a common jurisprudence and a common civilization, and there is no good reason for any diversity of law on subjects where diversity is an evil or an annoyance.

Jones, *supra* at 552.

68. See, e.g., Address of President John W. Stevenson, Eighth Annual Meeting of the ABA (Aug. 19, 1885), reprinted in 8 A.B.A. REP. 149 (1885). "Increasing legislation in the states seems rapidly to be becoming one of the evils of the hour." *Id.* at 150.

69. For example, the *Albany Law Journal* commented on the problem as follows:

We have, including Congress and the United States courts, some forty legislative bodies building up, altering and tearing down our systems of statute law, and as many courts busy in construing these statutes, and declaring the common law, giving us some forty volumes of statute law, and a hundred volumes, yearly, of judicial decisions. We have, already, at least two thousand volumes of American reports, and nearly as many of those of the English courts. If the present condition of the Law is so appalling to the student and the practicing lawyer, what condition is the next generation to be in, when another two thousand volumes have been added to the mass?

Codes, 9 ALB. L.J. 33 (1874). John Dos Passos makes a similar point in *The American Lawyer*:

When the law reports were few, and the precedents shone like bright stars, in the legal firmament, and the lawyers knew and followed them, as astronomers do the particular planets, the application of *stare decisis* was easy and simple. But now—it flitters between the thousands of decisions as a phantom of the law—not as a vital principle.

J. DOS PASSOS, *THE AMERICAN LAWYER* 15 (1907).

70. See, e.g., Tompkins, *The Necessity for Uniformity in the Laws Governing Commercial Paper*, 13 A.B.A. REP. 247, 261 (1890).

71. In 1821 Joseph Story remarked on the vast increase in the number of reported decisions. Address by Joseph Story, Anniversary of the Suffolk Bar (Sept. 4, 1821), reprinted in 1 AM. JUR. 1, 31 (1829). Similarly, in 1823 Nathan Dane stated, "The evil to be feared in our country is, that so many sovereign legislatures, and so many Supreme courts, will produce too much law, and in too great a variety; so much and so various that any general revision will become impracticable." 1 N. DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW at xiv (Boston 1823). James Kent called for a digest to remedy the evils flowing from the mass of law. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 442 (New York 1826).

challenges, treatise writing and equity jurisprudence. Early in the nineteenth century writers responded to similar problems by writing treatises which presented the common law as a scientific system compatible with American conditions.⁷² However, treatise writers in the latter part of the century were not as successful. Roscoe Pound, remarking on the decline of the treatise tradition after the Civil War, claimed that, compared to the great output of the earlier period, the post-War era produced only three significant works: Cooley's *Constitutional Limitations* (1868), Dillon's *Municipal Corporations* (1872), and Pomeroy's *Equity Jurisprudence* (1881–1883).⁷³ One writer stated in the *American Law Review* that treatises had become cumbersome and no longer had sufficient certainty or authority to serve as a tool for reform.⁷⁴ Another criticized most textbooks as largely cut-and-paste works and contended that there was a great need for more jurists and "jurist works."⁷⁵ In 1902 the ABA's special committee on classification of the law remarked on the inadequacy of textbooks.⁷⁶

In the early part of the nineteenth century the equity courts had been a major force in ameliorating problems with the common law, but the procedural merger of law and equity restricted the use of equitable doctrine. For example, in New York the Married Women's Property Acts resulted from pressure exerted on the legislature after the elimination of equity power, the traditional method of protecting married women's property interests.⁷⁷ In the preface to his *Equity Jurisprudence*, John Norton Pomeroy remarked on the decline of equity: "Every careful observer must admit that in all the states which have adopted the Reformed Procedure there has been, to a greater or less [er] degree, a weakening, decrease, or disregard of equitable principles in the administration of justice."⁷⁸

72. E.g., J. KENT, *supra* note 71; see P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 156–64 (1965).

73. R. POUND, *supra* note 34, at 140–41, 157–59.

74. 20 AM. L. REV. 22, 23 (1886).

75. Bishop, *The Common Law as a System of Reasoning—How and Why Essential to Good Government; What Its Perils and How Averted*, 22 AM. L. REV. 1, 10–13 (1888).

76. *Report of the Committee on the Classification of the Law*, 25 A.B.A. REP. 425, 442–43 (1902).

77. Rabkin, *The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and its Contribution to the Passage of the Early Married Women's Property Acts*, 24 BUFFALO L. REV. 683, 692–94, 726–48 (1975).

78. 1 J. POMEROY, *POMEROY'S EQUITY JURISPRUDENCE* at xxiv (5th ed. 1941) (originally published 1881). See also Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244 (1945); Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905).

B. *The Emergence of the Professional Law Teacher and the Corporate Lawyer*

Between 1820 and 1870, two factors combined to transform American higher education. First, the classical, liberal arts curriculum of the older eastern colleges was modified to include modern science.⁷⁹ Second, many American intellectuals received postgraduate education in German universities which had selective admissions policies and were devoted to research and public service. They returned to the United States determined to model American higher education after the German system.⁸⁰ The result of these factors was the emergence of the modern American university.⁸¹

Legal education was revitalized because of these changes in higher education. Admission and graduation requirements were tightened.⁸² The most dramatic example of change in legal education was the adoption of the case method of instruction. The case method reflected the new university environment in two ways: first, it was based on an

79. During the colonial period and the early part of the nineteenth century, higher education consisted of classical liberal arts training which excluded science. J. BRUBACHER, *HIGHER EDUCATION IN TRANSITION* 13-15 (3d ed. 1976). An early attempt to reform the curriculum was made by Jefferson at Virginia. *Id.* at 101-02. However, the revival movement which swept the country in the early part of the century and the *Yale Report of 1828*, *YALE COLLEGE, REPORTS ON THE COURSE OF INSTRUCTION IN YALE COLLEGE* (New Haven, Conn. 1828), which recommended the retention of the traditional curriculum, tended to retard change. J. BRUBACHER, *supra* at 105. Shortly before the Civil War, however, it was no longer possible to deny science a place in higher education. Beginning with Rensselaer Technical Institute in 1824, various scientific schools designed to meet the needs of the emerging industrial society opened. *Id.* at 61-62. The creation of agricultural and mechanical colleges pursuant to the Morrill Act of 1862 intensified the new utilitarian emphasis in education. *Id.* at 62-64.

The formation of immense fortunes from the industrial society also prompted older colleges to change their curriculum. The holders of the new wealth, such as Andrew Carnegie, conceived of themselves as public trustees. A new university tied to science and public service was appealing to these men. *See* A. CARNEGIE, *THE GOSPEL OF WEALTH* 23-36 (1901). The creation of Stanford and Vanderbilt Universities demonstrates the results of such ideas. *See* E. MIMS, *HISTORY OF VANDERBILT UNIVERSITY* 13-22 (1946).

80. For example, George Ticknor influenced Harvard to reorganize into departments. J. BRUBACHER, *supra* note 79, at 102. In the 1840's Francis Wayland attempted similar reform at Brown. *Id.* at 106-07. At Michigan, Henry P. Tappan tried to raise the quality of the student body and of instruction by attempting to eliminate technical training and courses which he considered more appropriate for secondary schools. *Id.* at 107-09.

81. *Id.* at 143-73.

