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THE INFLUENCE OF BENTHAM'S PHILOSOPHY OF LAW ON THE EARLY NINETEENTH CENTURY CODIFICATION MOVEMENT IN THE UNITED STATES

INTRODUCTION

In the first and second decades of the nineteenth century rumblings of discontent with the legal system sounded in the eastern part of the United States. The dissatisfaction, rooted chiefly in hostility to "things English" and especially the English common law, was expressed in fiery rhetoric usually directed against those who voiced the opinion that the common law represented the "law of freedom" and the "birthright" of citizens of the United States.[1] By the beginning of the third decade of the nineteenth century the rather vague sense of unhappiness with the common law which had prevailed earlier became more clearly articulated; the issues were narrowed; and hot debate ensued between civilian and common law factions in the legal profession, the former advocating sweeping reform of the legal system, the latter asserting the need for legal stability and gradual reformation by modification of the common law.[2]

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1. *See, e.g.,* 3 DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 251 (J. Commons, U. Phillips, E. Gilmore, H. Sumner, & J. Andrews eds. 1958) [hereinafter cited as DOC. HIST.]. This is an excerpt from William Sampson's defense of the Cordwainers of New York, People v. Melvin, 2 Wheeler Crim. Cas. 262, 1 Yates Select Cases 81 (Ct. [Gen.] Sess. 1810), in which Sampson quotes freely from the opinion of Justice Levy, the recorder of Philadelphia, who compares the common law to a divine system of Providence.

2. In October, 1823, Charles Jared Ingersoll called for the emancipation of American legal thinking from feudal English thought. Address by Charles Jared Ingersoll, American Philosophical Society, Oct. 18, 1823, in THE LEGAL MIND IN AMERICA 78-82 (P. Miller ed. 1962) [hereinafter cited as Miller]. In the same year, Hoffman exalted the "durability" of the common law, saying, "it has survived many ages, and many revolutions of manners, and has yet been accommodated to them all." Address by David Hoffman, University of Maryland, 1823, in Miller 84, 89. Subsequently, William Sampson delivered his somewhat shocking *An Anniversary Discourse,* calling for codification. Address by William Sampson, Historical Society of New York, Dec. 6, 1823, in Miller 121. Shortly after Sampson presented his ideas to the Historical Society, a review of his thoughts appeared in the respectable *North American Review,* wherein convincing arguments for legal reform by codification were offered. Sedgwick, Book Review, 44 No. AM. REV. 411 (1824). In April, 1824, Peter DuPonceau, a Frenchman trained in civil law, sided with the anti-codificationists by proclaiming the impossibility of developing a code equal in merits to the common law. Valedictory address by Peter DuPonceau, Law Academy of Philadelphia, Apr. 22, 1824, in Miller 107. In 1827, Grimké argued for the possibility of reducing law to a code by using scientific method. Address by Thomas S. Grimké, South Carolina Bar Association, Mar. 17, 1827, in Miller 148. Finally, in 1828 an article appeared in *North American Review,* refuting the ideas of Sampson, Sedgwick, and Grimké. Porter, Book Review, 60 No. AM. REV. 167, 170-75 (1828).

By the middle of the fourth decade, although agitation for radical change in the legal system had almost completely subsided in professional circles—due in large part to the moderating effect which doctrinal writers and systematizers exercised in the legal profession[3]—new signs of discontent appeared among the growing labor force, frustrated as they were in their attempts to form unions by the court-enforced common law of conspiracy. Rhetoric used two decades earlier in professional debate over legal reform was revived and recast to fit new political realities.[4] The courts, however, responded to the roused feelings of labor by modifying the common law doctrine of conspiracy by demonstrating its two useful but disparate aspects—adaptability to the exigencies of the time and continuity with its historical past.[5]

By the middle of the nineteenth century both sides of the legal reform issue wearied of debate and controversy. A compromise position emerged in the creation of legislative commissions whose task it was to simplify by codification one or more particular areas of the common law by way of experiment. But even this moderate and practical approach met stiff resistance in some parts of the legal profession. It is not surprising, therefore, that despite the Herculean efforts of individual commission members these codes were only moderate successes.[6]

Such was the drift of the codification movement in the nineteenth century. The movement assumed such a variety of forms over the course of the century and was represented by spokesmen from such various backgrounds that attempts to capsulize the movement in a single formula inevitably present problems. Nonetheless, it is clear that at whatever stage of the movement one focuses, the influence of Jeremy Bentham is evident in one form or another especially among those who argued most vehemently for total codification of the laws.

