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THE MODEL PENAL CODE'S HISTORICAL ANTECEDENTS

Sanford H. Kadish*

We are here to take stock of how things stand with penal law reform, twenty-five years after the promulgation of the Model Penal Code.1 The main business of this Conference is to consider how well the Code has stood the buffeting of twenty-five years of social change. My role, however — a role, I should add, I find it increasingly comfortable to assume as the years roll by — is to speak up for the past.

The Model Penal Code has become a standard part of the furniture of the criminal law. In large measure it has become the principal text in criminal law teaching, the point of departure for criminal law scholarship, and the greatest single influence on the many new state codes that have followed in its wake. But, as with all achievements so successful that they seem to constitute the only relevant beginning, there is a tendency to take it for granted, as though it had always existed. The objective of these remarks, therefore, is to place the Code in historical context as the latest, though surely the most successful, of concerted efforts to set the substantive criminal law on a new footing through the formulation of a comprehensive code.

The modern codification tradition to which the Model Penal Code belongs has its roots in the new rationalism of the eighteenth century Enlightenment, which saw reason as the instrument both for understanding and mastering the world. For law, reason provided a lodestar and an instrument for reform. Through it, man could discern the natural law which lay behind the disordered accumulation of customary law and edicts, and could produce, by his own deliberate choice, a legislated body of reordered, reformed, and reconceived law more in accordance with natural

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I do not suggest that the new romance with reason alone accounts for the movement for codification in late eighteenth and early nineteenth century Europe. The rise of nationalism, for example, created a strong political interest in codification because of its value in unifying a divided realm into a nation. But the power of the ideas of the Enlightenment was surely one of the significant causal influences in the ferment that produced the Napoleonic Code and the later nineteenth century codes of law in Europe.

I. THE BENTHAMITE TRADITION

A. Jeremy Bentham

The ideas of the Enlightenment took hold in England as well as the Continent and led to a powerful movement toward codification of law. But it was through the work of one man, Jeremy Bentham, that these ideas had their greatest influence on law reform. Bentham had no patience with natural law and natural rights — "nonsense on stilts," he called them. But belief in natural law was not, apparently, a necessary condition of the codification spirit. It was enough that there was some set of governing norms towards which the law was seen as instrumental. For Bentham, those norms followed from the greatest happiness principle — what maximizes pleasure and minimizes pain overall — rather than from a fixed and given conception of natural law and natural right. But that hardly mattered to the spirit of legal codification and reform — natural lawyers and utilitarians were natural allies in this battle.

Bentham's passion for codification (a term he coined) was directed to law generally, not just to the criminal law. Indeed, as we shall see, most criminal law codification reform (though not the Model Penal Code, it is interesting to note, except insofar as it may be seen as an integral part of the larger law reform efforts of the American Law Institute) grew out of plans for codification of all law, or at least large bodies of it. But it is penal codification I am here primarily concerned with.

Bentham's thinking on codification of criminal law had a powerful influence on every codification effort in the English-speaking world in the nineteenth and twentieth centuries, not excluding the Model Penal Code. This is not to say that all of Bentham's premises and concerns continued to

be accepted. Aspirations to write law so that “he who runs may read” and so that “everyone [can be] his own lawyer” have a quaint sound today, reflecting a naïve view of the possibilities of language to capture the future. On the whole, however, Bentham’s conception of the case for codification and the requirements of a proper criminal code have survived: law defined in advance with clarity and certainty to maximize its potential for guiding behavior; inconsistencies and contradictions eliminated for like reasons; judicial discretion to make or change the law also eliminated as productive of uncertainty and arbitrariness; the doctrines of the criminal law and the principles of punishment justified only by their service to the purpose of the criminal law to prevent crime; penalties proportioned to the offense, and never greater than the minimum required to prevent crime; no punishment where it would be “groundless, inefficacious, unprofitable, or needless.”

B. Edward Livingston

For all that, Bentham never produced a complete code, nor did he ever succeed in his frantic international efforts to obtain a commission to propose one. The first great penal code in the Benthamite tradition was prepared by an American, Edward Livingston, for the state of Louisiana in 1826. There were earlier developments in America, such as the colonial statutes of Massachusetts in 1688 and Pennsylvania in 1682, which attempted a limited kind of codification and reform, and Thomas Jefferson’s unsuccessful bill to codify criminal sanctions in Virginia. However, these were limited in scope and influence, and not comparable to Livingston’s ground-breaking and comprehensive effort. Livingston “thought his code to be the first real attempt, at least in the Anglo-American world, to place the criminal law on a sound, scientific basis,” and he was right.

