IMPACT OF LEGAL CULTURE AND LEGAL TRANSPLANTS ON THE EVOLUTION OF THE U.S. LEGAL SYSTEM*

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I. *Legal History and Ethnology: Legal Culture and Legal Transplant*. Capacity of Legal Cultures to Accept Legal Transplants. II.*Transplantation of English Common Law to the United States*. 1. Colonial Era. 2. Post-Revolutionary War Adoption of the English Common Law Tradition By State Constitutions, Statutes, or Supreme Court Decisions. 3. The Field Codes. 4. Development of the National Marketplace. 5. Transplantation of Supranational Norms via the Supremacy and Treaty Clauses of the United States Constitution.

I. LEGAL HISTORY AND ETHNOLOGY: LEGAL CULTURE AND LEGAL TRANSPLANT

In this paper, we respond to the profound and pertinent questions asked by our distinguished general reporter, Professor Jorge Sanchez Cordero. We first address the U.S. experience with legal transplants at critical times in the evolution of its legal system. We then, in particular, address the matrimonial law of the community property regime of Texas and Louisiana, within the political, social, human, philosophical, and linguistic contexts of those states.

Capacity of Legal Cultures to Accept Legal Transplants

In order to succeed, a legal transplant must be acceptable to the general and legal culture in which it is inserted. Berkowitz, Pistor, and Richard cogently express this requirement as follows:

For the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law. [1]

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* This paper is based on the U.S. National Report to the 2010 International Congress of Comparative Law. It contains an overview of the U.S. experience with legal transplants and also specifically addresses transplant of the Spanish and French community property regimes into the legal regimes of Texas and Louisiana.

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This article supports this conclusion. The relationship between legal cultures and legal transplants is the subject of extensive analysis by many distinguished scholars.

What is a 'legal culture' and what is the concept supposed to do for us? A sampling of scholarly sources assists us in answering these questions.

Friedman tells us:

> *Legal culture …refers to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds …[L]egal culture is an essential intervening variable in the process of producing legal stasis or change*.[2]

Cotterrell tells us:

> *…[T]he concept of culture – and perhaps legal culture – remains useful as a way of referring to clusters of social phenomena (patterns of thought and belief, patterns of action or interaction, characteristic institutions) coexisting in certain social environments Culture is a convenient concept with which to refer provisionally to a general environment of social practices, traditions, understandings and values in which the law exists*.[3]

Huntington tells us:

> *Civilization and culture both refer to the overall way of life of a people, and a civilization is a culture writ large. They both involve the values, norms, institutions, and modes of thinking to which successive generations in a given society have attached primary importance*.[4]

Sacco notes:

> *In the language of the anthropologist, the word 'culture' does not mean only the totality of everyman's knowledge; it is also the totality of the values, traditions,*

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[1] Berkowitz, Daniel, *et al.*, "The Transplant Effect", *Am. J. Comp. L.* num. 51, 2003, pp. 163. This article also states "that for law to be effective, a demand for law must exist so that the law on the books will actually be used in practice and legal intermediaries responsible for developing the law are responsive to this demand." *Ibidem*, pp. 167 and 168.

[2] Friedman, Lawrence M., "The Concept of Legal Culture: A Reply", *Comparing Legal Cultures*, David Nelken (ed.), Dartmouth Publishing, 1997, p. 34.

[3] Roger Cotterrell, Roger, "The Concept of Legal Culture", *Comparing Legal Cultures*, David Nelken (ed.), Dartmouth Publishing, 1997, p. 27.

[4] Huntington, Samuel P., *The Clash of Civilizations and the Remaking of World Order*, Simon and Schuster, 2003, p. 41.

customs, beliefs and ways of thinking which characterize every human community…[5]

Lévy-Bruhl states:

There exists a necessary harmony between legal facts and the facts of culture... Culture has an impact on the law…[6]

Atias states:

Law is not given to be observed in some kind of 'source.' It is to be found, in every case, in the dialogue that occurs between all the sources and all available points of reference . . . Law is a constant dialogue between human nature, technical, economic and historical conditions of life in a society, legal dispositions and court decisions. The order that spontaneously emerges out of it is the law.[7]

II. TRANSPLANTATION OF ENGLISH COMMON LAW TO THE UNITED STATES

1. *Colonial Era – Early Acceptance of The English Common Law Tradition*

From its origins in colonial times through its founding and continuing into modern times, the United States experienced substantial interaction of different cultures.[8] The interaction of legal cultures and traditions within the United States has not been nearly as extensive. Much of the United States' legal system is deeply rooted in the English common law tradition.[9] In the colonial era, the English language and culture strongly influenced colonial governments to adopt English common law traditions. However, as Justice Story writes, "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles and claimed it as their birthright; but they brought with

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[5] Sacco, Rodolfo, "Anthropologie Juridique", *Apport À une Macro-Histoire du Droit*, Alain A. Levasseur trans., Dalloz, 2008, pp. 3, 13.

[6] Lévy-Bruhl, Henri, *Sociologie du droit, Que sais-je*, Alain A. Levasseur trans., Presses Universitaires de France, 1981, p. 83.

[7] Atias, Christian, *Epistémologie du droit, Que sais-je*, Alain A. Levasseur trans., Presses Universitaires de France, 1994, pp. 122, 131-32.

[8] See Gruning, David, *La lettre d'Amerique: Vive la difference? Why No Codification of Private Law in the United States?*, Revue Juridique Themis, num. 39, 2005, pp. 153, 155.