In the eastern United States, three men, all lawyers, loomed large in pro-codificationist thought in the nineteenth century—William Sampson, Thomas Grimké, and Robert Rantoul. Each represented a different stage and facet of the movement—Sampson the post-revolution antagonism to "things English," Grimké the intellectual preoccupation with ordered systems of laws, and Rantoul the popular respect

3. The first volume of STORY ON BAILMENTS was published in 1832. KENT'S COMMENTARIES were begun at the time of his retirement from the bench in 1823, but appeared somewhat later.

4. L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 193 (Harper ed. 1967) [hereinafter cited as LEVY].

5. *Id.* at 202.

6. Miller 286-87.

for the legislature and concomitant reaction against a strong judiciary. Similarly, each of these spokesmen for the movement emphasized a particular aspect of Bentham's argument for codification. Sampson centered his attention on the Benthamite argument that the common law was "foreign" and therefore an impingement on complete independence, Grimké on the argument that the common law was "incognoscible" because it lacked coherent structure and internal consistency, and Rantoul on Bentham's argument that the common law was judge-made law and therefore a usurpation by the judges of the legislative function. Yet however different their points of departure and emphasis, all three men shared Bentham's view that codification had to be total to be effective at all.

The purpose of this paper is simply to examine the role of these three men in the codification movement in the first half of the nineteenth century, to point out the extent to which their thinking reflects the influence of Bentham's philosophy of law, and to offer some reflections on the outcome of the movement.

I. The Role of Bentham

The origins and development of the American codification movement have been attributed to six intermingling factors: first, a general hostility towards the common law as foreign; second, a general distrust of lawyers; third, the vast number of law reports; fourth, the Jeffersonian distrust of the judiciary; fifth, the influence of the Napoleonic Code; sixth, the influence of Jeremy Bentham.[7] After 1824 one might add a seventh factor alluded to in some of the writings during the professional debate of the twenties, the example of Livingston's efforts in Louisiana.[8]

Although Bentham's name rarely appeared in the writings and speeches either of those favoring codification or of those opposing it,[9]

7. Charles Warren gives a list of only five factors, omitting the fourth on my list. *See* C. Warren, A History of the American Bar 508 (Fertig ed. 1966). As to number four on my list, see M. Howe, Codification 1, April 1, 1948 (unpublished manuscript in Harvard Law School Library). Howe's list omits number three on my list which is, however, cited by Warren.

8. S.C. Codification (Grimké, chm. pro tem.), A Report on the Practicability and Expediency of a Code of the Statute and Common Law of South Carolina 5 (pamphlet 1827) [hereinafter cited as S.C. Report]. *See also* Sampson, *supra* note 2, at 130.

9. In my readings I recall having seen Bentham's name mentioned only once. In DuPonceau's writing, Bentham's name appears in a passage derogatory of the codificationists. DuPonceau, *supra* note 2, at 112.

there is little serious question about his influence over the various forms of the movement in the nineteenth century. In a letter addressed to President Madison in 1811 Bentham foreshadowed the American codification movement by listing almost all the arguments American pro-codificationists would use against the common law.[10]

In his arguments against the common law Bentham is uncompromising in his demand for codification. The cardinal principle in Bentham's jurisprudential system was that "law" should be so clear on its face that any man capable of reading could understand his rights and duties simply by reading a copy of the code of laws. Since the common law, according to Bentham, consisted of a "shapeless mass of *merely conjectural* and *essentially incognoscible matter*" in its existing form, it could not properly speaking be considered "law."[11] Furthermore, Bentham thought that the common law was incapable of improvement because of its very form. Therefore, however much the common law might be altered in content, so long as its form or method remained, it constituted "a course of successive acts of arbitrary power . . . ."[12] It was Bentham's hope that the reduction of "law" to a code would eliminate arbitrary exercise of judicial power by establishing clear and certain norms of conduct in place of the "semblance" of rules used by the judiciary under the common law system.[13] The means by which Bentham proposed to achieve legal clarification and certainty was to be found in scientific method. By reducing "law" to an internally consistent structure of principles and rules Bentham hoped to create a legal system which would eliminate the ambiguities inherent in the common law.