82. At Harvard, one of the principal changes made by Christopher Columbus Langdell, who was appointed dean of the law school in 1870 by the first president of Harvard with a science background, Charles Eliot, was to raise admission and graduation requirements. A. SUTHERLAND, *THE LAW AT HARVARD* 167 (1967).

evolutionary, empirical conception of science;⁸³ second, because the method challenged the student intellectually, it represented emphasis on higher standards.⁸⁴

The innovation of the case method was a major factor in the professionalization of law teaching. Until the later part of the nineteenth century law teachers were drawn from the ranks of practitioners. In 1873 Christopher Columbus Langdell, the new dean of Harvard, convinced the university to employ James Barr Ames, who had graduated from the law school only the year before.⁸⁵ Although Harvard contin-

83. Christopher Columbus Langdell viewed law as a science: "Law, considered as a science, consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries." C. LANGDELL, *CASES ON CONTRACTS* at v (1871), *quoted in* A. SUTHERLAND, *supra* note 82, at 174. In an address to the Harvard Law School Association he suggested:

[It] was indispensable to establish at least two things; first that law is a science; secondly, that all the available materials of that science are contained in printed books. . . . We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.

Address by Dean Langdell, Meeting of the Harvard Law School Association on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College (Nov. 5, 1886), *quoted in* A. SUTHERLAND, *supra* note 82, at 175.

84. When the debate over adoption of the case method took place at Columbia, opponents argued that it was suitable for the most qualified students but not for the average pupil. COLUMBIA UNIVERSITY FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *A HISTORY OF THE SCHOOL OF LAW OF COLUMBIA UNIVERSITY* 144 (1955). Advocates of the case method also believed this and, in fact, this was one of the reasons that they favored the method. A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW* 381 (Carnegie Foundation Bulletin No. 15, 1921).

85. A. SUTHERLAND, *supra* note 82, at 190. The decision to professionalize law teaching was controversial. In 1883, when the governing boards of Harvard University were considering the appointment of Albert Keener, who had practiced for only four years, Ephraim W. Gurney, the dean of Harvard College, wrote to President Eliot. Referring to Langdell, he said:

Now to my mind it will be a dark day for the School when either of these views is able to dominate the other, and the more dangerous success of the two would be the doctrinaire because it would starve the School. In my judgment, which you may well say on such a matter is not worth much, if the appointment of Keener—of whom I never heard till yesterday, and of whom I am ready to believe all the good which is said—means that the School commits itself to the theory of breeding within itself its Corps of instructors and thus severs itself from the great current of legal life which flows through the courts and the bar, it commits the gravest error of policy which it could adopt, and I hope you will think many times and consult with persons who, unlike myself, have professional qualifications for judging of it before you announce it in print.

Letter from Ephraim W. Gurney to Charles W. Eliot (Spring 1883), *reprinted in* A. SUTHERLAND, *supra* note 82, at 188. Despite this, President Eliot supported Langdell's approach. In 1895 he said to the Law School Association:

ued to appoint individuals with substantial practical experience, by 1890 the existence of the professional law teacher was well established with the appointments of Samuel Williston and Joseph Beale.⁸⁶ The professionalization of law teaching was institutionally confirmed by the formation of the Association of American Law Schools in 1900.⁸⁷ Association meetings gave law teachers the opportunity to discuss their problems separately from other members of the bar.

During this same period the modern American corporate lawyer emerged as a significant force in the profession. James Willard Hurst has shown that many lawyers achieved fame by becoming general counsel for railroads,⁸⁸ and Jerold Auerbach has demonstrated that corporate lawyers emerged as a dominant force in the profession in the last quarter of the nineteenth century.⁸⁹

Both the professional law teacher and the new corporate lawyer desired to solve the problems of the legal system, though for different reasons. The professor regarded uncertainty and complexity in doctrine as an affront to conceptual purity. In 1914, Professor Beale, later the reporter for the Restatement of Conflicts, gave this view of the common law system:

It is surely a philosophical system, a body of scientific principle which has been adopted in each of the common law jurisdictions in this country, as the basis of its law. Courts of each jurisdiction, in attempting to apply this general body of principles . . . have sometimes misconceived it and misstated it. . . . But the general scientific law remains unchanged in spite of these errors; the same throughout all common law jurisdictions. This is the science which we teach, and this

And what does it mean? What is to be the ultimate outcome of this courageous venture? In due course, and that in no long term of years, there will be produced in this country a body of men learned in the law, who have never been on the bench or at the bar, but who nevertheless hold positions of great weight and influence as teachers of the law, as expounders, systematizers, and historians. This, I venture to predict, is one of the most far-reaching changes in the organization of the profession that has ever been made in our country.

Address by Charles W. Eliot, Ninth Annual Meeting of the Harvard Law School Association (June 25, 1895), *quoted in* A. SUTHERLAND, *supra* note 82, at 184. In that same year Ames became dean of the law school. A. SUTHERLAND, *supra* note 82, at 204.

86. *Id.* at 190.

87. Transcripts of meetings of the AALS, as well as copies of papers which were presented, are published in the Proceedings of the Association. In its infancy, the proceedings of the AALS were included in the *A.B.A. Reports*. *E.g.*, 23 A.B.A. REP. 569 (1900) (first meeting of the AALS).

88. J. HURST, *THE GROWTH OF AMERICAN LAW* 295-301 (1950).

89. J. AUERBACH, *UNEQUAL JUSTICE* 21-25 (1976).

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is the science which requires systematic statement in order that progress and reform may be possible.⁹⁰

Certainty and regularity were also important to corporate lawyers because many of their clients engaged in multistate transactions. To the extent that the rules governing such transactions were uncertain or conflicting, business was impaired. As one advocate of codification of negotiable instruments law stated:

The immense volume of the commerce carried on between the citizens of the different States, the greater part of which is done by the use of such paper, is an ever-present argument for such uniformity. . . . When the merchant in New York takes from his customer in South Carolina a negotiable promissory note for the bill of merchandise he has sold him, he ought not to be in doubt as to the legal construction and operation of the contract. He ought to be able to feel that the same rules of law govern⁹¹

C. *The Late Nineteenth Century Codification Movement*

During the last quarter of the nineteenth century, a significant codification movement aimed at alleviating the problems of the legal system developed at both state and national levels. Codification was unsuccessful at the state level principally because of the opposition of traditional members of the bar and the poor quality of the codes which were prepared. The ABA, which was formed in 1878,⁹² sponsored the national movement. The ABA, however, lacked the resources, both in time and money, necessary to prepare a completely satisfactory code and so, in the end, the national movement achieved only limited success.

1. *Codification at the state level*

Although advocates of codification, particularly David Dudley Field, contended that codification of substantive and procedural law could alleviate the problems of uncertainty, complexity, and delay in the legal system,⁹³ the rank and file of the bar opposed the change—

90. Beale, *The Necessity for a Study of Legal System*, 14 AALS PROCEEDINGS 31, 39 (1914).

91. Tompkins, *supra* note 70, at 261.

92. L. FRIEDMAN, *supra* note 4, at 563.

93. Field's writings in support of codification are extensive. A bibliography may be found in FIELD CENTENARY ESSAYS 384–85 (A. Reppy ed. 1949).

and usually prevailed. Despite much effort by Field and his supporters, codification of substantive law suffered a major defeat in New York. In 1870 the New York legislature appointed a commission to revise and consolidate its statutory law.⁹⁴ Five years later the commission was given the power to consider adoption of the codes of substantive law⁹⁵ which Field had prepared between 1857 and 1865.⁹⁶ The legislature passed the codes twice, but the governor vetoed both measures.⁹⁷ In the late 1880's, Field made several more unsuccessful efforts to have his codes enacted.⁹⁸

The major reason for the defeat of codification in New York was the opposition of the New York Bar; the Association of the Bar of the City of New York lobbied extensively to defeat codification.⁹⁹ Opposition seems to have come from three groups of attorneys. First, many ordinary practitioners were opposed to codification because they saw it as an economic threat. For example, "One Hundred Lawyers" frankly admitted that they opposed codification because "it will reduce our business."¹⁰⁰ The *American Law Review* criticized such members of the legal community:

[W]hile we believe and fully concede that a good deal of the opposition to codification springs from learned and honest visionaries who believe that it would have the effect of checking what they are pleased to term the natural growth of the law, another portion of it is real

94. 1870 N.Y. Laws ch. 33.