[9] See Aumann, Francis R., *The Changing American Legal System*, Da Capo Press, 1969, pp. 3-6 (1940); see also Farnsworth, E. Allan, *An Introduction to the Legal System of the United States*, 3d ed. 1996), pp. 6 and 7; see also Pope, Herbert, "The English Common Law in the United States", *Harvard Law Review*, num. 24, 1910, p. 6.

them and adopted only that portion which was applicable to their condition".[10]

Each English colony took elements of English common law and adapted it to its particular needs. Some colonies experienced civil law influences and made attempts at codifying English case law.[11] For example, in Plymouth, Massachusetts, early settlers established a simple code in order to make basic legal issues easy to understand and adjudicate.[12] Massachusetts also developed an early penal code, *The Laws and Liberties of Massachusetts* (1648), which codified criminal offenses.[13]

During the early colonial era, English legal books were not readily available and there were a limited number of trained lawyers.[14] Additionally, since many local judges were not legally trained, several colonies adopted judicial systems with strong biblical roots that focused on moral precepts of right and wrong.[15] Reverend Nathaniel Ward drafted his *Body of Liberties* text in 1641, which was adopted by the colony of Massachusetts and was inspired by Mosaic code principles.[16] Ward's text referenced the basic tenets of the Ten Commandments, as well as biblical books from Deuteronomy, Exodus, and Leviticus.[17] Massachusetts' *Body of Liberties* adopted Ward's text by making it a crime to commit idolatry, murder, witchcraft, or adultery.[18] For example, *Body of Liberties* states "[I]f any person commits any willful murder, which is manslaughter, committed upon premeditated malice, hatred, or cruelty, not in a man's necessary and just defense, nor by mere casualty against his will, he shall be put to death".[19]

Civil laws in Massachusetts further reveal biblical roots in crimes of theft, which required "restitution to the owner, as the Court considering all

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[10] *Van Ness* vs. *Pacard*, 27 U.S. 137, 144 (1829) (In this landlord-tenant case, the Court looked to custom in areas in which the law was silent).

[11] *See* Friedman, Lawrence M., *A History of American Law*, 3d ed., 2005, pp. 113-119 [hereinafter Friedman, History of American Law]; see also Aumann, supra note 9, pp. 12-13, n. 44.

[12] See Aumann, *Idem*.

[13] See Friedman, *History of American Law*, supra note 11, p. 32.

[14] See Stoebuck, William B., "Back to the Crib?", Symposium on the 21st Century Lawyer, *Wash. L. Rev.*, num. 69, July 1994, pp. 665, 667.

[15] See Welch, John W., "Biblical Law in America: Historical Perspective and Potentials for Reform", *B.Y.U. L. Rev.*, 2002, pp. 611, 614.

[16] See Massachusetts Body of Liberties (1641), available at *www.bartleby.com/43/8.htm*; see also Happy, J. Nelson and Pyeatt Menefee, Samuel, "Genesis!: Scriptural Citation and the Lawyer's Bible Project", *Regent U.L. Rev.*, num. 9, Fall 1997, pp. 89, 109.

[17] See Massachusetts Liberties of Nathaniel Ward, available at *faculty.cua.edu/pennington/Law508/Massachusetts Liberties1641.htm*.

[18] *Idem*.

[19] *Idem*.

circumstances shall judge most agreeable to the word of God".[20] Early New Hampshire laws also made it a crime to work, play, or drink alcohol "on the Lords day".[21] In addition, Pennsylvania's Quaker-influenced laws prohibited swearing and gambling and encouraged "kindness, goodness, and charity" to others.[22]

New immigrants included English trained lawyers ready to capitalize on new colonial markets in bustling American cities. They brought with them William Blackstone's *Commentaries of the Laws of England*.[23] These English trained lawyers began to utilize English law in commercial domestic transactions within the colonies, as well as in transactions with parties in England.[24] Blackstone's *Commentaries* served as the standard legal text during the Revolution and early days of the new nation.[25] Even President Abraham Lincoln, in his law practice days, used Blackstone's *Commentaries*.[26] In an 1858 letter, Lincoln wrote, "The cheapest, quickest and best way" [to become a lawyer is to] read Blackstone's Commentaries, get a license, and go to the practice and still keep reading".[27] David Gruning notes that Blackstone's *Commentaries* was so popular that the number of copies sold in American colonies equaled the number of copies sold throughout England.[28]

2. *Post-Revolutionary War Adoption of the English Common Law Tradition By State Constitutions, Statutes, or Supreme Court Decisions – Limited Impact of the French Civil Code Tradition*

By 1776, each colony had some well-established and properly prepared legal professionals trained in the English common law tradition.[29] As each new state set out on the newly charted path of independence from England, the need for English legal standards became ever-more apparent.

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[20] See Welch, supra note 15, pp. 225-226. This language references Exodus 22:1-5, regarding theft.
[21] See Friedman, *History of American Law*, supra note 11, at 35, n. 111.
[22] See McGarvie, Mark and Mensch, Elizabeth, "Law and Religion in Colonial America, in The Cambridge History of Law in America", I, *Early America (1580-1815)*, Michael Grossberg and Christopher Tomlins (eds.), Volume I, 2008, pp. 348-49.
[23] See Gruning, supra note 8, pp. 157-159.
[24] See Friedman, *History of American Law*, supra note 11,pp. 69-70; see also Priest, Claire, "Currency Policies and Legal Development in Colonial New England", *Yale L. J.*, num 110, June 2001, pp. 1303, 1308.
[25] See Friedman, *History of American Law*, supra note 11, pp. 463 n.1, (quoting a letter from Lincoln, and citing Nortrup, Jack, "The Education of a Western Lawyer", *Am. J. Legal Hist.*, num 12, 1968, pp. 294, 294.
[26] *Idem*.
[27] *Idem*.
[28] See Aumann, supra note 9, p. 30, n. 68 (stating "When the first edition of Blackstone appeared in 1765, there were more than one thousand copies sold in America. This exceeded the number sold in England.")
[29] See Stoebuck, supra note 14, p. 668.