II. William Sampson (1764-1836)

Much of Sampson's hostility to the common law and concomitant desire for a national code stemmed from his experiences as a rebel Londonderry lawyer at the time of the Irish uprising in 1798[14] and

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10. 4 The Works of Jeremy Bentham 459-61 (J. Bowring ltd. ed. 1843). Editing Bentham's list to avoid redundancy, I have reduced his arguments to the following few: (1) the common law is incognoscible; (2) the common law reflects the interests of a monarchy; (3) the common law is antiquated; (4) common law is judge-made law; (5) common law is foreign to the United States; and (6) common law is incapable of improvement because of its form.

11. *Id.* at 459.

12. *Id.* at 460.

13. *Id.*

14. W. Sampson, The Memoirs of William Sampson, An Irish Exile 162-65

subsequent forced exile to France[15] where he became acquainted with the Napoleon family and witnessed firsthand the process of codification in that country. From a well-to-do Protestant[16] family in northern Ireland, Sampson became suspect to English authorities for three reasons: he proposed a "radical" scheme of reform in 1793; he was a sympathizer with the United Irishmen, a coalition of Catholics and Protestants; and he defended prisoners of the rebellion.[17] In 1799 Sampson was exiled to France where he remained for only a few years. He was then brought back to London and was exiled again, this time to the United States in 1806.[18]

Sampson had hardly settled into life in the United States when in 1810 he took up the two causes of labor and codification by acting as counsel for the Journeymen Cordwainers of the City of New York.[19] In argument to support the motion to quash the indictment Sampson took a position so clearly and unequivocally against the application of the common law to the United States[20] that Mayor Clinton, sitting as Justice of the Sessions, found it necessary to instruct the jury as to the application of the common law in New York State to counterweight the effect of Sampson's remarks.[21] After brief argument along strictly legal lines Sampson launched into a florid digression on the merits of codification:

> The more I reflect upon the advantages this nation has gained by independence, the more I regret that one thing should still be wanting to crown the noble arch—a National Code.
>
> I lament that the authors of the revolution, wearied with toil and human waywardness, should on the very threshold of perfect redemption, have failed, like the fabled poet of antiquity, by looking back, and suffered the object of their long and ardent cares to relapse

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(3d ed. 1832) [hereinafter cited as MEMOIRS]. *See also* M. HOWE, READINGS IN AMERICAN LEGAL HISTORY 442 (1952) [hereinafter cited as HOWE, READINGS] (referring to the trial of the Journeymen Cordwainers of New York).

15. MEMOIRS 155-56.

16. Sampson has been referred to as a Protestant in 16 DICTIONARY OF AMERICAN BIOGRAPHY 321 (D. Malone ed. 1935) [hereinafter cited as DICTIONARY] and in Taylor, *Introduction* to MEMOIRS at xiv-xv. However, Miller refers to Sampson as a "devout Catholic," an inference no doubt from the fact that Sampson published a legal treatise, THE CATHOLIC QUESTION IN AMERICA (1813). *See* Miller 120.

17. MEMOIRS at xxv.

18. 16 DICTIONARY 321.

19. People v. Melvin, 2 Wheeler Crim. Cas. 262, 1 Yates Select Cases 81 (Ct. [Gen.] Sess. 1810).

20. HOWE, READINGS 435.

21. *Id.* at 443 n.6.

> again into the empire of Pluto and themselves to sink at length breathless and spent under the burthen of the common law.[22]

Elaborating on the codification theme, Sampson devoted the remainder of his argument to that issue.

As the passage above indicates, Sampson initially directed his appeal for codification to the desire for complete national independence rather than to a desire for clarification and simplification of the law. In later presentations of his thought, however, he drew nearer to a Benthamite rationale on the issue.

In December of 1823 Sampson delivered an *Anniversary Discourse* to the Historical Society of New York. In it he articulated a position for codification which was reflected in the writings and speeches of later codificationists.