95. 1875 N.Y. Laws ch. 520.

96. Field's efforts at codification have a tortuous history. The New York Constitution of 1846 required the legislature to appoint three commissioners to codify the state's substantive law. N.Y. CONST. of 1846, art. I, § 17. In 1847 the legislature created Commissioners of the Code. 1847 N.Y. Laws ch. 59. The first report of the commissioners expressed doubt as to whether the task could be accomplished. M. LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA 134-35 (1924); Reppy, *The Field Codification Concept* in FIELD CENTENARY ESSAYS 17, 38 (A. Reppy ed. 1949). In 1850 the legislature repealed the act creating the commission. 1850 N.Y. Laws ch. 281. Field, the principal advocate of codification in New York, then engaged in an extensive campaign to revive the effort. In 1857 he succeeded in having the legislature recreate the Code Commission and he was appointed as a member. 1857 N.Y. Laws ch. 266. From then until 1865 the commissioners worked on political, civil, and penal codes. M. LANG, *supra* at 136-40. The final report of the commissioners, on February 13, 1865, contained completed codes, but the legislature failed to adopt them.

97. Reppy, *supra* note 96, at 46-48.

98. *Id.*

99. The bar association sponsored the publication of numerous pamphlets in opposition to the code. The Association established a special committee to urge rejection of the proposed civil code. *Id.* See also 22 AM. L. REV. 284 (1888).

100. Letter from "One Hundred Lawyers" to the editor (May 1880), reprinted in 21 ALB. L.J. 419 (1880). See Letter from "A Thousand Lawyers" to the editor (May 1880), reprinted in 21 ALB. L.J. 380 (1880) (expressing opposition to codification).

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dishonesty, having a foundation in no higher motive than the desire of lawyers to keep the law in a state of confusion and mystery, and thereby increase legal business and enhance legal fees.¹⁰¹

The “learned and honest visionaries” comprised the second group of opponents. These conservative lawyers opposed codification on theoretical grounds; they viewed the common law as the embodiment of customary behavior and statutory law as an interference with this “natural” system.¹⁰²

The third group of opponents generally favored codification but opposed the Field codes because they thought that the codes were poorly prepared. For example, one supporter of codification criticized the system of classification which Field used because it ignored the excellent works on the subject prepared by scholars in the analytical tradition.¹⁰³ Similarly, Frederick Pollock, an advocate of codifica-

101. 20 AM. L. REV. 100, 101 (1886).

102. For example, James Coolidge Carter, an influential member of the New York bar, opposed codification for this reason. J. C. CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW* (1884) (pamphlet written on behalf of the New York City Bar Association's Special Committee in Opposition to the Codes); Carter, *The Provinces of the Written and the Unwritten Law*, 24 AM. L. REV. 1 (1890). Proponents of codification responded to Carter's arguments. See, e.g., D. D. FIELD, *A SHORT RESPONSE TO A LONG DISCOURSE* (1884); Letter from Arthur Furber to the editor (March 1882), reprinted in 25 ALB. L.J. 259 (1882); 25 ALB. L.J. 221 (1882). Theodore Dwight, a law professor at Columbia, also made this argument. See Dwight, *Professor Dwight on the Code*, 25 ALB. L.J. 346 (1882). Dwight's criticisms were attacked. See, e.g., Field, *Professor Dwight and the Civil Code*, 25 ALB. L.J. 285 (1882); Letter from C.K. to the editor (March 23, 1882), reprinted in 25 ALB. L.J. 319 (1882); Letter from “One Who Is For The Code” to the editor (March 27, 1882), reprinted in 25 ALB. L.J. 260 (1882); 25 ALB. L.J. 344 (1882).

103. Platt, *The Proposed Civil Code of New York*, 20 AM. L. REV. 713 (1886). Platt concluded:

It must be admitted that our substantive law has become a vast, disordered mass and that most of our lawyers have only such ideas of its classification and relations of its parts as they happen to derive from the crude digests into which it is gathered. A code, therefore, even though it were exceedingly general and meager, which illustrated sound principles of classification so lucidly that they could be readily employed to reduce to mental order the chaos of statute and judiciary law beyond its scope, would be invaluable. Unfortunately, the *Civil Code* fails essentially to answer this description; and, owing to the fundamental imperfections of its method, it could, if adopted, have no other effect upon the existing confusion in the form of our law than to render that confusion more inveterate.

Id. at 717. See also S. AMOS, *AN ENGLISH CODE* 99 (1893). Similar complaints were made against New York's code of procedure. In 1876 and 1877 the New York legislature repealed the Field code and adopted a code of procedure prepared by Monroe Throop. 1877 N.Y. Laws chs. 416–417, 422; 1876 N.Y. Laws chs. 448–449. This excessively detailed enactment was widely criticized by both supporters and opponents of codification for its inflexibility. The code contained 3,356 sections, compared to 391 in the Field Code of Procedure which it replaced. 20 AM. L. REV. 578 (1886). The *Ameri-*

tion, called the civil code "about the worst piece of codification ever produced."¹⁰⁴ A more humorous expression of the opposition to codification appears in a newspaper report of the *Oades* case,¹⁰⁵ probably a fictional piece¹⁰⁶ written to expose the poor draftsmanship of the California codes, which were based on the Field codes.¹⁰⁷ The newspaper comments:

can Law Review labeled it a "legal monstrosity" but nonetheless argued that this failure should not be conclusive against codification. *Id.*

104. Pollock, *Preface to D. MULLA & F. POLLOCK, INDIAN CONTRACT LAW AND SPECIFIC RELIEF ACTS at ix.* (1905), quoted in Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 CALIF. L. REV. 766, 778 n.45 (1954). Pollock, the editor of the *Law Quarterly Review*, expressed the same thought in a comment he inserted at the end of an article by M.D. Chalmers, the drafter of the English Bills of Exchange Act. Chalmers, *An Experiment in Codification*, 2 LAW Q. REV. 125, 134 (1886).

105. *Weekly Express*, Dec. 18, 1873, reprinted in 20 AM. L. REV. 764 (1886).

106. Internal evidence leads to the conclusion that the account is fictional. Mr. Oades speaks of the decline of natural law in defending his living arrangements. It seems implausible that someone with the background of Oades would be conversant with the principles of natural law. The interview with the codifier also seems implausible.

107. Oades was an Englishman who immigrated to San Bernardino, California, and married a young widow (hereinafter referred to as Mrs. Oades No. 2). Sometime in 1873, a woman (Mrs. Oades No. 1) arrived in San Bernardino with three children and began to live with Oades and his new wife, also holding herself out as his wife. Because of this conduct the neighbors filed a criminal complaint against Oades and wife No. 1 for open and notorious cohabitation and adultery. At the trial Oades proved that he and No. 1 had been lawfully married in England twenty years earlier. Based on this evidence, they were acquitted.

