

The Enchantment of Codification in the Common-Law World

Gunther A. Weiss[†]

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[†] LL.M., Yale Law School, 1999; Attorney-at-Law, New York, Germany, and Czech Republic, 2000. I would like to thank Professor John H. Langbein of Yale Law School for his invaluable guidance. I am also very grateful to John Houlihan and André Namphy of *The Yale Journal of International Law* for the enormous amount of editorial work they did, as well as to Tracy MacDonald and Jonathan Fine for their stylistic assistance. Special thanks to Professor Claus-Wilhelm Canaris of Munich, Professor Mario G. Losano of Milan, Professor Josef Drexel of Munich, Professor Marilyn Drees of Yale Law School, Davis Polk & Wardwell, and last, but not least, the German National Merit Foundation for supporting me in many respects. I dedicate this article to Petr Nosek.

Unless otherwise noted, all translations are by the Author.

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I. INTRODUCTION: THE NEED TO EXPLORE THE ROLE OF CODIFICATION IN THE COMMON-LAW WORLD

Evaluating the attitude towards codification at any given time requires one to rely much more on literature and proposals that, for whatever reason, have not been enacted, than on successful codifications.¹

The question of whether law should be codified has been asked repeatedly throughout the world.² Until now, however, legal scholars have focused attention on the history of codification in continental Europe, while the role codification has played in the common-law world remains unclear.³ Much has been written on codification in the civil law,⁴ but the role of codification in the common law has not been widely studied.⁵

1. Erich Molitor, *Der Versuch einer Neukodifikation des römischen Rechts durch den Philosophen Leibniz*, in 1 L'EUROPA E IL DIRITTO ROMANO: STUDI IN MEMORIA DI PAOLO KOSCHAKER 357, 360 (1954) ("Wenn man die Anschauungen einer Zeit über Kodifikation feststellen will, dann ist man weit mehr als auf erfolgreiche Kodifikationen . . . auf literarische Äusserungen einzelner und auf Entwürfe angewiesen, die aus irgend einem Grunde nicht Gesetz geworden sind.").

2. Csaba Varga's geographically and historically comprehensive work on codification provides a first impression of how powerful and widespread the idea of codification is. See CSABA VARGA, *CODIFICATION AS A SOCIO-HISTORICAL PHENOMENON* (Sander Eszenyi et al. trans., 1991) (1979). For a review, see Pierre Legrand, *Strange Power of Words: Codification Situated*, 9 TUL. EUR. & CIV. L.F. 1 (1994).

3. Except for the literature on Jeremy Bentham and the Field-Carter controversy in the United States, the topic of codification in the common-law world has been neglected. Scholars have called attention to this gap in the literature. See WERNER TEUBNER, *KODIFIKATION UND RECHTSREFORM IN ENGLAND* 15–16 (1974); Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 99 n.19 (1989) (complaining that the struggle between Field and Carter has been largely ignored by German legal scholarship); Barbara Shapiro, *Codification of the Laws in Seventeenth Century England*, 1974 WISC. L. REV. 428, 428–29 (referring to codification in England); Konrad Zweigert & Hans-Jürgen Puttfarcken, *Allgemeines und Besonderes zur Kodifikation*, in Festschrift für Imre Zajtay, 569, 569–70, 572 (Ronald Graveson et al. eds., 1982) (referring to codification in Anglo-American law generally and calling for a comparative theory of codification).

4. See, e.g., *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE* (Helmuth Coing ed., 1982) [hereinafter *HANDBUCH*]. For references to literature on codification in the civil law, see Pío Caroni, "PRIVATRECHT": EINE SOZIALHISTORISCHE EINFÜHRUNG 58–61 (1988) [hereinafter *CARONI, PRIVATRECHT*]; Pío Caroni, *Das Entzauberte Gesetzbuch*, 41 SCHWEIZERISCHE ZEITSCHRIFT FÜR GESCHICHTE 249 (1991) [hereinafter *Caroni, Gesetzbuch*]; and Pío Caroni, *Kodifikation*, in 2 *HANDWÖRTERBUCH ZUR DEUTSCHEN RECHTSGESCHICHTE* 907–22 (Adalbert Erler & Ekkehard Kaufmann eds., 1978) [hereinafter *Caroni, Kodifikation*]. The references in Caroni's *Gesetzbuch* and his *Kodifikation* include international publications.

5. There are three major exceptions. See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (1981) (discussing American codification between 1820 and 1850 in particular); MAURICE EUGEN LANG, *CODIFICATION IN THE BRITISH EMPIRE AND AMERICA* (1924); TEUBNER, *supra* note 3 (studying codification in nineteenth-century England).

This Article seeks to explore the role of codification in the common-law world. Such an exploration serves two purposes: It helps us to understand the similarities and differences between the world's legal systems, and it contributes to the discussion regarding a future European civil code. The Article begins by explicating the concept of codification on the European continent (Part II). It seems appropriate to look more closely into this. Without a nuanced and accurate understanding of the European concept of codification, it is impossible to assess whether and to what extent there is a difference between the two major legal systems regarding this trait and to what extent common-law systems did or did not experience codification. Using this continental European concept as a template, the Article then turns to the history of the common law, focusing on England (Part III) and America (Part IV).

A. *Implications for Macro-Comparison*

In a process called macro-comparison, comparativists traditionally distinguish common-law from civil-law systems.⁶ The distinction refers to the legal systems on the European continent derived from Roman law on one hand (civil law) and those derived from Anglo-American law on the other (common law).⁷ This distinction, based on the differences in historical development, has become less convincing over the course of time. Various studies have shown that the European *ius commune* and the English common law were not as radically distinct as has been historically suggested. Since the Norman Conquest, there has been ongoing intellectual convergence and, particularly in nineteenth-century contract law, a process of continuous reception of the concepts of one system by the other.⁸ Since the historical

6. This popular distinction was especially promoted by the famous comparativist René David. See RENÉ DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* (8th ed. 1982) (distinguishing common law, civil law, and socialist law).

Macro-comparison is understood in contrast to micro-comparison. While micro-comparison seeks to compare how different legal systems solve specific problems (for example, how different legal systems treat same-sex partnerships), macro-comparison, in a more abstract way, aims at comparing style and method of legal systems (for example, by analyzing the methods of statutory interpretation in different legal systems). See, e.g., KONRAD ZWIEGERT & HEIN KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 4–5 (1996) (explaining macro- and micro-comparison).

7. ZWIEGERT & KÖTZ, *supra* note 6, at 185 (explaining this distinction between common law and civil law).

8. Reinhard Zimmermann's works in particular shed new light on an old story. See, e.g., REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* at xi (1996) [hereinafter ZIMMERMANN, *LAW OF OBLIGATIONS*]; Reinhard Zimmermann, *Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit*, 47 JURISTENZEITUNG [JZ] 8, 15–18 (1992); Reinhard Zimmermann, *Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen Civil Law und Common Law*, 1 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEUP] 4 (1993) [hereinafter Zimmermann, *Charakter*]; see also ZWIEGERT & KÖTZ, *supra* note 6, at 28 (listing many further references). Recently, Gordley even titled an article *Common Law and Civil Law: An Obsolete Distinction*. James Gordley, *Common law und civil law: eine überholte Unterscheidung*, 1 ZEUJ 498 (1993) (pointing out that there are no longer fundamental structural differences between the legal systems apart from the common-law trust). Even the trust no longer serves to distinguish the common law, because a number of mixed jurisdictions and civil-law jurisdictions have adopted the trust by legislation. See, e.g., MAURIZIO LUPOI, *TRUSTS* (1997); Michel Grimaldi & François

distinction is becoming more and more "impure," the interest may shift to seemingly simpler and "purer" elements to explain and maintain the classic two-part distinction. Other distinguishing features have been discussed in comparative law. The presence or absence of codification, as well as its style, has often been used as criteria to differentiate civil- and common-law systems.⁹ Closer examination, however, shows that it is a contentious issue whether, and in what sense, codification is a legitimate distinguishing factor. The reason for this uncertainty is not that some countries on the "civil-law" side, such as Scotland and South Africa, have legal systems that are strongly influenced by Roman law but obviously not codified to the extent of other civil-law systems such as France or Germany.¹⁰ Instead, the uncertainty stems from the fact that scholars have advanced divergent views regarding the role of codification in the common-law world. At least five different theses can be distinguished in this respect: a simple distinction thesis, a sophisticated distinction thesis, a convergence thesis, an equation thesis, and a reversal thesis.

1. *Simple Distinction Thesis*

The conventional wisdom in comparative law suggests, on first examination, that the idea of codification, traced by counting codifications in individual states, is historically and geographically widespread in one legal domain: the civil-law system.¹¹ In contrast, a second domain, the common-law system, is said to be uncoded because it is grounded in case law. The simplicity of this analysis made the traditional bifurcation of legal systems attractive. Once the idea was born that codification stands for the civil-law world while case law stands for the common-law world, it was virtually impossible to resist such a *prima facie* plausible and easy way of distinguishing one legal system from the other.¹² Additionally, confusion of

Barrière, *Trust and Fiducie*, in *TOWARDS A EUROPEAN CIVIL CODE* 567 (Arthur Hartkamp et al. eds., 2d ed. 1998).

9. See, e.g., ZWIEGERT & KÖTZ, *supra* note 6, at 62–73 (presenting various criteria for distinguishing the legal systems of the world). For the most recent effort to distinguish the civil law from the common law by discussing various points of comparison, see William Tetley, *Mixed Jurisdiction: Common Law vs Civil Law (Codified and Uncodified)*, 4 UNIFORM L. REV. 591 (1999) (pt. 1), 4 UNIFORM L. REV. 877 (1999) (pt. 2).

10. See, e.g., Tetley, *supra* note 9, at 3 UNIFORM L. REV. 596 (explaining that civil law eventually divided into two streams, the "codified Roman law," such as in France, and the "uncodified Roman law," such as in Scotland and South Africa); see also REINHARD ZIMMERMANN & DANIEL VISSER, *SOUTHERN CROSS* 2–3 (1996) (calling Scotland and South Africa mixed legal systems at the "intersection . . . of civil law and common law" where civilian jurisprudence has survived within a common-law environment).

11. See the table of codifications worldwide in VARGA, *supra* note 2, at 371–91, but note that he also includes drafts and private codes. It is debatable which of Varga's various examples really deserve the codification label, depending on how codification is defined.

12. See, for example, Frederick Lawson's and John Merryman's complaints in FREDERICK H. LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* 47 (1955); and JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 26 (1985). Merryman writes: "One often hears it said, sometimes by people who should know better, that civil law systems are codified statutory systems, whereas the common law is uncoded and is based in large part on judicial decisions." MERRYMAN, *supra*. For examples of this argument, see Carlos Bollen & Gerard-René de Groot, *The Sources and Backgrounds of European Legal*

the different ways in which the term "common law" can be used may also provide illusory support for this thesis. The term "common law" is not only used to distinguish legal systems. It is also employed to distinguish the law of common-law courts from statutory law. Used in this sense, "common law" is equivalent to uncoded law.¹³

2. *Sophisticated Distinction Thesis*

Many scholars feel uncomfortable with the clear-cut distinction expressed in the simplistic formula that civil law is equivalent to codified law and common law to case law. They claim that codification exists in both legal systems, but that it does not exist to the same extent and it manifests a different nature in each system. However, it is unclear and disputed exactly what the difference is.¹⁴

3. *Convergence Thesis*

Some scholars suggest that codification may no longer be a proper way of distinguishing one legal system from the other. They contend that the two legal traditions, originally distinguished by a clear dichotomy between codification and case law, have been converging in the twentieth century. They describe, for example, a "tendency toward codification in major

Systems, in *TOWARDS A EUROPEAN CIVIL CODE* 97, 112 (A.S. Hartkamp et al. eds., 1994); Roy Goode, *The Codification of Commercial Law*, 14 *MONASH U. L. REV.* 135, 135-36 (1988); and Ferdinand Stone, *To Codify or Not To Codify: Derivation of Louisiana Law*, 9 *A.B.A. INT'L & COMP. L. BULL.* 16 (1965). See also KLAUS RÖHL, *ALLGEMEINE RECHTSLEHRE* 579 (1994) (stating that lawyers first think of codification when they want to explain the difference between common law and continental European civil law); Franz Bydliniski, *Civil Law Codification and Special Legislation*, in *QUESTIONS OF CIVIL LAW CODIFICATION* 25, 29 (Attila Harmathy and Ágnes Németh eds., 1990) ("the common law, which tends to be viewed as the antithesis of codified law"); Helmut Coing, *Zur Vorgeschichte der Kodifikation: Die Diskussion um die Kodifikation im 17. und 18. Jahrhundert*, in 2 *LA FORMAZIONE STORICA DEL DIRITTO MODERNO IN EUROPA* 797, 797 (1977) (mentioning that, in comparative law, codification is regarded as a characteristic trait of civil law).

13. For different ways of using "common law," see, for example, ZWEIGERT & KÖTZ, *supra* note 6, at 185. For another example see ZIMMERMANN & VISSER, *supra* note 10, at 3, who describe South African law with its largely civilian jurisprudence as based on "common (in the sense of uncoded) law."

14. See, e.g., Jean L. Bergel, *Principal Features and Methods of Codification*, 48 *LA. L. REV.* 1073, 1076 (1988) (contrasting European-style "substantive" codification and "purely formal" common-law codification, but acknowledging that common-law countries also produce some legal genres that closely resemble codifications of substantive law); Michel Berger, *Codification*, in *PERSPECTIVES IN JURISPRUDENCE* 142, 143, 153, 155 (Elspeth Attwooll ed., 1977) (stressing the difference between "Anglo-Saxon codification" and European codes regarding the degree of reform); René David, *Sources of Law*, in 2 *THE LEGAL SYSTEMS OF THE WORLD: THEIR COMPARISON AND UNIFICATION* 56, 57-58 (René David ed., 1984) (claiming that common-law "compilations" closely resemble "Romano-Germanic" codes, but that they are distinguished by the fact that it is not their objective to give lawyers a new basis for their task of interpreting the law); Richard Hyland, *The American Restatements and the Uniform Commercial Code*, in *TOWARDS A EUROPEAN CIVIL CODE*, *supra* note 8, at 55, 60-61 (claiming that the notion of codification is not foreign to American law but that "American courts tend to read the codes to facilitate case law evolution rather than as the definitive resolution of the issue involved"); Peter M. North, *Problems of Codification in a Common Law System*, 46 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ]* 490, 503 (1982) (pointing to the "principled approach of the civil lawyer and the far more pragmatic approach of the common lawyer").

common law nations" and countertendencies in that "civil law judges are becoming more consciously active, less inclined to conform to the image of a passive *bouche de la loi* and thus more like common law judges."¹⁵

4. Equation Thesis

The equation thesis resembles the convergence thesis in that it suggests that codification is already present in both legal systems, or at least that both systems could function successfully by using codification-based law.¹⁶ This thesis does not claim convergence because it does not necessarily imply that, historically, there was a fundamental difference that has now vanished in a process of convergence.

5. Reversal Thesis

Recently, one scholar made the suggestion that entrenched systems of codification and common law are reversing their original preference for one approach over the other. According to this view, the United States seems to have turned to codification, whereas Europe has become more and more skeptical about codification as an appropriate device for organizing a legal system.¹⁷ This claim also resembles the convergence thesis because it

15. JOHN H. MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS, CASES AND MATERIALS* 54 (1978); see also Arthur T. Von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, U.C. DAVIS L. REV. 659, 667 (1998) ("As the twentieth century wore on, case-law systems, especially as represented by the United States, and codified systems, in particular the mature legal orders of continental Europe, began to converge in conception and practice."); cf. ZWIEGERT & KÖTZ, *supra* note 6, at 198, 264-65 (stating that distinguishing legal systems by codification is no longer as convincing as it was towards the end of the 1800s). On convergence in general, see THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES, AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY (Basil S. Markesinis ed., 1994).

16. For the theory that codification has already succeeded everywhere, see Denis Tallon, *Codification and Consolidation of the Law at the Present Time*, 14 ISRAEL L. REV. 1, 2 (1979) ("Codification is now present everywhere, in every kind of legal system."). Tallon adds, however, that U.S. codes "are somewhat different from the traditional European codes." See *id.* Other scholars present the theory that codification could succeed in both systems. See, e.g., LORD GERALD GARDINER, *LAW REFORM NOW* 11 (1963) ("The contention that English law, by its nature, is uncodifiable has been disproved by the experience gained with our own codifying statutes and on a much wider scale by the experience of the British Dominions."); VARGA, *supra* note 2, at 258 (claiming that codification is "mere form" and thus concluding: "Legal systems of varying types and family backgrounds can attempt to use codification for solving socio-legal problems equally successfully."); cf. Shapiro, *supra* note 3, at 428, 429 (emphasizing common-law traditions of "codification" and criticizing the tendency to erect a barrier between common- and code-law systems).

17. "On the utility of private law codes, Europe and the United States seem to have reversed roles in the last few decades." Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 432 (1996). Herman points to the U.C.C. in the United States on one hand and to the European discussion about "decodification" and the present impossibility of codification on the other hand. See *id.* The idea that codification is now impossible was initiated by Natalino Irti in Italy and Friedrich Kübler and Josef Esser in Germany. See NATALINO IRTI, *L'ETÀ DELLA DECODIFICAZIONE* (3d ed. 1989); Josef Esser, *Gesetzesrationalität im Kodifikationszeitalter und heute*, in 100 JAHRE OBERSTE DEUTSCHE JUSTIZBEHÖRDE 13 (Hans-Jochen Vogel & Josef Esser eds., 1977); Friedrich Kübler, *Kodifikation und Demokratie*, 24 JZ 645 (1969); cf. Klaus Rolinski, *Ersetzt Common Law partiell kodifiziertes Recht?*, in 1 FESTSCHRIFT FÜR ULRICH KLUG 143, 143 (Günter Kohlmann ed., 1983) (observing a tendency in the German legal system to increase the power of judges while common-law systems increasingly bind judges to codifications).

acknowledges the process of convergence. At the same time, the reversal thesis means more than convergence. It asserts that, so to speak, the process has already reached beyond the intersection of common law and civil law and that divergence has now followed convergence.

6. *Evaluation*

These five theses are quite different and even contradictory. It is time to stand back, take a fresh look at legal history including the most recent developments, and evaluate which of these suggestions is most likely to give a proper description of current legal regimes. In providing a historical overview of codification in the common-law world, this Article will assert that a "modified sophisticated distinction thesis" describes the reality most accurately.

Even though American law and English law have not been codified to the extent of civil-law systems, the idea of codification is not an idea historically confined to the European continent. Instead, as this Article will demonstrate, codification is a very important common historical strand in both great legal traditions. This fact supports a thesis of "distinction" rather than equation because it shows that the law has been codified to a considerably different degree in the two legal systems. Such a thesis is "sophisticated" rather than "simple" because it does not limit the analysis to comparing whether codes have been enacted or not. Finally, for three reasons, as this Article will show, the thesis may also be described as "modified." First, this Article will develop a more realistic European concept of codification as a template and background for the subsequent history of the common law. Second, the Article will take more thorough account of the history of unsuccessful codes in the common-law world. Third, the Article will consider more recent developments, including in particular whether the Uniform Commercial Code (U.C.C.) deserves its name.

Besides this general justification raised by the interest in macro-comparison, there is a more specific reason to justify examining codification in the common law: the idea of a civil code for the European Union.

B. *Implications for European Codification*

Shedding light on the idea of codification in the common-law world has present relevance. In 1989, and again in 1994, the European Parliament suggested beginning preliminary work towards a comprehensive European civil code to promote harmonization or unification of law.¹⁸ This idea is not novel. Harmonization of private law was an issue from the beginning of the European Economic Community, and in 1968 a scholar expressly concluded

18. See Parliament Resolution on Action To Bring into Line the Private Law of the Member States of 5/26/1989, 1989 O.J. (C 158) 400, *reprinted in* 1 ZEuP 613 (1993); Parliament Resolution on the Harmonisation of Certain Sectors of the Private Law of the Member States of 5/6/1994, 1994 O.J. (C 205) 518, *reprinted in* 3 ZEuP 669 (1995).

that a European Civil Code was both feasible and desirable.¹⁹ The idea of European codification, however, has never been taken seriously enough to become established in the political institutions of the European Community. The Parliament's suggestions were therefore somewhat surprising. Given the frequently low technical quality of European regulation, however, it is not surprising that the European Parliament has not vouchsafed us a definition of codification in its resolution.²⁰ Given this ambiguity, there is a mounting flood of literature discussing a bewildering variety of models of what European codification could and should look like.²¹ The following section attempts to survey the range of ideas currently under discussion.

1. *The Substance of European Codification*

In substantive terms, the European Parliament has not definitively identified which areas of law to include in these codification plans or what level of harmonization to strive for. Proposals include "zero codification options" denying any need for harmonization and unification or claiming the superiority of means other than legislation, as well as calls for codification for transborder or trade-related areas. Another area of debate pits those in favor of limiting codification to the law of obligations against those championing more ambitious plans for codifying large additional fields, or even going so far as to propose a comprehensive codification of all of traditional private law. Codification can be envisaged not only as a single code modeled on one or

19. See Alexander G. Chloros, *Principle, Reason, and Policy in the Development of European Law*, 17 INT'L & COMP. L.Q. 849 (1968) (discussing the codification of European private law); Walter Hallstein, *Angeleichung des Privat- und Prozeßrechts in der europäischen Wirtschaftsgemeinschaft*, 28 RABELSZ 211 (1964) (providing an early discussion of the need to harmonize European private law). Chloros titled this passage of his article in a way that has since become familiar: "Towards a European Civil Code." Chloros, *supra*, at 875. He favored a European Law Institute or a European Law Commission and suggested that codification could start with a European Code of Obligations. See *id.* at 876. Chloros also emphasized that "as far as the form is concerned, we will have to adapt ourselves to a continental type of codification." *Id.* at 877.

20. See Oliver Remien, *Über den Stil des europäischen Privatrechts*, 60 RABELSZ 1 (1996) (commenting on regulatory style in European private law). For various ways in which "codification" has been understood within European law in general see, for example, Sylvaine Peruzzetto, *La Codification du droit communautaire*, in LA CODIFICATION 145, 152-58 (Bernard Beignier ed., 1996); Otmar Philipp, *Kodifizierung des Gemeinschaftsrechts*, 6 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 165 (1995); and Fritz Rittner, *Das Projekt eines europäischen Privatrechtsgesetzbuches und die wirtschaftliche Praxis*, 49 DER BETRIEB 25, 25-27 (1996).

21. For discussions of a European civil code against the background of unification and harmonization of private law, including alternative ways of harmonization, see, for example, AUF DEM WEGE ZU EINEM EUROPÄISCHEN ZIVILGESETZBUCH (Dieter Martiny & Normann Witzleb eds., 1999); ULRICH DROBNIG, PRIVATE LAW IN THE EUROPEAN UNION (1996); EUROPÄISCHE RECHTSANGLEICHUNG UND NATIONALE PRIVATRECHTE (Hans Schulte-Nölke & Reiner Schulze eds., 1999); MARTIN GEBAUER, GRUNDFRAGEN DER EUROPÄISIERUNG DES PRIVATRECHTS (1998); GEMEINSAMES PRIVATRECHT IN DER EUROPÄISCHEN GEMEINSCHAFT (Peter-Christian Müller-Graff ed., 1993); HERIBERT HIRTE, WEGE ZU EINEM EUROPÄISCHEN ZIVILRECHT (1996); JOCHEN TAUPITZ, EUROPÄISCHE PRIVATRECHTSVEREINHEITLICHUNG HEUTE UND MORGEN (1993); TOWARDS A EUROPEAN CIVIL CODE, *supra* note 8; Rittner, *supra* note 20; and Reinhard Zimmermann, *Civil Code or Civil Law? Towards a New European Private Law*, 20 SYRACUSE J. INT'L L. & COM. 217 (1994). See also Jochen Zenthöfer, *Brauchen wir ein europäisches Zivilgesetzbuch?*, 1999 HUMBOLDT FORUM RECHT 4 (July 13, 1999) <<http://www.humboldt-forum-recht.de/4-1999>> (briefly summarizing the debate and presenting various models of codification currently under discussion).

more of the existing national civil codes or a more independently created European code, which then serves as a substitute for all existing civil codes and private statutory laws within the European Union.²² Alternatively, there could be a European code in addition to the existing fifteen national systems with various possible ways of defining its authority and scope, or a flexible uniform code that expressly permits the member states to deviate subsequently from the code by national legislation.²³

There is some evidence that, at least for the time being, the European Parliament means to address harmonization by codification in the law of obligations and parts of international private law.²⁴ In 1999, an EU official indicated that, outside of these areas, a general harmonization of the law "is not regarded as very realistic" in Brussels.²⁵ But this might be viewed differently at a later stage of the European process of integration. Currently, commissions of independent European scholars have been commissioned for the substantive preparation of a European civil code, and their work has already resulted in impressive first drafts, including the important *Principles of European Contract Law*.²⁶

2. *The Form of European Codification*

Technically, there is a multitude of tools for bringing about legal harmonization in general and harmonization by European codification in particular.²⁷ First of all, there are various distinct European tools for harmonization and unification according to the EC Treaty. These devices are agreements, regulations, and, most importantly in private law, directives. In particular, regulations and directives are effective instruments with which to achieve "supra-national" codification because these legal measures may "penetrate directly into the legal systems of [EC] Member States."²⁸ Under article 220 of the Treaty, agreements are international law agreements, signed

22. See, e.g., Dieter Martiny, *Europäisches Privatrecht—greifbar oder unerreichbar?*, in AUF DEM WEGE ZU EINEM EUROPÄISCHEN ZIVILGESETZBUCH, *supra* note 21, at 1, 10 (commenting on the tendency for legal scholars to recommend their own national legal system as a model because it is the system they know best).

23. For a brief discussion of the proposal for a European code to operate alongside national codes, see Rittner, *supra* note 20, at 25. The uniform code proposal is supported in Oliver Remien, *Europäisches Zivilgesetzbuch—Einheitsrecht mit nationaler Abänderungsbefugnis*, in AUF DEM WEGE ZU EINEM EUROPÄISCHEN ZIVILGESETZBUCH, *supra* note 21, at 125.

24. See Winfried Tilmann, *Zweiter Kodifikationsbeschluss des europäischen Parlaments*, 3 ZEuP 534, 540–41 (1995).

25. Christiaan W.A. Timmermans, *Zur Entwicklung des europäischen Zivilrechts*, 7 ZEuP 1, 4–5 (1999).

26. See, e.g., PRINCIPLES OF EUROPEAN CONTRACT LAW, PART I: PERFORMANCE, NON-PERFORMANCE AND REMEDIES (Ole Lando & Hugh Beale eds., 1995). For further commissions and working groups see Ulrich Drobnig, *Europäisches Zivilgesetzbuch—Gründe und Grundgedanken*, in AUF DEM WEGE ZU EINEM EUROPÄISCHEN ZIVILGESETZBUCH, *supra* note 22, at 109, 110–11.

27. For a general overview see, for example, TAUPITZ, *supra* note 21, and for different models of codification see Rittner, *supra* note 20.

28. Peter Schlechtriem, *Towards a European Law: The Contribution of Law Faculties to Reform and the Unification of Private Law*, 1 EUR. J.L. REFORM 31, 41 & n.38 (1999) (quoting Roy Goode).

by individual member states, that supersede opposing national law. Under article 189(2) of the Treaty, regulations enacted by the Council are generally and directly applicable in all member states, are binding on citizens of all of the member states, and take priority over national law. Finally, the Council issues directives to national legislatures of member states, requiring these legislatures to implement their substantive contents into national law but leaving the member states some flexibility as to form, methods, and time of implementation. Currently, one of the major controversies is whether the European Union already possesses the power to prepare and enact a European codification by any of these means.²⁹

However, it should not go unmentioned that there are ways of harmonizing law other than by EU tools that may also ultimately result in codification. There is, for example, the classic instrument of international conventions (other than the convention under article 220 of the Treaty) concluded by European states. Such conventions may, under certain conditions, even allow the direct and immediate "self-executing" implementation of private-law codification into national law.³⁰ Regarding conventions, the International Institute for the Unification of Private Law (UNIDROIT) in Rome, founded by the League of Nations in 1926, is already a leading actor in European and global harmonization of private law.³¹ The Institute paved the way for the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG) and, in recent years, for a Convention on International Financial Leasing (1988) and a Convention on International Factoring (1988).³² Apart from conventions, there is the less ambitious tool of preparing model laws and restatements. If a uniform code is later adopted by the legislature or if a comprehensive restatement serves as a model for subsequent legislation, these tools may equally result in codifications.³³

29. See, e.g., Matthias Pechstein, *Europäisches Zivilgesetzbuch und Rechtssetzungsbefugnisse der EG*, in *AUF DEM WEGE ZU EINEM EUROPÄISCHEN ZIVILGESETZBUCH*, *supra* note 21, at 19.

30. See, e.g., Schlechtriem, *supra* note 28, at 39–41 (1999) (providing a brief account of the various techniques by which conventions are implemented into national law).

31. See Pierre Widmer, *The International Institute for the Unification of Private Law: Shipyard for World-Wide Unification of Private Law*, 1 EUR. J.L. REFORM 181 (1999) (discussing the creation, mission, and projects of UNIDROIT).