After the Revolution, the states used English law to fill gaps in their legal systems until they could establish their own legal norms by creating domestic case or statutory law. Some states adopted English law by state constitution[30] or by statute,[31] whereas other states adopted English law by judicial decisions.[32] Illustrative of adoption by judicial decisions is the language of the

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[30] The language of adoption provisions in state constitutions varies. Some constitutional provisions list specific dates for the adoption of English statutory law, whereas other constitutional provisions adopt English common law generally. For example, the Pennsylvania Constitution adopts "the common law and such of the statutes of England as were in force in the Province of Pennsylvania on May 14, 1776, and which were properly adapted to the circumstances of the inhabitants of this Commonwealth." 1 Pa. Cons. Stat. § 1503 (2009). Some states, such as Delaware, have adopted common law and statutes in effect during 1776. Del. Const. Schedule, § 18 (1831) (2009). For additional state constitutional provisions adopting English common law, *see* Ky. Const. § 233 (1792) (2009); Md. Const. Dec. of R., art.V (1867) (2009); ALM Const. Pt. 2, Ch. VI, Art. VI (1780) (2005); Mich. Const. art. III, § 7 (1908) (2009); Miss. Const. Ann. art. XV, § 274 (1892) (2008); N.H. Const. pt. 2, art. 90 (1784) (2009); N.J. Const. art. XI, § 1, ¶ 3 (1844) (2009); N.Y. Const. art. I, §14 (1938) (2009); Or. Const. art. XVIII, §7 (1859) (2007); Tenn. Const. art. XI §1 (1870) (2009); Wis. Const. art. XIV, §13 (1848) (2008) (stating that the English common law is not codified circa 1776, but is the starting point for continuing laws that may be abrogated by the Wisconsin courts).

[31]Some adoption statutes list specific dates for the adoption of English statutory law, whereas other statutes adopt English common law generally. For example, the Rhode Island adoption statute incorporates English common law "introduced before the Declaration of Independence." R.I. Gen. Laws § 43-3-1 (1896) (2009). However, some states, such as Colorado, use more formal language and adopt English statutes in existence "prior to the fourth year of James the First, excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth." C. R. S. §2-4-211 (1876) (2008). For additional state constitutional provisions adopting English common law, *see* Ala. Code § 1-3-1 (1875) (2009); Alaska Stat. § 01.10.010 (2009); Ark. Code Ann. § 1-2-119 (1869) (2008); Ariz. Rev. Stat. § 1-201 (1901) (2008); Cal. Civ. Code § 22.2 (1850) (2008); C. R. S. §2-4-211 (1876) (2008) (accepted English common law by legislative enactment and held until the adoption of the Colorado constitution); Fla. Stat. § 2.01 (1829) (2009); O.C.G.A. §1-1-10(c)(1) (1784) (2009); Idaho Code § 73-116 (1845) (2008); 5 I. L. C. S. 50/1 (1818) (2009) *see* 1-4 Powell on Real Property § 4.38 (stating that when Illinois became a state in 1818, the law included all enactments of the Northwest Territory, including "the act of 1795 reviving the English common law"); Burns Ind. Code Ann. § 1-1-2-1 (1807) (2009); Kan. Stat. Ann. § 77-109 (1816) (2008); R. S. Mo. §1.010 (1821) (2009); Mont. Code Ann. § 1-1-109 (1816) (2007); Nev. Rev. Stat. Ann. § 1.030 (1861) (2008); N.M. Stat. Ann. § 38-1-3 (1876) (2008); N.C. Gen. Stat. § 4-1 (1778) (2009); N.D. Cent. Code § 1-01-03 (1816) (2009); Okl. Stat. Ann. tit. 12, §2 (1866) (2009); S.C. Code Ann. § 14-1-50 (1778) (2008); S.D. Codified Laws § 1-1-23 (1889) (2009); Tex. Civ. Prac. & Rem. Code Ann. § 5.001 (1836) (2009); Utah Code Ann. § 68-3-1 (1895) (2009); Va. Code Ann. § 1-200 (1776) (2009); 1 V.S.A § 271 (1782) (2005); Wash. Rev. Code § 4.04.010 (1889) (2009); Wyo. Stat. Ann. § 8-1-101 (1889) (2009). For an involved history of the reception statutes of the fifty states, *see* Thomas, David A., *Thompson on Real Property*, Thompson on Real Property, Thomas Editions § 7.02, 2008, pp. 1-7.

[32] *See e.g.* Cleveland, Columbus and Cincinnati R.R. Co. v. Keary, 3 Ohio St. 201, 205-06 (1854) (A case involving common law of agency tort actions where a railroad employee was injured as a result of the negligence of a railroad train conductor. Using the principle of respondeat superior, the Ohio Supreme Court held that the railroad was vicariously liable for its conductor's negligence.)