A similar complaint was then brought against Oades and No. 2. At this trial Oades proved that he and No. 1 had been living at a frontier settlement in New Zealand about 8 years before when, in Mr. Oades' absence, the settlement was attacked by a tribe of savages. When Oades returned he found evidence of human remains in his burned home. From this and other information which he gathered over the next few years, Oades concluded that his family had been killed. Subsequently he moved to California and in good faith married No. 2. Oades moved to dismiss the charges based on § 61 of the California Civil Code, which provided that the second marriage of a person with a former spouse was void "[u]nless his former husband or wife was absent and not known to such person to be living for the space of five successive years immediately preceding the subsequent marriage, in which case the subsequent marriage is void only from the time its nullity is adjudged by a proper tribunal." CAL. CIV. CODE § 61 (1872) (amended 1873). Based on this provision, the complaint was dismissed.

The neighbors then complained to the local district attorney who presented the case to a grand jury which returned a true bill for bigamy. At trial the prosecution argued that the code could not have intended to make bigamy lawful, while the defense asserted that criminal statutes should be strictly construed. The court ruled for the defense and dismissed the charge.

Subsequently, the neighbors gathered to consider what action to take. Some suggested proceeding to annul the marriage under § 82 of the California Civil Code, but § 83 stated that such a suit could be brought only by one of the parties to the marriage and none of the parties seemed to want to do so. The newspaper article concluded that neigh-

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[I]t couldn't be expected that a commission of three men, without any special training or experience for the purpose, could complete in two years a work for which Justinian had found it necessary to employ the great Tribonian and seventeen other of the most eminent lawyers in the Empire during many years; a work of such transcendent difficulty that the greatest of English jurists, Austin, had thought it necessary to recommend that a large number of the ablest men should be especially educated for it and should devote their whole lives to it; a work, finally, so extensive that it had taken even Mr. David Dudley Field some time to accomplish it. As for himself, he said he never had pretended to be much of a codifier, but the position was offered to him with a good salary and he didn't feel called upon to decline it; that he made it a rule never to decline anything that was offered on account of his own incompetency—that being a matter that concerned only those who employed him; that if anyone were to offer to employ him to make a piano or a steam engine—which was as much out of his line as codifying itself, he would accept the offer provided always that it was on a salary, and that he was not to be paid by the job.¹⁰⁸

In California and a few other states, codes of substantive law were enacted,¹⁰⁹ but codification failed to remedy the ills of the legal system. John Norton Pomeroy, in a series of articles,¹¹⁰ criticized the

bors were at a loss as to what to do but that violence was rumored. *Weekly Express*, *supra* note 105.

108. *Id.* at 768–69.

109. See M. LANG, *supra* note 96, at 152–59; Kleps, *The Revision and Codification of California Statutes 1849–1953*, 42 CALIF. L. REV. 766, 774–75 (1954). Lang traces the history of the adoption of codes in North and South Dakota and Montana. Prior to the Civil War, Georgia had adopted a code system. M. LANG, *supra* at 149–52.

110. Pomeroy, *The True Method of Interpreting the Civil Code* (pts. 1–3), 3 W. COAST REP. 585, 691, 717 (1884), (pts. 4–7), 4 W. COAST REP. 1, 49, 109, 145 (1884). Pomeroy criticized four aspects of the code. First, he charged that the drafters had either failed to express their intent clearly or had changed prior law without good reason. For example, the California code seemed to prevent lapse only in the case of devises of real estate. Pomeroy argued that it was impossible to conclude that the authors of the code intended to have the common law rules in effect for legacies. The result of this was that courts would either be compelled to interpret the code section to include legacies or to follow the code in situations in which the result was intuitively unreasonable. 3 W. COAST REP. at 587–90. Second, he charged that the code was poorly arranged. Provisions dealing with the rights of finders of money and goods were contained in the Political Code. The division of the code on “Successions” rather than the section on “Marriages” or “Parent and Child” contained a clause which provided that the children of all void marriages were legitimate. *Id.* at 591–93. Third, the drafters unnecessarily abandoned familiar terms to create a new nomenclature. The code abandoned the distinction between express and implied authority of an agent in favor of actual and ostensible authority. The concept of a trust relationship was extended to situations in which it had not previously been applicable, such as attorney and client. New terminology on the form of endorsements was introduced. As a result the code increased uncertainty in the

California code and argued that the California courts should mend the code's defects by interpreting it as declarative of the common law unless a clear intent to the contrary was expressed.¹¹¹ The California Supreme Court ultimately adopted Pomeroy's approach, thereby negating the effect of codification to a large extent.¹¹²

In some cases, codification actually added to the doctrinal confusion. State legislatures were still inexperienced at updating and revising the codes. In California, for example, the legislature failed to provide for a permanent commission to incorporate new legislation into the codes.¹¹³ As a result, a large body of uncodified statutory law developed. Despite efforts at code revision, little progress was made for many years. In 1929, when a permanent code commission was appointed, it stated in its first report: "The California statutory law is in a deplorable condition. Familiarity with it tends to blind practitioners to its defects, but law writers and publishers unite in considering it the worst statutory law in the country."¹¹⁴

Codification of procedural law was more successful. By 1900 approximately one-half of the states had adopted codes based on the Field code which had been enacted in New York in 1848.¹¹⁵ The relative success of procedural codification seems to stem from the fact that the bar did not oppose procedural codification as strongly as substantive codification. There was widespread agreement within the profession that the common law system of pleading needed reform.¹¹⁶

2. *Codification at the national level*

The ABA sponsored a somewhat more successful campaign for

law by creating matters for judicial construction. *Id.* at 691-96. Finally, the drafters were unnecessarily concise. Important issues could be resolved only by inferences from the language of the code. No illustrations were included. *Id.* at 717-21, 4 W. COAST REP. at 1-6.

111. Pomeroy, *supra* note 110, 4 W. COAST REP. at 110.

112. *Sharon v. Sharon*, 75 Cal. 1, 28, 16 P. 345, 357 (1888). Section 55 of the California Civil Code provided, "Marriage is a personal relation, arising out of civil contract, to which the consent of the parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations." CAL. CIV. CODE § 55 (1872) (amended 1895). The court interpreted the section as declarative of the common law rule that consent plus consummation was sufficient to establish a marriage, but that public celebration was not required. 75 Cal. at 28-30, 16 P. at 357-58.

113. Kleps, *supra* note 109, at 779-80.

114. *Id.* at 793.

115. C. CLARKE, HANDBOOK OF THE LAW OF CODE PLEADING 24 (2d ed. 1947).

116. C. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* 395 (1974) (unpublished doctoral thesis in University of Maryland Library).

codification at the national level. Although originally formed in 1878 principally as a social organization,¹¹⁷ the ABA soon began to support law reform. Leading members of the ABA, such as Thomas Semmes, one of its presidents, advocated codification and criticized lawyers who opposed the movement because of self-interest.¹¹⁸

More significant than individual declarations, however, was the ABA's institutional support for codification. In 1884, the ABA appointed a special committee to report on ways in which delay and uncertainty in the law could be prevented.¹¹⁹ The next year the committee presented a report through Field and John Dillon containing fourteen recommendations.¹²⁰ All were adopted by the ABA except the thirteenth, which dealt with codification, providing that "[t]he law itself should be reduced, as far as possible, to the form of a statute."¹²¹ Although the drafters of the report denied that the thirteenth provision was an endorsement of general codification,¹²² many members apparently considered the proposal this way. Because of the significance of the issue, the ABA voted to postpone consideration until 1886 and reappointed the special committee to consider the subject of general codification.¹²³

During the next year, Field, on behalf of the committee, sent a circular to the approximately 700 members of the ABA asking various questions relating to the issues of delay and uncertainty in the law. Several questions dealt with codification.¹²⁴ Although only forty to fifty members responded, the majority of those felt that reduction

117. See 1 A.B.A. REP. 429 (1878) (general discussion of formation of the ABA).

118. Semmes, *Codification, The Natural Result of Evolution of the Law*, 9 A.B.A. REP. 189 (1886). The following articles also supported codification: Hoadly, *Codification*, 11 A.B.A. REP. 219 (1888); MacFarland, *The Evolution of Jurisprudence*, 16 A.B.A. REP. 271 (1893).