32. For a list of UNIDROIT conventions and their state of implementation, see *Implementation of Uniform Law Convention*, 3 UNIFORM L. REV. 852, 857 (1998) (CISG and Financial Leasing); and *id.* at 858 (Factoring). Note that the Institute also published *Principles for International Commercial Contracts* in 1994. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* (1994); see also Michael J. Bonell, *The UNIDROIT Principles: First Practical Experiences*, 1 EUR. J.L. REFORM 193, 202 (1999) (taking stock and concluding that the Principles' "success in practice has gone beyond all expectation"); Claus-Wilhelm Canaris, *Die Stellung der "UNIDROIT Principles" und der "Principles of European Contract Law" im System der Rechtsquellen*, in *EUROPÄISCHE VERTRAGSRECHTSVEREINHEITLICHUNG UND DEUTSCHES RECHT 5* (Jürgen Basedow ed., 2000) (discussing the role of the UNIDROIT Principles and the European Principles within the system of legal sources).

33. For the character of uniform laws and restatements and their significance for codification, see *infra* Subsection IV.C.2.

3. *The Historical Argument Against European Codification*

Beyond this cursory glance over issues in the European codification controversy, I will abstain from taking up the fundamental debate on harmonization of private law in Europe. There are too many suggestions, assertions, and arguments to do justice to all of them in one article. Instead, I will confine myself to a more specific question. It addresses the comparative methodological foundations of European codification.

The European Union is in some sense a mixed legal system.³⁴ Within the European Union, the center of the common-law world—England—meets the centers of the civil-law world, such as France, Germany, Austria, and Italy.³⁵ It has been assumed that this is mixing fire and water, that it will not work.³⁶ Since Europe is now developing a growing body of European private law, and since Parliament expressly voted for much more ambitious codification plans, it is time to reconsider this pessimistic prediction. The concern goes far beyond questions of differing substantive laws. Such differences are present everywhere, and they can equally be found between different countries within the civil-law or the common-law system. The puzzle is whether a European civil code can function at all in a union that brings together the main representatives of both great legal systems, and how the common-law member states in particular will take this medicine.³⁷ To a greater or lesser extent, all forms of codification currently proposed raise this question. From the most ambitious plan of a comprehensive supranational civil code enacted in the form of a regulation, to a voluntarily adopted uniform code encompassing only parts of trade-related transborder law, all plans may lead to a code that eventually will apply to a common-law system. They all therefore raise the question of whether the civil law-common law divide, which separates England, Wales, and Ireland from the Continental legal systems, is a major obstacle to European codification. Taking up this concern is also part of the “bricks and mortar” that comparative legal research can produce to lay the foundations for successful harmonization of the law in Europe.³⁸

34. See, e.g., Tetley, *supra* note 9, at 591–92. For definitions of “mixed legal system” and “mixed jurisdiction,” see *id.* at 592, 597.

35. Note that Denmark, Finland, and Sweden can hardly be counted as civil-law countries because Roman law was less influential there. It is therefore justifiable to treat those countries separately as Nordic legal systems. See LARS BJÖRNE, *NORDISCHE RECHTSSYSTEME* (1987); ZWIEGERT & KÖTZ, *supra* note 6, at 270–80.

36. See Hans Claudius Taschner, *Rechtsangleichung in der Bewährung?*, in *RECHTSVERGLEICHUNG, EUROPARECHT UND STAATENINTEGRATION* 765, 776 (Gerhard Lücke et al. eds., 1983) (“Das Bangen hat seinen Grund in der pessimistischen Annahme, man vermähle hier Feuer und Wasser.”).

37. See Zweigert & Puttfarcken, *supra* note 3, at 569 (“The substance is always discussed most thoroughly, codification as a legal technique hardly.”). In 1998, however, a new law journal, the *European Journal of Law Reform*, was founded, which promises to address the art and methodology of European law reform. For a first step, see Alfred E. Kellermann, *Proposals for Improving the Quality of European and National Legislation*, 1 *EUR. J.L. REFORM* 7 (1999).

38. See Schlechtriem, *supra* note 28, at 44–53 (discussing what law faculties can contribute to the process of harmonization and unification of the law).

This Article aims at contributing in this regard by focusing on only one argument against European codification plans. This argument is rooted in the historical common law-civil law divide, and it may thus be called the “comparative legal history argument” against European codification. Recently, for example, a strong opponent of codification expressed it by arguing that, “*given the historical resistance of common-law tradition to the idea of codification,*” a civil code for the whole European continent is neither desirable nor feasible.³⁹ This argument is not only interesting for comparative legal history, it is representative of a widespread and recurrent implicit attitude among scholars. It also provokes the fundamental question of whether, even beyond the case of a European civil code, all codification plans in common-law systems are doomed from the start. Moreover, the argument is important because the reference to experience, history, and tradition is likely to be compelling among jurists.

Nevertheless, it is crucial to bear in mind that the historical argument against a European codification is only one argument in a multilayered discussion. In logical terms, this Article addresses a *necessary* but not a *sufficient* presupposition for a European code. There may well be many good reasons for not codifying at all or for not codifying in the present circumstances. I do not assert that a European civil code in a certain form and with a certain content is feasible or even that it is the most desirable solution at this point. A historical analysis is unlikely to provide sufficient grounds for such far-reaching claims. But I do assert that *the history of codification in the common law in general* cannot serve as an argument *against* a European civil code.

Examining the fate of the idea of codification in the common law provides the evidence for my first and second assertions. The historical perspective illustrates that a European civil code would *not* artificially graft codification onto a legal environment to which such an idea is by nature anomalous, antagonistic, or alien, and it thus disproves the historical argument against a European codification.

39. As Legrand has noted:

[T]o promote a civil code for the whole of the European Continent, *given the historical resistance of the common-law tradition to the idea of codification*, is necessarily to affirm performatively what is otherwise denied, that is, to assimilate the agents within one legal tradition to a different way of speaking and acting and to different moral preferences that, because they are culturally embedded, are arguably incompatible and incommensurable with their horizon of expectations.

Pierre Legrand, *Codification and the Politics of Exclusion: A Challenge For Comparativists*, 31 U.C. DAVIS L. REV. 799, 805 (1998) (emphasis added); see also Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44, 56–59 (1997) (arguing for “polyjurality” instead of codification and calling it “arrogant” to promote the adoption of a European civil code); Pierre Legrand, *Sens et non-sens d’une codification réformatrice du droit européen*, 82 REVUE FRANÇAISE D’ADMINISTRATION PUBLIQUE 227, 230 (1997) (calling for a “third way” between codification and the common law). Legrand is a representative of a cultural approach to comparative law that seeks to distinguish legal systems by their “legal culture” rather than by the substance and form of their sources of law. See, e.g., ZWIGERT & KÖTZ, *supra* note 6, at 66 (explaining the cultural approach and identifying Legrand and Friedman as proponents of this approach).

C. Summary

There are two important reasons to explore the role of codification in the common-law world. First, such study contributes to the sophistication of legal macro-comparison. Ever since comparativists have tried to distinguish the world's two main legal systems, common law and civil law, codification has been one of the distinguishing features. This Article aims at illuminating whether and to what extent codification can serve this purpose. Second, examining the common-law history of codification has practical relevance because of the debate over a European civil code. With respect to these plans, the assertion in this Article is not that codification is feasible or even desirable at the present time. Instead, the focus is on objections to such plans that are founded on long-standing misconceptions about common-law history and experience. This analysis illustrates that the history of codification in the common-law world does not argue against European codification plans. The overarching claim of this Article is that civil-law and common-law systems have been touched by the "enchantment of codification."

II. CODIFICATION ON THE EUROPEAN CONTINENT

Etymologically, the word "codification" is a combination of "codex" with the Latin verb "facere" (to do).⁴⁰ Jeremy Bentham coined this neologism.⁴¹ The term itself appeared for the first time in June 1815 when Bentham wrote a letter to Tsar Alexander I, in which he distinguished "codification" from normal "legislation."⁴² Interestingly, therefore, the

40. For the etymology and the history of the word "codification," see ADOLF BERGER, *ENCYCLOPEDIA DICTIONARY OF ROMAN LAW* 391 (1953); CARONI, *PRIVATRECHT*, *supra* note 4, at 53-54 (1988); GERHARD KÖBLER, *ETYMOLOGISCHES RECHTSWÖRTERBUCH* 222 (1995); WOLFGANG PFEIFER, *ETYMOLOGISCHES WÖRTERBUCH* 686 (1993); JACQUES VANDERLINDEN, *LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIII^e AU XIX^e SIÈCLE: ESSAI DE DÉFINITION* 72 (1967); Theodor Bühler, *Der Stand der Kodifikationsentwicklung Ende des 16., Anfang des 17. Jahrhunderts*, in *DAS REICH UND DIE EIDGENOSSENSCHAFT 1580-1650*, at 179, 179 (Ulrich Im Hof & Suzanne Stehelin eds., 1986); Theo Mayer-Maly, *Kodifikation und Rechtsklarheit in der Demokratie*, in *IDEOLOGIEKRITIK UND DEMOKRATIETHEORIE BEI HANS Kelsen* 201, 204 (Werner Krawietz et al. eds., 1982); and Christian Starck, "Kodifikation," in *3 STAATSLERIKON* 563 (Görres-Gesellschaft ed., 7th ed. 1987).

In this context, see also the brief conceptual remarks on the history of the French and English term "code," the German "Kodex," the Spanish "código," and the Italian "codice" in VANDERLINDEN, *supra*, at 14; VARGA, *supra* note 2, at 19; and Stanislaw Salmonowicz, *Die neuzeitliche europäische Kodifikation (16.-17. Jahrhundert): Die Lehre und ihre Verwirklichung*, 37 *ACTA POLONIAE HISTORICA* 29, 31 (1978).

41. On Bentham's neologisms "codification," "international," "to maximize," and "to minimize," see JOHN DINWIDDY, *BENTHAM* 47-48 (1989).

42. Letter from Jeremy Bentham to Tsar Alexander I (June 1815), in 8 JEREMY BENTHAM, *THE CORRESPONDENCE OF JEREMY BENTHAM* 464, 468 (Stephen Conway ed., Oxford 1988) (explaining "the case (it may be called) of Codification"); see also Jacques Vanderlinden, *Code et codification dans la pensée de Jeremy Bentham*, 32 *TJDSCHRIFT VOOR RECHTSGESCHIEDENIS/REVUE D'HISTOIRE DU DROIT* 45, 46 (1964); Armin Wolf, *Gesetzgebung und Kodifikationen*, in *DIE RENAISSANCE DER WISSENSCHAFTEN IM 12. JAHRHUNDERT* 143, 149 & 166 n.28 (Peter Weimar ed., 1981). A multitude of misleading assertions and incorrect dates for the term's origin circulate in the literature. See, e.g., DINWIDDY, *supra* note 41, at 58-59 (1989) (stating that "codification" appears in letters since 1808 but providing no evidence); STEN GAGNÉR, *STUDIEN ZUR IDEENGESCHICHTE DER GESETZGEBUNG* 109-10 n.1 (1960) (giving 1817 instead of 1815 and probably referring to the *Papers Relative to Codification*

Prussian (1794), French (1804), and Austrian (1811) codes already existed before the word "codification" appeared. Meanwhile this term has become so familiar that it is no longer realized that it had a fairly recent inception and that we approach history with the language of later times.⁴³ Bentham also created another word for his special type of legislation: "pannomion."⁴⁴ Unlike "codification," "pannomion" and "pannomification" have never become popular.

Today, the term "codification" is familiar, and yet it is unclear. There are dozens of definitions and explications of codification in the legal literature. Codification is, for example, defined as "a *book* of law [that] claims to regulate not only *without contradiction* but also *exclusively* and *completely* the whole of the law or at least a comprehensive part of it,"⁴⁵ or as "a regulation that is meant to be lasting, comprehensive, and concluding, and that leaves no scope in adjudication for shaping the law."⁴⁶ But it is also characterized either simply as a "bod[y] of law laid out systematically and comprehensively"⁴⁷ or alternatively as "[t]he process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code."⁴⁸ Finally, sometimes even certain non-legislative or private acts—standard-form contracts, for example—are labeled as codifications.⁴⁹ In reviewing the literature encompassing a multitude of countries and legal systems (Austria,⁵⁰ Switzerland,⁵¹ France,⁵² Belgium,⁵³ Germany,⁵⁴ Italy,⁵⁵ the

published in 1817, which contain Bentham's letter written in 1815); Helmut Coing, *Allgemeine Züge der privatrechtlichen Gesetzgebung im 19. Jahrhundert*, in 3-1 HANDBUCH, *supra* note 4, at 3, 4 (referring to Dumont's *De la Codification* (1803), which does not exist: Etienne Dumont's *De l'organisation judiciaire et de la codification: Extraits de divers ouvrages de Jérémie Bentham* was published in Paris in 1828); GESETZSKODIFIKATION: EINE AUS DER MODE GEKOMMENE KUNST? 12 (Abgeordnetenhaus von Berlin ed., 1995) (remarks of Hans Hattenhauer, claiming that Frederick the Great knew the word "codification" in 1749).

43. On this methodological problem in legal history in general see, for example, 1 STEN GAGNÉR, *ZUR METHODIK NEUERER RECHTSGESCHICHTLICHER UNTERSUCHUNGEN* (1993). In the 20th century the term has even gone far beyond its legal environment. See, e.g., NIKLAS LUHMANN, *LIEBE ALS PASSION: ZUR CODIERUNG VON INTIMITÄT* 57 n.1 (1994); 1 NIKLAS LUHMANN, *DIE GESELLSCHAFT DER GESELLSCHAFT* 21 (1997).

44. On this alternative terminology, see Vanderlinden, *supra* note 42, at 45, 46, 48. Consequently, Vanderlinden creates the neologism "pannomification." See *id.* at 48.

45. MANFRED REHBINDER, *EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT* 207 (1995).

46. FRIEDRICH KÜBLER, *ÜBER DIE PRAKTISCHEN AUFGABEN ZEITGEMÄßER PRIVATRECHTS-THEORIE* 31 (1975).

47. KARSTEN SCHMIDT, *DIE ZUKUNFT DER KODIFIKATIONSIDEE: WISSENSCHAFT UND GESETZ-GEbung VOR DEN GESETZESWERKEN DES GELTENDEN RECHTS* 78 (1985).

48. BLACK'S LAW DICTIONARY 252 (7th ed. 1999).

49. See, e.g., KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* (1999); Ernst E. Hirsch, *Probleme der Kodifikation im Lichte der heutigen Erfahrungen und Bedingungen*, in *DEUTSCHE LANDESREFERATE ZUM VI. INTERNATIONALEN KONGREß FÜR RECHTSVERGLEICHUNG IN HAMBURG* 1962, at 115, 116-17 (Hans Dölle ed., 1962).

50. This selection from the hundreds of definitions and explications is arranged by the countries from which the authors come from or to which their definition of codification applies. For Austria, see, for example, FRANZ BYDLINSKI, *JURISTISCHE METHODENLEHRE UND RECHTSBEGRIFF* 314 (1982); FRANZ BYDLINSKI, *SYSTEM UND PRINZIPIEN DES PRIVATRECHTS* 421 (1996) [hereinafter BYDLINSKI, SYSTEM].

51. See, e.g., 1 THEODOR BÜHLER, *GEWOHNHEITSRECHT-ENQUÊTE-KODIFIKATION* 103-18 (1977); Caroni, *Gesetzbuch*, *supra* note 4, at 249; Caroni, *Kodifikation*, *supra* note 4, at 907-08.

52. See, e.g., ALAIN VIANDIER, *RECHERCHE DE LÉGISLATIVE COMPARÉE* 37 (1988); Francois

Netherlands,⁵⁶ Russia,⁵⁷ and the common-law systems⁵⁸) as well as the literature on the specific meaning of codification in European law⁵⁹ and

Terré, *La Codification*, 3 EUR. REV. PRIVATE L. 31, 34 (1993); Christian Vigouroux, *Die Kodifikation des Umweltrechts in Frankreich*, in 48 DIE ÖFFENTLICHE VERWALTUNG 754, 755-56 (1995); Walter Wilhelm, *Gesetzgebung und Kodifikation in Frankreich*, in 1 IUS COMMUNE 241 (Helmut Coing ed., 1967).

53. See, e.g., VANDERLINDEN, *supra* note 40, at 229-36 (providing probably the most comprehensive historical study comprising all types of codes with many valuable sources); Guy Braibant, *La Problématique de la Codification*, in 82 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 165 (1997); Jacques Hoeffler, *L'Avenir de la Codification en Belgique*, 40 REVUE JURIDIQUE ET POLITIQUE 768 (1986); Christian Lambotte, *Les Méthodes de la codification en Belgique*, 40 REVUE JURIDIQUE ET POLITIQUE 776 (1986); Christian Lambotte, *Les Méthodes d'interprétation des codifications en Belgique*, 40 REVUE JURIDIQUE ET POLITIQUE 799 (1986); Christian Lambotte, *Les Réalisations en matière de codification en Belgique*, 40 REVUE JURIDIQUE ET POLITIQUE 806 (1986); Christian Lambotte, *Les Techniques de la codification en Belgique*, 40 REVUE JURIDIQUE ET POLITIQUE 788 (1986); Christian Lambotte, *Une Expérience: Le Bureau de coordination du Conseil d'état de Belgique*, 40 REVUE JURIDIQUE ET POLITIQUE 817 (1986); Philippe Malaurie, *Peut-on définir la codification? Éléments communs et éléments divers*, in REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 177 (1997); J. Vanderlinden, *Aspects de l'idée de codification*, in RAPPORTS BELGES AU VIE CONGRÈS INTERNATIONAL DE DROIT COMPARÉ 41 (1962).

54. See, e.g., FRIEDRICH EBEL, *GESCHICHTE DER GESETZGEBUNG IN DEUTSCHLAND* 76-77 (supp. reprint of 2d ed. 1958, 1988); GAGNÉ, *supra* note 42, at 54, 109; RUDOLF GMÜR, *GRUNDRIß DER DEUTSCHEN RECHTSGESCHICHTE* 85 (1996); HERMANN HILL, *EINFÜHRUNG IN DIE GESETZGEBUNGSLEHRE* 26 (1982); GERHARD KÖBLER, *JURISTISCHES WÖRTERBUCH* 163 (3d ed. 1983); GERHARD KÖBLER, *LEXIKON DER EUROPÄISCHEN RECHTSGESCHICHTE* 292 (1997); PETER NOLL, *GESETZGEBUNGSLEHRE* 215 (1973); RETHORN, *KODIFIKATIONSGERECHTE RECHTSPRECHUNG* 125-26 (1979); RÖHL, *supra* note 12, at 577-78; HANS SCHNEIDER, *GESETZGEBUNG* 253 (2d ed. 1991); HELMUTH SCHULZE-FIELITZ, *THEORIE UND PRAXIS PARLAMENTARISCHER GESETZGEBUNG* 94 (1988); FRANZ WIEACKER, *PRIVATRECHTS-GESCHICHTE DER NEUZEIT UNTER BESONDERER BERÜCKSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG* 475 (2d ed. 1967); Richard Motsch, *Bemerkungen zu EDV-gestützter Rechtssetzung und -anwendung*, in *STUDIEN ZU EINER THEORIE DER GESETZGEBUNG* 696, 697 (Jürgen Rödig ed., 1976); Klaus Weber, *Rechtsvereinfachung durch Kodifikation*, 51 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1673 (1998); Wolf, *supra* note 42, at 148-49.

55. See generally IRTI, *supra* note 17; SALVATORE PATTI, *ZIVILGESETZBÜCHER IN EUROPA: KRISE UND REFORM* (1983); SANDRO SCHIPANI, *LA CODIFICAZIONE DEL DIRITTO ROMANO COMUNE* 37-38 (1996); Rodolfo Sacco, *Codificare: Modo superato di legiferare?*, 29 RIVISTA DI DIRITTO CIVILE 117 (1983).

56. See, e.g., J.H.A. LOKIN & W.J. ZWALVE, *HOOFDSTUKKEN UIT DE EUROPESE CODIFICATIEGESCHIEDENIS* 2 (1992); A. PITLO, *HET SYSTEEM VAN HET NEDERLANDSE PRIVAATRECHT* 21 (11th ed. 1995); G.F.M. Bossers, *Codificatie en strafrecht*, in 63 NEDERLANDS JURISTEN BLAD 699 (1988); E.H. Hondius, *Nieuw burgerlijk wetboek: Novum voor West-Europa?*, in 63 NEDERLANDS JURISTEN BLAD 669, 673-74 (1988).

57. See, e.g., D.A. KERIMOV, *ZAKONODATEL'NAYA TEKHNKA* 60-63 (1965); THE SOVIET SOBRANIE OF LAWS: PROBLEMS OF CODIFICATION AND NON-PUBLICATION (Richard M. Buxbaum & Kathryn Hendley eds., 1991); Harold J. Berman, *Codes and Codification*, in *ENCYCLOPEDIA OF SOVIET LAW* 134-35 (Ferdinand J. M. Feldbrugge et al. eds., 1985).

58. See, e.g., BLACK'S LAW DICTIONARY 324 (4th ed. 1951) (defining "code" and "codification"); BLACK'S LAW DICTIONARY 252 (7th ed. 1999) (defining "code" and "codification"); 1 THE DICTIONARY OF ENGLISH LAW 366-67 (William A. Jowitt & Clifford Walsh eds., 1977) (defining "code" and "codification"); ELIZABETH A. MARTIN, *A DICTIONARY OF LAW* 71 (1996) (codifying statute); MERRYMAN, *supra* note 12, at 26; VARGA, *supra* note 2, at 264-65 (collecting definitions from the English and American literature); WALKER & WALKER'S ENGLISH LEGAL SYSTEM 17, 20 (Richard Ward ed., 8th ed. 1998) (defining "code" and "codification"); Bruce Donald, *Codification in Common Law Systems*, 47 AUSTL. L.J. 160 (1973); MATERIALS ON LEGISLATION 206 (compiled by Horace E. Read et al., 4th ed. 1982); Goode, *supra* note 12, at 139-40; James Gordley, *Codification and Legal Scholarship*, 31 U.C. DAVIS L. REV. 735 (1998); North, *supra* note 14, at 503-04; Denis Tallon, *Codification and Consolidation of the Law at the Present Time*, 14 ISR. L. REV. 1 (1979).

59. For a variety of definitions in European law, see *supra* note 20.

international law⁶⁰ of the last decades,⁶¹ it is apparent that it is impossible to find a single uniform notion of codification. Of the many definitions and explanations, no two are exactly alike. The concept of codification is both unclear and polysemous.

Additionally, the term is often applied loosely to deal with an extremely wide range of historical code-like phenomena. Some scholars use this term even for the first written documents of legal history.⁶² Others begin with a history of "codification" in late antiquity.⁶³ Still others emphasize that there is a medieval history of "codification."⁶⁴ Most authors, however, reserve the term almost exclusively for phenomena in the modern age or at least distinguish a modern concept of codification from an ancient one.⁶⁵

Despite the varying applications of the term, there is a consensus that codification is, above all, an actual phenomenon that has existed since at least 1800.⁶⁶ While it is unclear which codification is the first in modern history, authors agree that the French Civil Code (1804) is a codification, if not the most important one. In the next section, I shall review briefly the intellectual and political context of codification in modern history.

A. *The Intellectual, Political, and Legal Environment of Codification on the European Continent in Modern History*

From the late seventeenth century onwards, the idea of codification captured the European continent.⁶⁷ The authority of the Roman-Canon *ius*

60. See *Statute of the International Law Commission*, art. 15, UN Doc. A/CN.4/4/Rev.2 (1982); MARCO SASSÒLI, BEDEUTUNG EINER KODIFIKATION FÜR DAS ALLGEMEINE VÖLKERRECHT 77 (1990); ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT 372–79 (3d ed. 1984); Yves Daudet, *La Codification du droit international*, 82 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 197, 197–98 (1997); Ferenc Majoros, *Zur Krise der internationalen Kodifikationspolitik*, 6 ZEITSCHRIFT FÜR RECHTSPOLITIK 65 (1973); Meinhard Schröder, *Codification and Progressive Development of International Law Within the UN*, in UNITED NATIONS: LAW, POLICIES AND PRACTICE 100 (Rüdiger Wolfrum & Christiane Philipp eds. 1995).

61. For further concepts in the earlier literature before the 1960s, see VANDERLINDEN, *supra* note 40, at 13–14.

62. See, e.g., 1 THEODOR BÜHLER, RECHTSQUELLENLEHRE 80–83 (1977); VARGA, *supra* note 2, at 27; Jules Deschenes, *Conférence de clôture*, in CODIFICATION: VALEURS ET LANGAGE: ACTES DU COLLOQUE INTERNATIONAL DE DROIT CIVIL COMPARÉ 693 (Conseil de la langue française, Gouvernement du Québec et al. eds. 1985) [hereinafter CODIFICATION: VALEURS ET LANGAGE]; Terré, *supra* note 52, at 31–32.

63. See, e.g., LOKIN & ZWALVE, *supra* note 56; VANDERLINDEN, *supra* note 40, at 22; Donald, *supra* note 58, at 162–63; Peter Koch et al., *Die motivierenden Ideen der Kodifikation*, in GRUNDFRAGEN DER RECHTSSETZUNG 39 (Kurt Eichenberger et al. eds., 1978).

64. See, e.g., GAGNÉ, *supra* note 42; Wolf, *supra* note 42 (providing further references at 164–65 n.26).

65. See, e.g., Hans Ankum, *La 'codification' de Justinien était-elle une véritable codification?*, in LIBER AMICORUM JOHN GILISSEN—CODE ET CONSTITUTION: MÉLANGES HISTORIQUES—WETBOEK EN GRONDWET IN HISTORISCH PERSPECTIEF 1, 2 (1983); Coing, *supra* note 12, at 797–99; Salmonowicz, *supra* note 40, at 34 (1978); Franz Wieacker, *Aufstieg, Blüte und Krisis der Kodifikationsidee*, in FESTSCHRIFT FÜR GUSTAV BOEHMER 34, 34 (1954); Reinhard Zimmermann, *Codification: History and Present Significance of an Idea*, 3 EUR. REV. PRIVATE L. 95, 98 (1995).

66. The history of codification is regarded as one of the core issues of modern legal history. See Caroni, *Gesetzbuch*, *supra* note 4, at 249.

67. Since this is the familiar part of the history of codification, I offer only a broad outline based on the following literature. For two brief accounts in English, see Helmut Coing, *An Intellectual*

commune began to wane. Roman law was criticized for being the law of despotic rulers and of another time. More importantly, legal sources had become chaotic. Many territorial and local laws were in force even as Roman law remained applicable *in subsidio*. The number of legal sources was enormous and these sources were complicated, contradictory, and obscure.

This state of the law coincided with two influential intellectual movements, the Enlightenment and the natural law movement. The Enlightenment brought "to light" the idea that reason is the instrument with which men can form a just and better society. Drawing on ancient and medieval traditions, the idea developed that everyone has inherent natural rights and duties and that reason rather than tradition should determine the law. The dominance of reason led to the dominance of systems. Natural lawyers tried to create comprehensive systems of the law. This systematization, influenced by the flourishing natural sciences, promoted a view of lawyers as legal scientists. But soon it was no longer enough to find the abstract natural law. Law needed to be translated into practice, which required a theoretical as well as a practical basis.

The concept of a global and universal natural law was made concrete in the idea of legal codifications for the individual Continental monarchies. These codes were conceived of as codes of universal applicability. Montesquieu provided another bridge between the abstract idea of a global natural law and the actual law of a state. In his *Esprit des lois* (1748), he argued that any legislation must be adapted to the specific character of each individual society.⁶⁸

Practically, the transformation required a powerful institution that was willing and able to codify its laws. Enlightened absolutism provided the perfect political environment in which codification could take place. An absolute power to legislate met the need to assert sovereignty and promote the public welfare at the same time—the former being the absolutist and the latter the enlightened side of enlightened absolutism. Codification was welcomed because it fostered a rational system of administration and because it centralized and unified the law. Codification could serve to make the law known by laying it down in an easily comprehensible, public, and definite form. Thus it could bind the citizen to obey the law. At the same time, it bound the government, moving towards the establishment of the rule of law. The combination of these two elements, binding the citizen and binding the

History of European Codification in the Eighteenth and Nineteenth Centuries, in PROBLEMS OF CODIFICATION 16 (S.J. Stoljar ed., 1977); and Zimmermann, *supra* note 65, at 95. For further material, see CARONI, PRIVATRECHT, *supra* note 4; GAGNÉ, *supra* note 42, at 60; HANS THIEME, DAS NATURRECHT UND DIE EUROPÄISCHE PRIVATRECHTSGESCHICHTE (1947); Koch et al., *supra* note 63, at 39, 43–44; Claes Peterson, *Der Naturrechtslehrer als Weltbürger des Rechts: Rechteinheit durch Naturrecht?*, in JURISTISCHE THEORIEBILDUNG UND RECHTLICHE EINHEIT 145 (Claes Peterson ed., 1993); Alfredo Mordechai Rabello, *Montesquieu and the Codification of Private Law (Code Napoléon)*, in EUROPEAN LEGAL TRADITIONS AND ISRAEL 39 (Alfredo Mordechai Rabello ed., 1994); and Wieacker, *supra* note 65, at 34.

68. See [CHARLES DE SECONDAT, BARON DE MONTESQUIEU], DE L'ESPRIT DES LOIS XIX (Geneva, Barrillot [1748]).

state, incorporated common Enlightenment ideas like those of John Locke about the origin of the state and the law as a social contract.