What led to the appearance of this draft code at this time in

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7. 2 THE PAPERS OF THOMAS JEFFERSON 322 (J. Boyd ed. 1950); D. MALONE, JEFFERSON THE VIRGINIAN 269-273 (1948); Preyer, Crime, the Criminal Law and Reform in Post-Revolutionary Virginia, 1 LAW & HIST. REV. 53, 59 (1983).
8. McClain, supra note 6, at 505.
Louisiana? Many factors, doubtlessly, but conspicuously among them was the commitment of one man to the idea of codification. Livingston was a learned man, well read in continental as well as English intellectual and social developments. He was captured by the ideas of Bentham and the ferment for legal reform and codification in revolutionary America and France. Earlier in his career as a United States Congressman he sought a revision of the United States penal law. That his code was drafted for Louisiana may be due simply to the accident that led him to leave New York and to transplant his legal and public career there. It is simply hard to believe that a penal code would have been appeared in Louisiana if it weren't for Livingston.

Livingston's Code was breathtaking in conception and achievement. His Penal Code included a Code of Procedure, a Code of Evidence, a Code of Reform and Prison Discipline, and a Code of Crimes and Punishments. His unassisted completion of this task within three years was one of those prodigious, virtuoso performances that is scarcely imaginable today (even putting aside that he had to do it all over when a nearly completed draft and his notes were destroyed by fire).

Livingston explicitly stated the theory of his code in Chapter I. Its object was to collect in one place and present as an integrated whole, without reference to “foreign law,” the laws governing criminal prohibitions, procedure, and corrections. At the same time, he made clear that it was Benthamite codification reform he had in mind, not simply consolidation. Central among his stated objectives was “to change the present penal laws in all those points in which they contravene” the principles underlying the legislation. He then went on to spell-out those principles: “Vengeance is unknown to the law.” The only object of punishment is prevention which the law achieves by special deterrence of the delinquent and general deterrence of the rest of the community. Acts injurious to the state and to persons should be made criminal; but to avoid multiplication of penal laws without “evident necessity,” such acts should not be made criminal when private suit is sufficient to repress them; neither should such acts be made crimes which can not be enforced, whether because of public opinion or otherwise. Laws should be written in plain, unequivocal language so that

9. See Livingston Works, supra note 5.
10. 1 Livingston Works, supra note 5, at 81.
11. 2 Livingston Works, supra note 5, at 4.
12. Id.
13. Id. at 4-5.
14. Id. at 5.
all can understand, and concisely so that all can remember.  

His Benthamite philosophy was manifested in many of the Code’s provisions, notably those relating to the judicial function. Livingston distrusted judges no less than Bentham; consequently, common-law crimes, use of common-law terms, and all means through which judges might infuse their own moral views into the definition of crimes were outlawed. Even the authority to create new defenses was ruled out. Judicial sentencing discretion also had to be reined in. He tried to achieve this by creating a large number of statutory punishment discriminations and, anticipating a tactic of the Model Penal Code, by a detailed specification of aggravating and mitigating circumstances. Sometimes Livingston went a bit overboard in his hostility to judges: no summary contempt power at all; criminal penalties against a judge presuming to enjoin libelous or seditious writing or for participating in cases of conflict of interest, or for any action interfering with freedom of speech or press. 

The object of the Code, to leave as little as possible to judicial creativity, is apparent in its preference for exhaustive and detailed specifications of rules. The homicide provisions, for example, even excluding those on justifiable and excusable homicide, cover some thirteen pages of text, with nearly forty lines per page. This compares with a total of about fifty lines of text in the Model Penal Code. Livingston was daring and improvisational. He could also be tediously verbose. 