119. 7 A.B.A. REP. 77 (1884).

120. 1885 *Special Committee Report*, *supra* note 61, at 362.

121. *Id.* at 364.

122. Remarks of David Dudley Field, Eighth Annual Meeting of the ABA (Aug. 21, 1885), *reprinted in* 8 A.B.A. REP. 73, 75 (1885).

123. 8 A.B.A. REP. 83-84 (1885).

124. The first question dealt with codification and asked four subquestions:

1. In your opinion, is it practicable and desirable to reduce to the form of a statute the entire body of the general rules of the law of rights and remedies, so far as the same have been settled by the decisions of the courts?

2. Is it practicable and desirable to attempt, by the aid of legislation, with or without the aid of a commission, to settle and reduce to the form of a statute those questions of law which are known to be unsettled and disputed?

3. Are there any special subjects in the law which at present rest in judicial decisions only, which might usefully be reduced to the form of a statute? If so, please state what those subjects are and give your reasons for your conclusion.

4. Do you favor the adoption of the resolution pending before the American Bar

of both settled and disputed principles of common law to the form of a statute was both desirable and practicable and favored adoption of the codification recommendation pending before the ABA.¹²⁵

In 1886 the special committee again reported to the ABA in favor of the recommendation with one member dissenting.¹²⁶ At the annual meeting the membership debated the meaning of this recommendation. Proponents such as Field and Dillon argued that the resolution did not endorse *general* codification, by which they meant a comprehensive statement and revision of all law, both written and unwritten.¹²⁷ Instead, they argued the resolution meant that only settled principles were to be reduced to a statute and, even then, only "so far as practicable."¹²⁸

Field, however, quite obviously viewed the recommendation as the first step toward his ultimate goal of general codification.¹²⁹ His opponents interpreted the resolution as implicitly endorsing general codification and argued that, in any event, passage of the recommendation would appear to be support for general codification by the ABA.¹³⁰ Several attempts to substitute more obviously limited recommendations or to amend the proposed recommendation to make it clear that the ABA did not support general codification were defeated.¹³¹ The membership finally passed a substitute resolution,

Association, that the law should be reduced, as far as possible, to the form of a statute?

Report of the Special Committee On Delay and Uncertainty In Judicial Administration, 9 A.B.A. REP. 325, 388-89 (1886).

125. The responses were as follows:

1. Desirable and practicable - 24, desirable but not practicable - 3, not desirable - 20, uncertain response - 1.
2. Desirable and practicable - 17, either undesirable or impracticable - 12.
3. Subjects mentioned included commercial law and navigation.
4. Yes - 23, no - 16.

These responses were tabulated from the answers to the circular. *Id.* at 395-412.

126. *Id.* at 356.

127. Remarks of John F. Dillon, Ninth Annual Meeting of the ABA (Aug. 19, 1886), *reprinted in* 9 A.B.A. REP. 14 (1886); Remarks of David D. Field, Ninth Annual Meeting of the ABA (Aug. 19, 1886), *reprinted in* 9 A.B.A. REP. 18 (1886).

128. Remarks of John F. Dillon, *supra* note 127, at 16.

129. Remarks of David D. Field, *supra* note 127, at 18-19.

130. *See, e.g.*, Remarks of Austen G. Fox, Ninth Annual Meeting of the ABA (Aug. 20, 1886), *reprinted in* 9 A.B.A. REP. 59 (1886).

131. Stephen P. Nash offered a substitute motion stating that the subject of codification was irrelevant to the question of remedy for delay and uncertainty. 9 A.B.A. REP. 72 (1886). This motion was defeated 53 to 42. *Id.* Henry Wise Garnett of the District of Columbia moved that the resolution be amended to include the statement, "This Association does not, however, favor or oppose what is known as 'codification'." *Id.* at 30. This motion was defeated 49 to 29. *Id.* at 73.

which Field had accepted on behalf of the committee, providing that “[t]he law itself shall be reduced, so far as its substantive principles are settled, to the form of a statute.”¹³²

Subsequently, the ABA took other actions in support of codification. Two years later the ABA adopted a resolution favoring codification of civil and criminal procedure in the federal courts.¹³³ In 1889 the ABA appointed a special committee to consider the subject of uniformity in state legislation.¹³⁴ That year the New York legislature passed a statute appointing commissioners who were authorized to solicit the appointment of commissioners from other states with a view to promoting uniformity in state legislation.¹³⁵ The ABA’s special committee reported these developments and the ABA passed a resolution supporting the actions of the New York commissioners.¹³⁶ In 1892 the first meeting of the Commissioners on Uniform State Laws was held in connection with the annual meeting of the ABA.¹³⁷ At first the commissioners were mainly concerned with technical questions, such as standardized forms for acknowledgment of instruments,¹³⁸ but they soon considered more substantial questions, such as divorce, negotiable instruments, and sales. By the early part of the twentieth century, the commissioners had prepared uniform laws on these subjects.¹³⁹

3. *The frustration of the codification movement*

Experience had made both supporters and opponents of codification skeptical of the ability of state legislatures to produce a codification of the common law¹⁴⁰ and the ABA lacked the necessary re-

132. *Id.* at 73–74. The vote in favor of the resolution was 58 to 41. *Id.*

133. 11 A.B.A. REP. 79 (1888).

134. 12 A.B.A. REP. 50–51 (1889).

135. 1889 N.Y. LAWS ch. 289.

136. 13 A.B.A. REP. 29–30, 336–37 (1890).

137. *See* 1892 NAT’L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS HANDBOOK AND PROCEEDINGS.

138. *Id.* at 5–9.

139. *See* UNIFORM NEGOTIABLE INSTRUMENTS ACT (1896); UNIFORM SALES ACT (1906). Both of these uniform acts were replaced by the Uniform Commercial Code.

140. For example, a contributor to the *American Law Review* commented:

But the legislature, unless it should remain in session all the time, could not keep up with the follies of the courts in some jurisdictions. The legislatures, with their periods of session limited by constitutions, have too much to do to busy themselves with setting right the untenable decisions of the courts, rendered in private litigations, which by the force of the rule of stare decisis become the law for the whole people. Furthermore, such legislators as the people generally elect are not competent to perform such a task; for, bad as the decision of the courts may be, the deci-

sources. The chairman of the ABA's special committee on classification,¹⁴¹ a project regarded by advocates of codification as a necessary first step, remarked:

The Committee . . . [has] in times past done a great deal of work, but [has] accomplished very little results—perhaps less of practical result than [it has] of academic. The reason is, of course, that the Association and its committees cannot act practically upon a classification of the law and carry it out without the expenditure of more time and money than any ordinary committee can devote to it.¹⁴²

The National Conference of Commissioners on Uniform State Laws also was unable to achieve its goals completely. The Conference itself was poorly funded;¹⁴³ thus, it depended on preliminary work by others or the receipt of grants in order to undertake projects.¹⁴⁴ Uniformity was difficult to achieve: states were slow in appointing commissioners,¹⁴⁵ few acts were enacted by all states,¹⁴⁶ and courts often

sion of the legislature will generally be worse. The members of the legislature know this, and therefore they refrain from undertaking it, with limited exceptions. Note, *Codification*, 24 AM. L. REV. 655, 656 (1890).