1. *The Manifestations of the Idea of Codification: The Modern Codes*

In this intellectual, political, and legal environment, codes spread all over the European continent. The first comprehensive codes appeared in Scandinavia.⁶⁹ The Scandinavian absolutist codification movement led to the *Danske Lov*, which was enacted in 1683. This code took effect in the Norwegian part of the kingdom in 1734 under the name *Sveriges Rikes Lag*. Another early code was the *Codex Maximilianeus Bavaricus Civilis*, the Bavarian civil code that came into force in 1756.⁷⁰

According to the legal historian Franz Wieacker, the subsequent history of codification can be subdivided into two "waves of codification."⁷¹ The first wave comprises the three great natural-law codifications: the Prussian *Allgemeine Landrecht* (1794), the French *Code Civil* (1804), and the Austrian *Allgemeine Bürgerliche Gesetzbuch* (1811). After this first wave, the feasibility and necessity of codification for Germany was debated by Anton Friedrich Justus Thibaut (1772–1840) and his powerful opponent Friedrich Carl von Savigny (1779–1861) in the famous codification controversy of 1814.⁷² The victory of the opponents of codification, Savigny and the Historical School, lasted until the end of the nineteenth century when the German *Bürgerliche Gesetzbuch* (1900) and the Swiss *Zivilgesetzbuch* (1907) and *Obligationenrecht* (1911) came into force. They are the main representatives of, in Wieacker's words, a second wave of codification driven by nationhood ("Welle nationalstaatlicher Gesetzbücher"), which aimed at national legal unification.⁷³ In Germany, for example, the *Bürgerliche*

69. See HANS SCHLOSSER, GRUNDZÜGE DER NEUEREN PRIVATRECHTSGESCHICHTE 182–86 (6th ed. 1988); Geoffrey Sawer, *The Western Conception of Law*, in 2-1 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 51, at 26, 28–29, (1975); Wolfgang Wagner, *Die Wissenschaft des gemeinen römischen Rechts und das Allgemeine Landrecht für die Preussischen Staaten*, in WISSENSCHAFT UND KODIFIKATION DES PRIVATRECHTS IM 19. JAHRHUNDERT 119–20 n.2 (Helmut Coing & Walter Wilhelm eds., 1974); Wolfgang Wagner, *Zur Vorgeschichte der Kodifikation von 1734* [hereinafter Wagner, *Vorgeschichte*], in DAS SCHWEDISCHE REICHSGESETZBUCH (SVERIGES RIKES LAG) VON 1734, at 39, 39–40 (Wolfgang Wagner ed., 1986).

70. See URSULA FLOBMANN, ÖSTERREICHISCHE PRIVATRECHTSGESCHICHTE 14 (1996); RUDOLF HOKE, ÖSTERREICHISCHE UND DEUTSCHE RECHTSGESCHICHTE 254 (1992); SCHLOSSER, *supra* note 69, at 92; GERHARD WESENBERG & GUNTER WESENER, NEUERE DEUTSCHE PRIVATRECHTSGESCHICHTE IM RAHMEN DER EUROPÄISCHEN RECHTSENTWICKLUNG 158–59 (1985).

71. See Wieacker, *supra* note 65, at 34, 39.

72. See Thibaut's call for codification in ANTON FRIEDRICH JUSTUS THIBAUT, UEBER DIE NOTHWENDIGKEIT EINES ALLGEMEINEN BÜRGERLICHEN RECHTS FÜR DEUTSCHLAND (Heidelberg, Mohr 1840) (1814) and the rejoinder by Savigny in FRIEDRICH CARL VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT DEUTSCHLAND (Heidelberg, Mohr 1840) (1814). The latter is translated in FREDERICK CHARLES VON SAVIGNY, ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hawyard trans., London, Littlewood 1831). For a brief account of the debate in English, see Reimann, *supra* note 3, at 97–98.

73. See Wieacker, *supra* note 65, at 34, 39. But there are some doubts about Wieacker's account. One might ask whether the Prussian Code can really be regarded as a natural-law code. See ANDREAS SCHWENNICK, DIE ENTSTEHUNG DER EINLEITUNG DES PREUSSISCHEN ALLGEMEINEN LANDRECHTS VON 1794, at 129–36 (1994). One might also ask whether the Swiss Code is a

Gesetzbuch (BGB) was a code of high symbolic significance after the foundation of the Reich in 1871 and thus helped to form a sense of political identity.

Besides these five major codifications, Europe has seen the establishment of a multitude of codes covering virtually the whole continent during the nineteenth and twentieth centuries.⁷⁴ They were strongly influenced by the French, Swiss, German, and Austrian models. In the twentieth century, the idea of codification spread over almost all of the world. The exact number of codes is uncertain, because it has always remained unclear what exactly qualifies as codification. At the lowest estimate, more than forty codes have been enacted since World War II.⁷⁵ The most recent important codifications include the New Dutch Civil Code, the Québec Civil Code, and the Russian Civil Code.⁷⁶

B. *The Core Features of Continental European Codification*

A historical and comparative reference to the main representatives of modern codification—the French, Austrian, German, and Swiss codes—illustrates the main features of European codification.⁷⁷ In order to cover the core elements, I will briefly explore: (1) authority; (2) completeness, in the sense of an (a) exclusive, (b) gapless, and (c) comprehensive code; (3) system; (4) reform; (5) national legal unification; and (6) simplicity.

These elements encompass the areas that generally are discussed when scholars explain codification. In this respect, there is a certain consensus in the literature. But there is no consensus with respect to two things: first, which of these elements are *necessary* and which are only possible or desirable features

"supranational" ("übernational") code rather than a national one. See, e.g., Wilhelm Brauner, *Europäisches Privatrecht—aber was ist es?*, 15 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 225, 229 (1993) (claiming that it is not nationhood that drove the codification movement, but the development of the state ("Etatisierung")). Of course, Wieacker's account is not the only way of structuring the history of codifications. For an alternative, see, for example, Léontin-Jean Constantinesco, *Die Welle der Kodifikationen im 19. und 20. Jahrhundert unter dem Gesichtspunkt der Rechtskreise und der Rechtsvergleichung*, 79 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 59, 63–72 (1980); and Zweigert & Kötz, *supra* note 3, at 571–73.

74. See, e.g., 2 HELMUT COING, *EUROPÄISCHES PRIVATRECHT* 18–23 (1989) (describing how codifications started spreading all over Europe in the nineteenth century); VARGA, *supra* note 2, at 371–91 (providing an index of codes).

75. See BYDLINSKI, *SYSTEM*, *supra* note 50, at 424; PATTI, *supra* note 55, at 7; Hondius, *supra* note 56, at 669; Sacco, *supra* note 55, at 121 (1983).

76. On the new Dutch code see, for example, RENAISSANCE DER IDEE DER KODIFIKATION: DAS NEUE NIEDERLÄNDISCHE BÜRGERLICHE GESETZBUCH 1992 (Franz Bydlinski et al. eds., 1991). On Québec, see, for example, Daniel Jutras, *La Codification réformatrice: L'exemple du code civil québécois*, 82 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 193 (1997). On Russia, see, for example, Oleg Sadikov, *Das zweite Buch des neuen ZGB Russlands*, 4 ZEUP 903 (1999).

77. I do not overlook the fact that codification is a complex phenomenon. For an effort to cover as many aspects as possible, see, for example, VARGA, *supra* note 2 (listing numerous types of codification). For the problem of the scope of a concept of codification, see, for example, Caroni's criticism of Karsten Schmidt's work: Caroni, *Gesetzbuch*, *supra* note 4, at 254 & n.22; and Pio Caroni, Book Review, 10 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 126, 126–27 (1988) (reviewing KARSTEN SCHMIDT, *DIE ZUKUNFT DER KODIFIKATIONSIDEE* (1985)) [hereinafter Caroni, Book Review]. See also SCHMIDT, *supra* note 47.

of codification, and second, to what *degree* some elements are necessary in order for an effort to qualify as codification. This is a familiar problem with complex and abstract phenomena, and it is precisely this problem that is commonly “solved” by referring to Max Weber’s “ideal type.”⁷⁸ An “ideal type” combines elements of varied empirical significance in order to create a model of thought. It abstracts and summarizes the core features of complex, empirical phenomena, and it is neither merely descriptive nor merely heuristic but the result of thorough analysis of such phenomena in various historical contexts. In the case of codification, this means that individual historical codes show certain common features in varying intensity, but also certain different features. The most important of these features are then combined, clarified, and emphasized, and this results in a “pure” ideal type of codification. The ideal type itself need not necessarily exist anywhere in reality. It is conceded that thinking in such ideal types is helpful in understanding reality and coping with its complexity. But it is important to bear in mind that neither an ideal type nor reference to an “idea” or “notion” of codification can ever be a substitute for an analysis of the meaning and the approximate actual significance of each element. In the following discussion, I will therefore briefly indicate how each element is understood and whether we should really expect this element to appear in its pure form as a historical reality.⁷⁹

78. For a brief discussion of the different forms of “types” and Max Weber’s version in particular, see KARL LARENZ & CLAUS-WILHELM CANARIS, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 290, 292–93 (3d ed. 1995) (referring to MAX WEBER, *GESAMMELTE AUFSÄTZE ZUR WISSENSCHAFTSLEHRE* 191 (1922) and 1 MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT* 9–11 (1956)); and James Bohman, *Weber, Max*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 848, 849 (Robert Audi ed., 1995) (describing “Weberian ideal types”). To understand that the concept of codification is linked to reality in general and to the reality of individual historical codes in particular and that it is therefore a developing rather than a static concept, it might also be helpful to perceive codification as an “empirical concept” as described by Husserl. See EDMUND HUSSERL, *ERFAHRUNG UND URTEIL: UNTERSUCHUNGEN ZUR GENEALOGIE DER LOGIK* § 83a, at 398–401 (Ludwig Landgrebe ed., 1948) (explaining how empirical concepts are in flux, because they are continually changed by additional elements of reality).

79. There is a great deal of conceptual confusion in the literature on codification, which often leads to mutual misunderstanding. For an example of this conceptual confusion in the American context, see Stephan Sobotka, David Dudley Field und die Kodifikationsbestrebungen im Staat New York im 19. Jahrhundert, unter besonderer Berücksichtigung des “Civil Code” 100–01, 114 (1973) (unpublished doctoral dissertation, Universität zu Köln) (on file with author); for an English example see M.R. Topping & Jacques P.M. Vanderlinden, *Ibi Renascit Ius Commune*, 33 *MOD. L. REV.* 170, 173 (1970) (providing historical examples of how codification plans were fought by attacking views that the codifiers actually never held—for example, that codes could be gapless).

Since many scholars employ an exaggeratedly strong concept of codification, this conceptual uncertainty often results in hostility towards modern codification plans. Pessimism regarding the feasibility of codification in Europe, especially in the 1970s and the 1980s, was partly rooted in such mistaken and utopian strong concepts of codification. See SCHMIDT, *supra* note 47, at 19.

1. *Authority*

A modern codification must be enacted by a legislature. Historically, this element is crucial. With respect to the authoritative element, the history of codification is the history of legislation.⁸⁰ It reflects the evolution from custom to the collection of preexisting law to legislation as positive law. Since medieval times, law was increasingly regarded as new law created in written form. But it was not until the eighteenth century, with its intellectual environment, that this evolution reached a stage in which it could be widely accepted that law is not only *found* but also *made*—that law is *positive* law. This new element appeared with the first modern codifications, especially the Prussian Code, as a transition from the old to the new perception. Therefore, the exercise of legislative authority particularly defines codification as modern codification. Codification, then, does not derive its authority only from cases, scholarly discussions, or reference to other sources of law. With the emergence of this form of positivism, the codification itself became the source of law because a legislator competent to make law enacted it.

2. *Completeness*

Codification aims at being complete. This element, which is often utilized in a confusing way in the many definitions that exist in the legal literature, has several implications. In the following discussion, I will distinguish three interwoven sub-elements.

a. *Exclusiveness*

A codification operates to exclude other sources of law. Reducing the number of sources was the goal of most historical codes.⁸¹ Until the dawn of the modern age of codification in the eighteenth century, however, a pluralism of legal sources always co-existed with the development of more extensive statutory bodies.⁸² The modern codifications changed this. Such codifications revolutionized the theory and practice of using legal sources. The Prussian, French, and Austrian codes all have provisions that expressly exclude other sources, in particular *ius commune*, but also legal custom.⁸³ Statutory law became the central source of law. The *ideal* was that the code could answer all legal questions and that it would not be necessary to fall back on judges' opinions, customs, or scholarly wisdom. Political absolutism led to legal

80. See EBEL, *supra* note 54; GAGNÉ, *supra* note 42; ARMIN WOLF, GESETZGEBUNG IN EUROPA 1100–1500 (1996). For a sociological view, see THOMAS RAISER, DAS LEBENDE RECHT, 327–34 (1995).

81. See, e.g., VANDERLINDEN, *supra* note 40, at 190–91 n.702 (tracing to the fifth century the idea of using codification to reduce the number of legal sources).

82. See, e.g., *id.* at 104–12; Theodor Bühler-Reimann, *Primat des Gesetzes unter den Rechtsquellen?*, in STUDIEN ZU EINER THEORIE DER GESETZGEBUNG 1982, at 53, 53–55 (Harald Kindermann ed., 1982); Paolo Grossi, *Juristischer Absolutismus und Privatrecht im 19. Jahrhundert*, in JURISTISCHE THEORIEBILDUNG UND RECHTLICHE EINHEIT, *supra* note 67, at 37, 40.

83. See, e.g., CARONI, PRIVATRECHT, *supra* note 4, at 59–61, 71.

absolutism and the reign of the code.⁸⁴ “Statutory law” and “law” almost became synonymous.

The *historical reality*, however, was less extreme. Under the Prussian Code, for example, local and territorial statutes remained untouched.⁸⁵ The code was only applicable *in subsidio*. Generally, the “Allgemeine Landrecht” did not aim at an entirely exclusive solution to the problem of multiple legal sources.⁸⁶ This is one reason why some scholars do not regard it as a true codification. But even the Austrian and French codes do not intend or result in an absolute idea of exclusion. These codes intend exclusion only in a very formal sense. Other sources, such as custom and natural principles (“natürliche Rechtsgrundsätze” in the Austrian code), are still legitimate legal sources. Thus, the codes are formally exclusive in the sense that although other sources of law may exist, the code itself must refer to them.⁸⁷

In practice, even this merely formal exclusion of other sources was soon neglected. Legal custom started to play an important role immediately following the enactment of the French and Austrian codes, sometimes in clear violation of their provisions.⁸⁸ Even at the peak of the codification movement, codification did not mean absolute exclusion of all other sources. German codifiers rejected a formal provision about sources other than the code, leaving the ultimate question to legal academia.⁸⁹ Finally, the Swiss code chose an even less exclusive solution, as is demonstrated by article 1 of the *Schweizerisches Zivilgesetzbuch* (ZGB), which expressly refers to customary law, legal doctrine, and case law in cases of gaps within the code.⁹⁰

84. See *id.*; HEINZ HÜBNER, KODIFIKATION UND ENTSCHEIDUNGSFREIHEIT DES RICHTERS IN DER GESCHICHTE DES PRIVATRECHTS 11 (1980); CLAUDIETER SCHOTT, “RECHTSGRUNDSÄTZE” UND GESETZESKORREKTUR: EIN BEITRAG ZUR GESCHICHTE GESETZLICHER RECHTSFINDUNGSREGELN 86 (1975).

85. Note, however, that contrary to the original plans only few territorial statutes came into existence. See SCHLOSSER, *supra* note 69, at 100.

86. See SCHWENNICK, *supra* note 73, at 69–70 (analyzing §§ 2–4 of the Introduction to the Prussian Code).

87. See JOSEF ESSER, GRUNDSATZ UND NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS 177–78 (1956) (also calling this requirement merely “formal”). It is a point of contention whether this type of exclusion is of a Benthamite heritage. For the somewhat absurd debate between Hatschek and Lukas, see Julius Hatschek, *Bentham und die Geschlossenheit des Rechtssystems: Eine Kritik und ein Versuch*, 24 ARCHIV FÜR ÖFFENTLICHES RECHT [AÖR] 442 (1909) [hereinafter Hatschek, *Kritik*]; Julius Hatschek, *Bentham und die Geschlossenheit des Rechtssystems: Ein Schlußwort*, 26 AÖR 458 (1910) [hereinafter Hatschek, *Schlußwort*]; Josef Lukas, *Benthams Einfluss auf die Geschlossenheit der Kodifikation*, 26 AÖR 67 (1910); and Josef Lukas, *Benthams Einfluss auf die Geschlossenheit der Kodifikation: Ein Schlußwort*, 26 AÖR 465 (1910) (discussing whether and to what extent Benthamite ideas of completeness actually had an impact on the legislators of the *Code Napoléon*).

88. On the French Civil Code, see the analysis of decisions in Jean Coudert, *Das Fortleben Französischer Gewohnheitsrechte aus dem Ancien Régime nach 1804*, in FRANZÖSISCHES ZIVILRECHT IN EUROPA WÄHREND DES 19. JAHRHUNDERTS 37, 40 (Reiner Schulze ed., 1994). On the Austrian Civil Code, see 3 FIKENTSCHER, *supra* note 69, at 773 (referring to the violation of art. 10 of the Austrian code, which permits the application of legal custom only if the code expressly allows for such).

89. See HORST HEINRICH JAKOBS, WISSENSCHAFT UND GESETZGEBUNG IM BÜRGERLICHEN RECHT NACH DER RECHTSQUELLENLEHRE DES 19. JAHRHUNDERTS 128 (1983) (pointing to the discussion about § 4 (first commission) and § 2 (second commission) on custom with a formal exclusion clause—“gelten nur insoweit, als das Gesetz auf Gewohnheitsrecht verweist”—a proposal that was not adopted).

90. As the ZGB provides,

Thus, the main representatives of the European codification movement demonstrate the element of exclusion of other sources, but not in a radical and absolute form. These legislatures abolished the pluralism of legal sources and tried to subsume all legal sources, at least in a formal sense. The resulting codification, therefore, aims at establishing the primacy of the code within a legal system.⁹¹

b. *The Absence of Gaps*

The second aspect, the problem of gaps (*lacunae*) in the code, refers to the role of judges under a code. A gap exists when the code does not provide a rule to solve the case: "[C]asus non est verbis expressus."⁹² It is often claimed that codification has no gaps. Then, it is said, the judge's role is limited to mechanical application of the code, and the judge is, in Montesquieu's words, only the "mouthpiece" of the code.⁹³ The materials behind codification (*Cabinetts-Ordre*, first drafts, etc.) provide some evidence that this was indeed the legislators' intention. Friedrich Wilhelm II, for instance, expressly forbade judges "to indulge in any arbitrary deviation, however slight, from the clear and express terms of the laws, whether on the ground of some allegedly logical reasoning or under the pretext of an interpretation based on the supposed aim and purpose of the statute."⁹⁴ The judges were to call on the Legislative Commission in cases of doubt.⁹⁵ In Austria, the first draft of the code (1766) also prohibited judges from

1) The Law must be applied in all cases which come within the letter or the spirit of any of its provisions. 2) Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator. 3) Herein he must be guided by approved legal doctrine and case law.

ZGB art. 1, in 1 THE SWISS CIVIL CODE, ENGLISH VERSION 1 (Ivy Williams trans., Siegfried Wyler & Barbara Wyler eds., 1987).

91. Note that Savigny had already realized that within a codification there are inevitably several sources of law. The core issue is not that there is only one source of law but which legal source governs. See Pio Caroni, *Savignys "Beruf" und die heutige Krise der Kodifikation*, in 39 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 451, 460-61 (1971). But see JAKOBS, *supra* note 89, at 45 (criticizing Caroni's interpretation of Savigny's "Beruf").

92. PETER RAISCH, *JURISTISCHE METHODEN: VOM ANTIKEN ROM BIS ZUR GEGENWART* 110 (1995). This is, of course, a simple definition of the concept of gap but it suffices in this context. However, for a theory of adjudication a more sophisticated version is required. The most elaborated conception has been developed in CLAUS-WILHELM CANARIS, *DIE FESTSTELLUNG VON LÜCKEN IM GESETZ* (1983); and LARENZ & CANARIS, *supra* note 78, at 187-252.

93. See MONTESQUIEU, *supra* note 68, at XL.6 ("Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la Loi, des Etres inanimés qui n'en peuvent modérer ni la force ni la rigueur.") Note, however, that this only applies to the case of a republican constitution. In a monarchy the judge has to search for the "spirit" of the laws. See HÜBNER, *supra* note 84, at 26 n.105; MONTESQUIEU, *supra* note 68, at VI.3 ("[L]à où [la loi] est précise le juge la suit, là où elle ne l'est pas il en cherche l'esprit").

94. Publikationspatent of 1794, art. XVIII, quoted in KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 91 (Tony Weir trans., 1987).

95. See Allerhöchste Königliche Cabinetts-Ordre die Verbesserung des Justitz-Wesens betreffend vom 14. April 1780 (Friedrich to Groß-Canzler v. Carner), reprinted in ALLGEMEINES LANDECHT FÜR DIE PREUBISCHEN STAATEN VON 1794, at 37, 40-41 (Hans Hattenhauer ed., 3d ed. 1996).

deviating from the code.⁹⁶ The rulers liked the idea of reducing judges to legal calculating machines, because it secured their own power over the law and it protected citizens from arbitrary standards in judging. France tended to bind judges rigidly, regardless of whether driven by absolutism or *volonté générale*.⁹⁷ It has also been asserted that the German Civil Code aimed at the ideals of having no gaps and of binding judges strictly.⁹⁸

In reality, codifiers never believed that it would be possible to foresee all future cases and to provide concrete rules for them in the code. Even in the seventeenth and eighteenth centuries, there was no belief in the seamlessness of codification.⁹⁹ Samuel Pufendorf, one of the intellectual fathers of the Prussian Code, referred to Aristotle and advocated a creative role for judges in the process of adjudication.¹⁰⁰ The drafters of the Prussian Code actually knew quite well that, even with almost 20,000 sections, of which more than 15,000 dealt with private law, they could not cover all possible future problems. They knew that there could be no codification without gaps.¹⁰¹ The existence of a *référé législative*, the judicial duty to turn to the legislature if no provision of the code is applicable, shows that cases of doubt were foreseen. Soon even the *référé législative* was abolished, and judges could fill in the gaps themselves.¹⁰² Moreover, articles 49 and 50 of the Introduction to the Prussian Code allow judges to decide according to the "general principles adopted in this code" ("in dem Gesetzbuche angenommenen allgemeinen Grundsätze") and to draw analogies. In this respect, the judge was not meant to be merely the "mouthpiece" described by Montesquieu.

The example of Austrian codification leads to the same conclusion. Section 7 of the code allowed judges to fall back on "natural principles" ("natürliche Rechtsgrundsätze") if a case could not be solved with the help of the code. The Austrian legislature, therefore, expressly provided for a

96. See FRITZ-RENÉ GRABAU, *ÜBER DIE NORMEN ZUR GESETZES- UND VERTRAGSINTERPRETATION* 40–41 (1993); HÜBNER, *supra* note 84, at 34.

97. For the situation in France, see HÜBNER, *supra* note 84, at 39–45; and SCHOTT, *supra* note 84, at 49–55.

98. See, e.g., Martin Lipp, *Privatrechtssysteme*, in 3 *HANDWÖRTERBUCH ZUR DEUTSCHEN RECHTSGESCHICHTE* 1978, 1986 (Adalbert Erler & Ekkehard Kaufmann eds., 1984) (expressly claiming that the Bürgerliche Gesetzbuch [BGB] was meant to be gapless). My impression is that belief in the gaplessness of civil codes is even more widespread in the common-law world, where scholars and judges tend to underestimate the importance of the judge under a European code. See, e.g., MERRYMAN, *supra* note 12, at 29, 80–84 (assuming that civil-law codification means producing complete codes without any gaps and that judges are regarded as mere "operators of the law"); Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1130 & n.28 (claiming that "contemporary Europeans" regard only "Fully Comprehensive" codes, i.e., codes without lacunae, as codes); see also JEROME FRANK, *COURTS ON TRIAL* 290 (1949) (arguing that codification plans have never succeeded because "[n]o code can anticipate every possible set of facts," but overlooking the fact that codifications have never actually claimed to do this).

99. See SCHWENNICK, *supra* note 73, at 133–34, 280–81.

100. See, e.g., HÜBNER, *supra* note 84, at 26–27.

101. For an analysis, see Hans Hattenhauer, *Einführung*, in *ALLGEMEINES LANDRECHT FÜR DIE PREUBISCHEN STAATEN VON 1794*, *supra* note 95, at 1, 21; JÖRG NEUNER, *RECHTSFINDUNG CONTRA LEGEM* 50–52 (1992); SCHOTT, *supra* note 84, at 44; and SCHWENNICK, *supra* note 73, at 271–73.

102. See Hattenhauer, *supra* note 101, at 21–22; HÜBNER, *supra* note 84, at 30–31; SCHOTT, *supra* note 84, at 36–38.

procedure to be followed when a gap was encountered. Franz von Zeiller (1751–1828) and the drafters tried to find a compromise between treating judges as legal calculators and giving them full discretion with its danger of arbitrary decisions.¹⁰³

In the case of the French civil code, the dogma of a gapless code would have been incompatible with the underlying legal theory of the code's intellectual founder Jean-Étienne-Marie Portalis (1746–1807), head of the commission that prepared the French Civil Code in 1800. Portalis explained in his *Discours Préliminaire sur le Projet du Code Civil* that even the best code necessarily has gaps, which should be filled by the judges who interpret the code.¹⁰⁴ Furthermore, article 4 of the French code stated the famous “*dénis de justice*” provision that forbade judges from leaving a decision open, because they could then be prosecuted for a “*denial of justice*.”¹⁰⁵ This provision also implied that there could be gaps in the code and that those gaps are to be filled by judges.

The subsequent history of most of the nineteenth century under the French and Austrian codes is generally described as “*exegetic*” (“*l'école de l'exégèse*”), which means that the codes were regarded as complete and systematized in immutable and absolute principles.¹⁰⁶ But even in this “*exegetic*” period, legal scholarship and practice accepted that the existing law did not always provide an answer and that judges needed a certain creative power, though attempts were always made to justify these creative results as falling as nearly as possible within the code provisions.¹⁰⁷

103. See HÜBNER, *supra* note 84, at 37; Herbert Hofmeister, *Die Rolle Franz von Zeillers bei den Beratungen zum ABGB*, in FORSCHUNGSBAND FRANZ VON ZEILLER (1751–1828): BEITRÄGE ZUR GESETZGEBUNGS- UND WISSENSCHAFTSGESCHICHTE 107, 110 (Walter Selb & Herbert Hofmeister eds., 1980).

104. See [Jean-Étienne-Marie] Portalis et al., *Discours préliminaire prononcé lors de la présentation du projet de la commission du gouvernement*, in 1 RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL, SUIVI D'UNE ÉDITION DE CE CODE, À LAQUELLE SONT AJOUTÉS LES LOIS, DÉCRETS ET ORDONNANCES FORMANT LE COMPLÉMENT DE LA LÉGISLATION CIVILE DE LA FRANCE, ET OU SE TROUVENT INDIQUÉS, SOUS CHAQUE ARTICLE SÉPARÉMENT, TOUS LES PASSAGES DU RECUEIL QUI S'Y RATTACHENT 463, 470 (P.A. Fenet ed., Paris, Ducasso 1827); see also 1 FIKENTSCHER, *supra* note 69, at 437–38; Ankum, *supra* note 65, at 1, 2 n.8.

105. “Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.” CODE CIVIL [C. CIV.] art. 4. See also Ekkehard Schumann, *Das Rechtsverweigerungsverbot*, 81 ZEITSCHRIFT FÜR ZIVILPROZESS 79, 80–83 (1968) (commenting on the historical background and the significance of art. 4 of the French Civil Code and emphasizing that this provision shows that the code is a starting point for further judicial development of the law).

106. See, for example, the almost dramatic account of 1 FIKENTSCHER, *supra* note 69, at 431–33 (describing the personalities involved).