Though there are civil law influences, such as the use of family relation between the killer and his victim as an aggravating circumstance, the Code is recognizably common law in its formulations. But a great many changes were made, some remarkably modern. For example, persons under attack have a duty to make a safe retreat, where available, before killing. Killing in defense of property is justifiable only when the defender’s life is endangered by the taker’s resistance to the owner’s exertions to recover it. Duress under threat of great physical injury is a potential defense to any crime, not only non-homicidal ones. The concept of malice makes no appearance in the Code; nor does the felony-murder rule. Only killing

15. Id.
16. Id. Art. 7, at 15.
17. Id. Art. 431, at 294-95.
18. Id. Art. 205, at 60.
19. Id. Art. 240, at 70.
20. Id. Arts. 479-491, 515-547, at 125-49.
22. Id. Art. 511, at 136-37.
23. Id. Art. 40, at 22.
"inflicted with a premeditated design" qualifies for murder.24 Other notable characteristics of the Code include: its rejection of capital punishment, based on a lengthy and powerful argument against it;25 its moderation of punishments (e.g., one to five years imprisonment for voluntary manslaughter);26 its forceful protection of freedom of speech and the rights of the accused;27 the prominent place it gave to reform of the offender and its provision of means to accomplish it.28

Several of Livingston's Codes were enacted (e.g., his Civil Code and his Code of Practice),29 but his Penal Code was not. Though a code was particularly needed in Louisiana, which was subject to remnants of French and Spanish law and ad hoc statutes, as well as the English common law, the Penal Code was too radical a proposal for a state like Louisiana in the early nineteenth century. It stands, nonetheless, as the most worthy effort at criminal codification in the United States until the Model Penal Code.

C. Thomas Babbington Macaulay

The next significant Code (and the last great one until the Model Penal Code) was prepared for India in 1837 by Thomas Babbington Macaulay,30 the nineteenth century English essayist and historian. Macaulay was barely a lawyer, but he was, like Livingston, a Bentham epigone, as were so many intellectuals and public officials of his generation.

It is hard to see why a serious criminal codification effort should have happened in Louisiana. It is not so hard to see why it happened in India. There was a lot less resistance to codification there than there was in England. This was partly because of the smaller vested interest of lawyers and judges in the existing legal system and a less developed legal system upon which a new code was to be imposed. Given the disordered state of law in India, codes could plausibly be seen and accepted as the creation of a system of law rather than a radical restructuring of an existing, working system of law. Moreover, there was the further consideration that a comprehensive system of codified laws could help bring some unity out of the traditional racial, social and political discord of colonial India. This was

24. Id. Art. 537, at 147.
25. 1 Livingston Works, supra note 5, at 210.
26. Id. Art. 536, at 147.
27. Id. Arts. 12, 16, 239, at 16, 69.
30. A Penal Code Prepared by the Indian Law Commissioners (1838) [hereinafter Indian Penal Code].
particularly true of a penal code. Since criminal law consisted of a mixture of Muslim and Hindu law, the regulations of the East India Company, as well as a version of the common law, it was often contingent and uncertain who was subject to what criminal penalties for what conduct. This may explain why the only direct fruit of Macaulay's efforts was the Penal Code, though such were the obstacles to reform that even that Code had to wait twenty-two years after its submission before it was enacted.

Macaulay's Code, like Livingston's, was essentially a solo production, for though Macaulay was only one of a committee, the other members in fact did not function. It was an equally prodigious undertaking, completed within two years by a person with no real previous background in criminal law and while attending to other duties. There were, in addition, further similarities to Livingston's Code, largely deriving from their shared Benthamism. Like Livingston, Macaulay was not concerned with restating, rearranging or consolidating. It was a reconstituted system of penal law from the ground up that he sought to create. He also embraced the utilitarian ethic of Bentham, and with him shared a strong antipathy to the common law and its rule by judges generally.

Macaulay insisted that no existing system of law furnished even the "groundwork" of his Code (much as Livingston thought of his Code as largely an original creation). It is nevertheless apparent from its structure and content that the Code is heavily influenced by English law, just as Livingston's was. Fitzjames Stephen described the Code "as the criminal law of England freed from all technicalities and superfluities, systematically arranged." 31 This seems acceptable, however, only subject to the qualification that the English law so freed "has undergone such a metamorphosis as to be an entirely new thing." 32

I have so far mentioned the similarities between Livingston's and Macaulay's Codes, stemming from their common Benthamism. However, the two men were quite different in basic ways and the differences show. Macaulay was not the democrat Livingston was. Unlike Livingston, for example, Macaulay made no provision for criminalizing actions interfering with freedom of speech and press; and where Livingston confined sedition to overt preparation for revolution, Macaulay's Code punished the use of words to "excite feelings of disaffection to the Government." 33