Ohio Supreme Court in its 1854 opinion where it adopts English common law by stating:

> *We profess to administer the common law of England, in so far as its principles are not inconsistent with the genius and spirit of our own institutions, or opposed to the settled habits, customs, and policy of the people of this State, thereby rendering it inapplicable to our situation and circumstances. It has not been adopted by express legislative enactment, but brought to the old States by our fathers, and constantly claimed as their birthright. Its introduction here by their descendants was almost a matter of course, and its terms and foundation principles have been so interwoven with our constitution and laws, so blended with the remedies we afford, and so constantly enforced by our courts, that its implied recognition by the government and the people, may be fairly assumed; and if it cannot be said to be in force as the common law of England, it may not inaptly be termed the common law of Ohio.*[33]

During the Revolution, and post-Revolution era, anti-British sentiment ran high. Some states, including New Jersey and Rhode Island, adopted statutes prohibiting the use and transplantation of English court decisions rendered after the date of the Declaration of Independence in 1776.[34] The decrease of English influence after the American Revolution, however, was not replaced by the newfound friendship and influence of the French. Although French political philosophy significantly influenced the American patriots, the French legal system did not have the same impact on every-day Americans and the American legal system.[35] Most Americans lacked the capacity to speak, read, and write the French language at this time. A majority of Americans traced their roots back to England and spoke the English language. This made every-day access to the French Civil Code impossible for most colonial Americans, and therefore, limited the influence of the French Civil Code tradition.[36] Additionally, most judges were not trained in French or any other foreign languages.[37]

In the early 1800s, Blackstone's *Commentaries* (published from 1765-1769) and James Kent's *Commentaries on the Law* (published in 1826) served as the basic legal texts for the U.S. legal system and made the need for

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[33] *Idem.*

[34] See Stein, Peter, "The Attraction of the Civil Law in Post-Revolutionary America", *Va. L. Rev.*, num. 52, 1966, pp. 403, 410; see also N. J. Const. art. XI, §1, ¶ 3 (1844) (2009); R.I. Gen. Laws § 43-3-1 (1896) (2009).

[35] See generally Farnsworth, supra note 9, p. 9; see also Stein, supra note 34 pp. 432-433.

[36] See Carriere, Jeanne Louise, "From Status to Peron In Book I, Title 1 of the Civil Code", *Tul. L. Rev.*, num. 73, March 1999, pp. 1263, 1275.

[37] See Jones, Mark L., "Fundamental Dimensions of Law and Legal Education: An Historical Framework – A History of the U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s", *J. Marshall L. Rev.*, num. 39, Summer 2006, pp. 1041, 1056-57.

codification less necessary.[38] Blackstone's *Commentaries* achieved wide-spread use and availability throughout the early 1800s.[39] In many frontier areas, Kent's *Commentaries* served as the only legal text available.[40] Kent's treatise was written in English and served as an easily transportable legal pocket guide to assist frontier territories in establishing an English-based common law legal system.[41] Blackstone and Kent's books were staple legal texts in the few formal legal education programs established at this time in the new nation.[42] As of 1834, only a limited number of formal legal education programs existed.[43]

As the new nation's commercial, industrial, and agricultural industries expanded, new legal norms were needed to settle disputes.[44] Domestic law in the areas of property, contracts, and torts began to grow out of local usages, customs, and the needs of local citizens.[45] Like the practicing bar, English speaking judges and state legislators with limited legal training turned to English common law to develop their local and state legal systems.[46] The compatibility of general legal and cultural traditions between the colonial population and the English along with the longstanding tradition of *stare decisis* in English and colonial America facilitated the expansion of English common law into the legal system of the United States.[47]

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[38] See generally Hulsebosh, Daniel J., "Empire: An Empire of Law: Chancellor Kent and the Revolution of Books in the Early Republic", *Ala. L. Rev.*, num. 60, 2009, p. 377; see also Moline, Brian J., "Early American Legal Education", *Washburn L. J.* num. 42, Summer, 2004, p. 755; see also Jones, supra note 37.

[39] See generally Hulsebosh, supra note 38; see also Moline, supra note 38.

[40] See Gruning, supra note 8, p. 171.

[41] *Idem.*

[42] See Jones, supra note 37, pp. 1056, 1085. For a discussion regarding legal education in the United States from the colonial era until the 1860s, see generally Jones, supra note 37.

[43] As of 1834, the following legal education programs, still in existence today, were in place:

- William & Mary, 1779, *law.wm.edu/about/index.php.*
- Columbia Law School, 1793, *www.law.columbia.edu/jd_applicants/aboutcls/ourhistory/beginnings.*
- Harvard Law School, 1817, *www.law.harvard.edu/about/history.html.*
- Virginia Law, 1819, *www.law.virginia.edu/html/about/about.htm.*
- Yale Law School, 1824, *www.law.yale.edu/about/historyofyls.asp.*
- University of Cincinnati College of Law, 1833, *www.law.uc.edu/ about/history.*
- Penn State The Dickinson School of Law, 1834, *www.dsl.psu.edu/about/historical.cfm.*

[44] See Farnsworth, supra note 9, at 10. (Farnsworth states, "The customs of western farmers and gold miners formed the basis for water and mining law in some of the western states. Some of the prairie states where cattle-raising was the means of livelihood and wood for fences was scarce, changed the English rule that the owner of cattle is liable without fault for damage that they may cause to a neighboring crop-owner.")

[45] *Idem.*

[46] See Henretta, James A., "Magistrates, Common Law Lawyers, Legislators, in The Cambridge History of Law in America", *Early America (1580 – 1815),* Michael Grossberg and Christopher Tomlins, eds., Volume 1, 2008, p. 587.

[47] *Idem.*

French Civil Law influence and codification efforts in the United States only began to take hold after the colonial era on the perimeters of its territories in areas like Louisiana, Florida, and Texas.[48] Louisiana's legal system benefited from both French and Spanish influences.[49] French and Spanish culture, religion, monarchical government, and legal traditions were both very similar and made it easier for the two influences to blend to create the Louisiana legal system.[50] Louisianans feared implementation of English common law, since many did not understand the English language, United States culture, and with their monarchical tradition also did not understand the United States democratic governing system.[51] French cultural and language predominance greatly influenced the creation of Louisiana's First Constitution in 1812, which was written in French and preserved the civil law system.[52] As the years passed, French culture and language remained predominant in Louisiana. Within this ambience, the codification movement remained strong even after the French political presence ceased to exist.[53]

3. *The Field Codes*

In 1839, David Dudley Field, a New York attorney,[54] began his efforts to codify and reform civil and criminal procedure in New York.[55]

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[48] The influence of the French and Spanish civil code tradition in Texas and Louisiana, particularly in the area of community property, is discussed infra Part III of this article. See also Ward, Roger K., "Note, The French Language in Louisiana Law and Legal Education: A Requiem", *La. L. Rev.*, num 57, Summer, 1997, pp. 1283, 1289.