107. The traditional account of nineteenth-century French and Austrian legal theory and practice has been substantially modified in the last few years. See, e.g., WILHELM BRAUNEDER, STUDIEN II: ENTWICKLUNG DES PRIVATRECHTS 43–71 (1994); ALFONS BÜRGE, DAS FRANZÖSISCHE PRIVATRECHT IM 19. JAHRHUNDERT (1991); MATHIAS GLÄSER, LEHRE UND RECHTSPRECHUNG IM FRANZÖSISCHEN ZIVILRECHT DES 19. JAHRHUNDERTS 163–70 (1996) (arguing against the traditional view of exegetic science and the strict distinction between science and practice); Wilhelm Brauner, *Joseph Unger, 1828–1913*, in JURISTEN IN ÖSTERREICH 1200–1980, at 177–83 (Wilhelm Brauner ed., 1987) (dealing with the Austrian exegetic school and practice); Wilhelm Brauner, *Privatrechtsfortbildung durch Juristenrecht in Exegetik und Pandektistik in Österreich*, 5 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 22 (1983); see also REGINA OGOREK, RICHTERKÖNIG ODER

When preparations for the German Civil Code began, the intellectual environment consisted of positivist and pandectist legal thought. If this theory had been applied to a code, it could have resulted in a strict statutory positivism ("Gesetzespositivismus"). This statutory positivism would not assume that the legislator could foresee all possible cases and that the code would therefore be gapless. Instead, the belief in a systematic and scientific law could have led to the claim that the code did not contain gaps. The historical reality departed from these possible scenarios. Certainly, the German Civil Code is a codification rooted in positivism, and the five-part system that came to be known as *Pandektensystem* forms the code's systematic basis.¹⁰⁸ However, the codifiers did not simply combine the popular legal theory with the plan of a code.¹⁰⁹ The BGB was not seen as based on strict statutory positivism. Although the Imperial Department of Justice (*Reichsjustizamt*) wanted to bind judges to the code, even the *Reichsjustizamt* recognized gaps in the code.¹¹⁰ The existence of gaps was accepted and in some cases it was even intentional and deliberate.¹¹¹ The *Reichsjustizamt* was also relatively generous in accepting "general clauses" such as article 242 of the civil code.¹¹² These "general clauses" turned out to be very important for the flexibility and the development of the law during the last 100 years and, more recently, for a process of "constitutionalization" of the private law.¹¹³ Originally, it was discussed whether to draft

SUBSUMTIONSAUTOMAT? (1986) (refuting the prejudice that nineteenth-century German theory and practice regarded the judge as a sort of legal calculator ("*Subsumtionsautomat*") who applied the law in a logical-mechanical way); cf. PIO CARONI, EINLEITUNGSTITEL DES ZIVILGESETZBUCHES 70 (1996) (emphasizing that there is no evidence that judges have ever assumed that they apply a gapless code).

108. For the significance and origins of the *Pandektensystem* that forms the systematic basis of the German Civil Code (general part, obligations, things, family law, and succession), see, for example, ZIMMERMANN, LAW OF OBLIGATIONS, *supra* note 8, at 29–31.

109. See JAKOBS, *supra* note 89, at 128–33 (drawing a clear distinction between the scholarly positivism of the Historical School and statutory positivism (*Gesetzespositivismus*)). But see Lipp, *supra* note 98, at 1978, 1986–87 (claiming that the absence of gaps is the distinctive trait of the BGB).

110. For the view of the *Reichsjustizamt* toward judicial interpretation of the code, see HANS SCHULTE-NÖLKE, DAS REICHJUSTIZAMT UND DIE ENTSTEHUNG DES BÜRGERLICHEN GESETZBUCHES 341–46 (1995).

111. On the deliberate incompleteness of the German code, see JAKOBS, *supra* note 89, at 134–36, 140–42.

112. See SCHULTE-NÖLKE, *supra* note 110, at 345–46. But see HÜBNER, *supra* note 84, at 55, 57, 60, 65 (claiming that the *Reichsjustizamt* increasingly opposed general clauses in the end of the legislative preparations). Article 242 of the German Civil Code says: "The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage [*Verkehrssitte*]." BGB art. 242.

113. For the significance of general clauses, see KARL LARENZ, ALLGEMEINER TEIL DES DEUTSCHEN BÜRGERLICHEN RECHTS 25–26 (7th ed. 1989); FRANZ WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT UNTER BESONDERER BERÜCKSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG 476–77 (2d ed. 1967) (HISTORY OF PRIVATE LAW IN EUROPE: WITH PARTICULAR REFERENCE TO GERMANY (Tony Weir trans., Clarendon Press 1995)); and PETER SCHLECHTRIEM, GOOD FAITH IN GERMAN LAW AND IN INTERNATIONAL UNIFORM LAWS 7–8 (1997). General clauses served as crucial instruments for transforming German private law towards a more "social" conception of law by, for example, increasing protection for "weak" parties, in a process often called "social materialization." See, e.g., JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 472–93 (1992).

For the related tendency towards "constitutionalization" of private law, a process by which the constitution's fundamental rights increasingly guide and control in private law, see most recently CLAUS-WILHELM CANARIS, GRUNDRECHTE UND PRIVATRECHT (1999). Canaris summarizes the debate,

methodological guidelines for cases in which the code did not contain a provision. Such guidelines would have expressly admitted that gaps were inevitable. These provisions never became part of the code—not because they were wrong, but because they were regarded as self-evident and superfluous.¹¹⁴

Ultimately, it was the Swiss Civil Code that expressly recognized and codified today's inevitable complementary role of code-law and judge-made law. Article 1 of the ZGB (1907) establishes the primacy of the code and, at the same time, recognizes an important role for judges.¹¹⁵ Primarily, the judge has to apply the code in all cases that come within the letter or the spirit of its provisions. Thus, the code is the primary source of the law. In cases where no provision is applicable, however, the judge must decide according to the existing customary law and, in default thereof, according to the rules that he would lay down if he himself had to act as legislator.¹¹⁶

These examples demonstrate the role of the judiciary for a theory of codification. Judges must obey the code; however, in the course of the history of codification, it has also been realized and accepted that judges are much more than mere "executors" of the code in every case.

c. *Comprehensiveness*

A codification does not merely provide regulation for specific issues. While the scope is broader than that, it is unclear how broad it must be in order to call a body of law a codification. Historically, codifications did not aim at encompassing the whole law in one "all-comprehensive code."¹¹⁷ With the French codes, the common feature of having five codes became generally accepted: Civil Code, Penal Code, Commercial Code, Civil Procedure, and

discusses the impact of fundamental rights on various aspects of private law including private law norms, *id.* at 11–23, their application, and their development by the courts, *id.* at 23–33, as well as their direct impact on the acts of citizens, *id.* at 33–51, and provides various examples, *id.* at 50–90.

114. See 1 DIE GESAMMELTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH 568–69 (Benno Mugdan, ed., Berlin, Decker, 1899); HÜBNER, *supra* note 84, at 50–51 (containing the legislative proposals); SCHOTT, *supra* note 84, at 95; SCHMIDT, *supra* note 47, at 46.

115. For the text of the code, see THE SWISS CIVIL CODE, ENGLISH VERSION, *supra* note 90, at 1.

116. See *id.*; see also CARONI, *supra* note 107, at 36–37 (commenting on the significance of art. 1).

117. Sometimes this comprehensive quality is attributed to the Prussian Code, but even for this exhaustive code it is not true. The code does not encompass the law of procedure or the law of organization and government of the courts. See, e.g., Thilo Ramm, *Die friederizianische Gesamtkodifikation und der historische Rechtsvergleich*, in DAS PREUSSISCHE ALLGEMEINE LANDRECHT 1, 3 (Jörg Wolff ed., 1995). Ramm claims that the Prussian Code was the only all-comprehensive codification ("Gesamtkodifikation"), but treats the Corpus Iuris Friedericianum (1793) and the Prussian Code (1794) as one single code. See *id.*

The Austrian code was eventually limited to the private law. See Werner Ogris, *Diskussionsbeitrag*, in GEMEINWOHL-FREIHEIT-VERNUNFT-RECHTSSTAAT 140 (Friedrich Ebel ed., 1995). In 1753, Maria Theresia appointed a commission that dealt only with private law. See E. Schwarz, *Die Geschichte der privatrechtlichen Kodifikationsbestrebungen in Deutschland und die Entstehungsgeschichte des Entwurfs eines bürgerlichen Gesetzbuchs für das Deutsche Reich*, in 1 ARCHIV FÜR BÜRGERLICHES RECHT 1, 2 (Berlin, Heymann 1889).

Criminal Procedure.¹¹⁸ Codification therefore seems to cover a field of law in its entirety. Even within each of these five fields, codifications are not necessarily comprehensive. The German Civil Code, for example, excludes law relating to patents, copyrights, and designs, law relating to the protection of industrial rights, and parts of private labor law. It may still be true that a codification at least has to cover certain fields *within* private law. In the historical codifications—for instance, the German Civil Code—not even this is necessarily the case. While the heart of every field could generally be found in the code, there was still a whole list of specific issues that were left to the *Länder*, and the pre-commission (*Vorkommission*) excluded various issues in order to treat them separately.¹¹⁹

Codifications generally cover a broad field of the law, but codifications cannot, and need not, cover everything. Within each field, however, they do not have to be *fully* comprehensive.

3. System

Codifications are systematic. All definitions and explanations of codification provided in the legal literature mention the elements of system and order. These elements are commonly regarded as the most characteristic features of a codification. They distinguish modern codifications from the code of Justinian and other earlier codes.¹²⁰ In history's first effort to prepare a systematic and comprehensive encyclopedia of law, the *Nova methodus discendae docendaeque jurisprudentiae* of 1667, Gottfried Wilhelm Leibniz (1646–1678) heralded the future agenda for many codifiers when he emphasized that a new *Corpus Juris* needed to be expounded “plene, breviter, ordinate,” i.e., “completely, briefly, and systematically.”¹²¹

The underlying idea that there is a system in law reached its peak with the scholarly systems of natural lawyers, above all with the works of Christian

118. For a discussion of the French codes, see WIEACKER, *supra* note 113, at 271. The Italian *Codice Civile* and the Dutch *Burgerlijk Wetboek*, for example, even encompass commercial law. Swiss private law is split into the law of obligations (*Obligationenrecht*) and the civil code (*Zivilgesetzbuch*). However, these are not really two separate codes. They are successively enacted parts of the same code, because the law of obligations is the fifth part of the civil code. See *id.* at 387.

119. An example of issues left to the *Länder*, the so-called “casualty list” of legal unification, is a substantial part of property law. See *Einführungsgesetz zum Bürgerlichen Gesetzbuch* [EGBGB] arts. 55–152, 218. Examples of exclusions by the *Vorkommission* include the law of publications, the law of copyright of artistic work, the law of insurance contracts, and many more. On the *Vorkommission*, see Schwarz, *supra* note 117, at 169–70.

120. See, e.g., SCHMIDT, *supra* note 47, at 78–79 (summarizing a study on the future of codification by claiming that, of the various historical reasons for codification, it is only the desire to systematize that remains relevant today); see also Ankum, *supra* note 65, at 1–17 (explaining the novel quality of a modern “codification” as compared to a Roman “code”). But see 1 FIKENTSCHER, *supra* note 69, at 418–20 (commenting critically on the amalgamation of codification and system).

121. GOTTFRIED WILHELM LEIBNIZ, *Nova methodus discendae docendaeque jurisprudentiae ex artis didacticae principiis*, in 6-1 SÄMTLICHE SCHRIFTEN UND BRIEFE 261, 307 (Preussische Akademie der Wissenschaften ed., 1930) (1667) (emphasis added). This work marked the onset of the important encyclopedic movement that aimed at presenting the totality of law and legal scholarship in a systematic way. For an account of the encyclopedic movement in law, see ANNETTE BROCKMÖLLER, DIE ENTSTEHUNG DER RECHTSTHEORIE IM 19. JAHRHUNDERT IN DEUTSCHLAND 137–65, 177–82 (1997).

Wolff (1679–1754).¹²² These systems laid the foundations for future codification. Since, for political and philosophical reasons, they were attractive to the legislators of the time, drafting a comprehensive code based on a huge systematic plan became possible and desirable. Doctrine and legislation formed an alliance that resulted in the natural-law codes of the first wave of codification. The attempt of the natural lawyers to develop a functional scheme of classifying obligations according to content and effect, for example, can be found in the Prussian Code.¹²³ Following this influence of natural-law systems, the belief in systems once again had an impact on legislation. The German Civil Code is rooted in Germany's nineteenth-century jurisprudence, which is generally described as representing conceptual jurisprudence (*Begriffsjurisprudenz*) and partially even characterized by a strict logical process of deductions from a system or pyramid of legal concepts.¹²⁴

Though having a systematic character seems to be a crucial element of a codification, the definitions and explanations in the literature show fundamental differences in two points: the *degree of technicality* and the *object of systematization* that codification requires.

The *degree of technicality* can range from a mere alphabetical or numerical order to an order that refers directly to legally relevant phenomena of the world outside the code (e.g., forming the category "family"), to an order that collects various rules under a dogmatic subject title (e.g., "obligations"), and finally to an elaborated, complex system that, in the most optimistic and utopian conceptions, is said to allow strict logical-axiomatic deduction.¹²⁵

The *object of systematization* can be legal concepts, concrete rules, or principles of law.¹²⁶ This also raises an important distinction, one that is generally neglected in the many definitions and explanations of codification in the legal literature. Today, jurisprudence usually distinguishes an "outer" system from an "inner" system of law.¹²⁷ In the case of codified law, this

122. For a history of system and law, see 1 MARIO G. LOSANO, *SISTEMA E STRUTTURA NEL DIRITTO* (1968). Losano's second volume, covering the period from the Historical School to the present, is forthcoming this year. For brief accounts, see also HELMUT COING, *ZUR GESCHICHTE DES PRIVATRECHTSYSTEMS* 9–28 (1962); and Lipp, *supra* note 98.

123. See, e.g., ZIMMERMANN, *LAW OF OBLIGATIONS*, *supra* note 8, at 18 n.100 (comparing the system of the Prussian Code with Pufendorf's and Grotius's natural law system).

124. For the classic account of the nineteenth century's conceptual jurisprudence, see KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 19–35 (6th ed. 1991). But see OGOREK, *supra* note 107, at 208 (denying that the logical element was dominant in Puchta's jurisprudence); Peter Landau, *Puchta und Aristoteles*, 109 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE (ROMANISTISCHE ABTEILUNG)* 1, 3–4 (1992); and Peter Landau, *Die Rechtsquellenlehre in der deutschen Rechtswissenschaft des 19. Jahrhunderts*, in *JURISTISCHE THEORIEBILDUNG UND RECHTLICHE EINHEIT*, *supra* note 67, at 70–79 (arguing that Puchta's legal theory and the nineteenth century's Historical School were principled rather than conceptual).

125. For various degrees and criteria of systematization, see, for example, BYDLINSKI, *SYSTEM*, *supra* note 50, at 9–17, 64–65; and VARGA, *supra* note 2, at 323–24.

126. See, e.g., LARENZ & CANARIS, *supra* note 78, at 263–89 (dealing with an abstract-conceptual system); *id.* at 302–18 (dealing with a system of legal principles including a corresponding system of legal concepts).

127. See, e.g., BYDLINSKI, *SYSTEM*, *supra* note 50, at 4; CLAUD-WILHELM CANARIS, *SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ* 19 (1983); LARENZ & CANARIS, *supra* note

distinction means that the way in which the code tries to structure and order its subject matter represents the "outer" system. A code may distinguish, for example, the law of obligations, property law, and the law of succession. It may further subdivide the law of obligations into contractual and non-contractual obligations. These may in turn be further subdivided, and all these subparts consist of more or less abstract legal concepts (such as "sales" or "unjust enrichment"). In the process of adjudication and development of the law, this systematization is useful for orientation and overview, at least, and it might even help to construe the law.¹²⁸

In addition to such "outer" systems, many scholars also believe in an "inner" system of law.¹²⁹ In its most sophisticated and prominent version, it is an "inner" system of *principles*, and it is this "inner system" that is crucial for the process of adjudication and for doctrinal, judicial, and legislative development of the law.¹³⁰ Of course, "inner" and "outer" systems are not completely unrelated. They are mutually intertwined, most importantly because the code's "outer" system may "mirror" the "inner" system and the "inner" teleology of the law.¹³¹

Historically, there are strong and weak forms of codification with respect to the (outer) systematic element. The Prussian Code tries to structure and order, but conceptually it is less exact and technical. It compiles, for example, many individual casuistic rules and illustrations.¹³² The German Civil Code, on the other hand, thorough and scholarly in its preparation, reaches a higher degree of conceptual abstractness and systematization. It uses, for example, a complicated scheme of general and special parts, which was a typical way of structuring and systematizing law in nineteenth-century

78, at 265; Peter Liver, *Begriff und System in der Rechtssetzung*, in *PROBLEME DER RECHTSSETZUNG/L'ART DE LÉGIFÉRER*, 135, 165 (Schweizerischer Juristenverein ed., 1974). These sources all follow the terminology of PHILIPP HECK, *BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ* 139–43 (1932).

128. See CANARIS, *supra* note 127, at 19; LARENZ & CANARIS, *supra* note 78, at 265–67 (addressing the "outer system" in general); *id.* 145–49 (discussing "systematic" or "contextual" interpretation ("Bedeutungszusammenhang des Gesetzes")).

129. See sources cited *supra* note 127.

130. For want of space, I cannot explain the details of Canaris's approach here. Instead, see CANARIS, *supra* note 127; and LARENZ & CANARIS, *supra* note 78, at 302–18. Note that it is strictly speaking an "inner" system of principles along with a corresponding system of legal concepts. See CANARIS, *supra* note 127, at 50; LARENZ & CANARIS, *supra* note 78, at 310. But see, e.g., FRANZ-JOSEF PEINE, *DAS RECHT ALS SYSTEM* 16–28 (1983) (criticizing Canaris's theory). For the different functions of "outer" and "inner" systems, see CANARIS, *supra* note 127, at 19.

131. See CANARIS, *supra* note 127, at 19 (explaining that the "outer" system may "mirror" the "inner" system but adding that this need not necessarily be the case). For further opinions that the "outer" system is influenced by the teleology of the "inner" system, see, for example, Liver, *supra* note 127, at 167 (citing 1 FRANÇOIS GÉNY, *SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF* 47–49 (1914) and 3 *id.* at 123 (1921), and providing further references). See also BYDLINSKI, *SYSTEM*, *supra* note 50, at 18–19 n.22 (emphasizing the great significance of the "outer" system by claiming that an "inner" system cannot be elaborated without an independent "outer" system of law).

132. See, for example, the infamous chapter on accessories and fixtures in *ALLGEMEINES LANDRECHT FÜR DIE PREUSSISCHEN STAATEN VON 1794*, *supra* note 95, at pt. I, tit. 2, §§ 42–108, where, in 67 sections altogether, the reader can find not only a definition but also numerous ridiculously detailed examples of what qualifies as an accessory or fixture and what does not.

jurisprudence.¹³³ All other actual codes fall somewhere within the continuum between these two codes.

The exact degree of systematization that is required to call a legislative act a codification can hardly be measured. Given the modern examples of Continental codes, codification is surely meant to be more than a mere index, an alphabetical or loosely subject-related order. It *aims*, at least, to present a clearly structured and consistent whole of legal rules and principles ("outer" system), promoting the internal coherence of the law ("inner" system), and providing a conceptual framework for further doctrinal, judicial, or legislative development.¹³⁴

4. *Reform*

Some authors regard reform in substance as a necessary element of codification,¹³⁵ while others define codification as a reform in form.¹³⁶ An examination of the five historical codifications demonstrates that there was always a combination of change in form and change in substance. The change in form is necessarily caused by the reduction of legal sources and the establishment of the primacy of statutory law. In substance, the Prussian Code, the "code of compromises,"¹³⁷ only made minor changes to the law compared to the French Code.¹³⁸ The German Code can be described as relatively conservative with respect to the changes it incorporated.¹³⁹

133. For an explanation of the scheme used in the BGB, for example, see 1 ERNST J. COHN, *MANUAL OF GERMAN LAW* 62–63 (1968). See also BROCKMÖLLER, *supra* note 121, at 177–82 (with an account of the historical origins of such systems of general and special parts in law).

134. See, e.g., BYDLINSKI, *SYSTEM*, *supra* note 50, at 421 (distinguishing and explaining clearly both the "inner" and the "outer" aspects of codification's systematic nature); Zimmermann, *supra* note 65, at 97 (summarizing the systematic approach to law in modern codification).

135. See CARONI, *PRIVATRECHT*, *supra* note 4, at 74 (providing further references); J.M. Polak, *Alternatieven voor algemene wetboeken*, 63 *NEDERLANDS JURISTEN BLAD* 708, 710 (1988) ("Normaal is dat codificeren met modifieren gepaard gaat." (footnote omitted)); Schwarz, *supra* note 117, at 2; Dennis Tallon, *Codification and Consolidation of the Law at the Present Time*, 14 *ISR. L. REV.* 1, 3 (1970). But see, e.g., Dame Mary Arden, *Time for an English Commercial Code?*, 56 *CAMBRIDGE L.J.* 516, 518 ("[I]t is often thought that a code was to be a piece of substantially new law but there is no reason why that need be so.").

136. See JOSEPH VAN KAN, *LES EFFORTS DE CODIFICATION EN FRANCE: ÉTUDE HISTORIQUE ET PSYCHOLOGIQUE* 259 (1929) (arguing that change in substance is at best a secondary motivation); NOLL, *supra* note 54, at 215; Franz Bydliński et al., *Vorwort*, in *RENAISSANCE DER IDEE DER KODIFIKATION: DAS NEUE NIEDERLÄNDISCHE BÜRGERLICHE GESETZBUCH 1992*, *supra* note 76, at 7; Gérard Cornu, *Codification contemporaine: Valeurs et langage*, in *CODIFICATION: VALEURS ET LANGAGE*, *supra* note 63, at 31, 34–35; Vanderlinden, *supra* note 53, at 52; cf. RÖHL, *supra* note 12, at 579 (distinguishing "conservative codification" from "revolutionary codification"). During the whole of the nineteenth century, it was common to understand codification as the process of laying down existing law and deciding cases of doubts. See Barbara Dölemeyer, *Kodifikationsbewegung*, in 3-2 *HANDBUCH*, *supra* note 4, at 1403, 1425–26.

137. Hattenhauer, *supra* note 101, at 17 (describing the "Gesetzbuch der Kompromisse").

138. Note, however, that the revolutionary and modernizing character of the French Code is increasingly contested. See, e.g., Bernd-Rüdiger Kern, *Die französische Gesetzgebung unter Napoleon*, 6 *LEIPZIGER JURISTISCHE VORTRÄGE* 11, 29–31 (1995); James Gordley, *Myths of the French Civil Code*, 42 *AM. J. COMP. L.* 459 (1994).

139. See ZWIGERT & KÖTZ, *supra* note 6, at 141–42 (1996) ("Zu diesen Kodifikationen konservativen und bewahrenden Charakters zählt auch das deutsche Bürgerliche Gesetzbuch.").

In reality, codification is always both innovation in form and innovation in substance. From the subjective standpoint of the legislature, it may be possible to have only changes in form. Objectively, this is virtually impossible.¹⁴⁰ Even if the legislature merely tries to codify the existing law, it inevitably changes the law in substance. If, for example, the previous sources are contradictory regarding one legal problem, the legislature has to choose one source for the possible solutions. This is a change in the law, since the other previously authoritative or persuasive sources are eliminated. Moreover, the mere fact that the law is reformulated and put in different words implies a change. International law practice illustrates very well the impossibility of keeping strictly separated changes in form and changes in substance. The Statute of the International Law Commission requires that the two forms of codification be kept separate.¹⁴¹ It has turned out that this is impossible in practice.¹⁴²

Codification is, in practically all cases, a change in substance *and* in form. Apart from that, the act of codification cannot be defined as a specific high or low degree of reform. The historical examples show that the reform ranges across a broad spectrum.

5. National Legal Unification

Codification often served to attain legal *and* political unity in a given territory with previously heterogeneous legal sources. This was particularly true in the nineteenth century, when codification became linked to the emergence of modern nation states.¹⁴³ A code enacted by a strong central authority was meant not only to serve the technical goal of unification for legal reasons, but also to constitute a sense of political identity and to serve as a symbol of national unity and prestige. Historically, "technical" legal unification by means of codification often came hand in hand with political unification. Nevertheless, the idea of codification should not be limited to just

140. See, e.g., CARONI, *supra* note 107, at 15–17; CARONI, *PRIVATRECHT*, *supra* note 4, at 73–75 (1988); Caroni, *Gesetzbuch*, *supra* note 4, at 273; David, *supra* note 14, at 59; André Morel, *Codification: Insertion du droit nouveau*, in CODIFICATION: VALEURS ET LANGAGE, *supra* note 62, at 369; F. Terré, *Codification: Insertion du droit nouveau (communications)*, in CODIFICATION: VALEURS ET LANGAGE, *supra* note 62, at 375, 376; see also KARL F. ATZMÜLLER, *DIE KODIFIKATION DES KOLLEKTIVEN ARBEITSRECHTS* 16–17 (1985) (distinguishing between reform and the politics of reform, the former being necessarily part of codification and the latter being limited to codification in politically contested areas).

141. See *Statute of the International Law Commission*, *supra* note 60, at art. 15.

142. See, e.g., SASSÖLI, *supra* note 60, at 78–79; VERDROSS & SIMMA, *supra* note 60, at 302; Gilbert Guillaume, *La Codification en droit international*, 40 *REVUE JURIDIQUE ET POLITIQUE* 875, 877–78 (1986); Schröder, *supra* note 60, at 102 ("In the field of international law, it is at least as difficult as in other fields of law, and perhaps even more difficult, to distinguish between the codification and the creation of rules and regulations.").

143. See, e.g., CARONI, *PRIVATRECHT*, *supra* note 4, at 33; MICHAEL JOHN, *POLITICS AND LAW IN LATE NINETEENTH-CENTURY GERMANY: THE ORIGINS OF THE CIVIL CODE* 241–57 (1989); Caroni, *Kodifikation*, *supra* note 4, at 907; Hirsch, *supra* note 49, at 131–32; Wieacker, *supra* note 65, at 34–38; Franz Wieacker, *Der Kampf des 19. Jahrhunderts um die Nationalgesetzbücher*, in *INDUSTRIE-GESELLSCHAFT UND PRIVATRECHTSORDNUNG* 79–93 (Franz Wieacker ed., 1974); Zimmermann, *supra* note 65, at 100–01.

one specific historical situation. Nationhood, as conceived in the nineteenth century, is not the only possible political framework within which codification flourishes. The necessity of certain political circumstances for codification to occur should not be overemphasized. Even the previous brief outline of the history of codification shows that it was not limited to one unique combination of political or social factors. In fact, codification asserted itself under radically different conditions, including the enlightened absolutism of the eighteenth century (Prussia), the nationalistic liberalism of the nineteenth century (Germany), and the socialist or democratic pluralist societies of the twentieth century (the Netherlands). Therefore, it would be a mistake to limit codification, politically as well as intellectually and philosophically, to only one set of conditions.¹⁴⁴

Codification often unifies different pre-existing laws. In so doing, it may also promote political unity. However, codification is not necessarily supportive of only one political idea, nor is it exclusively devoted to the idea of a nation state.

6. *Simplicity*

Finally, simplicity can be found in most definitions of codification. The idea of simplicity looks back to a long history in law and legislation.¹⁴⁵ Simplicity does not refer only to the technicality of drafting laws. It also raises an important political question: To whom is a codification addressed?¹⁴⁶

Striving for simplicity has always been a goal of good law, but under enlightened absolutism this idea was promoted intensively in legislative practice. While the element of a gapless code was addressed to the judiciary, and the systematic element spoke to legal scholars, during the first European wave of codification, the element of simplicity referred to the citizen. It had the "Janus-face" of giving citizens simple, comprehensible laws in order to bind them while on the other hand establishing a rule of law. Men such as Christian Wolff and Carl Gottlieb Svarez, however, saw the conflict between the goals of addressing the code to legal experts, the judiciary, and legal scholars, and at the same time, to every citizen or, at least, to educated citizens. Consequently, they even considered the unusual idea of giving a code

144. See, e.g., SCHMIDT, *supra* note 47, at 30, 34; Mayer-Maly, *supra* note 40, at 205; Fritz Pringsheim, *Some Causes of Codification*, reprinted in 2 GESAMMELTE ABHANDLUNGEN 106, 113 (1961); Zimmermann, *supra* note 65, at 103. However, note also Caroni's criticism. See Caroni, *Gesetzbuch*, *supra* note 4, at 252-53; Caroni, Book Review, *supra* note 77, at 126-27 (criticizing as reductive the creation of an overly abstract concept of codification without sufficient links to historical reality).

145. For excellent accounts of "simplicitas" in the context of law and legislation, see Clausdieter Schott, *Einfachheit als Leitbild des Rechts und der Gesetzgebung*, 5 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 121, 121-34 (1983) [hereinafter Schott, *Einfachheit*]; Clausdieter Schott, *Gesetzesadressat und Begriffsvermögen*, in FESTSCHRIFT FÜR HEINZ HÜBNER 191 (Gottfried Baumgärtel et al. eds., 1984) [hereinafter Schott, *Gesetzesadressat*]; Clausdieter Schott, *Kritik an der "Simplifikation"*, in GEDÄCHTNISCHRIFT FÜR PETER NOLL 127 (Robert Hauser et al. eds., 1984).

146. See Schott, *Einfachheit*, *supra* note 145, at 121, 134; Schott, *Gesetzesadressat*, *supra* note 145, at 191.

to each addressee by simply drafting two versions of the code.¹⁴⁷ This sort of “twin-code” was never enacted. Instead, there was only one Prussian Code that contained not only abstract rules but also many definitions and much casuistry with numerous examples of how to apply the code. It was meant to be a sort of clear and understandable treatise with the goal of teaching the law to its addressee, the (educated) citizen. It tried to enable the citizen to know and understand the law without the help of legal professionals.¹⁴⁸

Even during the first wave of codification, many important scholars such as Johann Georg Schlosser and Jean-Étienne-Marie Portalis realized that simplicity is not an absolute goal. Simplicity conflicts with another element of codification—striving for completeness.¹⁴⁹ Portalis knew that “le grand art est de tout simplifier en prévoyant tout” and that a complex state like France cannot be governed by laws “aussi simples que celles d’une société pauvre ou plus réduite.”¹⁵⁰

When the political conditions changed from absolutism to the liberal constitutional state, it was possible to rethink the goal of simplicity. Probably the best example of a new approach occurred in Germany, because the German Civil Code was obviously not meant to be a “bible of law” or a “first law reader” for the people. Ordinary citizens can hardly understand its highly technical language, which lacks the Prussian Code’s explanatory style and its many definitions and concrete examples. This was obvious in 1900 when the German Civil Code came into force. The BGB was, above all, addressed to legal professionals.¹⁵¹

Therefore, simplicity in the sense of a simple law that can be understood by everybody might be a desirable feature, but the historical record shows that it is not necessarily a defining element of codification.