Nor was Macaulay as moved by moral and humanitarian impulses. He was not ready, as Livingston was, to extend criminal penalties to those

32. Vesey-FitzGerald, Bentham and the India Penal Codes, in Jeremy Bentham and the Law 222,227 (G.W. Keeton and G. Schwarzenberger eds. 1948).
33. Indian Penal Code cl. 113, at 16.
who callously fail to save another. For him the value of individual autonomy and the danger of an imprecise line between the criminal and non-criminal justified the traditional common law requirement of an independent legal duty to act. 44 Unlike Livingston he retained capital punishment; and while he confined it to murder and treason (a great departure from the common law), he did this for practical, not humanitarian reasons. 35

Macaulay's Code was both less ideological and more pragmatic than was Livingston's. Despite his distrust of judges, he was prepared to put up with them when the alternatives were impractical. For example, where Livingston tried to construct legislative solutions to some typical problems of causation in homicide (e.g., neglect or maltreatment of slight wounds resulting in death), Macaulay, after showing that these formulations could be both over- and under-inclusive, concluded that causation issues should best "be left a question of evidence to be decided by the courts, according to the circumstances of every case." 36 Where Livingston sought to control judicial discretion in imposing prison terms by providing an extremely large number of punishment gradations for different offenses, Macaulay's Code included considerably fewer maximum gradations and used a minimum only for a few crimes. Livingston tried to prevent judges from imposing excessive fines on the poor by barring fines greater than one-fourth of the offender's property. Macaulay reasoned that this prohibition would be impractical, in requiring lengthy and unsatisfactory investigations into the offender's wealth, as well as unwise, in preventing the court, where appropriate, from requiring the offender to disgorge the whole of the profit made from his wrong. He concluded that judicial discretion over fines was an evil that had to be endured if fines were to be used. 37 Where Livingston sought, in the provisions on theft offenses, to deal definitively with the problem of defining "possession," Macaulay, after deftly poking a few holes in Livingston's formulation, concluded that it was better to "leave it to the tribunals, without any direction to determine whether particular property is at a particular time in the possession of a particular person, or not." 38

Pace Bentham!

Two other provisions that reveal Macaulay's practical-mindedness are noteworthy because they represent innovations that have since been adopted elsewhere. One is his provision for dealing with what he regarded

34. Id. cl. 294, at 38.
35. Id. Note A, at 69.
36. Id. Note B, at 104-07.
37. Id. Note A, at 72.
38. Id. Note N, at 120.
as the ineradicable indistinctness of the lines separating theft, criminal misappropriation of property not in possession, and criminal breaches of trust. Since these distinctions are irrelevant to whether a person was punishable, Macaulay provided that in doubtful cases it need not be resolved which provision the offender violated so long as he was sentenced to a punishment common to the mooted provisions. The other was a provision explicitly exempting from punishment actions technically punishable if the harm caused was "so slight that no person of ordinary sense and temper would complain." He reasoned that judges would sensibly exclude such cases in any event, but without the clause could do so only by one of two equally pernicious practices: "by making law, or by wresting the language of law from its plain meaning."

A feature of Macaulay's Code that well illustrates the perspicuity of his analysis is his treatment of the problem of mens rea. Like Livingston, he eliminated the felony-murder and misdemeanor-manslaughter rules, but with a supporting rationale that has served as the definitive case against these doctrines to date. He manifested the same sensitivity to consideration of culpability in dealing with mens rea requirements of particular crimes. Strict liability was rarely imposed, and then only when punishment was minor and the offense regulatory. For the rest he was unusually careful in defining crimes to specify the mens rea required, attending carefully to whether negligence was sufficient, or awareness of a danger was required, or knowledge was required or some further intention was called for. Not until the Model Penal Code do we encounter as clear-headed an approach to the mens rea elements of crime.

It took over twenty years for the final adoption of the Code, by then regrettably modified for the worse by various committees. But it was generally conceded that it triumphantly passed the test of experience, enduring even to the present in the basic character of the Indian Penal Code.