Sampson's purpose in the *Discourse* appeared to be twofold. In the first place, Sampson wished to demythologize the common law by uncovering its "barbarous and feudal roots" and to relativize it by focusing the attention of his audience on the transitions it had undergone.[23] It appears that Sampson also wished to allay fears of those concerned about the unstabilizing effects of codification by pointing to the existence of code projects elsewhere[24] and by showing that the desire for codification stemmed from sound reason.[25]

Three fundamental tenets of American codificationist theory emerge from Sampson's *Discourse* and later writings. The first expresses Sampson's conviction about the effect of theory on practice:

> No longer forced into the degrading paths of Norman subtleties, nor to copy from models of Saxon barbarity, but taught to resolve every argument into principles of natural reason, universal justice, and present convenience, truth would have been the constant object of their search; chicane and pettifogging would have found no dark crevices to lurk in; bad faith would have been banished from the temple of Justice . . . .[26]

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22. *Id.* at 437.

23. Approximately two-thirds of the sixty-odd pages in the *Discourse* are devoted to an historical account of the barbarous sources of the common law. W. SAMPSON, AN ANNIVERSARY DISCOURSE (1824).

24. "A sister state has already set on foot the experiment of a penal code, and committed its execution to one of its most capable citizens." Sampson, *supra* note 2, at 130. *See also id.* at 131.

25. *Id.* at 133.

26. *Id.* at 125.

That the reasonableness and truth supporting clarification of the law must necessarily blossom into good practical effects was seldom doubted even by those codificationists who were aware of harsh political realities.

The second tenet suggests the basis of the theorists' confidence in the practical outcome of codification by revealing the particular conception of science upon which codificationists relied and the application of this conception to law:

> Of simplicity, be it observed however, there are two periods. The first, where uncultivated human beings, with few ideas and few wants, pursue, like other gregarious animals, the instinctive habits of their species. To that state we can no more return than be again born of our mothers. The other period of simplicity is that of mature wisdom, where many ideas are referred to few and general principles. To this we must labour to attain: to this perfection we must endeavour to bring that law . . . .[27]

That "law" could be reduced to a few general principles which in turn would provide a structural framework for laws was practically guaranteed by the fact of the "progress of science" in other fields.[28]

The third principle of early codificationist theory manifests a conviction about the effect of reason on political factions. Sampson and the early theorists believed that codification was such a compelling idea that no reasonable mind could resist assenting to it, no matter how partisan the mind happened to be. In a letter written to Charles Watts of New Orleans, Sampson declared:

> As my own sentiments are the result of more than thirty years' study, observation, and reflection, without any selfish view or pride of opinion that I am conscious of, I am convinced that nothing is wanting but fair discussion to bring every reasonable mind to the same general conclusion.[29]

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27. *Id.* at 133.

28. This line of reasoning is especially prominent in Grimké's thought, which will be analyzed later. *See* Grimké, *supra* note 2, at 152-53. *See also* Sedgwick, Book Review, 19 No. Am. Rev. 438-39 (1824), stating:

> The laws should be as simple as is consistent with the multiplied relations of society, they should be homogeneous, and adapted to the existing state of things, they should be intelligible, that they may be understood, and just, that they may be approved, and they should be carried into execution in a direct, economical, expeditious and effectual method.

29. W. Sampson, Sampson's Discourse, and Correspondence with Various Learned Jurists Upon the History of the Law 151 (1826).

When fierce reaction to codification set in, with theoretical consistency Sampson attributed it to irrational fear of innovation or misguided reaction to poor attempts at codification.[30] It was incredible, however, to the moderate code proponents that reasonable people, once illuminated by codificationist rationale, should reject the thought of codification so hostilely.[31]

III. THOMAS SMITH GRIMKE (1786-1834)

A generation younger than William Sampson, Thomas Grimké took up the issue of codification in South Carolina where he was raised in the conservative manner of his parents. Though he aspired to the ministry in the Episcopal Church, out of deference to his father he studied law. Combining profession and aspiration, he preached a variety of unpopular causes from pacificism and temperance to the education of women and legal reform.[32]

Like Sampson, Grimké stood uncompromisingly for complete codification of law. He went so far as to suggest to the moderate codifiers that codification of only the statutory laws without inclusion of the common law would result in futility since common and statute law were actually only two parts of the same "scheme" of law. Therefore, codification of the statute law would be vitiated by the failure to codify the common law.[33]

30. Writing of DuPonceau's reaction against codification early in 1825, Sampson said:

> [W]hen he declares himself against a written code, [he] must be under a bias, either from over cautious fear of innovation, or from the point of view in which he stands in a state where unsuccessful attempts at reformation have created a temporary reaction.