C. Summary

Bearing in mind that there is a whole continuum of stronger and weaker forms of codification, that the historical codes do not develop a concept of codification that draws an exact line between what qualifies as codification

147. See CHRISTIAN WOLFF, *VERNÜNFFTIGE GEDANCKEN VON DEM GESELLSCHAFTLICHEN LEBEN DER MENSCHEN UND INSONDERHEIT DEM GEMEINEN WESEN* 445 (4th ed. Frankfurt & Leipzig, Renger 1736); Carl Gottlieb Svarez, *Inwiefern können und müssen Gesetze kurz sein*, in *VORTRÄGE ÜBER RECHT UND STAAT VON C. G. SVAREZ* 627, 629 (Hermann Conrad & Gerd Kleinheyer eds., 1960) (1788); see also Schott, *Gesetzesadressat*, *supra* note 145, at 201–03 (“Das ‘doppelte Gesetzbuch’”).

148. See Jan Schröder, *Das Verhältnis von Rechtsdogmatik und Gesetzgebung in der neuzeitlichen Rechtsgeschichte (am Beispiel des Privatrechts)*, in *GESETZGEBUNG UND DOGMATIK*, 3. SYMPOSIUM DER KOMMISSION “DIE FUNKTION DES GESETZES IN GESCHICHTE UND GEGENWART” AM 29. UND 30. APRIL 1988, at 37, 43–46 (Okko Behrends & Wolfram Henckel eds., 1989) (describing the didactic style of the Prussian Code as compared to the style of the German BGB).

149. See Schott, *Einfachheit*, *supra* note 145, at 121, 133–34, 137–39.

150. Portalis et al., *supra* note 104, at 467, 468.

151. See 2 THOMAS NIPPERDEY, *DEUTSCHE GESCHICHTE 1866–1918*, at 199 (1992); Schröder, *supra* note 148, at 47. But see, e.g., Norbert Horn, *Ein Jahrhundert Bürgerliches Gesetzbuch*, 53 NJW 40, 41 (2000) (contending but not proving that the German Civil Code manifests the idea of summarizing rights in a “clear and comprehensible way,” which enables “everyone to know his rights and to make use of them on his own.”).

and what does not, and that the concept of codification has persistently been in flux over the last 200 years, we can summarize the core elements of codification in the following way: Codification is a conception of the law that is centered upon a code. Such a code is authoritative rather than merely persuasive. It is complete in the sense that it is the primary source of the law with respect to the exclusion of other sources in the field of law that it covers. It requires a theory of adjudication that binds the judge to the code, yet gives the judge the power to fill in gaps and develop the law. This code aims at presenting a clearly structured and consistent whole of legal rules and principles ("outer" system), promoting the internal coherence of the law ("inner" system), and providing a conceptual framework for further doctrinal, judicial, or legislative development. It often serves to promote both legal and political unification.

In the remainder of this Article, I will try to evaluate the role that codification played in England and the United States, using this concept of codification as a template. I shall first examine the English history of codification and then turn to American legal history.

III. CODIFICATION IN ENGLISH LEGAL HISTORY

The history of the idea of codification in England can be roughly subdivided into three chronological parts. The first covers the period from the sixteenth century to the beginning of the work of Jeremy Bentham, the second deals with the nineteenth century and Bentham's thought, and the third comprises the twentieth century to the present.

A. *From the Beginnings to Jeremy Bentham*

In many respects, the sixteenth century was a crucial turning point in English history.¹⁵² Many reasons, both legal and non-legal, have been offered to explain this turning point, but one reason has often been overlooked: Suggestions for a code of common law in English history can be traced back to the sixteenth century.¹⁵³

152. See John H. Langbein, Book Review, 19 AM. J. LEGAL HIST. 330, 330 (1975) (emphasizing that the sources available to historians changed character in a fundamental way in the 16th century).

153. See LANG, *supra* note 5, at 28-29; BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 216 (1993) (stating that the idea of codifying the common law goes back at least to Francis Bacon's proposal in 1614); TEUBNER, *supra* note 3, at 40-60; Shapiro, *supra* note 3, at 428, 431-34.

Naturally, the exact point at which the history of codification began depends, for England as well as for Europe in general, on how we understand codification. Wolf, for instance, designates a piece of legislation enacted in the reign of Canute of Denmark (1017-1035) as the first codification. See WOLF, *supra* note 80, at 338. On the other hand, the entire codification movement in England is sometimes considered to begin and end with Bentham, which would mean that it did not begin before the end of the eighteenth century. For the different opinions on this issue, see Shapiro, *supra* note 3, at 428-65. Too narrow an interpretation might be impractical, because it would tear apart the existing historical lines of codification in England; but none of these opinions is "wrong" as long as there is no strictly fixed meaning, i.e., no consensus in the scholarly community as to the meaning of the word "codification."

1. *The Idea of a Code in the Sixteenth and Seventeenth Centuries*

In the sixteenth and seventeenth centuries the idea of a code was driven by one goal: the reform of a legal system that was regarded as unsatisfactory in form because of the accretion of an enormous number of precedents in combination with muddled legislation. For the first time in English history, the sources of the law became a serious problem. A huge mass (and mess) of yearbooks, nominate reports, statutes, and abridgements (Statham (around 1495), Fitzherbert (1516), and others) had accumulated.¹⁵⁴ During the early sixteenth century, the rising importance of printing exacerbated the problem.¹⁵⁵ A new organization for legal materials had to be developed. Encyclopedias, digests, dictionaries, and especially in the late eighteenth century, treatises were developed as new devices to collect and organize the wisdom of the law. This revolution in the history of legal literature served as a basis for considering codification. The following early suggestions for reform in this direction are noteworthy.

During the reign of Henry VIII (1509–1547), the creation of a civil code was discussed for the first time. Cardinal Reginald Pole (1500–1558) criticized English law as confused and uncertain, and he advocated the formation of a code modeled on Justinian's code of Roman law.¹⁵⁶ Henry VIII himself also seemed to support this idea.¹⁵⁷ Yet this consensus did not lead to any practical reforms.

In 1549 under Edward VI (1547–1553), who like his predecessor felt sympathetic to the idea of a code, the House of Lords considered the idea of collecting all the common law and the statute law in one codex.¹⁵⁸ However, their consideration did not result in any legislative action.

During the reign of Elizabeth I (1558–1603), one endeavor to reform the law concentrated on consolidating the statutes.¹⁵⁹ The idea was to collect parts

154. For the origins and the character of the yearbooks, see J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 204–14 (1990); 2 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 525–56 (2d ed. 1937). For the nature of the abridgements, see THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 273–76 (5th ed. 1956). For an account of the transition from yearbooks to the nominate reports as well as a comparison, see BAKER, *supra*, at 153–56; and 5 HOLDSWORTH, *supra*, at 355–78.

155. Printing was introduced to England in the 1470s. The first printed law book was Littleton's *Tenures* (1481). See BAKER, *supra* note 154, at 207.

156. Pole's views were given voice as follows:

Therefor, to remedy thys mater groundly, hyt were necessary, in our law, to vse the same remedy that Justynyan dyd in the law of the Romaynys, to bryng thys infynyte processe to certayn endys, to cut away thys long lawys, and, by the wysdome of some polytyke and wyse men, instytute a few and bettur lawys and ordynancys.

VANDERLINDEN, *supra* note 40, at 301 (quoting an imaginary dialogue between Reginald Pole and Thomas Lupset written by Thomas Starkey, an advisor to Henry VIII, in 1534); Frederic W. Maitland, *English Law and the Renaissance*, in 1 *SELECTED HISTORICAL ESSAYS OF F.W. MAITLAND* 135, 137 (1907) (ascribing to Pole the view that "a wise prince would banish this barbaric stuff [English law] and receive in its stead the civil law of the Romans").

157. See Maitland, *supra* note 156, at 142.

158. See LANG, *supra* note 5, at 28 (adding that the effort was abandoned, because it was regarded as too important to be attempted under an infant king).

159. See PLUCKNETT, *supra* note 154, at 325; TEUBNER, *supra* note 3, at 48.

of the statutory law and add a preamble explaining the problems and the goals of such a consolidation, but leave the common law untouched. One example is the Statute of Labourers (1562), which consists of the relevant parts of the statutory law along with a preamble presenting the problems and the goals of the statute, but which does not change the relevant common law.¹⁶⁰ Later, in 1593, a similar effort to prepare a restatement of the law was made, but again did not result in any practical impact.¹⁶¹ A general consolidation of statutes was not undertaken. The same result occurred in response to the next suggestion. Nicholas Bacon, Lord Keeper of The Great Seal, and father of Francis Bacon, proposed to Queen Elizabeth I that all the laws in a certain area should be brought together in one statute. Once the statute was enacted, all competing laws would cease to be in force. In the end, the statutes in each area of law were to be put together in one code.¹⁶²

This trend towards proposals of codes continued under the reign of James I (1603–1625). In his speeches on the opening of Parliament in 1607 and 1609, King James criticized judge-made law and attacked the common law. He advocated concentrating all legal rules into a single work in order to convert the unwritten common law into written and statutory law. James admired the legal system of Denmark, where “the formality of the law hath no place . . . all their state is governed only by a written law Happy were all kingdoms if they could be so. But here, curious writs, various conceits, different actions and variety of examples breed questions in the law.”¹⁶³ Ultimately, due to political controversies between the king and Parliament, the work did not proceed further.¹⁶⁴

Francis Bacon (1561–1626) was the central ideological personality of this first period in the history of codification.¹⁶⁵ His learned criticism of the common law and his moderate and conservative rather than revolutionary ideas for law reform were proposed to James I in 1614 and 1616. Bacon suggested creating two separate collections of law: one consisting of statutory law, the other consisting of case law. The statutory law would be reformed to abolish obsolete statutes, to revise the remaining statutes, and to codify new statutes as necessary. Bacon’s suggestion for case-law reform was intended to create a system that would consolidate the enormous number of judicial decisions. Remarkably, in the case of controversial questions or issues that

160. See 4 HOLDSWORTH, *supra* note 154, at 380–83; Berger, *supra* note 14, at 143–44.

161. See 5 HOLDSWORTH, *supra* note 154, at 485 n.3.

162. See TEUBNER, *supra* note 3, at 48–49.

163. THE POLITICAL WORKS OF JAMES I, at 332 (C.H. McIlwain ed., 1918), *quoted in* DONALD VEALL, THE POPULAR MOVEMENT FOR LAW REFORM, 1640–1660, at 71 (1970). On James’s plans, see also LANG, *supra* note 5, at 29 (quoting from James’s speech at Whitehall in March 1609).

164. See LANG, *supra* note 5, at 29.

165. Bacon’s main ideas regarding the reform of the common law can be found in DE DIGNITATE ET AUGMENTIS SCIENTIARUM (Paris, Mettayer 1624) and in *A Proposition Touching the Compiling of the Laws of England*, in 2 FRANCIS BACON, THE WORKS (London, Bibliothèque royale de Bruxelles 1778) 540–47, *reprinted in* VANDERLINDEN, *supra* note 40, at 342–45. For Bacon’s role in the history of codification, see, for example, 4 HOLDSWORTH, *supra* note 154, at 467; LANG, *supra* note 5, at 29–30; 3 ROSCOE POUND, JURISPRUDENCE 705–07 (1959); TEUBNER, *supra* note 3, at 50–52; VARGA, *supra* note 2, at 146–47; VEALL, *supra* note 163, at 69–72; Berger, *supra* note 14, at 143–44; and Shapiro, *supra* note 3, at 441–47.

had not yet been decided, Bacon did not propose that the king or Parliament should exercise legislative competence. Instead, judges would decide the question with legally binding authority in a hypothetical lawsuit. Obviously, Bacon did not want to give up the case-law method. From 1616 to 1620, commissions were appointed, and the king and both the House of Commons and the House of Lords considered the suggested reform, but in the end the same political tensions between the king and Parliament thwarted these plans once again.¹⁶⁶

Following this period, there were further attempts at reform.¹⁶⁷ The great jurist of the seventeenth century, Sir Matthew Hale (1609–1676), suggested several concrete codification plans. In his preface to Henry Rolle's *Abridgement*, for example, Hale made a recommendation similar to Bacon's earlier proposals.¹⁶⁸ And in 1653, and again in 1666, committees were appointed to consider legal reform including the idea of preparing a code of law. These plans were not realized.

In summary, if success of the codification effort is measured by the outcome of the reform debates, the result is disappointing. Between the sixteenth and the turn of the eighteenth century, a surprising number of reform plans were proposed with the goal of changing the state of legal sources. Yet all those plans that, to a greater (e.g., Pole, James I) or lesser (Elizabeth I) extent tried to move toward a codified law floundered. But why, when many renowned jurists criticized the muddled state of the sources of English law, demanded that the law be put in order, and prepared reform proposals, was there such a stubborn resistance to change?

The legal literature has provided various explanations for this seeming contradiction. Most explanations for the failure to codify are political rather than legal: The political structure of Parliament made it impossible to provide majorities that could enact comprehensive reforms; many jurists in Parliament opposed comprehensive reform because of their conservative attitude towards any kind of general reform; there was also a lack of time to devote to the task of codification, because other questions were seen as more pressing; finally, it was feared that comprehensive legal reform might be followed by undesirable social reform.¹⁶⁹

The legal literature mentions only one genuinely jurisprudential reason that prevented codification from occurring. It has been asserted that English law had not yet been thoroughly systematized and conceptualized.¹⁷⁰ Therefore, the law had not achieved the "ripeness" necessary to take the path

166. See, e.g., 5 HOLDSWORTH, *supra* note 154, at 487; Shapiro, *supra* note 3, at 441–46.

167. For the development after Bacon, see LANG, *supra* note 5, at 30–31; TEUBNER, *supra* note 3, at 53–60; and Shapiro, *supra* note 3, at 428–31, 448–62.

168. See COOK, *supra* note 5, at 78.

169. See 6 HOLDSWORTH, *supra* note 154, at 411–30; TEUBNER, *supra* note 3, at 58–59; VEALL, *supra* note 163, at 228–35.

170. See TEUBNER, *supra* note 3, at 59 (referring to Holdsworth and Robinson); see also Geoffrey Samuel, *System und Systemdenken: Zu den Unterschieden zwischen kontinentaleuropäischem Recht und Common Law*, 3 ZEUP 375–97 (1995) (analyzing the difference in the degree of systematization between Continental law and English law). Note, however, that English law was at least conceptualized and organized around the writs and writ pleading.

of codification. On the other hand, it was impossible to start codification from scratch, because rich legal material existed in the form of many decisions that could not simply be dismissed by radical reform. Instead, in the eighteenth century, an alternative form of orientation and systematization in law became successful.

2. *The Retreat of the Idea of a Code in the Eighteenth Century: Blackstone's Commentaries*

William Blackstone (1732–1780) tried to create a complete and systematic overview of the muddled English law of his times with the inception of his *Commentaries on the Laws of England* in 1765.¹⁷¹ Blackstone's striving for order and system has provoked a great deal of discussion as to whether he could be called a representative of eighteenth-century natural-law theory or even of the systematic wing of the natural-law movement.¹⁷² Consequently, this raises the question why Blackstone's efforts did not result in codification as had natural-law theory on the European continent, and why Blackstone disfavored the implementation of his system by legislative authority.

Blackstone did not deduce his system from an abstract idea of natural law.¹⁷³ Instead, his starting point was the existing common law. He did not want to overcome the existing legal system, but tried to order and systematize what he found in the existing law. He asked questions about how the law *is*, and not how the law *ought to be*. Blackstone did not need an authoritative codification, because the sources, his objects of systematization, already possessed legal authority in the sense that they were legally binding.

Assuming, therefore, that Blackstone is indeed not a representative of the natural-law school, and assuming further that this can explain why he did not strive for codification, then the weakness of natural-law theory seems to explain why codification never succeeded apart from Blackstone. It is true that the Continental natural-law movement never really gained a foothold in England.¹⁷⁴ Even though this might be one reason why England did not follow the Continental example in the late eighteenth century, it is difficult to believe that the lack of natural-law thinking can explain much in the English history of codification. Natural-law movements do not necessarily and easily result in calls for codification,¹⁷⁵ nor does the absence of natural-law thinking mean automatically that there can be no support for codification. The role of natural-law thinking is, in a sense, secondary for the history of codification. Jeremy Bentham, for example, was the strongest advocate of codification. Yet he was simultaneously a strict opponent of the natural-law "hodge-podge of

171. WILLIAM BLACKSTONE, COMMENTARIES.

172. See, e.g., John M. Finnis, *Blackstone's Theoretical Intentions*, 12 NAT. L.F. 163 (1967).

173. See TEUBNER, *supra* note 3, at 69–73, 126–31 (providing many further references). Regarding the (low) influence of the natural law movement on England, see *id.* at 108–38.

174. See *id.* at 108–31.

175. See *supra* Section II.A.

confusion and absurdity.”¹⁷⁶ Natural-law thinking can be one driving force behind codification, but it is not a necessary one.

Blackstone's *Commentaries* were a tremendous success not only in England but also in America.¹⁷⁷ This astonishing success can only be understood if the history of systematic legal writing is taken into account.¹⁷⁸ Prior to Blackstone's *Commentaries* there had been only one systematic exposition of the common law since the Norman Conquest (1066): *De Legibus et consuetudinibus Angliae*, produced in the thirteenth century and attributed to Henry de Bracton.¹⁷⁹ Blackstone's work was therefore an enormous improvement of English law “in form.” Ultimately, however, the *Commentaries* as a scholarly work could not completely solve the problems of the diffuse and muddled state of the sources of law. Furthermore, since the *Commentaries* were written strictly on the basis of the existing common law, reformers soon found them to be too conservative.

B. *Jeremy Bentham and the English Codification Movement in the Nineteenth Century*

Codification in theory has to be distinguished from codification in practice. The latter does not necessarily mirror the former. Since this is particularly true for nineteenth-century England, the two will be addressed separately in the following analysis.

1. *Codification in Theory: Bentham, Austin, and Beyond*

At the end of the eighteenth century, the utilitarian Jeremy Bentham (1748–1832) emerged as the most important advocate of codification, not only in England but throughout the world.¹⁸⁰

176. JEREMY BENTHAM, *Memoirs and Correspondence*, reprinted in 10 THE WORKS OF JEREMY BENTHAM 63 (John Bowring ed., Edinburgh, William Tait 1843). On Bentham and natural law, see ALBERT VENN DICEY, *LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* 145 (Legal Classics Library 1985) (1905).

177. For the role of the *Commentaries* in American law see, for example, LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 21, 112 (1985); and FRIEDRICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* 43–47 (1986).

178. For an account of the history of legal literature, particularly the history of the legal treatise, see Alfred W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981), reprinted with revisions and notes in ALFRED W.B. SIMPSON, *LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW* 273–320 (1997) [hereinafter SIMPSON, *LEGAL THEORY*].

179. BRACON: *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* (George E. Woodbine & Samuel E. Thorne eds. 1968–77).

180. For a good introduction to Bentham's personality and work, see DINWIDDY, *supra* note 41. A table of Bentham's works in DAVID LYONS, *IN THE INTEREST OF THE GOVERNED: A STUDY IN BENTHAM'S PHILOSOPHY OF UTILITY AND LAW* 138–43 (1991) gives an idea of the wide range of Bentham's interests. There are two collections of Bentham's works: BENTHAM, *supra* note 176 (Bowring's edition), which is not complete; and THE COLLECTED WORKS OF JEREMY BENTHAM (James H. Burns et al. eds., 1968–), which is not yet complete.

a. *Jeremy Bentham and Codification*

Bentham criticized the English law of his time. In his view, the fundamental evil was the common law that had evolved over hundreds of years. Since the existing legal system was particularly admired by Blackstone, Blackstone became the subject of Bentham's severest criticism.¹⁸¹ Bentham diagnosed a disastrous state in English law: It was unclear, uncertain, and full of fictions and tautologies; the judiciary was slow and unjust. The therapy he recommended was simple and radical. He suggested translating his version of utilitarianism into legal practice and applying the principle of "the greatest happiness of the greatest number." In Bentham's conception, the way to implement the utilitarian principle and reach this goal in social politics was legislation. However, Bentham did not think of legislation in the classic sense of the English word "legislation," but rather of a new type of legislation for which he specifically created the term "codification."¹⁸² Bentham wanted England and the whole world to enact utilitarian codes, which he volunteered to draft. Bentham corresponded with many rulers and heads of state, trying to convince them that such plans were promising.¹⁸³ He particularly strove for codification in England, the United States, and Russia, but also France, Portugal, Spain, the South American countries, India, Tripoli, and Egypt. Because of this extensive commitment, which came close to an obsession, Bentham was called the "greatest codification enthusiast of all times and peoples."¹⁸⁴

Bentham's theoretical works on codification were even more important than all his practical attempts at codifying the laws of the world, which in the end were generally unsuccessful. In fact, Bentham created the first complete theory of codification.¹⁸⁵ Contemporaries and later historians often laughed at

181. On Bentham's criticism of Blackstone, see DINWIDDY, *supra* note 41, at 55-56; LANG, *supra* note 5, at 33; and GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 145-217 (1986). See also RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 13-47 (1996) (comparing Blackstone with Bentham).

Blackstone, in turn, attacked Bentham's idea of codification. See 3 BLACKSTONE, *supra* note 171, at *267 (calling it "too Herculean a task to begin the work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counselors" for "popular assemblies, even of the representative kind" rather than a "single legislator or an enterprising sovereign, a Solon or Lycurgus, a Justinian or a Frederick.").

182. For the history of the word "codification," see *supra* Part II.

183. For the correspondence regarding Bentham's codification plans, see 8 BENTHAM, CORRESPONDENCE, *supra* note 42, at xxx & 366-71.

184. "Größter Kodifikationsenthusiast aller Zeiten und Völker." Karl Korsch, *Freirechtsbewegung und Kodifikationsidee*, reprinted in GESETZESBINDUNG UND RICHTERFREIHEIT: TEXTE ZUR METHODENDEBATTE 1900-1914, at 275, 276 (Andreas Gängel & Karl A. Mollnau eds., 1992). There is another famous characterization by the great historian James Fitzjames Stephen, who claimed that Bentham's influence on practice can be compared to the influence of Adam Smith and his successors on commerce. See 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 216 (London, MacMillan 1883).

185. See Berger, *supra* note 14, at 144 ("Bentham's is regarded as the most thorough-going approach to codification."); Helmut Coing, *Benthams Bedeutung für die Entwicklung der Interessenjurisprudenz und der allgemeinen Rechtslehre*, 54 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 68 (1968); Reiner Schulze, *Französisches Recht und europäische Rechtsgeschichte im 19. Jahrhundert*, in FRANZÖSISCHES ZIVILRECHT IN EUROPA WÄHREND DES 19. JAHRHUNDERTS 9, 21

Bentham's theory of codification because of his eccentric style and exaggerated examples. But this does Bentham an injustice. It is easy, for example, to point to some of Bentham's odd and absurd statements about the simplicity of the law. But it is difficult to understand his theory of codification and to put together the different pieces of his theory, because Bentham wrote about codification in many parts of his work.¹⁸⁶ While there are many accounts of Bentham's plans for reform in legal substance through the introduction of utility as a general principle governing all fields of the law,¹⁸⁷ his method of codification and his theory of adjudication have been underestimated and oversimplified.¹⁸⁸ Consequently, the following account of Bentham's theory of codification concentrates on the methodological ideas rather than on the content of Bentham's "greatest-happiness-of-the-greatest-number codification." The core qualities of a codification discussed earlier¹⁸⁹ will serve as a framework for an introduction to Bentham's ideas on the nature of codification:

1) *Authority*. It was crucial for Bentham that a codification be enacted by the legislature.¹⁹⁰ In his *Justice and Codification Petitions*, addressed to the House of Commons, Bentham emphasized that the king, the Lords, and the House of Commons together had to enact a codification: "Completed, indeed, it cannot be; and of this too we are fully sensible, otherwise than by the King and the Lords, in conjunction with your Honourable House."¹⁹¹

2) *Completeness*. Bentham mentions several times that a codification has to be an "all comprehensive body of law," that it has to be "complete."¹⁹²

(Reiner Schulze ed., 1994) (stating that in Bentham's works the ideal of codification reached "its most stringent theoretical markedness.").

186. See JEREMY BENTHAM, *Justice and Codification Petitions* (n.d.), reprinted in 5 BENTHAM, *supra* note 176, at 437–548; JEREMY BENTHAM, *A General View of a Complete Code of Laws* (1802), reprinted in 3 BENTHAM, *supra* note 176, at 155–295 (presenting Bentham's theory of codification in a methodological sense) [hereinafter BENTHAM, *A Complete Code*]; JEREMY BENTHAM, *Pannomial Fragments* (n.d.), reprinted in 3 BENTHAM, *supra* note 176, at 211–30; JEREMY BENTHAM, *Papers Relative to Codification and Public Instruction* (1817), reprinted in 4 BENTHAM, *supra* note 176, at 451–553; JEREMY BENTHAM, *Principles of Judicial Procedure, with the Outlines of a Procedure Code* (n.d.), reprinted in 2 BENTHAM, *supra* note 176, at 1–188; JEREMY BENTHAM, *Principles of Penal Law* (n.d.), reprinted in 1 BENTHAM, *supra* note 176, at 365–580; JEREMY BENTHAM, *Principles of the Civil Code* (n.d.), reprinted in 1 BENTHAM, *supra* note 176, at 297–364.

187. See, e.g., DICEY, *supra* note 176, at 134–68.

188. For the best accounts of Bentham's method of codification, including his theory of adjudication, see DINWIDDY, *supra* note 41, at 54–72; and POSTEMA, *supra* note 181, at 403–39. For further material, see, for example, STIG STRÖMHOLM, *A SHORT HISTORY OF LEGAL THINKING IN THE WEST* 249–54 (1985); TEUBNER, *supra* note 3, at 136–42; VANDERLINDEN, *supra* note 40, at 126–27, 189–91, 462–64 (1967); Dean Alfange, *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58 (1970); Steffen Luik, *Bentham*, in DEUTSCHE UND EUROPÄISCHE JURISTEN AUS NEUN JAHRHUNDERTEN 47, 49–50 (Gerd Kleinheyer & Jan Schröder eds., 1996); Vanderlinden, *supra* note 42, at 45–78; Wolfgang Wagner, *Von der Vollkommenheit der Institution*, in DAS SCHWEDISCHE REICHSGESETZBUCH (SVERIGES RIKES LAG) VON 1734, *supra* note 69, at 23, 31–34 [hereinafter Wagner, *Vollkommenheit*]; Wagner, *Vorgeschichte*, *supra* note 69, at 39–40.

189. See *supra* Section II.B.

190. See VANDERLINDEN, *supra* note 40, at 126–27, 462–64; Vanderlinden, *supra* note 42, at 72–78.

191. JEREMY BENTHAM, *Codification Proposals*, reprinted in 5 BENTHAM, *supra* note 176, at 547.

192. See VANDERLINDEN, *supra* note 40, at 189–90, 462–64; Vanderlinden, *supra* note 42, at

"Whatever is not in the code of laws, ought not to be law."¹⁹³ Taking the three categories that subdivide "completeness," namely exclusivity, absence of gaps, and comprehensiveness,¹⁹⁴ Bentham's theory of codification can be summarized as follows.¹⁹⁵

First, Bentham's codification was meant to be *exclusive*. He wanted a revolution in the English system with respect to the sources of law. Legally binding precedents and legal custom were no longer to be accepted as sources of law.¹⁹⁶

Second, regarding *gaps*, Bentham did not assume that his codification could contain specific rules for all future cases.

It is objected to the forming a code of laws, that it is not possible to foresee every case which can happen. I acknowledge that it is not possible to foresee them individually, but they may be foreseen in their species . . .

With a good method, we go before events, instead of following them.¹⁹⁷

The judge still had something to do in Bentham's system of codification. Instead of rigid casuistry, Bentham wanted to rely on flexible rules, general principles, and the power of a good method. He did not believe that judges could always find an answer immediately and with mechanical security. If the legislature's will was clear but the legislature "failed to express [its will], either through haste or inaccuracy of language," the power of interpretation was left to the judge.¹⁹⁸ Although Bentham held quite an optimistic view of what a good codification could do, he did not believe that it always would easily provide a concrete rule to solve the case at hand. If a judge failed to resolve a conflict by applying the codification, Bentham suggested at least two rather different ways of adjudication; Bentham's dominant view is unclear.¹⁹⁹

66-72, 77-78.

193. BENTHAM, *A Complete Code*, *supra* note 186, at 205.

194. See *supra* Subsection II.B.2.

195. For a discussion of "completeness" in Bentham's theory of codification, see, for example, DINWIDDY, *supra* note 41, at 54-72 (1989); POSTEMA, *supra* note 181, at 421-34; STRÖMHOLM, *supra* note 188, at 253-54; TEUBNER, *supra* note 3, at 136-42; VANDERLINDEN, *supra* note 40, at 189-90, 462-64; Hatschek, *Kritik*, *supra* note 87; Hatschek, *Schlußwort*, *supra* note 87; Vanderlinden, *supra* note 42, at 46-50; Wagner, *Vollkommenheit*, *supra* note 188, at 23, 31-34; and Wagner, *Vorgeschichte*, *supra* note 69, at 39-40.