II. Penal Codification in England

As we saw, the momentum of the Benthamite spirit led to the draft of a penal code for Louisiana and an enacted penal code in India. But what of England itself, the home and bulwark of the common law? The short answer is that there was much movement but little action — largely

39. Id. Note A, at 78.
40. Id. Note B, at 81.
41. Id. Note M, at 110-12.
42. See 3 J.F. Stephen, supra note 31, at 299.
statutes dealing with particular crimes — due primarily to coups de grace administered by the judiciary at crucial times and to the generally conservative predispositions of the English bar. Bentham prevailed among the legal intelligentsia and in the academy; in the trenches of Parliament Blackstone is alive and well, even to this day.

A. The Criminal Law Commissioners

The same intellectual ferment that produced the codification effort for India produced a monumental effort to codify the English criminal law. Between 1833 and 1849 a number of successive Criminal Law Commissioners produced thirteen reports, with elaborate commentary and drafts, yielding in 1843 the first draft of a substantive and procedural criminal code for England (really a statutory digest of the common law rather than a draft). As the late Rupert Cross observed, this effort represented “the largest and most abortive codification enterprise yet seen in this country.” The reports of the law commissioners were considered by later select committees, and some bills were introduced based on their proposals during the next decade. But opposition by the judges sabotaged the whole enterprise, after an expenditure of twenty years of work and £50,000. As Rupert Cross put it:

The unanimously unfavourable judicial reaction ... resembled the clamorous protests that might be expected from a body of total abstainers asked for their views on a proposal to provide the pupils at state schools with tots of whisky instead of free meals. A further measure of statutory consolidation was acceptable, but the attempt to reduce the common law into a statute was thought to be little short of lunacy.”

B. James Fitzjames Stephen

That was the end of penal codification in England until James Fitzjames Stephen returned from his codifying efforts in India in 1872 with the notion that he might do the same for England.

Stephen was, like both his predecessors, a man of affairs and public service. Like Macaulay he was a prolific essayist who took a hand in the

44. Cross, The Reports of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853, in Reshaping the Criminal Law 5 (P. R. Glazebrook ed. 1978).
45. M. Lang, Codification in the British Empire and America 54 (1924).
46. Cross, supra note 44, at 9. For a detailed account of the judges’ reactions see M. Lang, supra note 45, at 47-53.
political and social controversies of his day. In contrast to his two predecessors, however, Stephen was a professional scholar of the criminal law, later producing a classic in the three-volume History of the Criminal Law in England. Also unlike his predecessors (and in sharpest contrast to Livingston) he was profoundly conservative in his political and moral outlook, possessing a fierce, not to say bloodthirsty, vision of punishment as legitimized vengeance (which he justified in Benthamite terms as a "pleasure of malevolence — one of the 15 classes into which [Bentham] divided pleasures").

An opportunity to draft a homicide bill came Stephen’s way in 1874. It got nowhere in Parliament. One of the objections to the bill was that it codified only a part of the criminal law. Stephen took this objection seriously and he set about preparing a digest of the English law as a first step to drafting a code (one supposes he was helped by the extensive digesting done by the Criminal Law Commissioners in their many reports between 1833 and 1845). The second step came in 1877 when the Attorney General and the Lord Chancellor, impressed by Stephen’s Digest, arranged for him to be commissioned to prepare a code of the substantive and procedural criminal law. His draft, completed in a year, was referred to a Royal Commission (on which he served) which, after making a number of changes, completed its draft in the spring of 1879 and introduced it in the House of Commons. This draft was the closest England came to achieving a codified criminal law.

Stephen’s draft, unlike its predecessors, was anything but the root and


The pleasures of malevolence are the pleasures resulting from the view of any pain supposed to be suffered by the beings who may become the objects of malevolence. . . . These may also be styled the pleasures of ill-will, the pleasures of the irascible appetite, the pleasures of antipathy, or the pleasures of the malevolent or dissocial affections.