[49] See generally McHugh, James T., "On the Dominant Ideology of the Louisiana Constitution", *Alb. L. Rev.*, num. 59, 1996, p. 1579.

[50] See *Ibidem*, p. 1584.

[51] See Ward, supra note 48, pp. 1290-1292.

[52] See generally McHugh, supra note 49.

[53] See Ward, supra note 48, pp. 1293-1294.

[54] See id. at 68-69. David Dudley Field was born on February 13, 1805. Henry M. Field, The Life of David Dudley Field 15 (Charles Scribner's Sons 1898). He attended Williams College in Massachusetts, where he attacked his studies with "fierce determination." Id. at 28-29. Although Field was one of the college's best scholars, he left Williams College one course shy of completing his degree requirements because "something [on Field's part] had given offence to the President, Dr. Griffin, who was somewhat tenacious of his dignity", *Ibidem*, p. 30. Field's brother, Henry, in his biography of Field, does not specify what Field had done to offend the President. See id. Henry Field writes that "[b]ut whatever the petty irritation, it was soon after removed." Id. After finishing his final course and obtaining his degree from Williams College, Field moved to New York "to make himself master of the law", *Ibidem*, p. 38. When Field's wife passed away in 1836, he crossed the sea to Europe for the first time, *Ibidem*, pp. 39-41. Upon his return to America in 1837, the country was suffering from a financial collapse, *Ibidem*, p. 41. Field's law practice grew rapidly because people needed "the ablest and most trusted legal advisers" during this critical time. Id. As he worked, Field realized that he was interested in reforming the law to improve it and to make it ideal for future generations, *Idem.*

[55] Field's first effort at reforming the law was in 1839, when in a letter to a friend he wrote on the "Reform of our Judicial System", *Ibidem*, p. 46. That same year, Field addressed a committee of the state legislature on the topic of reform, *Idem.* The Judiciary Committee did not adopt Field's legislative proposals, *Idem.* However, he published a series of articles in the

Field's efforts at codification were distinctively American.[56] The civil law tradition had limited influence on his work.[57] His main purpose was to make the law simple, clear, concise[58] and more accessible and understandable to the common man.[59] His most sweeping and revolutionary proposal was entitled "The Codification of the Common Law".[60] Field's ideal had two elements: "first, that the law, as enacted by human governments, should be founded in natural justice; and second, that it should be set forth in the simplest and clearest language, so that it should be *understanded of the people*".[61] He did not intend to destroy the common law; rather, Field wanted to preserve and exalt it "by cutting off its excrescences, and by translating it into the language of the people, so as to make it worthy, not only of the free States of America, but of all English-speaking peoples on the habitable globe".[62] Over thirty states adopted or based codes on Dudley Field's Codes and the New York civil[63] and criminal codes of procedure.[64]

Evening Post on "The Reorganization of the Judiciary," which were collected in a pamphlet and widely circulated in 1846, *Ibidem*, pp. 46-47. Field also spoke about his views to members of the New York Constitutional Convention, and he continued to publish articles in the *Evening Post*, *Ibidem*, p. 47. The Convention adopted a provision that "contained two law reforming provisions – one in the first article, aiming at a general Code; and the other in the sixth article, aiming at the Reform of the Practice", *Idem.* Field's brother notes that the provisions "owed their existence very much to his [Field's] voice and pen", *Idem.* In 1847, Field published a thirty-five page treatise entitled, "What shall be done with the Practice of the Courts? Shall it be wholly reformed? Questions addressed to lawyers", *Idem.* He then composed a Memorial to the Legislature, which was signed by more than fifty members of the New York state bar, *Ibidem*, p. 48. The memorial stated that "a radical reform of legal procedure in all its departments is demanded by the interests of justice and by the voice of people", *Idem.* By 1848, a fragmentary Code of Procedure had been adopted in New York, *Ibidem*, p. 69. The state legislature then passed an act to appoint a commission ("Code Commission") to codify the whole substantive law, *Idem.* Field was not a member of the Code Commission, *See Idem.* After two years, the members of the Code Commission reported on only a small fragment of law, which they did not recommend for adoption, *Idem.* As a result, the legislature decided to repeal the act that had established the Code Commission, *Idem.* Although the legislature's repeal felt like a fatal blow to Field, he never lost hope, *Idem.* He pleaded his cause in a series of Law Reform Tracts, *Idem.*

[56] See Gruning, supra note 8 at 177.

[57] *Idem*.

[58] See Subrin, Stephen N., "David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision", *L. & Hist. Rev*. num. 6, Fall, 1988, p. 311.

[59] *Ibidem*, p. 319.

[60] Field, supra note 54, p. 70.

[61] *Ibidem*, p. 44. The phrase "understanded of the people" is the actual early 19th century language used by Field.

[62] *Ibidem*, p. 73-74.

[63] See generally Subrin, Stephen N., "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective", *U. Pa. L. Rev*. num. 135, April, 1987, p. 909.

[64] See Farnsworth, supra note 9, pp. 68-69.