Id. at 43.

31. Grimké and Sedgwick, unlike Sampson, came to the question of codification without great hostility to the common law. Their appeal throughout writings and reports was temperately directed to reason. For an example of this attitude in Grimké's thought, see Grimké, *supra* note 2, at 150.

32. Miller 147. *See also* 7 DICTIONARY 635-36 (1931). The DICTIONARY, however, gives no indication that Grimké was even concerned with the movement for codification.

33.

> But there is a farther [*sic*] reason in favor of combining the common and statute law in a Code. If you simply digest the latter as it is, you exclude all addition; and if you give the power to alter, the whole common law relative to the statutes must be explored, and a greater number of amendments, properly of the common law itself, will be the result. As now the common and statute law are really one scheme or body of laws, why should we admit only so much of the latter, as relates exclusively to existing statutes, when those very statutes depend on the common law as their basis?

S.C. REPORT 17.

Unlike his predecessor, though, Grimké approached the issue of codification with no inbred hostility to the common law.[34] Rather, he based his argument for codification on the purely rational conviction that scientific progress was the key to solving human problems, even those associated with human behavior. By applying scientific method to a particular human activity, one might resolve the problems associated with that activity:

> The true glory and excellency of Science consists in its aptitude to meliorate the condition of man, and to promote substantial, practical, permanent improvement, in the education and the government . . . .[35]

Thus, according to Grimké's reasoning, problems in the legal system were due to the failure to apply scientific method to law:

> The experience of every age testifies then, that almost, if not all of the irregularity, confusion and inconsistency, which disfigure the legal and political institutions of a people, are attributable to the disregard of principles and system.[36]

The central issue raised by Grimké, therefore, was not whether the French code was better than the English common law, but whether the materials of the common law could be improved by codification.[37] By recasting the issue in terms of expediency and practicability Grimké attempted to eliminate the distracting questions of loyalties and sentiments and to direct discussion along more rational lines.

Grimké's belief that codification was expedient turned on the cardinal principle that law was a science whose development and improvement depended on the reduction of heterogeneous rules to general principles, and general principles to a system:

> Give to it principles, the symmetry of order, and it will boldly arrogate to itself the rank of a science, by virtue of the systematic form of its theory. No one doubts that every science is exalted and proved by systematizing its principles. It is more clear and consistent, more easily understood, and more readily applied. These are great advantages in a practical science, like the law.[38]

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34. Grimké, *supra* note 2, at 150. *See also supra* note 31.
35. T. GRIMKÉ, REFLECTION ON THE CHARACTER AND OBJECTS OF ALL SCIENCE AND LITERATURE, AND ON THE RELATIVE EXCELLENCE AND VALUE OF RELIGIOUS AND SECULAR EDUCATION 8 (pamphlet 1831).
36. S.C. REPORT 3.
37. *Id.* at 21-22.
38. *Id.* at 7.

Treating law as a science and subjecting it to a rigorous scientific method, Grimké thought, would produce four results. First, law would achieve internal consistency. Second, law would become more "rational" in that it would conform to natural justice and right reason. Third, law would gain a greater degree of certainty. Finally, present defects and omissions resulting in injustice would be provided for.[39]

By placing emphasis on law as a principled system akin to science, a point not found in high relief in Sampson's writings, Grimké brought American codification theory considerably closer to a position reflecting the "rational," scientific side of Bentham's theory.[40] Convinced as he was of the possibilities revealed in science, Grimké sought a technique in scientific method which would apply to law. Theoretically, he found the technique in codification, the inductive process by which a multiplicity of rules is reduced to a few simple principles through a system of structured legal thinking.