196. See, e.g., DINWIDDY, *supra* note 41, at 64-65 (explaining that Bentham not only attacked judge-made law and "uncognoscible" statute law but also tried to avoid the flaw (as Bentham saw it) of the incomplete European codes of his own time, which had to be supplemented by a mass of customary law, commentaries, and the invocation of natural law and Roman law principles to fill in gaps and determine doubtful points).

197. BENTHAM, *A Complete Code*, *supra* note 186, at 205; see also POSTEMA, *supra* note 181, at 421-34 (discussing Bentham's views on the comprehensive nature of a code).

198. BENTHAM, *A Complete Code*, *supra* note 186, at 210.

199. The following discussion particularly relies on POSTEMA, *supra* note 181, at 403-39. Postema points to the fact that part of the literature merely deals with Bentham's early works and thus stresses a strictly mechanical theory of adjudication; whereas, the other part of the literature only considers his later works, which dealt largely with procedural issues and in which he grants wide discretion to the judges. Postema describes both views on Bentham's theory of adjudication and shows convincingly that Bentham did not limit the latter to procedural issues. Bentham generally tried to reconcile the conflicting ends of security and flexibility in combining fully flexible, systematic, comprehensive utilitarian codes with a theory of adjudication in which the judge is no mere mechanical executor of the laws. *Id.*

One way, a judicial function that he calls the “suspensive power,” was for the judge to wait to rule in the matter until he had consulted the legislature. The judge could propose to the legislature, through the minister of justice, an amendment or refinement of the law. If the amendment was accepted or not objected to within a given period, it would become part of the code, and the case would be decided accordingly. The other way was for the judge to make the final decision, ultimately by appeal to the balance of the utilities in the particular case. In Bentham’s view, the code might not always contain the necessary rule, but it would contain the relevant utilitarian principles that the judge should weigh in order to decide the case. In no circumstances would this decision have been deemed to have precedential effect. Bentham’s theory tried to keep adjudication radically separated from lawmaking. Judges must resolve disputes, but Bentham opposed lawmaking in the process of adjudication; for him, this was the basic problem with common-law adjudication. Therefore, the judge is given the power to decide on the merits of the case as circumscribed, but the effect of the judge’s decision is strictly limited to the particular case at hand.

Third, Bentham held various opinions about how *comprehensive* a codification should be.²⁰⁰ In his earlier works, Bentham favored a division into various fields with a constitutional code, a civil code, and a penal code, along with a code of procedure for each of these fields, as well as codes for commercial law, maritime law, and military law. Later, he preferred an easier scheme with just one code for procedural issues. Also, Bentham wanted to have an additional general codification that contained the law relevant to all citizens and particular codes for groups of people in different occupations and walks of life.²⁰¹ Although Bentham did not claim that a codification must encompass all of the law, he did emphasize that every codification must avoid covering too small an area of law.

3) *System*. The systematic element played an important role in Bentham’s theory of codification. Very early in his life, Bentham became interested in all kinds of comprehensive classifications, such as those that existed in medicine and in botany. He wondered if it would be possible to have a comparable degree of order in legislation.²⁰² Therefore, Bentham made many efforts toward structure and order, such as his *Complete Code of Laws*.²⁰³ He dedicated one of its chapters to his method of systematizing laws.²⁰⁴ Bentham did not simply fall back on the existing ways of organizing the laws—for example, the organizational scheme of Roman law. Instead, he developed a completely new plan of systematizing the whole law.²⁰⁵

200. See, e.g., DINWIDDY, *supra* note 41, at 54–72.

201. See *id.* at 60.

202. Bentham was particularly influenced by the grammarian James Harris and by the French Humanist Ramus. See *id.* at 46–49.

203. See BENTHAM, *A Complete Code*, *supra* note 186, at 155.

204. See *id.* at 161 (“Of Method”). Bentham called his system of laws a “classification.” See *id.* at 171.

205. See *id.* at 186.

4) *Simplicity*. The idea of simplicity in codification is something for which Bentham is (in)famous. The following quotation from one of his typical statements on this topic may show why.

A code formed upon these principles would not require schools for its explanation, would not require casuists to unravel its subtleties. It would speak a language familiar to everybody: each one might consult it at his need. It would be distinguished from all other books by its greater simplicity and clearness. *The father of a family, without assistance, might take it in his hand and teach it to his children . . .*²⁰⁶

Bentham imagined "*every man his own lawyer*!"²⁰⁷ Given the complexity of Bentham's own drafts in combination with his complete theory of codification, including adjudication, his views are surprising. Perhaps readers must not take all of Bentham's exalted statements too literally. But even then the passages on simplicity in his works remain striking. It is, to a great extent, because of his overly optimistic belief that language could convey purely, precisely, and unambiguously the writer's ideas, that "even Bentham deluded himself to this extent" when it came to simplicity.²⁰⁸

5) *Reform*. Bentham wanted the law of England and of the entire world to be governed by his principle of utility. It is difficult to evaluate to what extent this would have changed the law had Bentham succeeded. There was probably a substantial part of the law that was already organized according to Bentham's principle.²⁰⁹ But this was obviously not Bentham's nor his contemporaries' view. They regarded Bentham's plans as a radical reform of form *and substance*.²¹⁰ In fact, this became an important reason why such codes were never enacted.²¹¹

b. John Austin and Codification

The other great figure in the English history of codification is John Austin (1790–1859). He dealt with the subject in his work *Lectures on Jurisprudence or the Philosophy of Positive Law*, which was written around

206. *Id.* at 209 (emphasis added).

207. JEREMY BENTHAM, *Letter to the Citizens of the Several American United States (II)* (1817), reprinted in 4 BENTHAM, *supra* note 176, at 490 (emphasis in original).

208. 2 ROBERT VON MOHL, STAATSRICHT, VÖLKERRECHT UND POLITIK 461 n.2 (Tübingen, Laupp & Siebeck 1862) ("Unbegreiflich ist, dass selbst Bentham dieser Täuschung sich in so weitgehendem Masse hingeben mochte . . ."); see also POSNER, *supra* note 181, at 44–45 (explaining Blackstone's and Bentham's implicit disagreement with respect to the nature of language as a human institution).

209. Bentham's principle of utility is undergoing a revival in the present "law and economics" movement, with its guiding principle of efficiency. It remains unclear today to what extent the existing law is, consciously or unconsciously, already based on the principle of efficiency and to what extent the economic analysis of law does not merely describe the law differently, but actually seeks to change it. See, e.g., HANS-BERND SCHÄFER & CLAUS OTT, *LEHRBUCH DER ÖKONOMISCHEN ANALYSE DES ZIVILRECHTS* 47–48 (1995).

210. Theoretically, Bentham distinguished a "natural method" from a "technical method" of legislation. The former intends to promote welfare, while the latter is meant to be merely technical. See HANS-JOACHIM MENGEL, *GESETZGEBUNG UND VERFAHREN* 221 (1997).

211. See, e.g., R.C. VAN CAENEGEM, *AN HISTORICAL INTRODUCTION TO PRIVATE LAW* 13 (D.E.L. Johnston trans., Cambridge Univ. Press 1992) (1988).

1830 and published posthumously.²¹² Austin supported the idea of codifying the common law. He drew heavily from the German Savigny/Thibaut controversy and felt sympathetic to Thibaut's position.²¹³ Austin's concept of codification differs from Bentham's in that codification for Austin was meant to systematize existing law and not to create or to change the law.

In his *Lectures on Jurisprudence*, Austin introduced the important distinction between "innovation on substance" and "innovation on form."²¹⁴ In Austin's view, every material reform includes a formal one, but not every formal reform includes a material one: "Codification of existing law, and innovation upon the substance of existing law, are perfectly distinct; although a code may happen to be wholly or partially new in matter as well as in form."²¹⁵ This distinction is of both historic and present relevance. Historically, the distinction could have shown that codification was not necessarily connected to radical reform, with radical changes in substance for which English society and especially influential English lawyers were not ready. However, Austin's distinction was neglected. Codification was still predominantly regarded as a Benthamite or French idea of radical reform in form and substance.²¹⁶ Today, Austin's distinction remains useful for scholars, legislators, and historians. Many scholars use it as one of the core criteria for the definition of codification.²¹⁷ The legislature can sort out codification proposals based more on substance from those based more on form or method. In Germany, for instance, there is almost a consensus that the law of labor contracts could be improved by codifying it (question of form), but the extent to which this area of labor law should be reformed is politically contested (question of substance).²¹⁸ Thus many "anti-codifiers" are not really against codification as a means to organize a legal system but against concrete codification proposals. For historians, the value of this distinction is that it helps us understand why many codification plans end in failure. We always

212. See JOHN AUSTIN, *LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW* (Robert Campbell ed., 4th ed. London, Murray 1879) (in particular *Lecture XXXIX*, 2 *id.* at 669–704, and Austin's notes on codification, 2 *id.* at 1056–74); see also NOLL, *supra* note 54, at 215 n.76. For a discussion of Austin's contribution to the idea of codification see, for example, GAGNÉ, *supra* note 42, at 92–107 (1960); LANG, *supra* note 5, at 35–37 (1924); and Donald, *supra* note 58, at 164–65.

213. Austin did not ignore Savigny's position, but he rejected it as inapplicable beyond the German case. See 2 AUSTIN, *supra* note 212, at 698–702. For a general account of Austin and the German codification controversy, see MATHIAS REIMANN, *HISTORISCHE SCHULE UND COMMON LAW: DIE DEUTSCHE RECHTSWISSENSCHAFT DES 19. JAHRHUNDERTS IM AMERIKANISCHEN RECHTSDENKEN* 209 (1993).

214. For this distinction, see 2 AUSTIN, *supra* note 212, at 685, 1061. For a comment, see GAGNÉ, *supra* note 42, at 96–98, 105, 110.

215. 2 AUSTIN, *supra* note 212, at 1061.

216. This was most clearly expressed by R.C. van Caenegem: "The difference between the English and the European approach is to be explained . . . by suspicion among the English ruling classes of all codification, which tended to be associated with ideas of radical or even revolutionary reform." CAENEDEM, *supra* note 211, at 13 (emphasis added).

217. For the significance of this distinction in defining "codification," see *supra* notes 135–136 and accompanying text.

218. On labor law codification, see the brief account in Wilhelm Dütz, *Bürgerliches Gesetzbuch und arbeitsrechtliche Kodifikation*, in *BÜRGERLICHES GESETZBUCH 1896–1996*, at 61 (Hans Schlosser ed., 1997).

have to ask whether and to what extent a historical legislative body could not agree upon substance or whether it could not agree upon form in questions of codification.

2. *The Transition from Theory to Practice: Codification and the Rise of the Treatises*

Bentham was unique in the extent to which he supported codification, but he was not the only English advocate of codification in the nineteenth century. Many leading jurists in England were pro-codification. Among the most important were Frederick Pollock,²¹⁹ T.E. Holland, Sheldon Amos, James Fitzjames Stephen, Frederic William Maitland,²²⁰ John Romilly, T.B. Macaulay, Henry Maine, Mackenzie Chalmers, Henry Brougham, James Humphrey, Anthony Hammond, Lord Sidmouth, and Earl Stanhope.²²¹ There is a striking link between the increasing number of renowned jurists in favor of codification and the proliferation of the treatise.²²² The treatise, as a textbook with method, covers a particular branch of the law and tries to present the law as a systematic whole of legal principles driven by a belief in the scientific character of law. Starting in the sixteenth century, the idea of systematizing the mass of legal materials became influential. It continued to develop from alphabetical or rough title-based organization—digests, for example—towards sophisticated systematization.²²³ Considering the core elements of the concept of codification as stated in Part II.B of this Article, the treatise tradition was important for the elements of authority, system, and completeness, and it prepared, or could have prepared, English law for codification.

The first digests followed another early form of legal literature, the abridgement. The digests organized other legal authorities but did not themselves possess authority. With the advent of legal dictionaries, the analytical dimension of legal writing began to prevail over merely compiling and re-arranging legal materials, although the dictionaries still relied on the previous sources. Later, at the end of a long development in the law, institutional works—Blackstone in England and Kent in America—restated the law of the time.²²⁴ They described *and* rationalized, but they were too

219. See FREDERICK POLLOCK, *The Science of Case-Law*, in *ESSAYS IN JURISPRUDENCE AND ETHICS* 237 (London, MacMillan 1882); FREDERICK POLLOCK, *Some Defects of our Commercial Law*, in *ESSAYS IN JURISPRUDENCE AND ETHICS*, *supra*, at 60.

220. See FREDERIC W. MAITLAND, *The Making of the German Civil Code*, in 3 *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 474, 487 (H.A.L. Fisher ed., 1911) (admiring the German Civil Code).

221. See LANG, *supra* note 5, at 38 (citing Pollock, Holland, and Amos as influential jurists); VARGA, *supra* note 2, at 158–59 (1991); Berger, *supra* note 14, at 145; Herman R. Hahlo, *Here Lies the Common Law*, 30 *MOD. L. REV.* 241, 242 n.14 (1967) (identifying Stephen, Pollock, and Amos as supporters of codification).

222. See Simpson, *supra* note 178 (providing a brilliant account of the history of the legal treatise).

223. See *id.* at 275–82.

224. See BLACKSTONE, *supra* note 171; JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (New York, DaCapo Press 1826–30).

bulky and overinclusive. A developed legal system needs depth rather than breadth. The treatises finally satisfied this need.²²⁵ In the nineteenth century, they became the primary form of creative legal literature.

Treatises formed the last step before codification. Once treatises, as methodical schemes of principles and rules, were written in the form of codes, actually enacting a codification came within reach.²²⁶ After the treatises were organized in code form, the legislature could fall back on this system of organization—as, for example, the Prussian drafters did with Samuel Pufendorf (1632–1694), the French drafters with the works of Robert-Joseph Pothier (1699–1772) and Jean Domat (1625–1692), and the German drafters with the pandectist wisdom.²²⁷ Stephen, Chalmers, Pollock, and others wanted to take this final step toward codification.

In fact codification did not occur. Scholarly treatment of the law in legal literature is a necessary but not a sufficient condition for codification. The scholarly approach of treatises could provide a system of principles, the indispensable systematic element of a modern code. Actually enacting a codification, however, requires more than the realization throughout the legal community of the value of such scholarly treatment. Legislative practice is often immune to academic insights of this kind. Thus, few of these code-like treatises became real codes.²²⁸

3. *Codification in Practice: British India and England*

The following discussion addresses what happened in legislative practice and to what extent the academic discussions bore fruit. Examining codification practice in British India and England reveals the extent to which academic discussions were reflected in the form of codification. The following sections will explore the history of legislative practice in these areas.

225. See ZIMMERMANN, LAW OF OBLIGATIONS, *supra* note 8, at 569–70 (referring to Sir William Jones's essay on the Law of Bailments (1781) as the first English monograph that can properly be called a legal treatise); see also John Langbein, *Introduction*, in 3 BLACKSTONE, *supra* note 171, at iv (Univ. Chicago Press 1979) (emphasizing that the treatise tradition owes a good deal to Blackstone's conception of the legal writer's job).

226. See Simpson, *supra* note 178, at 307. Simpson lists the following treatises as being written in the form of codes: Mackenzie D. Chalmers, *Digest of the Law of Bills of Exchange, Promissory Notes, and Cheques* (1878); Mackenzie D. Chalmers, *A Digest of the Law Relating to Marine Insurance* (1901); Mackenzie D. Chalmers, *The Sale of Goods* (1890); Albert V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896); Frederick Pollock, *Digest of the Law of Partnership* (1877); James Fitzjames Stephen, *A Digest of the Criminal Law* (1877); and James Fitzjames Stephen, *Digest of the Law of Evidence* (1876). See *id.*

227. On Wolff, Pufendorf, Pothier, and Domat and their significance for the codes, see, for example, DEUTSCHE UND EUROPÄISCHE JURISTEN AUS NEUN JAHRHUNDERTEN 111, 323, 338, 453 (Gerd Kleinheyer & Jan Schröder eds., 1996). For the pandectist system as a source of the German Civil Code, see, for example, ZIMMERMANN, LAW OF OBLIGATIONS, *supra* note 8, at 29–31.

228. In this respect, the work of Chalmers was the most successful. See *The Bills of Exchange Act*, 1882, 45 & 46 Vict., ch. 61; *The Sale of Goods Act*, 1893, 56 & 57 Vict., ch. 71. For Chalmers's work on codification, see Arden, *supra* note 135, at 518–22.

a. *Achievements in Practice I: Trying Codification in British India*

British India was the most successful area of English codification in the nineteenth century. It is difficult to say conclusively whether this was a conscious strategy of the British empire, but it appears that the crown wanted to test codification abroad before initiating it at home. The state of the law in British India was different from that of England, in that the confusion of sources in India was worse.²²⁹ Sources in India included English laws enacted before 1726 (the time when the Mayor's Courts had been created), later English legislation, and indigenous Islamic and Hindu law that was often unclear and contradictory. British India had several different legislative bodies enacting statutes and, last but not least, several chief courts, each of which was independent of the others.²³⁰

Because of the chaotic state of Indian legal sources in the nineteenth century, there was a call for codification. Macaulay summarized the general view in India: "I believe that no country ever stood so much in need of a code as India, and I believe also that there never was a country in which the want might so easily be supplied."²³¹ In response to this need, the first Indian Law Commission was appointed in 1834, consisting of T.B. Macaulay, J.M. Macleod, G.W. Anderson, and F. Millet. The Commission presented the first draft of a penal code in 1837 as a first installment of a complete codification of the entire law of India.²³²

Until the final enactment, codification had a protracted gestation period. It was not until 1860, when the political circumstances changed after the crown took over administration from the East India Company, that a code could be enacted. Meanwhile, a second Indian Law Commission, which included Bentham's friend and supporter John Romilly,²³³ was appointed in 1853 to consider the recommendations of the previous commission as well as further issues. In 1861, a third commission was constituted to consider more broadly enacting a body of substantive law based on the law of England.

229. For the most thorough account of the history of codification in India, see generally BIJAY KISOR ACHARYYA, *CODIFICATION IN BRITISH INDIA* (1914). Acharyya divides the history into three periods: 1601–1765, 1765–1833 (the period of the Regulation Laws), and 1834–present (the period of partial codification). See *id.* at 37–38. This Article concentrates on the last period in Acharyya's account. See *id.*; see also ALAN GLEDHILL, *THE REPUBLIC OF INDIA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 211–23 (2d ed. 1964) (for development of the legal system in general); *id.* at 224–372 (for particular fields of law); COURTENAY ILBERT, *LEGISLATIVE METHODS AND FORMS* 129–55, 200 (1901); LANG, *supra* note 5, at 69–95; MARIO G. LOSANO, *I GRANDI SISTEMI GIURIDICI: INTRODUZIONE AI DIRITTI EUROPEI ED EXTRAEUROPEI* 237–40 (1978); 3 POUND, *supra* note 165, at 707–08; VARGA, *supra* note 2, at 149–51, 193, 201–02, 252; ZWEIGERT & KÖTZ, *supra* note 6, at 220–24; Arden, *supra* note 135, at 522–23.

For a brief account of the export of British law to other colonies and its role in the history of codification, see VARGA, *supra* note 2, at 151–52.

230. For an account of the state of law in India before the codification movement, see ACHARYYA, *supra* note 229, at 75–92.

231. LANG, *supra* note 5, at 77 (quoting T.B. Macaulay).

232. See ACHARYYA, *supra* note 229, at 63–65.

233. For a discussion of Sir John Romilly and his role in codification, see 3 POUND, *supra* note 165, at 707–08.

Finally, a fourth commission was created in 1875 to deal with several areas including trusts and negotiable instruments.²³⁴

The commissions used Field's Civil Code for New York as an important source of inspiration.²³⁵ Henry Maine, later succeeded by James Fitzjames Stephen, became Law Member of the Council of the Governor-General, which also furthered many legislative projects such as the Companies Act, the Divorce Act, an Evidence Act, the Contract Act, and others.²³⁶ Despite these efforts, the plan of codifying the whole body of law failed. Amos emphasized this in his comprehensive work on codification in England in 1867: "Again, there is no Code at all in India. There are Codes, but there is no Code."²³⁷ Within about twenty years, the following codes were enacted: Civil Procedure Code (1859), Penal Code (1860), Code of Criminal Procedure (1861), Indian Succession Act (1865), Indian Contract Act (1872), Specific Relief Act (1877), Transfer of Property Act (1882), and Indian Trusts Act (1882).²³⁸ Today, therefore, legal comparativists generally regard (Anglo-)Indian law as a system of codified law in the common-law tradition.²³⁹

The secret of this partial success was due not only to the urgent need for clearing up the state of legal sources in India, but especially to the peculiar political conditions that existed after 1860 in a "government like that of India . . . an enlightened and paternal despotism."²⁴⁰ It seems to be a historical insight confirmed by the experience of the twentieth century that the less pluralistic and democratic a system, the more easily codification can be achieved.²⁴¹ Since Indian conditions were so peculiar, success in India proves little in favor of a codification of the law of England.²⁴² Even during the Indian codification movement, contemporaries were not insensitive to the lack of similarity between India and England. In 1867, Amos expressed his doubt about any parallel between India and England. He dedicated the entire chapter "The Analogy of the Anglo-Indian Codes" in his book on codification in

234. For the scope and work of the commissions and the later development in India, see ACHARYYA, *supra* note 229, at 65–66 (second Commission), 66–71 (third Commission), 71–72 (fourth Commission), and 72–74 (from 1882 to 1913).

235. See 3 POUND, *supra* note 165, at 708 (criticizing the use of Field's code as a model because, in Pound's view, it led to low quality in the Anglo-Indian codes); Sobotka, *supra* note 79, at 130 (providing further references). For more on the Field Code, see *infra* notes 347–391 and accompanying text.

236. For the important role of the Governor-General of India in Council and the Law Member of this council, see ACHARYYA, *supra* note 229, at 62–63, 166–71.

237. SHELDON AMOS, *AN ENGLISH CODE: ITS DIFFICULTIES AND THE MODES OF OVERCOMING THEM* 90 (London, W. Ridgway 1873).

238. For the various codes enacted in the second half of the nineteenth century, see generally LANG, *supra* note 5; VARGA, *supra* note 2; and ZWIEGERT & KÖTZ, *supra* note 6.

239. See, e.g., ZWIEGERT & KÖTZ, *supra* note 6, at 223; Zweigert & Puttfarcken, *supra* note 3, at 572.

240. LANG, *supra* note 5, at 94 (quoting T.B. Macaulay).

241. The relationship between codification and democracy has been heavily debated since the 1960s. See Esser, *supra* note 17; Kübler, *supra* note 17; see also Wieacker, *supra* note 65, at 49–50 (touching upon this problem in the 1950s). At least since the successful enactment of the new Dutch civil code, we know that, contrary to Kübler's and Esser's assertion, codification is difficult and yet not impossible in current pluralistic democratic political systems.

242. This was most clearly expressed in LANG, *supra* note 5, at 93.

England and America to this issue.²⁴³ And, indeed, the fate of codification in England was different.

b. *Achievements in Practice II: Further Attempts in England*

The idea of codification had an impact on legislative practice in England as well. England seriously considered codification several times. The codification movement started slowly. At the end of the eighteenth century and in the first half of the nineteenth century, the reform of statutory law was a first step towards, although still far away from, codification.²⁴⁴ The process of promulgating statutes was improved and efforts were made to compile a collection of all statutes. Eventually, the technique of "consolidation" was introduced and practiced. A consolidating statute collects, repeals, and re-enacts existing statutes that relate to a particular subject in order to simplify the presentation of the law.²⁴⁵ Though still far from Bentham's idea and influence, these reforms responded to the core claims of the Benthamite codifiers.

Soon the idea of codification was in the air. The growing academic discussion in the early nineteenth century became the impetus for later parliamentary discussion.²⁴⁶ Romilly, Mill, Beaumont, Hammond, and Harrison, for example, all supported the idea of a code. Some even published first drafts. The most influential suggestion came from James Humphreys. His project of codifying the law of property, the 1826 Property Code, provoked general discussion.²⁴⁷ Ultimately, however, the Real Property Commission of Parliament rejected Humphreys's plans.²⁴⁸ In 1828 Lord Chancellor Brougham (1778–1868) delivered a famous six-hour speech titled *The Present State of the Law* to the Commons, which inspired Parliament to deal more intensively with the question of reform.²⁴⁹ Although he made some allusions to the French Civil Code in his speech, Brougham did not expressly suggest a codification. It is likely that he did not want to propose too radical a reform

243. AMOS, *supra* note 237, at 86–94; see also *id.* at xi–xii (also commenting on this comparison).

244. For the reforms of statutory law, see TEUBNER, *supra* note 3, at 100–05.

245. See A DICTIONARY OF LAW 86 (Elizabeth A. Martin ed., 4th ed. 1997) (defining "Consolidating Statute"). The Law Commission defines consolidation on its official website, *What is the Law Commission?* (visited Feb. 20, 2000) <<http://www.gtnet.gov.uk/lawcomm/misc/about.htm>>, under "Consolidation of Statutes," as "putting together in one Act of Parliament, or in a group of Acts, all the existing statutory provisions previously located in several different Acts, all of which can then be repealed." The Commission refers to the consolidation of the law on education into two new Acts in 1996 as a recent example of consolidation. See *id.*

246. See TEUBNER, *supra* note 3, at 144–48 (describing the discussion between about 1815 and 1833).

247. See REIMANN, *supra* note 213, at 208–09. John J. Park, in particular, influenced by the Historical School, criticized Humphrey's plans, which he found unnecessary. See JOHN JAMES PARK, A CONTRE-PROJET TO THE HUMPHREYSIAN CODE; AND TO THE PROJECTS OF REDACTION OF MESSRS. HAMMOND, UNIACKE, AND TWISS (London, J. and W. T. Clarke 1828).

248. See TEUBNER, *supra* note 3, at 147, 149–50 (describing further efforts to address codification to Parliament).

249. On the reactions to Brougham's speech, see PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 244 (1965).

that would be regarded by lawmakers as politically utopian. Brougham's friend Bentham, who had asked him to address the question of codification to Parliament and who had offered his support, of course, was disappointed by his moderate approach.²⁵⁰

Finally, in 1832, the year Bentham died, the reform of Parliament led to a body of representatives that was ready for law reform.²⁵¹ Criminal law was the first field to be considered for codification. Here, the main flaws of English law that were heavily criticized in those times, lack of certainty and lack of accessibility, were least acceptable. Criminal law reform was regarded as the model that, if successful, could be applied to private law. The House of Lords appointed a commission in 1833. The members, T. Starkey, H.B. Kerr, W. Wightman, Andrew Amos, and John Austin (later replaced by David Jardine), had to consider and report as to whether or not it would be advisable to bring together into one digest, as a single body of criminal law, all statutes, enactments, and unwritten law dealing with crimes, trials, and punishment. They answered in the affirmative with their last report, completed in 1841.

In 1848, the House of Lords considered for the first time "An entire Digest of the written and unwritten Law relating to the Definition of Crimes and Punishments" and then referred it to the committee for further revision.²⁵² The same procedure was repeated in 1852. This time, the committee decided to seek the opinions of judges on the content of the bills. Since, in the judges' view, the law was not in the chaotic state described by the supporters of codification, the judges did not expect much improvement from the bills and thus adopted an unfavorable attitude towards them. Finally, the project was dropped.²⁵³

In 1863, Lord Chancellor Westbury reintroduced the issue of criminal law codification in a speech in the House of Lords. Westbury suggested that it had become necessary to digest the entirety of the English criminal law. A commission was appointed towards this end. Although the commission recommended that the digest of the law not involve any changes of substance or alterations in the common law, the attempt at reform failed.²⁵⁴ Finally, in 1877, the government asked Sir James Fitzjames Stephen, after he had returned from his codifying labors in India and after he had written his *Digest of the Criminal Law*, to draft a criminal code. The initial part of his work was introduced in 1878 in the House of Commons as the Criminal Code (Indictable Offenses) Bill. The Bill was debated several times by only a handful of members. Nevertheless, many objections were raised that would

250. See TEUBNER, *supra* note 3, at 150.

251. For a more detailed report on the following outline of the post-Benthamite development, in particular the work of the commissions and the many parliamentary attempts, see 15 HOLDSWORTH, *supra* note 154, at 142-67; ILBERT, *supra* note 229, at 51, 122-55; LANG, *supra* note 5, at 42-58; 4 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 208-353 (1968); TEUBNER, *supra* note 3, at 154-58; and William R. Cornish, *England*, in 2 HANDBUCH, *supra* note 4, at 2217, 2217-18, 2225-27, 2241-42.

252. See, e.g., ILBERT, *supra* note 229, at 52.

253. See LANG, *supra* note 5, at 46-54.

254. See *id.* at 54-55.

have required a detailed discussion, section by section. Consequently, the Bill was abandoned in 1883.²⁵⁵ If it had succeeded, the reforms in criminal law probably would have served as an example for other areas of the law.