Ultimately, the Field Codes "served as a kind of catalytic agent" for reforms to state civil and criminal codes across the United States.[65] Although Field submitted the Code of Criminal Procedure to the New York state legislature in 1850, it was not adopted until 1882.[66] Field's Code of Civil Procedure was defeated by the New York State Senate.[67] A different Code of Civil Procedure, which was prepared by M.H. Throop, though mainly founded upon Field's Code, was adopted in segments between 1876 and 1880.[68] The Codes for New York are contained in five volumes.[69] Two of them – the Code of Civil Procedure and the Code of Criminal Procedure – prescribed the practice of courts and defined their jurisdiction.[70] Three of them – the Civil Code, the Penal Code, and the Political Code (which was a compilation of existing statutes that related to the government of the state and the functions of its public officers) – addressed the substantive law.[71]

4. *Development of the National Marketplace — Evolution of Uniform Laws and the Uniform Commercial Code – Limited Impact of Transplants*

Development of the mass production/mass consumption national marketplace with changes in the commercial, agricultural, and industrial landscape involving new ways of doing business and new types of legal relationships created new legal needs including the need for harmonized commercial law. This new body of harmonized commercial law developed in the United States substantially independently of transplants from other legal systems.

Commercial law in the United States developed primarily by case law until the late 19th and early 20th centuries. Today, the Uniform Commercial Code (UCC) replaces and augments the uniform statutes prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL)[72] and enacted by state legislatures beginning at the turn of

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[65] See Friedman, *History of American Law*, supra note 11, p. 293 (citing Van EE, Duan, *David Dudley Field and the reconstruction of the Law*, 1986).
[66] Field, supra note 54, p. 87.
[67] *Idem*.
[68] *Idem*.
[69] *Ibidem*, p. 81.
[70] *Ibidem*, p. 82.
[71] Field, supra note 54, pp. 81-82.
[72] The organization has been known as the National Conference of Commissioners on Uniform State Laws, NCCUSL, since 1915 (when the name was changed from "Commissioners on Uniform State Laws"). In the early 1970s, the Public Information Committee looked at the full title and recommended "ULC" as an all purpose acronym but did not try to establish a single title. The current Public Information Committee, at its October 2006 meeting, recommended shortening the Conference's name for PR purposes. A motion was made and approved to use the name "Uniform Law Commission" (also "ULC") in all of our communications. The committee did not recommend changing the legal name of

the 19th century and during the first half of the 20th century. Work on these uniform statutes served as a prelude to the preparation of the UCC. A series of uniform laws responding seriatim and individually with a statute addressing each newly recognized need for uniformity was prepared by the NCCUSL on individual types of transactions governing "sales",[73] "negotiable instruments",[74] "conditional sales",[75] "trust receipts",[76] "warehouse receipts",[77] "bills of lading",[78] and "stock transfers".[79] The lack of coherence among these individual uniform acts, each dealing with its own discreet subject matter, and the need for a single uniform commercial code to integrate the individual uniform acts was recognized in the early 1940s, when the Commissioners initially met for the sole purpose of updating and modernizing the Uniform Sales Act.[80]

During the more than decade-long preparation of the UCC between 1940 and 1952, there was relatively little use of comparative research in the legislative drafting process. Consequently, the use of transplants was limited. Commenting on this lack of interaction, Eric Stein, in his essay *On Uses and "Nonuses" of Comparative Law In Law Making*,[81] stated:

> *The …Uniform Commercial Code, clearly the most successful instance of American legal unification, was elaborated jointly by the American Law Institute*[82]

NCCUSL but thought it important to adopt a consistent "brand name." *www.nccusl.org/nccusl/newsletters/ UniformActivities/UniformActivities_print_Nov07.pdf*.

73 Uniform Sales Act (promulgated 1906, currently addressed in U.C.C. art. 2).

74 Uniform Negotiable Instruments Law (promulgated 1896, currently addressed in U.C.C. art. 3).

75 Uniform Conditional Sales Act (promulgated 1918, currently addressed in U.C.C. art. 9).

76 Uniform Trust Receipts Act (promulgated 1933, currently addressed in U.C.C. art. 9).

77 Uniform Warehouse Receipts Act (promulgated 1906, currently addressed in U.C.C. art. 7).

78 Uniform Bills of Lading Act (promulgated 1909, currently addressed in U.C.C. art. 7).

79 Uniform Stock Transfer Act (promulgated 1909, currently addressed in U.C.C. art. 8).

80 See Braucher, Robert, "The Legislative History of the Uniform Commercial Code", *Colum. L. Rev.*, num. 58, 1958, p. 798; see also Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 144 (1944). For additional information on the legislative history of the UCC, see generally Mooney, Charles W. Jr., "Survey: Uniform Commercial Code", *Bus. Law.*, num. 41, 1986, p. 1343, n. 4. Years later, in 1958, commenting on the Massachusetts experience with the earlier uniform acts and subsequent enactment of the Uniform Commercial code, Walter Malcolm, a distinguished former president of the NCCUSL, noted the sequential evolution of the various types of secured transactions laws in the United States and the need for a uniform commercial code which would integrate these laws. See Malcolm, Walter The Uniform Commercial Code as Enacted in Massachusetts, *Bus. Law.*, num. 13, 1958, p. 490.