IV. Robert Rantoul, Jr. (1805-1852)

Robert Rantoul shared Thomas Grimké's enthusiasm for reform: religious, political and legal. The son of an active and successful politician who was himself a "reformer," Rantoul favored temperance and tax-supported public education, and opposed capital punishment, corporations and slavery. While Grimké manifested no strong attraction for a particular political party, Rantoul actively supported the Jacksonian Democrats, a factor which played an important part in his thought on legal reform.[41]

If Rantoul's *Oration at Scituate* accurately reflected his thought and feeling about codification, he must be considered not only the most uncompromising but the most undaunted of the American codificationists. By 1836, when the oration was delivered, the volumes of Story had begun to appear, fortifying the position of Kent on the common law and providing new argument against total codification of the law. Also, in 1836, the Massachusetts Commission on Codification, chaired by Story, delivered its report arguing that codification in all fields of law was not practicable because, among other reasons, the developing commercial needs of the country required something less

39. *Id.* at 7-8.
40. Harrison, *Introduction* to J. Bentham, A Fragment on Government at xl-xli (1967).
41. 15 Dictionary 381.

fixed than code law.[42] Yet in spite of what appeared to be overwhelming authority against his view, Rantoul, standing almost completely counter to Story, called for complete codification.[43]

The speech at Scituate is a potpourri of Sampsonite epithets[44] and Benthamite arguments[45] against the common law, intended undoubtedly to delight the audience.[46] Unlike Grimké, Rantoul did not rhapsodize over the beauty and order inherent in a system of scientifically codified laws nor over the benefits guaranteed the institutions of government and law by the progress of science. Rather, consistent with his Jacksonian political stance, he found codification appealing because it placed the power of lawmaking in the legislative body:

> Statutes, enacted by the legislature, speak the public voice. Legislators, with us, are not only chosen because they possess the public confidence, but after their election, they are strongly influenced by public feeling. They must sympathize with the public, and express its will; should they fail to do so, the next year witnesses their removal from office, and others are elected to be the organs of the popular sentiment.[47]

The emphasis Rantoul placed on the Benthamite argument that all common law was judge-made law and therefore ex post facto law can be explained in terms of his democratic proclivities. Since the people elect legislators, and legislators enact statutes, statutes represent the voice of the people. Hence, the only way legal reform could be rationally accomplished in a democratic society was by systematizing statutes.[48]

Initially, what most bewilders the contemporary reader about Rantoul's speech is that, but for his emphasis on the role of the legislature in legal reform, it appears to be no more than a rehashing of

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42. REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMIC CODE, THE COMMON LAW OF MASSACHUSETTS 14 (December 28,1836).

43. "All American law must be statute law." Speech by Robert Rantoul, July 4, 1836, in Miller 222, 227.

44. Examples of these epithets are: "The Common Law had its origins in folly, barbarism, and feudality . . . ." *Id.* at 222. "Crudely conceived, savage in their spirit, vague, indeterminate, unlimited in their terms, and incoherent when regarded as parts of a system . . . ." *Id.* at 226.

45. Examples of these reflections of Bentham's thought are: "Judge-made law is *ex post facto* law, and therefore unjust." *Id.* at 223. "No man can tell what the Common Law is; therefore it is not law . . . ." *Id.*

46. The speech was given to a large audience on the Fourth of July.

47. Rantoul, *supra* note 43, at 225.

48. Miller 222.

issues and arguments discussed a decade earlier. Since codification as an issue was moribund in professional circles by Rantoul's time, one wonders how Rantoul hoped to revive it. It appears that Rantoul was not especially interested in raising the issue merely for the benefit of those in the legal profession. Rather, in a Jacksonian spirit he was taking the issue to the people and particularly to the workingmen who were gradually becoming aware of the significance of law in the economic and political spheres of their lives through their attempts to organize into unions for better wages and shorter working hours.[49] Seen from this perspective. Rantoul's speech may represent a clever attempt to broaden the appeal of codification by reformulating the movement in more inclusive terms.[50]

The issues of trade unions and codification merged more explicitly in the events leading up to and resulting in the opinion *Commonwealth v. Hunt*[51] handed down by Chief Justice Shaw in 1842. Acting as defense counsel for the Cordwainers of Boston, Rantoul went into the case with the weight of legal authority against him and the tide of public opinion with him.