While criminal law reform failed, many other less contentious reforms were successful. In the last decades of the nineteenth century and in the beginning of the twentieth century, several codes were enacted in discrete areas of the law. The most important examples are the Bills of Exchange Act (1882), the Interpretation Act (1893), the Partnership Act (1890), the Sale of Goods Act (1893), and the Marine Insurance Act (1906).²⁵⁶

Thus, despite its foundations in theory, its many advocates, and the several parliamentary attempts at codification undertaken after the end of the Napoleonic wars, there was no general codification of the law of England. Bentham in particular failed to spread his ideas and translate them into practice.²⁵⁷ England never enacted a codification like those of France, Austria, Germany, Italy, and Switzerland.

4. *Evaluation of the Nineteenth-Century Codification Movement*

The *theoretical and practical* efforts towards codification were not completely fruitless. With the works of Bentham, it was England and not the European continent that provided the first comprehensive contributions to a theory of codification. In *practice*, the idea of codification had influence not only on legislation in British India, but also on legislation as partial codification in the imperial state. The Sale of Goods Act, for example, encompasses an important field of the law and is therefore more than just the usual statutory piecemeal regulation in English law. Furthermore, many other reforms had already reached a very concrete form only to fail in Parliament at the last minute.

The main goal, the turn to general codification in English law, was not achieved. Therefore, it is important to evaluate the reasons for England's ultimate hostility towards codification during the nineteenth century. There are two valuable accounts where these reasons have been summarized, one historical and another one more recent: Sheldon Amos's writings on codification from the second half of the nineteenth century, and Werner Teubner's work on the nineteenth-century English codification movement.

255. *See id.* at 55–58.

256. The original Sale of Goods Act (1893) with some additional provisions became the Sale of Goods Act (1979). *See* Bollen et al., *supra* note 12, at 112–13 (providing basic information on the sources of English law in comparison to other European countries).

257. For a brief history of Bentham's influence on practical legislation in general, *see*, for example, ZWIGERT & KÖTZ, *supra* note 6, at 194–98. For Bentham's reception in nineteenth-century jurisprudence, *see*, for example, Philip Schofield, *Jeremy Bentham and Nineteenth-Century English Jurisprudence*, 12 J. LEGAL HIST. 58, 85 (1991) (concluding that Bentham's influence on nineteenth-century jurisprudence was limited because scholars did not take him seriously and often misunderstood him).

a. *Sheldon Amos's Works on Codification*

Sheldon Amos (1836–1886) stands out as the author of the first thorough evaluation of the codification movement in his time. His work summarized the state of the theory of codification in the second half of the nineteenth century.²⁵⁸ In *Codification in England and the State of New York*, published in 1867, Amos distinguished three “classes of opponents of codification.”²⁵⁹ First, there is “a selfish body of practitioners” who disfavor codification because they think that a code would remove the uncertainty of the law that is beneficial to them. They fear that the introduction of a reformed legal system of which they were profoundly ignorant would be a personal disadvantage.²⁶⁰ Second, there is a “large body of practitioners,” the “conservatives” of the profession, who feel reluctant to “cut away from under them the ladder on which they have risen.”²⁶¹ Finally, there are those who oppose codification “at the present time,” as Amos puts it, on grounds of “pure reason.”²⁶²

In the order of their relative importance, Amos listed four possible grounds based on “pure reason.” First, Amos conjectured that it is doubtful whether a change from a “law of language” to a “law of principles” can be advantageously reached in his generation, because “[t]he several arts of interpreting old law, of constructing the skeleton of a new legal system, and of filling in that skeleton with matter either new or old, are at an unusually low ebb.”²⁶³ Second, Amos pointed to the objection that a customary law is regarded as superior, because law ought to root in “‘the common consciousness’ of the people.”²⁶⁴ Third, Amos mentioned the concern that a code always leaves an “infinite amount of uncertainty as to the meaning likely to be attached by judges to particular phrases.”²⁶⁵ In all countries where codes have been introduced, the argument goes, this uncertainty has led to “anarchical and unreliable” law or works of commentators that offer no improvement as compared to the previous volumes of reports superseded by the codes.²⁶⁶ Fourth, Amos dealt with the objection that codification will have a negative effect on the “scientific study of law” in England and will generate “a race of shallow and impoverished law-students, barristers, and judges.”²⁶⁷

258. The relevant works are SHELDON AMOS, *CODIFICATION IN ENGLAND AND THE STATE OF NEW YORK* (London, W. Ridgeway 1867) [hereinafter AMOS, *CODIFICATION*]; AMOS, *supra* note 237; and SHELDON AMOS, *THE SCIENCE OF LAW* 360–79 (New York, D. Appleton 1874).

259. AMOS, *CODIFICATION*, *supra* note 258, at 6–9.

260. *See id.* at 6–7.

261. *Id.* at 7.

262. *Id.* at 7–8.

263. *Id.* at 14; *see also id.* at 9–20 (elaborating this argument).

264. *Id.* at 20–21. In his writings, Amos pointed to Savigny's objections in the German codification controversy. *See id.*; AMOS, *supra* note 237, at 57–63; *cf.* REIMANN, *supra* note 213, at 209 (commenting on Amos's references to Savigny). Amos, however, adds that this argument does not touch on the question of the expediency of codifying the law, but is addressed to the question of the proper materials from which a code should be made. *See* AMOS, *CODIFICATION*, *supra* note 258, at 20.

265. *Id.* at 21.

266. *Id.* at 21–22.

267. *Id.* at 23; *see also id.* at 23–24 (elaborating on this argument). Gordley recently claimed that modern civil codes interfere with the work of legal scholars who could develop their ideas more

Instead of carefully developing the law out of precedents, the law will be "at once summarily cited out of a book . . . through an impetuous recourse to superficial analogies, wrongly applied" ²⁶⁸

It is striking that, in Amos's account, it is only the third of three "classes of opponents" that disfavors codification on legal and methodological, rather than political, grounds.

b. *The Twentieth-Century Perception of Nineteenth-Century Codification Efforts*

The most thorough study of codification in nineteenth-century England is Werner Teubner's *Kodifikation und Rechtsreform in England*.²⁶⁹ Teubner described several reasons for the failure of codification in nineteenth-century England, which he subdivided into (1) methodological-systematic problems of codification,²⁷⁰ (2) social and political objections to codification,²⁷¹ and (3) the conservatism of the English jurists.²⁷²

1) *Methodological-Systematic Problems*.²⁷³ Teubner presents five problems in this category: (a) Codification often aims at unification of the law within a certain territory. In England, unlike on the Continent, the courts and the law had already been centralized and unified for centuries.²⁷⁴ (b) The idea that a strictly binding and constraining code is necessary to control judges and to prevent them from rendering politically motivated and arbitrary decisions was weaker in England than on the Continent. The English trusted their judges.²⁷⁵ (c) The drive to simplify the law and to present the law in an easily understandable way was weaker than on the Continent. The difficulties of knowing the law were apparent, but the law was understood as referring to

clearly and systematically if there were no codes. See James Gordley, *Codification and Legal Scholarship*, 31 U.C. DAVIS L. REV. 735, 735 (1998). This argument was common in nineteenth-century England. Therefore, the rebuttal to Gordley's thesis has for the most part already been written by Sheldon Amos. See AMOS, *CODIFICATION*, *supra* note 258, at 24–27.

268. AMOS, *supra* note 237, at 23.

269. See TEUBNER, *supra* note 3. But note that Teubner, in some respects, supports an exaggerated and historically mistaken concept of codification. For example, he claims that the idea of a closed system without any gaps, along with a judge mechanically applying the laws in a most literal sense, had been the viewpoint of the Prussian Code. See *id.* at 160 n.4. This is not true. See the arguments made *supra* notes 100–102 and accompanying text. Teubner also claims that it follows inevitably from the introduction of a codification that no legally binding precedents could be accepted anymore. See *id.* at 173. This is a mere assertion and an obvious contradiction to the Continental development of the last decades, in which precedents under an existing codification have increasingly been regarded as at least partially binding in a legal sense and not only in a sense of mere persuasiveness. See, e.g., LARENZ & CANARIS, *supra* note 78, at 256–58 (providing further references); Claus-Wilhelm Canaris, *Ehrenpromotion des Herrn o. Univ.-Prof. Dr. Claus-Wilhelm Canaris*, 50 GRAZER UNIVERSITÄTSREDEN 23, 33 (1993).

270. See TEUBNER, *supra* note 3, at 159–76.

271. See *id.* at 176–98.

272. See *id.* at 198–202. In this Article, I cannot mention all aspects and arguments of Teubner's work, and I partially modify his arguments. Also note that Teubner's subdivision is not always convincing. For example, it is hard to understand why reason 1(e), see *infra* note 278 and accompanying text, is methodological rather than political.

273. See TEUBNER, *supra* note 3, at 159–76.

274. See *id.* at 159–60.

275. See *id.* at 160–62.

jurists and lawyers and not to every individual citizen, as claimed by Bentham and Continental enlightened natural law theory.²⁷⁶ (d) The theory of the sources of law and, in particular, the role of the judges in England differed from the Continental theory. Unlike on the Continent, precedent was the primary source, and the statutes were supplementary.²⁷⁷ Codification would have required a radical change. (e) Codification would have raised the question whether the fundamental law also had to be laid down in a written document and, therefore, whether a written constitution was necessary.²⁷⁸ If so, it would have been necessary to settle highly contentious questions of a primarily political character, such as a delimitation of the rights of the Crown and the Parliament.

2) *Social and Political Objections.*²⁷⁹ Between 1775 and 1790 legal reforms were difficult. Most suggestions, and not only those referring to codification, were not discussed seriously. For the most part, English lawyers were proud of the state of the law. The law was regarded as "well established." Between 1790 and 1810, a majority of Parliament and the government still held the opinion that reforms in general were not necessary. In fact, reforms were regarded as dangerous. The English governing elite was suspicious of attempts to change the whole structure of state and society. The French Revolution was perceived as a traumatic event in England. Given this general mood, it is not surprising that Benthamite legal reform consisting of radical changes not only in form, but also in substance, was doomed from the very start.

From 1810 to 1832 the political climate started to change. Dicey noted that in "about 1830 utilitarianism was, as the expression goes, 'in the air.'"²⁸⁰ This did not lead to pressure for radical reform of the social structure according to utilitarian principles. Instead, the dominant middle classes preferred to reach the liberal goals of the Enlightenment by moderate reforms. Unlike the Continent, England had no absolutism. Legislation was therefore not needed as a protection against an absolutist monarchy. After the reform of Parliament in 1832, the bourgeoisie who drove the codification movement on the Continent had, in England, become part of the legislature. There was less

276. See *id.* at 162–63. For the addressee of the Benthamite codification, see *supra* notes 206–208 and accompanying text. For the addressee of enlightened European codification, see *supra* notes 146–148 and accompanying text.

277. See TEUBNER, *supra* note 3, at 165–74.

278. See *id.* at 174–75.

279. See *id.* at 176–98. Regarding the arguments of social politics, see generally DICEY, *supra* note 176. Dicey provides an excellent history of what he calls "legislative" or "law-making public opinion" during the nineteenth century. He distinguishes three currents or streams of opinion falling into three periods during the nineteenth century, see *id.* at 62–69: (1) the period of old Toryism or legislative quiescence (1800–1830), see *id.* at 70–125; (2) the period of Benthamism or Individualism (1825–1870), see *id.* at 126–210; and (3) the period of collectivism (1865–1900) (meaning the school of opinion favoring intervention of the state even at some sacrifice of individual freedom for the purpose of conferring a benefit upon the mass of the people), see *id.* at 259–302. Dicey summarizes the spirit of these three great currents as follows: "Blackstonian toryism was the historical reminiscence of paternal government; Benthamism is a doctrine of law reform; collectivism is a hope of social regeneration." *Id.* at 69.

280. DICEY, *supra* note 176, at 173.

need to pursue bourgeois goals through a code that guaranteed certain institutions and protected them from the state. Under these circumstances, codification as a means of social reform could not succeed. The only form of codification that could succeed would have been a codification without changes in substance, but this was not considered to be necessary.

Another reason why such a code was very unlikely to be established was that the political process of enacting such a code was more difficult in England than it was in Prussia, Austria, and France. England was already more democratic and more pluralistic than the Continental countries that embraced codification. Wherever a code would contain politically contentious provisions—and a code that covers a wide field of law usually contains many such provisions—it would be hard to enact. The fate of the plans for a criminal code in England illustrates this argument, since all efforts were blocked in the House of Lords for political reasons.

3) *Conservatism of English Lawyers.*²⁸¹ The majority of lawyers were conservative and admired the constitution and the historic nature of English law. English legal education, which consisted of no more than a compulsory period of apprenticeship, was dedicated to a practical attitude towards the law. Complex systems and abstract concepts were rare. Lawyers were strongly represented in Parliament and their opinions about questions of reform were always considered carefully. Legislative reform was therefore, in academia and in legislative practice, regarded as intrusive and only accepted when urgently needed. In such a climate, the dissenting ideas of Bentham, Austin, and their successors who were proponents of codification could not gain acceptance in practice.

Teubner's main conclusion is that the failure of a Continental codification in England can predominantly be attributed to social and political factors.²⁸² The methodological reasons are secondary. It is therefore not enough to point to different legal techniques, such as a different role of precedents or a different theory of statutory interpretation in a common-law versus a civil-law system, to explain why codification failed in England. Instead, social politics seems to be the true determinant for the fate of codification in nineteenth-century England.

c. *Further Reasons for England's Hostility to Codification*

1) *The Distinction Between Codification as a Methodological Device and the Content of a Code.* As Austin's writing on codification demonstrates, objecting to codification as a device to organize a legal system is one thing, and objecting to a concrete code for reasons of its regulatory content is another.²⁸³ There is some evidence that it was probably not codification as a methodological tool that was rejected stubbornly in nineteenth-century England, but only the suggested content of the codes. The proposed criminal

281. See TEUBNER, *supra* note 3, at 198–202.

282. See *id.* at 204–07.

283. See *supra* notes 135 & 214–218 and accompanying text.

code finally failed because the question of content was highly contested; whereas, codes in less contentious fields, such as the Sale of Goods Act (1893), were enacted successfully.²⁸⁴ It is probably legitimate to go even one step further. In the nineteenth century, codification tended to be associated with a Benthamite or French idea of radical or revolutionary reform in form and substance.²⁸⁵ If this is true, it is indeed possible that the political concern about the content of the codes led to the hostility towards codification rather than the belief that codification is in general not feasible or desirable as a means to organize a legal system for reasons of method.

2) *The Absence of Nationhood as a Driving Force in England.* Finally, another reason for the coolness towards codification existed. As previously discussed, Continental codifications were often an expression of the drive towards nationhood.²⁸⁶ For political reasons, England lacked this drive for codification, at least to the degree that it existed on the Continent—again, a political rather than a jurisprudential reason. If England's lack of drive towards nationhood is regarded as the main reason why English law has never been widely codified, it would be difficult to argue that England's history shows that a codification is not feasible in a common-law system, simply for methodological reasons.²⁸⁷

C. *The Idea of Codification in Twentieth-Century England*

Europe's nineteenth-century waves of codification never reached England, but the hopes for codification have not been shattered forever. Almost forty years ago it was predicted that "[i]t is difficult to believe that the codification of English law will not become a live issue within the next fifty years or so."²⁸⁸ Indeed, in the twentieth century, the question of codification of English law has been discussed in England and on the Continent intensively and persistently.²⁸⁹ For more than thirty years English law has been in a

284. See LANG, *supra* note 5, at 40–58.

285. See, e.g., CAENEGER, *supra* note 211, at 13.

286. See *supra* notes 143–144 and accompanying text.

287. For Cornish, the nationhood argument seems to be the core reason for the English resistance towards codification. See Cornish, *supra* note 251, at 2225.

288. RUPERT CROSS, *PRECEDENT IN ENGLISH LAW* 199 (1st ed. 1961). Interestingly, however, the chapter *The Question of Codification*, from which this prediction is quoted, was dropped in the subsequent three editions of 1968, 1972, and 1997.

289. See, e.g., (arranged chronologically) Maurice S. Amos, *Should We Codify the Law?*, 4 POL. Q. 357, 358–59 (1933); Jonas D. Meyers, *Case Law and Codified Systems of Private Law*, 33 MANUAL OF COMP. LEG. 8 (1951); CROSS, *supra* note 288, at 199; LESLIE G. SCARMAN, A CODE OF ENGLISH LAW? (1966); Leslie G. Scarman, CODIFICATION AND JUDGE-MADE LAW, A PROBLEM OF COEXISTENCE (1966); Hahlo, *supra* note 221; L.C.B. Gower, *Here Lies the Common Law: Rest in Peace*, 30 MOD. L. REV. 241, 259–62 (1967); Aubrey L. Diamond, *Codification of the Law of Contract*, 31 MOD. L. REV. 361 (1968); M.R. Topping & J.P.M. Vanderlinden, *Ibi Renascit Ius Commune*, 33 MOD. L. REV. 170 (1970); Donald, *supra* note 58; *Bulletin de la Société de législation comparée: Vie Colloque juridique franco-britannique (Rennes, 30 mars–1er avril 1973)*, in REVUE INTERNATIONALE DE DROIT COMPARÉ 703 (1973) (with the general topic "La Codification"); JOHN H. FARRAR, LAW REFORM AND THE LAW COMMISSION 62 (1974); Herman R. Hahlo, *Codifying the Common Law: Protracted Gestation*, 38 MOD. L. REV. 23 (1975) [hereinafter Hahlo, *Codifying the Common Law*]; Samuel Stoljar, *Codification in the Common Law*, in PROBLEMS OF CODIFICATION 1 (Samuel Stoljar ed., 1977); André Tunc, *Codification: The French Experience*, in PROBLEMS OF CODIFICATION, *supra*, at 63, 64–75 (giving

process of reforming its sources. Bentham would have been pleased that an English Law Commission was formed in 1965 with the following task:

[T]o take and keep under review all the law . . . with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernization of the law.²⁹⁰

The history of the English codification movement, which was a history of failures in practice, has not discouraged the Commission from considering codification issues. Given the ubiquitous definition problems, it is not surprising that how codification should be envisaged in the Law Commissions Act of 1965 was contentious. Some assumed that codification could only be understood as the enactment of a comprehensive code of rules covering particular fields of law, comparable to the civil codes on the Continent.²⁹¹ Others understood the term codification differently to include codes containing provisions of greater generality than those contained in the United Kingdom's codifying statutes but of less generality than those in civilian codes.²⁹² Obviously, there were also different views on the methodological framework of Continental codification. Recently, the Commission itself stated that, in most countries, whole areas of law are contained in a single code rather than being divided between the common law (derived from decisions of judges over the centuries) and statutory law (enacted by Parliament). The Commission further emphasized that "it has always been the Commission's objective that *parts of English law should similarly be governed by a series of statutory codes . . .*"²⁹³ The Commission's most recent *Seventh Programme of Law Reform*, for the period from April 1999 until at least March 2001, defines codification as "useful reduction of scattered enactments and judgements on a particular topic to coherent expression within a single formulation subject to any changes necessary as a result of review."²⁹⁴

There have been considerable achievements since the Law Commission was established. Based on the Commission's consultation papers and reports, there have been substantial legislative changes in various more or less

many references at p. 80 n.4); Berger, *supra* note 14, at 147; Michael Kerr, *Law Reform in Changing Terms*, 96 LAW Q. REV. 515 (1980); North, *supra* note 14; A. E. Anton, *Obstacles to Codification*, JUR. REV. 15-30 (1982); Herman R. Hahlo, *Codification: Méthode législative*, in CODIFICATION: VALEURS ET LANGAGE, *supra* note 62, at 49, 76-79; Hein Kötz, *Taking Civil Codes Less Seriously*, 50 MOD. L. REV. 1 (1987); VIANDIER, *supra* note 52, at 40; VARGA, *supra* note 2, at 165-66; Bollen & de Groot, *supra* note 12, at 113-14; Giuseppe Gandolfi, *Prefazione*, in HARVEY MCGREGOR, CONTRACT CODE: DRAWN UP ON BEHALF OF THE ENGLISH LAW COMMISSION (1993); ZWEIGERT & KÖTZ, *supra* note 6, at 208; Goode, *supra* note 12; Geoffrey Samuel, *Existe-t-il une procédure de codification du droit anglais?*, 82 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 209 (1997); Arden, *supra* note 135.

290. Law Commissions Act, 1965, 13 & 14 Eliz. 2, ch. 22, § 3.

291. See, e.g., Kerr, *supra* note 289, at 527.

292. See, e.g., Anton, *supra* note 289, at 20.

293. *The Law Commission, Codification* (visited Feb. 20, 2000) <<http://www.gtnet.gov.uk/lawcomm/misc/about.htm>> (emphasis added).

294. LAW COMMISSION, SEVENTH PROGRAMME OF LAW REFORM 18 n.84 (Report Law Comm'n No. 259, 1999) (defining "codification" in the context of the Commission's support of a criminal code and referring to F.A.R. BENNION, STATUTORY INTERPRETATION 466 (3d ed. 1997)).

comprehensive fields, including, for example, the Unfair Contract Terms Act (1977), the Family Law Reform Act (1987), the Children Act (1989), the Computer Misuse Act (1990), and the Family Law Act (1996).²⁹⁵

Probably the most urgent codification plan, the Commission's Criminal Code, has not yet been enacted. A criminal code team of the Law Commission produced a draft criminal code, which was published by the Law Commission in 1985.²⁹⁶ This code was revised and expanded in cooperation with the Commission and republished in 1989.²⁹⁷ But there was no prospect of Parliament finding time to deal with this code. The Commission decided not to press on with the Code, but rather to review discrete topics of the criminal law that can ultimately be welded together into a code—a legislative method that is, incidentally, familiar to continental European codification.²⁹⁸ The previous Chairman of the Law Commission emphasized that "it remains the view of the Commission that in the interests of fairness, certainty, accessibility, coherence and consistence there is an urgent need for a Criminal Code"²⁹⁹ and that "the case for codification of the principal areas of the criminal law is overwhelming."³⁰⁰ Currently, at least in criminal law, there is little disagreement about the merits and importance of codification *in principle*.³⁰¹

Originally, one of the Law Commission's main projects was the codification of the law of contracts.³⁰² After having worked on that project for more than six years, the Commission retreated from the plan of extensive reform and has concentrated on partial reforms in several fields of contract law. This change in scope was triggered by fundamental differences of position between the English and the Scottish Law Commission, which led the latter to withdraw from the project in 1971. Although codification of the law of contract has not been formally abandoned, it was assumed that the plan "receded in the nebulous future,"³⁰³ and it seemed to be "moribund."³⁰⁴ There was a growing body of opinion that was skeptical about extensive codification

295. A full list of all the Commission's consultation papers and reports and the resulting legislation is available on the Internet. See *The Law Commission* (visited Feb. 20, 2000) <<http://www.gtnet.gov.uk/lawcomm/homepage.htm>>.

296. CRIMINAL LAW: CODIFICATION OF THE CRIMINAL LAW: A REPORT TO THE LAW COMMISSION (Report Law Comm'n No. 143, 1985).

297. CRIMINAL LAW: A CRIMINAL CODE FOR ENGLAND AND WALES (Report Law Comm'n No. 177, 1989).

298. See SEVENTH PROGRAMME OF LAW REFORM, *supra* note 294, at 19.

299. Arden, *supra* note 135, at 524.

300. Mary Arden, *Law Reform—the Shape of Change*, JSB J., 1999, Issue 6, at 2, 3 (1999). The Lord Chief Justice also advocated the codification of criminal law, which has given impetus to the Law Commission's work. See *id.*

301. See the Commission's most recent assessment in its SEVENTH PROGRAMME OF LAW REFORM, *supra* note 294, at 19.

302. See Arden, *supra* note 135, at 524–30; Diamond, *supra* note 289, at 361; North, *supra* note 14, at 492. For a more complete account describing legislative reform of the common law of contract over the past eight centuries, see generally Kevin M. Teeven, *A History of Legislative Reform of the Common Law of Contract*, 26 U. TOL. L. REV. 35 (1995).

303. Hahlo, *Codifying the Common Law*, *supra* note 289, at 26.

304. North, *supra* note 14, at 494.

pursued by the Law Commissions Act (1965).³⁰⁵ Some even thought that codification as a whole was a dead issue in England.³⁰⁶

Surprisingly, a draft version of a codification of the English law of contracts, drawn up by Harvey McGregor, was introduced at the end of 1990 at a conference in Pavia, Italy. Although the original text had existed since 1972, it was never published and was not known outside England. In 1993, this 1972 version was supplemented by footnotes and a prologue written by the renowned Italian scholar Giuseppe Gandolfi. It was then published with the title *Contract Code: Drawn up on Behalf of the English Law Commission*.³⁰⁷ In a preface to the draft code, Gandolfi tried to revitalize the discussion about codification of the English law. He celebrated the importance of this event euphorically by comparing it to the landing of the Apollo 11 team on the moon and to the fall of the Berlin wall.³⁰⁸

Perhaps, another reform will be undertaken. In a lecture delivered in 1997 at Lincoln's Inn and published in the *Cambridge Law Journal*, the then Chairman of the Law Commission, Dame Mary Arden, came out in favor of codifying the English commercial law.³⁰⁹ Arden summarized several reasons why codification is desirable.³¹⁰ Codification would make the law more accessible, and in most situations it would be easier and quicker to find the answer to a legal problem in a code. The process of codification would enable the law to be updated and modernized. Arden mentions, for instance, the doctrine of consideration. Codification would allow for revision and development of the law without having to wait for a point of uncertainty to come up for judicial decision. Codification could be used to resolve uncertainty caused by conflicting authorities or a lack of authorities. The excessive amount of case law could be codified and, where necessary, updated. Arden assumes—perfectly in the spirit of European codification—that “the new clearly-formulated . . . provision becomes a springboard for further development of the law.”³¹¹ In terms of method of application, Roy Goode has suggested an interesting hierarchy of interpretational norms for the commercial code. These norms are intended to serve as methodological guidelines for ensuring that the commercial code will be treated as a real code and not as an ordinary common-law statute:

First, the language of the Code must be applied. If the Code is silent on the point in issue, recourse must be had to its underlying purposes and policies, so that a specific Code rule can be applied by analogy to the case under consideration. Only if these purposes and

305. For a good summary of these opinions, see, for example, Hahlo, *Codifying the Common Law*, *supra* note 289, at 29–30, and Hahlo, *supra* note 221, at 248–49.

306. See, e.g., Kötz, *supra* note 289, at 2.

307. HARVEY MCGREGOR, *CONTRACT CODE: DRAWN UP ON BEHALF OF THE ENGLISH LAW COMMISSION* (1993).

308. See Gandolfi, *supra* note 289, at v.

309. See Arden, *supra* note 135, at 516–536. The idea of codifying the English commercial law has been driven in particular by Roy Goode. See Goode, *supra* note 12, at 135–57; see also SEVENTH PROGRAMME OF LAW REFORM, *supra* note 294, at 7 (explaining that the Commission has other areas for consideration for possible law reform projects, including work on a possible commercial code).

310. See Arden, *supra* note 135, at 530–34.

311. *Id.* at 534.

policies offer no guide to the correct solution does it become legitimate to draw on pre-Code case law.³¹²

The Commission has not yet begun the project of creating a commercial code. In January 1999, the commercial code's strong advocate Mary Arden came to the end of her tenure as Chairman of the Law Commission. It is now unclear when exactly the Law Commission will deal with an English Commercial Code, but the Commission's current Seventh Program does expressly include work on a commercial code.³¹³

Although the practical outcome of these revivals of the idea of codification is yet to be seen, these recent developments demonstrate that the idea of codifying parts of the English law is still alive.³¹⁴

D. Summary

For centuries, codification has been debated in England. It is not true that the concept of codification never touched England. To the contrary, it was specifically in England, in the heartland of the common law, where the idea of codification reached a high theoretical elaboration in the works of Jeremy Bentham. Even the word "codification" was not coined in the countries of the great codes, but in England.³¹⁵

It is true that many of the historical codification plans and their actual legislative results can hardly be compared to what we find on the Continent in terms of completeness and systematization. In the end, moreover, England never codified as extensive a field of law as did the Continental legal systems. However, the failure to enact comprehensive codifications cannot obscure the important role that the idea of codification played in the England of the nineteenth century. There is a plethora of political and legal reasons why a general codification of the English common law failed. Among these reasons, the methodological claim that codification is inconsistent with a common-law

312. Goode, *supra* note 12, at 144.

313. See SEVENTH PROGRAMME OF LAW REFORM, *supra* note 294, at 7. The project of a commercial code is included in the category "further projects," meaning that it is currently subsidiary to the Commission's main projects and that it will be considered "when there is opportunity during or after the Seventh programme." *Id.* The project would commence with an extensive research phase, and the Commission would seek the approval of the Lord Chancellor before undertaking such a project. *See id.* Interestingly (and confusingly), the Commission also mentioned in passing that "the code would not necessarily be in statutory form." *See id.*

314. Cf. ZWEIGERT & KÖTZ, *supra* note 6, at 264 (expressing less pessimism on the codification plans in English private law than in 1987); Bollen & de Groot, *supra* note 12, at 113 ("Nevertheless, the call for codification remains and is even getting louder, also due to the social changes that have occurred over the last hundred years."); Reinhard Zimmermann, *Konturen eines europäischen Vertragsrechts*, 50 JURISTENZEITUNG 477, 479 (1995) (arguing that "the idea of codification is by no means obsolete"). *But cf.* Samuel, *supra* note 289 (arguing that even though there is a process of codification in England, the training of lawyers and the limited role accorded to academic scholarship remain serious obstacles to codification).