141. In 1888, a New York lawyer, Henry T. Terry, asked the ABA to sponsor a work on classification of the law. Letter from Henry T. Terry to the A.B.A. (Aug. 1888), reprinted in 12 A.B.A. REP. 327 (1889). Terry argued that such a work would help with the problem of the growing mass of reported decisions by providing a standard arrangement for digests and indexes. *Id.* at 328. Terry also claimed that the project would be acceptable to both proponents and opponents of codification. Advocates could consider the work as a step in the direction of codification while opponents could conclude that the development of a system of classification would eliminate the need for legislative action. *Id.* at 336–37. The special ABA committee appointed to consider Terry's proposal made reports in 1891, *Report of the Committee on Classification of the Law*, 14 A.B.A. REP. 379, 384 (1891), and 1902, *Report of the Committee on Classification of the Law*, 15 A.B.A. REP. 425 (1902). This committee was later revived when the ABA became interested in preparing Restatements of the common law. See text accompanying note 158 *infra*.

142. Remarks of James D. Andrews, Twenty-Eighth Annual Meeting of the ABA (Aug. 23, 1905), reprinted in 28 A.B.A. REP. 85 (1905).

143. Lewis, *The Work of the American Law Institute in Relation to Business Law*, 9 AM. L. SCH. REV. 724, 726 (1940). Lewis stated, "The Conference always has been, as it still is, hampered in its work by lack of funds." *Id.* At the first meeting of the ALI, the President of the National Conference of Commissioners, Nathan William MacChesney, offered a resolution that the Institute provide funding to the National Conference. The resolution was tabled. 1 ALI PROCEEDINGS, pt. II, at 40–42 (1923).

144. The conference's first success, the Negotiable Instruments Act, was based on the English Bills of Exchange Act, which had been drafted by Chalmers.

145. Because of attendance problems as well as the failure of some states to appoint commissioners, the Conference appointed a special committee in 1900 to examine the problem of participation. The committee proposed a uniform act for creation of boards of commissioners in all states. 1901 NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS HANDBOOK AND PROCEEDINGS 5–6.

146. See Remarks of Gilbert H. Montague. Thirty-Seventh Annual Meeting of the

construed the acts in a nonuniform manner.¹⁴⁷

The problems which developed in the nineteenth century legal system called for efforts to organize and unify the law. Codification seemed to be the most appropriate solution, but existing institutions proved inadequate to complete the task.

IV. THE RESTATEMENT MOVEMENT AS AN EXTENSION OF THE LATE NINETEENTH CENTURY CODIFICATION MOVEMENT

The Restatement project, begun in 1923 by the ALI, represents a continuation and modification of the late nineteenth century codification movement. This link is shown in two ways. First, the sponsorship of the Restatements came from professional law teachers and elite lawyers associated with the ABA, the same groups which were the principal sponsors of codification. Second, the goals and fundamental ideas of the advocates of the Restatement project were substantially the same as those of the late nineteenth century codifiers.

A. The Sponsorship of the Restatement Project

After the formation of the Association of American Law Schools (AALS) in 1900, law teachers began meeting to discuss common problems including the proper role of the law professor in society. Some professors spoke out on public issues and urged law reform;¹⁴⁸ many believed they had a social and professional responsibility to improve the legal system.¹⁴⁹

In order to implement this goal of public service and law reform, law professors advocated the creation of a juristic center for the scientific study and improvement of law. In 1907 the AALS passed a resolution establishing a committee to investigate the financing of such a center,¹⁵⁰ but nothing seems to have come from this effort. In 1915

National Conference of Commissioners on Uniform State Laws (Aug. 26, 1927), reprinted in 1927 NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS HANDBOOK AND PROCEEDINGS 270-305.

147. See, e.g., Hargest, *Keeping the Uniform State Laws Uniform*, 76 U. PA. L. REV. 178 (1927).

148. See Lewis, *Legal Education and the Failure of the Bar to Perform its Public Duties*, 30 A.B.A. REP. 34 (1906); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

149. See, e.g., Vance, *The Ultimate Function of the Teacher of Law*, 26 A.B.A. REP. 752 (1911).

150. 31 A.B.A. REP. 1057 (1907).

Wesley Hohfeld, a Yale professor, presented a paper to the AALS outlining six topics for research by law professors.¹⁵¹ Hohfeld's paper revitalized interest in the creation of a center for scholarly research and that year the American Academy of Jurisprudence, consisting of 50 leading scholars and jurists, was formed to consider such a center.¹⁵² The next year the president of the AALS expressed hope that Hohfeld's ideas could be realized through the creation of a center for research.¹⁵³ The AALS again appointed a committee to investigate the creation of such an institution,¹⁵⁴ but no progress was made until after World War I. In 1920 the AALS again appointed a committee, this time chaired by Joseph Beale of Harvard, to investigate the creation of a juristic center.¹⁵⁵ In 1921 the Beale committee recommended that the AALS create a committee with the power to invite the appointment of similar committees from courts and bar associations for the purpose of creating a permanent organization for the improvement of law.¹⁵⁶ The AALS reappointed the Beale committee as the Committee on the Establishment of a Juristic Center to carry out this recommendation.¹⁵⁷

While law professors were attempting to organize an institution devoted to the scientific study of the legal system, the elite lawyers of the ABA were taking similar action. In 1916 Elihu Root, the president of the ABA, called for a systematic classification of the law.¹⁵⁸ The next year the ABA recreated the special committee on classification of the law¹⁵⁹ which had expired in 1905. In 1919 the committee recommended that a general conference of jurists and scholars be held to consider the preparation of a system of classification. The following year the ABA approved a resolution submitted by the committee calling for cooperation with any body which "has for its purpose the car-

151. Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?*, 1914 AALS HANDBOOK AND PROCEEDINGS 76, 137.

152. *Report of the Special Committee on Classification and Restatement of the Law*, 6 A.B.A.J. 420, 421 (1920) (refers to creation of American Academy of Jurisprudence).

153. Richards, *Progress in Legal Education*, 1915 AALS HANDBOOK AND PROCEEDINGS 60, 75-76.

154. 1915 AALS HANDBOOK AND PROCEEDINGS 27-28.

155. 1920 AALS HANDBOOK AND PROCEEDINGS 75-76.

156. 1921 AALS HANDBOOK AND PROCEEDINGS 116, 123.

157. *Id.* at 116; 1 ALI PROCEEDINGS, pt. II, at 3 (1923).

158. Address by President Elihu Root, Thirty-Ninth Annual Meeting of the ABA (Aug. 30, 1916), reprinted in 41 A.B.A. REP. 365 (1916).