Between 1829 and 1842 there were eight prosecutions of unions for criminal conspiracy,[52] of which perhaps the most damaging from a purely legal point of view were Judge Savage's opinion in the Geneva Shoemakers case and Judge Edwards' opinion in the New York Tailors case. The Savage opinion of 1835 made it unmistakably clear that courts would condemn combinations to raise wages.[53] Although the Edwards opinion of 1836 may have been equally damaging to the workingmen's cause in legal effect, politically it did wonders for their cause. Shortly after the opinion was handed down 27,000 workingmen —according to the New York Evening Post, "chiefly radicals"— gathered in an open air meeting in New York City to protest the Edwards opinion and to plan for the future.[54] It is not inconceivable

49. Three years earlier, in 1833, Rantoul enumerated the rights of the workingman. Among the rights listed was the right to "steady and remunerating" wages. Oddly enough, however, Rantoul would not condone "combinations forcibly to raise the rate of wages." R. RANTOUL, AN ADDRESS TO THE WORKINGMEN OF AMERICA 75 (1833). *See also* 1 J. COMMONS, THE HISTORY OF LABOR IN THE UNITED STATES 401 (1918).

50. Rantoul was not original in this endeavor. *See* Address by Frederick Robinson to Trades Union of Boston and Vicinity, July 4, 1834, in HOWE, READINGS 455-60.

51. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (Sup. Jud. Ct. 1842).

52. 1 J. Commons, *supra* note 49, at 405.

53. *Id.* at 407.

54. *Id.* at 411. Commons argues that the political activity may have had an effect on the outcome of two subsequent cases: the Hudson Shoemakers case, People v.

that a decision against the Cordwainers in *Commonwealth v. Hunt* would have resulted in similar protest.[55] Thus, Rantoul found himself in an enviable position. If he prevailed against the weight of legal authority, he would have achieved immediate gain by changing the law of criminal conspiracy as it applied to unions. On the other hand, if legal authority prevailed, he would have acquired a strong case to support radical legal reform.

In his argument before Judge Thatcher's court Rantoul first contended that even if the common law of conspiracy were applicable in the Commonwealth of Massachusetts, all combinations were not necessarily conspiracies within the meaning of its doctrine. Then in the straightforward manner of Sampson, Rantoul argued that the common law of conspiracy should be repudiated by the Commonwealth as inconsistent with the law of freedom.[56]

Judge Thatcher's charge to the jury was no more subtle than Rantoul's second argument. He warned the jury that a verdict in favor of the Cordwainers would result in the spread of unions, which in turn would inhibit commerce and industry to the point of involving the whole country in fatal ruin. Predictably the jury returned a verdict of guilty, and Rantoul appealed to Shaw's court on the ground that the charge to the jury was incorrect.[57]

That Shaw thought Rantoul's repudiation of the common law in the Commonwealth constituted something more than an insubstantial threat may be inferred from the fact that the very first statement in the body of Shaw's opinion reaffirms the preeminent position of the common law in the Commonwealth. "We have no doubt," Shaw began with firmness, "that by the operation of the constitution of this Commonwealth, the general rules of the common law making conspiracy an indictable offense, are in force here . . . ."[58] After asserting the validity of the common law doctrine of conspiracy, Shaw qualified its applica-

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Cooper, 4 Doc. Hist. 277 (1836) and the Philadelphia Plasterers case, Commonwealth v. Grinder, 4 Doc. Hist. 335 (1836), wherein the juries returned verdicts of "not guilty," in addition to the effect on Commonwealth v. Hunt, *supra* note 51.

55. Levy, *supra* note 4, at 194. The writer refers to W. Nelles' analysis in *Commonwealth v. Hunt,* 32 Colum. L. Rev. 1128 (1932).

56. Levy 186. Rantoul's argument here resembles one made by Sampson in the 1810 Cordwainers case, *supra* note 1, wherein he argued that the law of conspiracy, as an attack on the "rights of man," was repugnant to the Constitution. *See also* W. Sampson, *supra* note 29, at 141.