Id. Stephen overlooked Bentham’s strictures against punishment solely to give this malevolent pleasure. “But all punishment is mischief: all punishment itself is evil. Upon the principle of utility, it ought at all to be admitted, it ought only to be admitted in so far as it promises to exclude some greater evil.” Id. at 158. To this Bentham appended a marginal note stating that “no punishment ought to be allotted merely” to afford pleasures of malevolence “because . . . no such pleasure is ever produced by punishment as can be equivalent to the pain.” Id. at 159 n.1 — an undemonstrable ipse dixit, but one reflecting the humanitarianism of Bentham, as much as its rejection reflected Stephen’s lack of it.

branch rewriting of the law that Bentham called for and that Livingston and Macaulay attempted. The fires of Benthamite reform had banked. Indeed even earlier, during the time of Sir Robert Peel, English codification had begun to take the form of a statutory enactment of the common law rather than a radical restructuring, accounting for Bentham's cry that "Mr. Peel is for consolidation in contradistinction to codification: I for codification in contradistinction to consolidation."\(^5\) Stephen's draft was in the tradition of the earlier English codification attempts, notably those of the Criminal Law Commissioners. He saw his Code as a continuation of his earlier efforts to prepare a digest of existing English law. The Report accompanying the Draft Code quite explicitly described it as "the reduction of the criminal law of England, written and unwritten, into one code."\(^5\) As Stephen later observed: a code "ought to be based upon the principle that it aims at nothing more than the reduction to a definite and systematic shape of results obtained and sanctioned by the experience of many centuries."\(^5\)

Still, to leave it at that would be unfair to Stephen. To be sure, Stephen was no zealous reformer in the Benthamite tradition. However, few such zealots remained in Victorian England. The fact that even Stephen's conservative code failed is a sure indication of how out of the question a reformist code would have been. The important fact is that within the codification tradition in which he worked, his code was a significant achievement. It drew together, systematized, and pruned English law, not radically but sufficiently to make it a more manageable whole. Just to advert, by way of example to some of the many useful features of the Code: it adopted from the Indian Penal Code Macaulay's provision for dismissal of de minimis cases;\(^5\) abolished mandatory minimum punishments;\(^5\) eliminated the requirement of materiality in perjury;\(^5\) tried to articulate the situations in which homicidal omissions were culpable;\(^5\) formulated the law of murder without the common-law concepts of malice afore-

50. 10 The Works of Jeremy Bentham 595 (1843). Consolidation, as Professor David Lieberman has shown, is just the kind of statute making Blackstone himself was prepared to accept. D. Lieberman, The Province of Legislation Determined-Legal Theory in 18th Century Britain, Chs. 2 & 9 (1988) (forthcoming).


52. 3 J.F. Stephen, supra note 31, at 361.


54. Id. at § 12.

55. Id. at §§ 119-29.

56. Id. at §§ 159-64.
thought and implied malice; narrowed felony-murder to cases where the defendant either did an unlawful act that he should have known would be likely to cause death, or intentionally inflicted great bodily injury in the commission of designated heinous felonies; established insult as a possible legal provocation; made an illegal arrest merely evidence of provocation rather than an automatic basis for reducing the offense to manslaughter; eliminated the defense of impossibility in attempt; provided for the punishment of non-homicidal negligent injuries; allowed the privilege of self-defense even where the victim's aggressive acts initiated the encounter; and eliminated the distinction between second degree principals and accessories before the fact.

Why then did the Code fail? Did it have a chance of enactment, given the circumstances of the time? These are historical speculations, certainly not idle ones, but ultimately non-demonstrable. Highly plausible explanations include the distraction created by the Irish question, which consumed a great deal of parliamentary time and overshadowed the issue of criminal codification; the letter of the Lord Chief Justice to the Attorney-General criticizing the Draft Code on the somewhat captious ground of its incompleteness in not incorporating every statute on the books carrying a criminal sanction, including historical relics and minor provisions that had fallen into desuetude, as well as summary offenses; the change of ministry in 1880; and, finally, the several provisions, mentioned earlier, that altered the law in various respects. Whatever the reasons, a great opportunity was lost. The campaign for codification continues in England to this day, though it has yet to come as close to success. Still, despite its failure in England, the Code had a fair measure of success in other Commonwealth countries. The Draft Code served as a model for a number of new jurisdictions, including New Zealand, Western Australia, Queensland and Tasmania, and Canada; for these newly developing systems the chaos of

57. Id. at §§ 174, 175.
58. Id. at §§ 174(d), 175(a).
59. Id. at § 176.
60. Id. at § 176.
61. Id. at § 74.
62. Id. at § 201.
63. Id. at § 56.
64. Id. at § 71.
the common law of crimes was less of an old shoe than it was for the English.