159. 44 A.B.A. REP. 261 (1919).

rying on of the proposed work of classification and restatement of law."¹⁶⁰

As a result of personal discussions between William Draper Lewis,¹⁶¹ who was a member of the AALS's committee on a juristic center, and Root, a meeting was held in May 1922 in which members of the Beale committee and influential members of the bar, including Root, discussed the project of classification and restatement. The group decided to form itself into the Committee on the Establishment of a Permanent Organization for the Improvement of Law and voted to prepare a report dealing with the desirability of establishing such an organization.¹⁶²

During the next six months, William Draper Lewis and Samuel Williston prepared the report,¹⁶³ which recommended the creation of a permanent organization for the improvement of law. The Committee on Permanent Organization approved the report in January 1923, ordered its publication, and initiated steps to convene a meeting of influential members of the American bar as recommended by the report. In February 1923, this meeting was held and, with little apparent discussion of the desirability of the project, those in attendance voted to incorporate the ALI and prepare Restatements of the common law.¹⁶⁴

B. The Character of the Restatements and Late Nineteenth Century Codification

Two characteristics of the Restatements support the theory that the Restatements were a continuation of the late nineteenth century codification movement. First, the purpose of the Restatement project was to reduce uncertainty and complexity in the law by producing an authoritative statement of the rules of the common law. Second, the

160. 45 A.B.A. REP. 84 (1920). In 1921 the Committee on Classification and Restatement recommended that the ABA support the project being contemplated by the American Academy of Jurisprudence, but this proposal was defeated on the recommendation of the executive committee of the ABA, apparently because of fear that the project was becoming commercialized. When the ALI was formed as a result of the actions of the committee of the AALS, the ABA naturally abandoned its committee.

161. Lewis, *History of the American Law Institute and the First Restatement of the Law, "How We Did It,"* in *RESTATEMENT IN THE COURTS* 1, 2 (1945).

162. 1 ALI PROCEEDINGS, pt. II, at 3-4 (1923).

163. Although a committee was appointed to prepare the report, most of the work seems to have been done by Lewis and Williston. See Lewis, *supra* note 161, at 3.

164. 1 ALI PROCEEDINGS, pt. II, at 20 (1923).

form of the Restatements was similar to the form of a code.

The report which sparked the Restatement project identified a series of factors which tended to increase the uncertainty and complexity of the law. These factors are essentially identical to those which prompted the efforts of the codifiers.¹⁶⁵ Like the codifiers, the restaters hoped to deal with the problems of the legal system by producing an authoritative statement of the common law. Although they did not favor legislative enactment, the supporters of the Restatement project hoped to give the work authority approaching that of a code by creating a prestigious organization representing the American bar:

To fulfill its objects the restatement must have authority greater than that now accorded to any legal treatise, an authority more nearly on a par with that accorded the decisions of the courts. To develop among judges and lawyers the feeling that the restatement has this high degree of authority the work of making the restatement must from its inception be generally recognized as a work carried on by the legal profession in fulfillment of an obligation to the American people, to promote the certainty and simplicity of the law, and its adaptation to the needs of life.¹⁶⁶

The method of work was designed to add to the authority of the Restatements. The report recommended a three-step process: the selection of a reporter to prepare drafts of the Restatement,¹⁶⁷ the submis-

165. The Report of the Committee on Permanent Organization concluded that the following factors were causing increasing uncertainty in legal doctrine:

1. Lack of agreement on the fundamental principles of the common law;
2. Lack of precision in the use of legal terms;
3. Conflicting and badly drawn statutory provisions;
4. Attempts to distinguish two cases where the facts present no distinction in the legal principles applicable;
5. The great volume of reported decisions;
6. Ignorance of judges and lawyers;
7. The number and nature of novel legal questions;
8. Varying law in different jurisdictions.

1 ALI PROCEEDINGS, pt. I, at 66-76. The following were given as the causes of complexity:

1. Complexity in the conditions of life;
2. Lack of systematic development of the law;
3. The unnecessary multiplication of administrative provisions;
4. Varying law in different jurisdictions.

Id. at 76-95.

166. 1 ALI PROCEEDINGS, pt. I, at 29 (1923).

167. The ALI Council chose William Draper Lewis of the University of Pennsylvania as director. 1 ALI PROCEEDINGS, pt. III, at 8 (1923). The reporters for the Restatements were as follows: Contracts, Samuel Williston of Harvard; Conflicts, Joseph Beale

sion by him of the drafts to a committee of experts for criticism, and the circulation of a draft approved by the committee to a larger body of the profession for review. This process, it was believed, would lead to a Restatement that had been widely read and accepted.¹⁶⁸

The second similarity between the Restatements and the codes was their analytical form. The Restatements were to be divided into a series of topics based on a system of classification.¹⁶⁹ Each topic contained a statement of fundamental principles as detailed as that which would be found in a well-drawn statute.¹⁷⁰ Such a precise statement of principles was necessary if the Restatement was to alleviate some of the causes of uncertainty and complexity which plagued the common law, such as lack of agreement on fundamental principles, lack of precision in the use of legal terms, and lack of systematic development.

C. *The Restatements and Traditional Bar Opposition to Codification*

Perry Miller, in *The Life of the Mind in America*, argues that the bar opposed the codification movement in the period before the Civil War.¹⁷¹ The opposition of the New York bar in the late nineteenth century has already been noted.¹⁷² This traditional professional opposition seems to contradict the argument that the Restatement project represents a continuation of a bar-sponsored codification movement. The apparent contradiction, however, arises from the erroneous assumption that the codification movement and the attitude of the legal profession toward codification were monolithic.

Proponents of codification have differed on two fundamental questions: the effect of a code on prior law, and the extent to which codification would take responsibility for developing legal doctrine away from the legal community by controlling judicial discretion and

of Harvard; Torts, Francis Bohlen of the University of Pennsylvania; Agency, Floyd Mechem of the University of Chicago. The reasons for these choices are not clear but two factors were significant: reputation in the field and the extent to which the individual had prepared materials which would be useful in the preparation of the Restatements.

168. 1 ALI PROCEEDINGS, pt. I, at 50 (1923).

169. One of the first acts of the ALI Council was to appoint Roscoe Pound as a special advisor on classification and terminology. 1 ALI PROCEEDINGS, pt. III, at 41, 114 (1923). Pound delivered a report to the Institute in which he discussed various theories of classification and recommended that the Institute follow the traditional categories of the common law. 2 ALI PROCEEDINGS 379-425 (1924).

170. See notes 32 & 33 and accompanying text *supra*.

171. P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 252 (1965).

172. See notes 99-104 and accompanying text *supra*.

eliminating the need for lawyers. Radical codification sought both to overthrow prior legal doctrine and to remove control of the legal system from lawyers. In the early nineteenth century Jeremy Bentham and his supporters in this country proposed to abolish the common law and replace it with a codified system founded on the principle of utility.¹⁷³ Bentham also claimed that adoption of a code would control judicial discretion and simplify the law so as to minimize the need for lawyers. Moderate codifiers, while favoring law reform, rejected a brand of codification like Bentham's which was antiprofessional. William Sampson proposed to codify the law in order to rid it of English influence and bring it into greater harmony with American conditions. But Sampson, who was a lawyer, attacked only the system of laws not the legal profession.¹⁷⁴ By contrast, the goals of conservative codification have been to preserve the common law and the position of the profession rather than to promote change. Joseph Story proposed codification of the basic principles of the common law in order to make the law more certain. Story's code, designed to simplify the work of judges and lawyers, also envisioned a continuation of the judge's traditional common law function.¹⁷⁵

The legal profession has not been of one mind as to codification. The attitudes of lawyers have varied depending on how codification affected their interests.¹⁷⁶ Because Bentham's proposals were radical, representing an attack on the legal profession, the bar was practically unanimous in its opposition.¹⁷⁷ Although Bentham's proposals were not accepted, there was widespread belief within the profession in the early part of the nineteenth century that the legal system suffered from problems, especially uncertainty of doctrine.¹⁷⁸ For this reason more temperate codification proposals were debated during the 1820's and 1830's. The main issue in these debates was the degree to which the American legal system would be freed from English influence. Moderate lawyers, such as Sampson, proposed creation of a unique American legal system, while Story and other conservative lawyers favored codification which would maintain continuity with the English common law.¹⁷⁹ By the Civil War, however, a variety of

173. C. COOK, *supra* note 116, at 188-90.

174. M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY* 75-78 (1976).

175. C. COOK, *supra* note 116, at 198-202.

176. The word "interests" is used here to mean the collection of values which a group considers important. It includes intellectual as well as economic commitments.