81 Stein, Eric, "On Uses and "Nonuses" of Comparative Law In Law Making", *Nw. U. L. Rev.*, num. 72, 1977, pp. 211, 198.

82 The American Law Institute (ALI) is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute consists of lawyers, judges, and law professors who drafts, discusses, revises, and

> *and the National Conference of Commissioners on Uniform State Laws. The preparatory working papers contain scattered references to foreign—mostly British—law,*[83] *and some of the Reporters brought their comparative skills to bear on the text…*

5. *Transplantation of Supranational Norms via the Supremacy and Treaty Clauses of the United States Constitution*

Development of the post World War II global marketplace has produced pressures for creation of new legal norms and harmonized law.[84] Major actors in this process on a global basis include The Hague Conference on Private International Law, UNIDROIT, UNCITRAL and the International Chamber of Commerce, and on a regional basis include the European Community, the Council of Europe and the Organization of American States.[85] These organizations utilize a variety of instruments to meet these needs, such as conventions (treaties), model laws, guidelines, "soft law" (which contracting parties may voluntarily incorporate into their contracts if they so desire) such as the UNIDROIT *Principles of International Commercial Contracts* and the International Chamber of Commerce *Incoterms*.[86]

Transplantation of supranational legal norms into the legal system of states of the United States via the Supremacy and Treaty Clauses of the United States Constitution may create difficulties. This is illustrated by United States case law implementing the Convention on the International Sale of Goods (hereafter CISG)[87] and the limited use of the CISG by the practicing bar in the United States.

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publishes Restatements of the Law, model statutes, and principles of law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education. ALI has long been influential internationally and, in recent years, more of its work has become international in scope.

[83] Stein stated that these scattered references were to U.C.C. art. 3 § 1, comment at 7 (Tent. Draft num. 1, 1946); U.C.C. art. 3, § 1, Comment at 4 (Tent. Draft num. 3, 1947). See also U.C.C. § 3-410, Comment 3 (1972) (citing English Bills of Exchange Act); id. at § 3-347, Comment 4, in which the case of Price v. Neal, 3 Burr. 1354 (K.B. 1762), is discussed." Stein, supra note 81 at 198

[84] See Duca, Louis F. Del, "Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence", *Tex. Int'l. L. J.*, num. 42, 2007, p. 625.

[85] *Ibidem*, p. 627.

[86] *Ibidem*, pp. 655-656.

[87] The CISG became applicable in the United States effective January 1, 1988. Currently, seventy-four nations have adopted the CISG. See Status – 1980 – United Nations Convention on the Contracts for the Sale of International Goods, *http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_ status.html* (last visited Sept. 22, 2009). For a lengthy inclusive bibliography of the voluminous literature on the CISG, see Electronic Library on International Commercial Law and the CISG, *www.cisg.law.pace.edu/cisg/biblio/biblio.html* (last visited Sept. 29, 2009).

The Supremacy Clause of the United States Constitution in part provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof: *and all Treaties* made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land…"[88] (Emphasis supplied). The Treaty Clause of the United States Constitution in part provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur…".[89]

While similarities exist between the results reached under the CISG and Article 2 (Sales) of the UCC, significant differences also exist. For example, UCC § 2-201 requires contracts for the sale of goods over $500 to be in writing,[90] whereas the CISG does not require a sales contract to be in writing.[91] Furthermore, § 2-202 of the UCC contains a parol evidence rule,[92] whereas Article 8(3) of the CISG displaces the parol evidence rule.[93]

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[88] U.S. CONST. art. 6 (emphasis added).

[89] U.S. CONST. art. II, § 2. *Missouri v. Holland*, 252 U.S. 416, (1920), illustrates transplant of a supranational norm into domestic law of a state which creates implementation problems where the legal culture and law already in existence in the receiving state differs from that of the global environment from which the transplant originates, *Ibidem*, p. 434. In *Missouri*, the United States Supreme Court held that treaties duly entered into by the United States and legislation enacted by Congress to implement the treaty are supreme over conflicting legislation enacted by a state even though the legislation pertains to a power reserved to the states under the 10th Amendment and not granted to the federal government by the United States Constitution, *Ibidem*, p. 434. Assertion of this supremacy evolved out of a confrontation between the U.S. Congress and state governments on the issue of whether the states or the national government had the power to regulate the hunting of migratory birds, *Ibidem*, pp. 430-432. The United States Congress had initially passed laws limiting the hunting of migratory birds on the theory that their migration across state and national borders empowered the Congress to enact such legislation, *Ibidem*, pp. 431-432. Arguing (within the 1920 concept of what constitutes the Interstate Commerce Clause) that since the United States Constitution did not give Congress an enumerated power to regulate hunting of migratory birds and that the power to do so was therefore reserved to the states under the 10th Amendment, the states successfully attacked this theory, *Ibidem*, p. 432. The U.S. federal government then entered into a 1916 Treaty with Great Britain (which at that time still was in control of foreign affairs for Canada) which required the federal government to enact any laws regulating the hunting of migratory birds, *Ibidem*, p. 431; *see also* Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S. – Gr. Brit., Aug. 16, 1916, 39 Stat. 1702. Congress subsequently enacted the Migratory Bird Treaty Act of 1918 prohibiting the hunting of migratory birds. *Missouri*, 25 U.S. at 431. Applying the 1916 Treaty, the Migratory Bird Treaty Act of 1918, and the Supremacy Clause of the U.S. Constitution, the Supreme Court in *Missouri* held invalid a law enacted by the state of Missouri authorizing hunting of birds migrating from Canada through the United States, *Ibidem*, p. 434.

[90] U.C.C. § 2-201 (2001).

[91] CISG article 11, 1489 U.N.T.S. 61, 19 I.L.M. 674, available at *http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf*.

[92] U.C.C. § 2-202 (2001).

[93] CISG art. 8(3).