III. THE CODIFICATION MOVEMENT IN THE UNITED STATES

The ferment for codification in England that was a part of the so-called Age of Reform — roughly covering the middle fifty years of the nineteenth century — had its counterpart in America. However, in America the cause of codification was associated with two indigenous circumstances. First, there was the rise of populism associated with Jacksonian democracy. Since both movements constituted challenges to big business and privileged elites generally in favor of popular political participation in all phases of government, it was natural for populists to embrace the cause of codification. Codification could be seen as an attack on the power of lawyers and judges to make and to declare law without democratic participation. It offered a plainly articulated body of laws accessible to and understandable by all in place of the oracular, mysterious incantation of doctrinal technicalities made by lawyers and judges. Moreover, it placed the power of the law squarely in the hands of the popularly elected representatives in the legislature.67

The second feature of mid-nineteenth century codification in America was that the controversy surrounding codification represented “a contest between nationalism and cosmopolitanism,” between provincial codifiers and cosmopolitan followers of the common law.68 Therefore, the cause of codification fit in well with nationalist ideology in America. It offered the prospect of law with a distinctly American stamp in place of English law.

A. Field’s Penal Code

The dominant figure in the codification movement in the United States was David Dudley Field, a prominent New York lawyer from a distinguished family (one brother, Stephen, became Chief Justice of the United States Supreme Court, another, Cyrus, presided over the laying of the first trans-Atlantic cable) who devoted himself with singular, and unpaid, devotion to the cause of codification, at first by waging a campaign of pamphleteering and general writing and later by organizing and drafting activities.69 His first success was in influencing a New York Constitutional Convention in 1846 to adopt, as one of many populist

features (including election of judges, levelling of the New York court structure, admission to the bar without examination), a provision directing the legislature to appoint a commission "to reduce into a written and systematic code the whole body of the law of this State," specifying such changes as it thought needed. 70 Field served as a member of this commission and of successor commissions whose efforts culminated in 1864 with the production of the famous "Field Codes," which consisted of a Political Code, a Civil Code, and a Penal Code. 71 Though Field's influence on and participation in the Political and Civil Codes was great enough to justify the eponymous attribution, he had only a minor role in the Penal Code, which was drafted by another commissioner, William Curtis Noyes, a former district attorney. 72

Like Stephen's Code, the Field Penal Code was avowedly non-reformist. Its purpose was not to propose a radical rethinking of the criminal law, but "to bring within the compass of a single volume the whole body of the law of crimes and punishment within this state." 73 Regrettably, the drafters carried out this purpose with undiscriminating thoroughness. The Code drew within its scope every instance in which a New York statute imposed a criminal penalty, including provisions on such subjects as intoxicated physicians, mismanagement of steamboats, trade mark infringements, refilling mineral bottles, using nets unlawfully in the Hudson River, and removing beacons in New York harbor. Even Stephen omitted provisions of this kind on the ground that they are "so closely connected with branches of law which have little or nothing to do with crimes, commonly so called, that it seems better to leave them as they stand than to introduce them into a Criminal Code." 74 Field's Code, on the other hand, carrying the spirit of codification to its ultimate conclusion, saw "[t]he value of the Penal Code" as depending "upon its containing provisions which embrace every species of act or omission which is the subject of criminal punishment." 75

Regarding the traditional crimes, the tendency was to reproduce existing statutes virtually whole. There was some effort "[t]o supply deficiencies and correct errors in existing definitions of crimes," in accordance with the Commission's stated goals. 76 For example, noting that

70. N.Y. CONST. OF 1846 art. VI, § 24 (F. Hough ed. 1867).
71. COMMISSIONERS OF THE CODE, DRAFT OF A PENAL CODE FOR NEW YORK (1864).
73. COMMISSIONERS OF THE CODE, supra note 71, preliminary note, at iii.
74. Report, supra note 51, at 12.
75. COMMISSIONERS OF THE CODE, supra note 71, preliminary note, at iv.
76. Id.
many special statutes governing perjury in a variety of proceedings were superfluous in view of the general perjury statute, the draftsman omitted the unnecessary statutes. Nevertheless, the examples of such revision were few and usually no more daring. Indeed, when changes were made they were often misconceived. For example, though degrees of murder had been introduced precisely to allow juries to withhold capital punishment, the Code eliminated them because “[t]he practical result of introducing such a distinction will be that jurors influenced by unwillingness to unite in a capital conviction, will always find the prisoner guilty of the second degree only.”