177. C. COOK, *supra* note 116, at 186.

178. *Id.* at 133-68.

179. *Id.* at 226-72. Cook labels Story a "moderate" and Sampson a "radical" but the classification used in this article seems to capture their thought more accurately.

factors, including opposition by members of the bar who were traditionalists and opposed to all tampering with the common law system, had caused the codification movement to wane.¹⁸⁰

After the Civil War, intensification of the problems which had produced the original codification movement, confusion and consequent delay in the legal system, produced new demands for codification. This renewed codification movement was led by groups in the legal profession which emerged in the last quarter of the nineteenth century, professional law teachers and corporate lawyers. Unlike traditional lawyers whose interests were served by opposing codification, these lawyers favored the idea because it was in their interest to do so. Law professors were devoted to the ideals of public service and a science of law and were not financially threatened by a change in the legal system. The professors viewed participation in the codification movement as a form of public service and believed that reducing the law to a written, systematic form would demonstrate its scientific character. Corporate lawyers, who were a prominent force in the ABA, supported codification because their clients, such as banks, railroads, and warehouses, conducted interstate business transactions in which uniformity and certainty in the law were highly desirable.¹⁸¹ Because their financial position was secure, codification did not appear threatening.

This second wave of the codification movement was essentially conservative;¹⁸² it neither challenged the role of lawyers in the legal system nor threatened established legal doctrine to a significant degree.¹⁸³ In older states, such as New York, traditionalists were still

180. *Id.* at 382, 421. First, because judges adapted the common law to American conditions, one of the motivations for codification no longer existed. Second, the development of treatises and digests helped to alleviate the problem of uncertainty. Third, public interest in law reform centered on other questions, such as selection of the judiciary and access to the bar.

181. The generalization that corporate lawyers were a force in the ABA comes from a review of the obituaries of ABA members which were contained in ABA reports until 1912. *See, e.g.*, 37 A.B.A. REP. 614-61 (1912) (especially the obituaries of New York attorneys). Further, many of the prominent corporate lawyers mentioned by James Willard Hurst in *The Growth of the American Law* were ABA members. J. HURST, *THE GROWTH OF THE AMERICAN LAW* 333-79 (1950). The desire of such businesses for uniformity and certainty appears in their requests to the National Conference of Commissioners to draft uniform laws. *See, e.g.*, Letter from the American Warehousemen's Association to the National Conference of Commissioners on Uniform State Laws (Sept. 22, 1904) (requesting that the Conference consider the preparation of a uniform act pertaining to warehouse receipts), *reprinted in* 27 A.B.A. REP. 605-06 (1904).

182. *See* note 175 and accompanying text *supra* (definition of "conservative codification").

183. C. COOK, *supra* note 116, at 422-33.

able to prevail. Codification was more successful in newer states, such as California, where traditional elements among the bar were not as strong and where the need for codification was greater because legal doctrine was more unsettled.¹⁸⁴

Professors and corporate lawyers, unable to achieve their goals fully through the codification movement, regarded the initial Restatement project as an alternative means to influence the legal system. Restatements displaced neither lawyers nor judges and did not upset the usual functioning of the common law system. Restating the common law could also be completely accomplished by the advocates of the Restatements because they required no legislative enactment. There was, therefore, little reason and no obvious occasion for traditional lawyers to oppose the Restatement project.

D. The Opposition of the Legal Realists to the Restatements and the Realists' Codification Efforts

Under the leadership of Karl Llewellyn, probably the best known legal realist, codification of the law became part of the legal realists' program.¹⁸⁵ Realist support for codification coupled with their distaste for the Restatements seems in conflict with the thesis of this article that the restaters were sympathetic to the goals of codification. When the type of codification favored by the realists is identified, this apparent contradiction disappears.

Realists opposed conservative codification¹⁸⁶ because they believed it would calcify legal doctrine,¹⁸⁷ a result which was inconsistent with one of their fundamental principles, that legal doctrine should be considered as a means to an end, as functional rather than a static body of general rules.¹⁸⁸ By contrast, realists supported a moderate form of codification,¹⁸⁹ like the Uniform Commercial Code, because it was

184. See A. Van Alstyne, *The California Civil Code*, in ANNOTATED CALIFORNIA CODES, CIVIL CODE 1-6 (West 1954).

185. See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 270-340 (1973) (discussion of Llewellyn's involvement in the U.C.C.).

186. See note 175 and accompanying text *supra* (definition of "conservative codification").

187. See note 44 *supra*. Karl Llewellyn, however, supported codification at this early point. Llewellyn, *supra* note 45, at 340.

188. On the influence of other disciplines leading to the development of this principle in realist jurisprudence, see E. PATTERSON, *JURISPRUDENCE* 548-52 (1953) (influence of psychology); W. RUMBLE, *supra* note 9, at 4-20 (influence of pragmatism and sociology).

189. See note 174 and accompanying text *supra* (definition of "moderate codification").

consistent with the principle of functionalism.¹⁹⁰ A good example of the realist attitude to codification is contained in Jerome Frank's *Law and the Modern Mind*, in which Frank first describes the evils of codification for the sake of simplicity and precision¹⁹¹ but then states that "a code deliberately devised with reference to the desirability of growth and stated in terms of general guiding and flexible principles may some day prove to be the way out of some of the difficulties of legal administration in America."¹⁹² Thus, the realists came to criticize the Restatement project because it was inconsistent with the idea that law should be functional rather than because they perceived it as anticodification.

V. CONCLUSION

Codification has not been one movement but a series of movements. The Restatement movement was the outgrowth of a conservative codification movement which developed in the last quarter of the nineteenth century. Although this movement failed to achieve success at the state level because it was opposed by members of the bar who had traditional values, the movement was supported by two new groups in the profession, law professors and corporate lawyers. Those two groups ultimately produced the Restatements, a codelike response to the problems of the legal system. During the 1930's, the ideas held by these groups underwent change. Elite lawyers and law professors began to regard the law as functional rather than as a set of general rules. As this realist conception of legal doctrine became dominant, the profession supported a moderate rather than a conservative codification project, the Uniform Commercial Code.

190. The U.C.C., in contrast to the Restatements, eliminates the common law requirement of consideration for certain contracts, U.C.C. § 2-205, modifies the statute of frauds, *id.* § 2-201(2), and deemphasizes the importance of title, *id.* § 2-401. Article 9 unifies a variety of security devices under the concept of the security interest. *Id.* § 9-102(2). This moderate form of codification changes legal doctrine while preserving the traditional common law role of the judge and lawyers. For example, judges are directed by U.C.C. § 1-205 to take into account custom in applying the Code and may, pursuant to section 1-103, apply common law doctrine to the extent it is not inconsistent with the Code.

191. J. FRANK, *LAW AND THE MODERN MIND* 186-95 (1930).

192. *Id.* at 311.