As indicated, Article 11 of the CISG displaces domestic statute of frauds provisions requiring contracts of a certain monetary amount to be evidenced by a writing in order to be enforceable.[94] It is not surprising that implementation of Article 11 has been much smoother in countries where the national law, like Article 11, abolishes the writing requirement. However, in countries such as the United States where a domestic statute of frauds provision for the sale of goods transactions still exists, implementation of Article 11 was initially marred by non-application of the CISG.[95] Case law in the United States initially also failed to apply Article 8(3) of the CISG which abolishes the parol evidence rule by providing that in determining the intent of the party due consideration is to be given "to all relevant circumstances of the case including the negotiations…"[96] As lawyers and judges became more familiar with the CISG these errors were corrected in subsequent CISG cases in the United States.[97]

As comparativists, we can understand the phenomena of delay and resistance in applying the new norms transplanted into a legal system with a different legal culture.[98] The legal tradition, history, and culture relating to use of juries in the United States is in sharp contrast to the limited use of juries in the tradition, history, and culture of most civil law countries. The statute of frauds and parol evidence exclusionary rules in countries like the United States facilitate fact finding by juries composed of lay persons untrained in the law. These lay persons may only on one or two occasions in a lifetime be called on to serve as jurors to make findings of fact in litigated cases.

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[94] CISG art. 11, 1489 U.N.T.S. 61, 19 I.L.M. 674.

[95] See Duca, Louis F. Del, "Implementation of Contract Formation Statute of Frauds, Parol Evidence, and Battle of the Forms CISG Provisions in Civil and Common Law Countries", *UCC L. J.*, num. 38, 2005, p. 55. In GPL Treatment, LTD vs. Louisiana-Pacific Corporation, 323 Or. 116, 118, 914 P.2d 682 (1996), the court ignored Article 11 of the CISG, which provides that "a contract of sale need not be concluded in or evidenced by a writing and is not subject to any other requirement as to form." GPL Treatment, LTD v. Louisiana-Pacific Corporation; CISG art. 11, 1489 U.N.T.S. 61, 19 I.L.M. 674.

[96] Duca supra note 95. The parol evidence issue was erroneously addressed in the case of Beijing Metals & Minerals Import/Export Corp. vs. American Business Center, Inc. 993 F.2d 1178, (5th Cir. 1993). In Beijing, the court somewhat cavalierly states that "[w]e need not resolve [the] choice of law issue [of whether Texas or the CISG is applicable], because our discussion is limited to application of the parol evidence rule (which applies regardless)." Id. at 1183 n.9 (emphasis added).

[97] Duca supra note 95. In sharp contrast to the murky decision in GPL, the court in Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd. No. 96 Civ. 8052 (HB) (THK), 1998 WL 164824, at *3 (S.D.N.Y. Apr. 7, 1998) correctly applied Article 11 of the CISG. In MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384, 1392-393 (11th Cir. 1998), CLOUT Case No. 222, the court correctly applied Article 8(3) of the CISG, which in effect abolishes the parol evidence rule.

[98] Duca supra note 95.

The process in the civil law tradition is fundamentally different. Most civil law countries assign fact finding to professional career judges. These judges, with their legal training and extensive experience presumably do not need the protection of statute of frauds and parol evidence exclusionary rules in performing their fact finding function. Therefore, it is not surprising that in some early United States court decisions involving applications of the CISG, the courts failed to apply the statute of frauds and parol evidence provisions of the CISG.

The impact of differences in legal culture on the extent to which transplants can be successfully incorporated into the law of the receiving state is further illustrated by the inclination of United States lawyers to utilize the opt out provision of Article 6 of the CISG.[99] Article 6 permits parties to a contract otherwise subject to the CISG to opt out of the CISG in its entirety or in part by merely including in their contract a provision to that effect.[100] U.S. lawyers are not currently utilizing the opt out provision as frequently as they did in the period immediately following ratification of the CISG by the United States. This may be due to a number of reasons. For instance, the development of a substantial body of case law interpreting the CISG provides more predictability for contracting parties as the number of cases interpreting the CISG expands.[101] In addition, the inclusion of CISG courses in law school curriculums, the increasing number of CISG continuing legal education programs, and the development of excellent websites like the CISG Database at the Pace University School of Law,[102] Unilex,[103] and Clout,[104] which make the CISG literature and case law readily available, is sensitizing the practicing bar to possibilities for using the CISG to the

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[99] Article 6 states that "the parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." CISG art. 6, 1489 U.N.T.S. 60, 19 I.L.M. 673.

[100] *Idem.*

[101] The CISG Database at the Institute of International Commercial Law at Pace University Law School reports over 2,000 cases on the CISG. As part of its efforts to foster a *global juris consultorium* contemplated by Article 7(1) of the CISG, the Institute also initiated a case translation program, and to date has translated over 1,500 cases. The CISG Database is accessed by persons from 160 countries. For a comprehensive library of CISG materials, see the CISG Database at *www.cisg.law.pace.edu*. For an example of the comity that CISG 7(1) contemplates, see the Italian judgment *Rheinland Versicherungen* vs. *Atlarex S.r.l* , July 12, 2000 (*http://www.cisg.law.pace.edu/cases/000712i3.html*). This is a ruling of the Tribunale di Vigevano in which the judge evaluates American, Austrian, Dutch, French, German, Italian and Swiss court rulings as well as arbitral awards in reasoning through the CISG issues he addresses, drawing on national reporters, texts and Internet websites for his case data.

[102] See Electronic Library on International Commercial Law and the CISG, *http://www.cisg.law.pace.edu/* (last visited Sept. 22, 2009).

[103] *See* UNILEX on CISG & UNIDROIT Principles, *http://www.unilex.info/* (last visited Sept. 22, 2009).

[104] See Case Law on UNICTRAL Text (CLOUT), last visited Sept. 22, 2009, *www.uncitral.org/uncitral/en/case_law.html?lf=899&lng=en* (last visited Sept. 22, 2009).

advantage of clients. These educational programs and facilities slowly develop a culture which is receptive to the transplanted legal norm. The result is that use of the opt out provision of Article 6 of the CISG is not the pro-forma choice which it used to be when the CISG first became law in the United States.