57. Levy 187.

58. Howe, Readings 479.

tion by noting that it "must depend upon the local laws of each country to determine, whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries."[59] Since the so-called conspiracy of the Cordwainers consisted of an agreement not to work for anyone who employed a person not a member of their association, and this purpose was not in violation of the laws of the Commonwealth, the agreement did not constitute a criminal conspiracy because the purpose of the combination was not unlawful.[60]

Notwithstanding the inner logic of his opinion in *Commonwealth v. Hunt,* Shaw could have sided with legal precedent and decided the case the other way. That he did not is explained by three distinct theories, varying in point of emphasis, but not necessarily exclusive of one another.[61]

According to one theory, the Shaw decision was motivated by a desire to appease labor and prevent a radical movement from endangering the protective tariff on Massachusetts textiles.[62] Another theory has it that the opinion expressed Shaw's confidence that a "free, competitive society in which men individually or in combinations pursue their own interests generally benefited all members of society."[63] The author of this theory views Shaw as one primarily interested in the integrity of the legal process in a free society and as a "dispassionate" judge, "beholden to no special interests."[64]

A third theory, based on the opening statement in the opinion, stresses the presuppositions of the second theory, namely, that Shaw was indeed concerned with the legal process as a means of protecting a particular type of society. According to this theory, Shaw was concerned with the preservation of the common law as a legal method particularly suited to the protection of a free society. Shaw's opinion, then, may be viewed as a response to the codification movement—and especially to its most influential spokesman, Robert Rantoul—which was intended to undermine the movement by demonstrating that old doc-

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59. *Id.*

60. *Id.* at 484.

61. LEVY 203. Levy implies that of the theories only one can hold sway, and that his is the most compelling. I disagree with him and maintain that it is possible to weave the three theories together.

62. *Id.* at 192 (Nelles' theory).

63. *Id.* at 203 (Levy's theory).

64. *Id.* at 206.

trine could be adapted to new conditions and by systematizing and liberalizing the common law.[65]

If such was Shaw's intention, he could not have chosen a more opportune moment to disarm the movement and keep the peace. Employers would be content to yield a little ground on the union issue to reap the benefits of the protective tariff; workingmen, finally secure in their right to form unions, would undoubtedly turn their restless energies away from the law and the courts; and Rantoul, hailed as a hero, would have won his case.[66]

Whatever the intent behind *Hunt v. Commonwealth,* the effect of the opinion apparently was to cool whatever enthusiasm had been generated for the type of codification Rantoul had proposed. In the wake of the opinion, Rantoul's cries for total codification appear to have subsided.[67]

Conclusion

The codification scheme initially suggested by Bentham, and echoed in the writings of Sampson, Grimké, and Rantoul, needless to say, was never realized in the eastern United States, notwithstanding the fact that in the second half of the nineteenth century more modest plans, oriented towards partial codification, were proposed and undertaken by various state legislatures. One reason for the failure—if it can be called that—of the movement for total codification may be the inertia of the legal profession. The common law had been the law in the colonies before the Revolution, and most lawyers were comfortable with its method and benefits. A second reason, perhaps related to the first, may be that with the publication of the doctrinal writings of Kent and Story in the 1830s many moderates who favored codification no longer felt the need for a complete codification of the laws. The works of Kent and Story answered some of the pro-codificationist arguments by apparently providing a structure and system for the mass of common law in a particular area.[68] Another reason, suggested by a letter of Sampson, may be that the thought of

65. *Id.* at 196.

66. Memoirs, Speeches and Writings of Robert Rantoul, Jr., 21 (L. Hamilton ed. 1854), citing with pride a newspaper evaluation of the case as "one of the completest triumphs that it ever fell to the lot of an American lawyer to achieve."

67. Between the time the decision was handed down and Rantoul's death in 1852, there is no indication in Rantoul's writings of his further support for total codification.

68. R. Pound, The Formative Era of American Law 140 *et seq.* (1938).

such large-scale innovations in the legal system instilled in some a fear of instability.[69] The plans of Bentham, Sampson, Grimké, and Rantoul, however theoretically appealing, represented a form of upheaval which might have hindered opportunities for economic growth and development at a time when the newly established United States could ill afford it.

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69. W. SAMPSON, *supra* note 29, at 151.