Consistent with one of the fundamental tenets of codification, the Field Code eliminated common-law offenses. Similarly, common-law terms were avoided, “because it is deemed essential to the usefulness of the Code that its definitions should not be dependent upon a recourse to the common law to render them intelligible.” Yet, in defining some important crimes, the Code invited back precisely what it purported to eliminate. Larceny, for example, was minimally defined as “the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof.” The Note then identified issues that had produced the most difficulties: “[w]hat property may be the subject of larceny”; “[w]hat is an intent to deprive another of his interest in the property taken”; “the distinction between a taking originally, and which is therefore larceny, and a possession acquired without intent to steal, and followed by a wrongful appropriation. . . .” Rather than legislating solutions to these problems, the Note in each instance simply directed the reader to the scores of English and American cases that were responsible for creating the chaos. Similarly, in dealing with burglary, the Note explained that “[i]t has not been thought best to insert any definition of ‘breaking’ or of ‘entering’, but rather to leave the meanings of these words, now well settled [sic], to adjudication” and then cited over thirty-five English and American cases. The Field Code marked the death of the codification spirit. Having begun with Bentham as “the clearing of the brain,” it became at the end a rearranging of the attic.

77. Id. § 150 Note, at 46.
78. Id. § 241 Note, at 82.
79. Id. § 248 Note, at 84.
80. Id. § 584 Note, at 210.
81. Id.
82. Id.
83. Id. § 540 Note, at 194.
The Penal Code was submitted to the New York legislature in 1865 and was enacted in 1881.\(^8\) It had a remarkable influence on American law, taking root, as did Stephen's code, in recently established jurisdictions, most notably the new western states. California adopted the Code in 1872; unfortunately, the local commissioners further injured an already damaged product by introducing into the homicide provisions the concepts of malice aforethought and express and implied malice. This move was regrettably followed by a number of states in adopting the California version.\(^8\) None of the codes I have considered had a larger measure of influence. None deserved it less.

\[B.\] \textit{The Model Penal Code}

Except for the singular development of the enactment of a Louisiana penal code in 1942,\(^8\) the adoption of Field's Code marked the end of criminal codification in the United States until the Model Penal Code project was launched by the American Law Institute after World War II. The codifying reformist zeal of Bentham, Livingston, and Macaulay had spent itself and was replaced by the more limited aspirations of restating and consolidating the criminal law. It is surely something of a historical phenomenon that the drafters of the Model Penal Code were able to revive the long-dormant Benthamite tradition.

I do not refer to that part of the Benthamite tradition that dwelled on supplanting judge-made law with legislation. That battle was largely over. By the middle of the twentieth century, defenders of judge-made law and statutory law were no longer locked in combat. Although many common-law terms and concepts persisted, the criminal law had become a statutory subject. The part of the Benthamite tradition that the Model Penal Code revived was rather the spirit of root-and-branch rethinking and reformulation toward a more just and more effective criminal law.

The fact that the criminal law was now in statutory form did not, unfortunately, make it better. As Professor Wechsler observed early in the work of the Model Penal Code:

As our statutes stand at present, they are disorganized and often accidental in their coverage, a medley of enactment and of common law, far more important in their gloss than in their text even in cases where the text is

\(^{85}\) See Act of July 26, 1881, ch. 676, 1881 N.Y. Laws 913.

\(^{86}\) See \textit{CAL. PENAL CODE} (1872).

Wechsler, Louis Schwartz and their colleagues rose to this challenge with a reformist legislative spirit that Bentham would have cheered. Seeking wisdom in the law and armed with collaboration from other disciplines, the draftsman would act as a "legislative commission, charged with construction of an ideal penal code" and would induce the legislative process "to determine the content of the penal law, the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of authority that it confers, by a contemporary reasoned judgment," heeding "Lord Radcliffe's counsel that 'every system of jurisprudence needs . . . a constant preoccupation with the task of relating its rules and principles to the fundamental moral assumptions of the society to which it belongs.'"

The success of the Model Penal Code has been stunning. Largely under its influence, well over half the states have adopted revised penal codes, creating a veritable renaissance of criminal law reform unparalleled in history. In fact, the influence of the Model Penal Code has been so great that it has now permeated and transformed the substantive criminal law of this country. None of the codes we have considered, including Field's, has had a greater influence. None deserved it more.

89. Id. at 525.