315. See WESENBERG & WESENER, *supra* note 70, at 156 (finding it "odd" that the codification movement "limited to the continent" was named in England). I have tried to show in this Article that it is not so "odd."

system has not dominated. Codification only partially succeeded, but for the most part, political rather than methodological reasons stood in its way.

In the twentieth century, codification has remained an important issue. In 1965, codification was even institutionalized in the form of the English Law Commission, which was the driving force behind several more recent codification plans. Today, comprehensive codification projects, including criminal law and most recently even commercial law, are regarded as desirable and seem to be feasible.

England does not have a tradition of codification *per se*.³¹⁶ However, for at least two hundred years it has had a tradition of seriously *considering* codification. Despite many failures, even recent decades have shown that codification has not yet lost its appeal.

IV. CODIFICATION IN AMERICAN LEGAL HISTORY

The American history of codification can be roughly divided into three periods: (1) colonial American history until around the 1830s, including the early colonial codes to the onset of the codification debate; (2) the mid- and late-nineteenth century, including the peak of the codification debate with David Dudley Field, its consequences, and the enactment of codes in some American states; and (3) codification in the twentieth century.

A. *The Beginnings of American Codification*

Codification in North America dates back to the beginning of the colonial period. The very first steps toward enacting codes were taken soon after the arrival of the Mayflower.³¹⁷

1. *The Early Colonial Codes*

a. *Beginning with Codes*

Colonial law was, to a striking extent, code law, because, as Friedman puts it in his *History of American Law*, "any fresh start demands codification."³¹⁸ An early comprehensive work was adopted in Massachusetts: the *Book of the General Laws and Libertyes* (1648), a collection of important legal rules, arranged alphabetically by subject.³¹⁹ This Massachusetts Code became the source of a first wave of codes. Within half a century, codes came

316. This was, however, claimed by Shapiro, *supra* note 3, at 428.

317. Usually, the legal literature on codification in America begins with the early nineteenth century, or even later, with David Dudley Field in the mid-nineteenth century. There are few exceptions. Varga starts in 1648 with the *Book of the General Laws and Libertyes*, see VARGA, *supra* note 2, at 152, while Berger claims that codification "started as early as 1634, when Massachusetts envisaged the drafting of codes inspired by Natural Law." Berger, *supra* note 14, at 152. Berger gives no sources and no evidence for his claim. It is unclear which code he is describing.

318. FRIEDMAN, *supra* note 177, at 90.

319. See *id.* at 91-93.

into existence in all thirteen colonies.³²⁰ These codes were strongly influenced by the Massachusetts Code and they even copied some of its provisions verbatim. They symbolized a new social and legal beginning. But soon they were modified repeatedly, replaced by new codes, or superseded by independent colonial legislation.³²¹

b. *The Growing Dissatisfaction with the Law*

After the Declaration of Independence (1776), the state of the law became increasingly muddled. Simultaneously, the law included colonial legislation, English law, and the legislation of the new states. By the end of the eighteenth century, the legal system had become a complicated morass of sources.³²² After the American Revolution, it was soon accepted that life is too complex to have a legal system based on mere common sense and informal dispute resolution. Instead of frontier romanticism, professionalization and learned law became essential.³²³ In response, the existing mountain of legal material started to grow. Since the American Revolution had not reformed the existing law's form and content, and federalism restrained the impulse to unify the law across states, all but two of the thirteen new states declared that pre-existing law would remain in force.³²⁴ With the growing statutory law, "the colonies worked within three distinct traditions: their own, that of their neighbors, and that of the imperial state."³²⁵ The American lawyers criticized their English legal heritage in form and substance. It was regarded as labyrinthine, inaccessible, uncertain, overly technical, mysterious, complex, and of alien identity. While the necessity of reform was not disputed, it was far from obvious that codification would be the accepted remedy. But there was one important exception: Louisiana.

2. *The Exceptional Case: Edward Livingston and Codification in Louisiana*

In the English history of codification, India was the exceptional case. In the American history, it was Louisiana.³²⁶ The region around what is today

320. For further references, see *id.* at 91–92; see also VARGA, *supra* note 2, at 153–54. As this Article was written at Yale Law School in New Haven, Connecticut, Ludlow's Connecticut Code of 1650 and the New Haven Code of 1656 deserve to be mentioned.

321. See FRIEDMAN, *supra* note 177, at 93; VARGA, *supra* note 2, at 153–54.

322. See, e.g., COOK, *supra* note 5, at 3–22; Herman, *supra* note 17, at 414–15.

323. For a brief account of the "titanic struggle about the character of American law" between the supporter of a kind of folk law and the professionals, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566 (1993). In the end, by about 1820, at least in the older states, the law was "returned to, or recaptured by the lawyers." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 23 (1977).

324. See COOK, *supra* note 5, at 3–6 (giving reasons for this legal continuity instead of radical change).

325. FRIEDMAN, *supra* note 177, at 93.

326. For an account of the history of the Louisiana Civil Code, see SHAEL HERMAN, *THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES* (1993); RICHARD H. KILBOURNE, *A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803–1839* (1987); and XIII *THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY, AN UNCOMMON*

New Orleans was a French settlement dating from the early 1700s. After 1769, it was possessed by Spain. In 1800, Spain ceded Louisiana to France, and on November 30, 1803, it was formally transferred to France. Only twenty days later, on December 20, 1803, the United States acquired Louisiana in the Louisiana Purchase. In March 1804, the U.S. Congress split the territory into two smaller territories, the District of Louisiana and the Territory of Orleans, and the latter became what is now the State of Louisiana.

Louisiana has never forgotten its French and Spanish-Roman roots. This legacy has meant a certain familiarity with French codification. In May 1806, the first legislature of the Territory of Orleans passed an act providing that Louisiana was to be governed by Roman and Spanish laws in effect at the time of the Louisiana Purchase. In June 1806, the legislature appointed James Brown and Louis Moreau-Lislet to draft a code based on the civil law by which this territory was now governed. As early as in 1808, the legislature enacted *A Digest of the Civil Laws Now in Force in the Territory of Orleans with Alterations and Amendments Adapted to its Present System of Government*, generally known as the Civil Code of 1808. The drafters of the Digest had not simply copied the French Civil Code of 1804, but selected their materials from French, Spanish, Roman, and English sources.³²⁷

In 1822, the Louisiana legislature decided to revise the Digest of 1808 and charged Edward Livingston, Pierre Derbigny, and Louis Moreau-Lislet with the task. Livingston (1764–1836), one of the leading lawyers of New York, later mayor of New York, Secretary of State under President Jackson, and Ambassador to Paris, was heavily influenced by Bentham and was one of the first to bring Bentham's ideas to America.³²⁸ He drafted a Civil Code, a Roman-French-style codification, which replaced the 1808 Digest. A civil code with 3522 articles, and thus more comprehensive than the previous Digest, took effect in 1825. And despite the national drive for uniformity of

EXPERIENCE: LAW AND JUDICIAL INSTITUTIONS IN LOUISIANA 1803–2003 (Judith K. Schafer & Warren M. Dilling eds., 1997).

327. There has been an intense debate about the sources of the Digest. See HERMAN, *supra* note 326, at 31–32 nn.60–61.

328. The actual influence of Bentham and the Benthamite School in America is hard to assess in retrospect. At a time in which Anglophobia was still widespread, the direct influence of a successfully enacted French Civil Code seems to have been stronger than the influence of theoretical works of Bentham. See, e.g., COOK, *supra* note 5, at 97 (“[Bentham] did convert some disciples to the cause of codified law and, more importantly, planted the idea so that it could be later harvested.”); PETER J. KING, *UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY* (1986); MILLER, *supra* note 249, at 243 (“Bentham did coin the word ‘codification,’ and though few Americans understood what he meant by it, yet if only by planting a slogan in the mind of America, Bentham marked it as decisively as did Immanuel Kant with the equally baffling term of ‘Transcendentalism.’”); REIMANN, *supra* note 213, at 209–10 (emphasizing that the French influence was stronger than Bentham's ideas); SCHWARTZ, *supra* note 153, at 220 (claiming that the work of the codifiers was not directly influenced by their English predecessors); Rodolfo Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799, 804 (1986) (pointing to the lack of Bentham's influence on Field); David S. Clark, *The Civil Law Influence on David Dudley Field's Code of Civil Procedure*, in *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD: 1820–1920*, at 63, 68, 73 (Mathias Reimann ed., 1993) (pointing to Bentham's minor influence on Field).

law, Louisiana stubbornly remains the classic example of a mixed legal system up to the present day.³²⁹

3. *The Early Calls for Codification in America*

America soon began to consider codes as an option for legal reform. The doyen of codification, Jeremy Bentham himself, began the long and persistent discussion about codification.³³⁰ In 1811 he wrote a letter to James Madison in which he offered his advice for drafting a code of American law. In the following years he also addressed the governors of the American states with this plan.³³¹ Only Governor Plumer of New Hampshire was responsive and presented Bentham's suggestion to the legislature. But the Benthamite plan was regarded as overly theoretical and impracticable by influential lawyers in both political parties, and was therefore postponed and never considered again.³³²

The next important public support for codification was given by Joseph Story in his address to the Suffolk Bar in 1821.³³³ He avoided the Benthamite term "codification" and pleaded for moderate reform. This reform would be gradually advanced under legislative authority by first reducing the principles of law to a text and organizing them into a general code. Story's suggestion remained largely unnoticed. Nevertheless, it was a first effort to free the concept of codification from the radical Benthamite connotation, which was unlikely to be accepted by legislators that were composed of pragmatic practicing lawyers.

In 1823, William Sampson delivered his *Anniversary Discourse* to the New York Historical Society.³³⁴ He encouraged codification but did not mention either Bentham or the word "codification." Strategically, he pointed to the successful codes in recent history. Citing the English authorities Bacon and Hale in favor of codification, he countered beforehand the objection that such codes belong only to the civil-law world.³³⁵ Sampson's speech was widely received and led to an intensive debate over codification.³³⁶

329. See ZWEIGERT & KÖTZ, *supra* note 6, at 114 (calling Louisiana an enclave of "civilian" jurisprudence in the areas of common law).

330. On Bentham's actual influence, see *supra* note 328.

331. See generally 8 BENTHAM, CORRESPONDENCE, *supra* note 42 (including his correspondence with American officials as well as similar offers to the tsar of Russia); BENTHAM, PAPERS RELATIVE TO CODIFICATION, *supra* note 186 (containing Bentham's reply to the American officials). For the fate of Bentham's suggestions, see COOK, *supra* note 5, at 97–101.

332. See COOK, *supra* note 5, at 102–103.

333. *Id.* at 104–106 (referring to JOSEPH STORY, *Progress of Jurisprudence*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 213–14, 237–39 (Boston, Charles C. Little & James Brown 1852)).

334. William Sampson, *An Anniversary Discourse Delivered Before the Historical Society of New York, on Saturday, December 6, 1823; Showing the Origin, Progress, Antiquity, Curiosities, and Nature of the Common Law*, reprinted in SAMPSON'S DISCOURSE, AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS UPON THE HISTORY OF THE LAW, WITH THE ADDITION OF SEVERAL ESSAYS, TRACTS, AND DOCUMENTS, RELATING TO THE SUBJECT (Wash. D.C., Gales & Seaton 1826). For Sampson's talk and its role in the codification movement, see COOK, *supra* note 5, at 106–09.

335. See Sampson, *supra* note 334, at 37.

336. See COOK, *supra* note 5, at 108–18.

4. *The Movement Gains Momentum: South Carolina and the Early Jacksonian Period*

In South Carolina, codification started to become a legislative reality.³³⁷ For various reasons, South Carolina's legal sources were particularly inaccessible and confused. Unlike the other states, South Carolina had very few volumes of compiled state statutes. Access to the state statutes via session law pamphlets and irregularly published collections of those pamphlets was difficult. Furthermore, the case law was particularly uncertain. Since 1808, two separate appellate courts, one for the common law and one for equity, existed in South Carolina. They often were in conflict and produced contradictory decisions.

In 1821, Governor Thomas Bennett asked the legislature to undertake a general revision of the state law, including the common law. He did not call this "codification," but he referred to the example of the French Civil Code. In the following years, many more advocates of codification appeared and moved the legislature towards considering this step.³³⁸ However, this momentum never resulted in a code.³³⁹

One reason for the failure to codify was that after 1828 the legislature was preoccupied with a political crisis.³⁴⁰ Another reason was that South Carolina had no tradition of reform.³⁴¹ As the most conservative of all the states, its legal practitioners embraced traditionalism. Since codification always at the least means a radical change in form, it cannot grow where conservatism and traditionalism are strong. Thus it could not grow in a state like early nineteenth-century South Carolina. Finally, one may also wonder whether there is a link to slavery, because it was probably feared that starting a general reform debate would also bring up this thorny issue.³⁴²

After 1830 the codification movement became stronger in all of the states.³⁴³ Jacksonianism, with its demand for greater democracy, provided an impetus for the idea of codification. Criticizing the state of the law was no longer just the business of professionals. Laymen regarded the complexity of

337. For an account of the codification movement in South Carolina, see *id.*, at 121–31.

338. Governors Wilson and Manning tried to convince the legislature of the necessity of reform. Thomas Cooper published several articles on codification, and Thomas Smith Grimké strongly supported the idea of codifying the law. Grimké delivered a declamation to the Bar Association in Charleston on March 17, 1827, entitled *An Oration on the Practicability and Expediency of Reducing the Whole Body of the Law to the Simplicity and Good Order of a Code*. See THOMAS S. GRIMKÉ, AN ORATION ON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING THE WHOLE BODY OF THE LAW TO THE SIMPLICITY AND GOOD ORDER OF A CODE (Charleston, S.C., Archibald E. Miller 1827). He complained about the lack of order in the mountain of reports, digests, and cases and pleaded for systematization of the civil branch of the common law. He emphasized transforming law into a "science." For a comment on Grimké's suggestions, see MILLER, *supra* note 249, at 246–49.

339. See COOK, *supra* note 5, at 130.

340. See *id.* at 130–132.

341. See *id.*

342. I am grateful to Professor John H. Langbein of the Yale Law School for pointing me to this connection.

343. Cook divides the codification movement into a first period from 1815–1830 and a second period beginning in 1830, which is distinguished from the first by the influence of Jacksonianism. See COOK, *supra* note 5, at 158.

the law as a manifestation of lawyers' attempts to monopolize and control the law and to exclude ordinary people from legal knowledge. Codification was discussed intensively throughout the country. Many more lawyers and non-lawyers supported codification in the 1830s and 1840s.³⁴⁴

The most interesting example of a state coming close to codification in this period occurred in Massachusetts.³⁴⁵ In 1836, Governor Edward Everett asked the legislature to take up codification of the common law. He wanted to make the law more accessible. He promised less litigation and clearer laws and suggested that some limited changes in substance might also be considered. The lower house felt positive about these proposals, and a commission, led by Joseph Story and including members who were prominent lawyers, was appointed. After summarizing the arguments that had been made for and against codes in recent years, the commission's report recommended codification.³⁴⁶ The report suggested that the common law should be codified, not abolished. The common law could then be used for solving future cases for which the code could not completely provide an answer. The report stated that only those rules and principles that had been developed for a sufficient time and thus had reached precision and exactness should be codified. Therefore, the report suggested that almost the entire common law of Massachusetts in civil cases as well as the commercial law and the law of crime and punishment should be codified. Politically, only the state's criminal law was likely to be codified since it would not threaten the interests of those who made the reforms. Subsequent to the release of the original report, a commission was appointed to codify the criminal law. The commission completed its work in 1841. However, in 1844, even this part of the original reform project was rejected.

B. *The Peak of the Codification Movement and the American Civil Codes*

1. *David Dudley Field—His Concept of Codification and His Codes*

As the Massachusetts codes were failing, the codification movement began in earnest in New York with the work of David Dudley Field (1805–1880), "the greatest codifier since Bentham."³⁴⁷ Field was America's

344. For further material, see KING, *supra* note 328, at 295–302.

345. For an account of the severe criticism of common-law principles stirred by the unfortunate criminal trial of Abner Kneeland, see COOK, *supra* note 5, at 171–72. For information on the Massachusetts codification movement in general, see also 3 POUND, *supra* note 165, at 713; SCHWARTZ, *supra* note 153, at 216–17; and Sobotka, *supra* note 79, at 47–48. Note, however, that Sobotka confuses the civil code and criminal code at the end of his discussion of the Massachusetts code. See Sobotka, *supra* note 79, at 48.

346. See *Report of the Commissioners to the Governor of the Commonwealth of Massachusetts, reprinted in THE GOLDEN AGE OF AMERICAN LAW* 249, 249–56 (Charles M. Haar ed., 1965).

347. Charles Noble Gregory, *Bentham and the Codifiers*, 13 HARV. L. REV. 344, 356 (1900). The codification movement in New York in Field's time is a more familiar topic in the legal literature than any other in the American history of codification. This account predominantly relies upon FRIEDMAN, *supra* note 177, at 391–98; KING, *supra* note 328, at 314; LANG, *supra* note 5, at 114–59; MILLER, *supra* note 249, at 254–65; SCHWARTZ, *supra* note 153, at 215–24 (discussing Field); *id.* at 337–46 (discussing Carter); Sobotka, *supra* note 79, at 1–41 (describing Field's personality); *id.* at 42–

Bentham, but unlike Bentham he was a practitioner and, in a typically American way, pragmatic. Codification theory owes much to Bentham and codification practice owes much to Field. As a practitioner, Field knew the shortcomings of the American law from his own experience. He strongly criticized the state of the law in New York. The problems he identified included extreme delays in litigation due to a faulty judicial system, low accessibility, confusion, and complexity.³⁴⁸

a. *Field's Concept of Codification*

For Field, the remedy for a state of law that he described as being not unlike that of the Roman law at the time of Justinian or of French law at the time of Napoleon, was codification. Codification was a model he had observed firsthand during fourteen months of traveling in Europe during 1836 and 1837.³⁴⁹ Subsequently, he began his campaign for codification. It was not Field's goal to undertake a radical change of the law. He favored moderate reform and concentrated on reorganizing the law of New York. He defined "code" and "codification" several times in slightly different ways:³⁵⁰

The records of the common law are in the reports of the decisions of the tribunals; the records of the statute law are in the volumes of legislative acts. To make a code of the known law is therefore but to make a complete, analytical, and authoritative compilation from these records. . . . [A] complete digest of our existing law, common and statute, dissected and analyzed, avoiding repetitions and rejecting contradictions, molded into distinct propositions, and arranged in scientific order, with proper amendments, and in this form sanctioned by the Legislature, is the Code which the organic law commanded to be made for the people of this State.³⁵¹

Later, Field provided another definition: "We mean by codification . . . the reduction to a positive code of those general principles of the common law, and of the expansions, exceptions, qualifications, and minor deductions, which have already, by judicial decisions or otherwise, been engrafted on them, and are now capable of a distinct enumeration."³⁵²

Field suggested that five codifications should comprise all fields of law.

If every branch of the law were codified, it would naturally be arranged in five different parts or codes: that is to say, a political code, embracing all the law relating to government and official relations; a code of civil procedure, or remedies in civil cases; a code of criminal procedure, or remedies in criminal cases; a code of private rights and

140 (describing Field and the codification movement); Clark, *supra* note 328, at 63; Herman, *supra* note 17, at 421-25; and Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 17-54 (Alison Reppy ed., 1949).

348. For a brief description of the legal milieu in which Field began his career as the leading codifier, see Clark, *supra* note 328, at 70.

349. See *id.* at 73 (pointing out that Field made 59 trips to Europe during his lifetime).

350. See Sobotka, *supra* note 79, at 64-67.

351. 1 DAVID DUDLEY FIELD, SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 326 (Abram P. Sprague ed., New York, Appleton and Co. 1884).

352. 3 *id.* at 239.

obligations; and a code of crimes and punishments.³⁵³

b. *Field's Code of (Civil) Procedure*

Compared to earlier codification attempts in the United States, Field's efforts were more successful.³⁵⁴ In 1846 he arranged for the new constitution of New York to contain provisions enabling the codification of the common law. Three commissioners would be appointed to reduce the whole body of the law of the state—or at least as much as the commissioners thought was proper—into a written and systematic code, including alterations and amendments.³⁵⁵ In April 1847, as required by the Constitution, the first code commission was appointed, and Field became a member in September 1847. The committee planned to produce a general Code of Procedure for New York.³⁵⁶ Indeed, as early as April 1848, a *Code of Procedure* was enacted. It covered civil procedure only—and even that was not covered comprehensively. It was brief (391 sections) and systematically arranged. In substance, it constituted “the death sentence of common-law pleading.”³⁵⁷ The procedural code abolished the distinction between actions at law and suits in equity.³⁵⁸

The commission continued its work. Four more reports were presented to the legislature before the first term expired at the end of 1849. The final result was a Code of Criminal Procedure and a Code of Civil Procedure, the latter including the already enacted Code of Procedure. Only the Code of Civil Procedure, called the Field Code, was enacted in 1851. It served as a model

353. 1 *id.* at 509.

354. See generally COOK, *supra* note 5, at 187–88 (arguing that Field's role in the codification movement is in need of reassessment). Field was neither the first codifier nor was his concept of codification reform an original one. The earlier codifiers Livingston, Sampson, Sedgwick, and others strongly influenced him. And yet, the persistence and intensity with which Field fought for the idea of codification and its practical application were unique in the American history of codification.

355. The New York Constitution provided as follows:

The Legislature, at its first session after the adoption of this Constitution, shall appoint three Commissioners whose duty it shall be to reduce into a written and systematic code the whole body of the law of this State, or so much and such parts thereof as to the said Commissioners shall seem practicable and expedient; and the said Commissioners shall specify such alterations and amendments therein as they shall deem proper, and they shall at all times make reports of their proceedings to the Legislature when called upon to do so; and the Legislature shall pass laws regulating the tenure of office, the filling of vacancies therein, and the compensation of said Commissioners, and shall also provide for the publication of the said code, prior to its being presented to the Legislature for adoption.

N.Y. CONST. of 1846 art. I, § 17.

The Legislature, at its first session after the adoption of this Constitution, shall provide for the appointment of three Commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this State, and to report thereon to the Legislature, subject to their adoption and modification from time to time.

Id. art. VI, § 24.

356. For a very detailed account of the legislative history, see LANG, *supra* note 5, at 124–29. For an investigation of the degree of civil-law influence on this code and an account of its history and content, see Clark, *supra* note 328, at 63.

357. FRIEDMAN, *supra* note 177, at 392.

358. See N.Y. PROCEDURAL CODE § 62 (1848).

for similar codes all over the country, but particularly in the West, where legal systems were immature.³⁵⁹ By 1897, thirty-one states and territories of the Union had codes of procedure more or less modeled on the Field Code.³⁶⁰

In the realm of civil procedure, the idea of codification was successful and has remained successful. Decades later, the next major reform, the 1938 Federal Rules of Civil Procedure, renewed Field's legacy.³⁶¹ But Field's main goal, that of codifying the substantive law, did not fare as well.

c. *The Heart of the Reform: The Civil Code*

Pursuant to the requirements of the 1847 constitution, another commission dealt with drafting a codification of the substantive law. However, it was abolished in 1850.³⁶² The codification failed, as Field put it, "because the men who were appointed to it had no faith in a codification of the common law."³⁶³ In 1857, however, Field's efforts succeeded in arranging for the appointment of a second code commission, headed by himself. This commission drafted three codes—a Penal Code, a Political Code, and a Civil Code. In 1865, after nine reports, the codification of the substantive law was deemed complete. Field was personally responsible for drafting the Political and Civil Code.

The Civil Code consisted of 2034 sections divided into four divisions: the law of persons, property, obligations, and general provisions. In form and content, it owed a debt to Roman law, the French Civil Code, and the Louisiana Civil Code.³⁶⁴

The draft contained references to case law, which were meant to explain the text of the code, justify it, and increase its authority.³⁶⁵ Relevant cases were cited after each section of the code. For the Continental observer this is striking. While Continental codes are also often based on pre-existing case law, these materials are not expressly mentioned in the code. They are identified separately, if at all, as the sources for the judges' historical interpretation of the codes and for scholarly research on how to construe the code.³⁶⁶ Since there is, strictly speaking, no need to provide for authority other than by *enacting* the code, Field's Civil Code is an interesting mixture of case law and codified law. This mixture was the result of his method. Starting with the existing case law, Field developed his code step by step:

359. For some possible reasons why its influence was particularly important in the West, see FRIEDMAN, *supra* note 177, at 394–96.

360. For a complete list with states and the dates they enacted codes (from Missouri in 1841 to New Mexico in 1897), see LANG, *supra* note 5, at 131.

361. See Clark, *supra* note 328, at 87.

362. For an account of the Commission's work, see LANG, *supra* note 5, at 132–48; Sobotka, *supra* note 79, at 68–75.

363. 1 FIELD, *supra* note 351, at 307.

364. For parallels to the French code, see Batiza, *supra* note 328, at 802–19; see also Herman, *supra* note 17, at 422–23.

365. See 3 POUND, *supra* note 165, at 712–13 n.118; Sobotka, *supra* note 79, at 77.

366. See, e.g., LARENZ & CANARIS, *supra* note 78, at 149–53, 164–65 (explaining the significance of references to pre-code case law in the German Civil Code's legislative materials for judicial interpretation of the code in the form of "historical" interpretation).

A careful analysis was in the beginning made and published. In [its] preparation, the plan was first to collect all the existing laws on the different subjects, then to reconcile what was contradictory, strike out what was superfluous, obsolete, or mischievous, and, where there appeared to be deficiencies, arrange the whole in scientific order, and express each section in as concise and exact language as possible.³⁶⁷

There are some similarities between Field's underlying theory of adjudication and the Continental approach. The similarity stems from Field's view on the comprehensiveness of the code regarding future cases.³⁶⁸ All provisions of the code would be broadly construed, but in the introduction to his Civil Code, Field stated clearly that this code could not provide for all future cases.³⁶⁹ Like civilians on the Continent, Field understood such a code as a statement of the general principles of private law and not as a compilation of rules directly applicable to all cases that could arise in the future.³⁷⁰

However, Field seemed to be unsure what should be done in the case of gaps in his Civil Code:

In cases where the law is not declared by the Code, it is to be hoped that analogies may nevertheless be discovered which will enable the courts to decide. If, in any such case, an analogy cannot be found, nor any rule which has been overlooked and omitted, then the courts will have either to decide, as at present, without reference to any settled rule of law, or to leave the case undecided, as was done by Lord MANSFIELD, in *King v. Hay*, 1 *W. Bl.*, 640, trusting to future legislation for future cases.³⁷¹

Field did not provide a fully satisfactory theory of adjudication, which would be necessary for a coherent and complete theory of codification. But he was on the way to a modern notion of codification.

2. *The Struggle for the Civil Code in New York: Field Versus Carter*

When the Field Commission finished its work in 1865, interest in codification had decreased in New York.³⁷² After the Civil War (1861–1865)

367. 1 FIELD, *supra* note 351, at 345.

368. See Batiza, *supra* note 328, at 813–15 (providing a good account of this methodological problem); Robert G. Natelson, *Running With the Land in Montana*, 51 MONT. L. REV. 17 (1990) (giving an account of Field's theory of adjudication); Natelson, *supra*, at 39 nn.92, 93 (comparing the theory of adjudication for the Code of Civil Procedure and the Civil Code as well as Justice Story's theory and pointing to slight differences).

369. See David Dudley Field, *Introduction*, N.Y. CIVIL CODE, at xvii–xviii (Albany, Weed, Parsons & Co. 1865).

370. See Batiza, *supra* note 328, at 814–15 (showing the parallel to Portalis's views regarding the Civil Code in France).

371. Field, *supra* note 369, at xviii. But see Batiza, *supra* note 328, at 816–18 (misstating Field's view). Batiza claims that in the case of lacunae, Field did not follow the example of the French Civil Code with its positive duty on judges to decide, see C. CIV. art. 4, since according to Field, in cases where the law is not declared by the Code, the courts may leave them undecided. Considering this part of the Civil Code's introduction, Batiza's interpretation is not convincing. First, he overlooks the fact that, "in cases where the law is not declared by the code," Field still trusts in the possibility "that analogies may nevertheless be discovered which will enable the courts to decide." Field, *supra* note 369, at xviii. Second, Batiza overlooks Field's first solution for cases in which not even such analogies can be found, namely the decision "without reference to any settled rule of law." *Id.*

372. For the period from 1830–1860, see, for example, COOK, *supra* note 5, at 185–200. For the fate of the Commission's drafts, see, for example, LANG, *supra* note 5, at 145–49; and Sobotka, *supra* note 79, at 82–92. For a brief account, see Maurice E. Harrison, *The First Half-Century of the*

there were more urgent problems than codification. The Anglophobic and Francophile attitudes of the early nineteenth century had disappeared. There was a reappraisal of the common law and an increasing interest in German scholarship, especially in Friedrich Carl von Savigny, who was hostile to codification.³⁷³

a. *The Failure of the Civil Code*

For many years, the Commission's three draft codes came up for discussion in the New York legislature again and again. In 1881, the Penal Code was enacted. The most important part of the reform, the Civil Code, passed the House of Assembly four times and both houses twice. But shortly before the final enactment, the City of New York's Association of the Bar, which always opposed the Field concept, fought the codification: Field, the American Thibaut, found his Savigny in James C. Carter.³⁷⁴ At the request of the Committee of the City of New York's Bar Association, Carter attacked Field's codification plans, particularly in his pamphlet *The Proposed Codification of Our Common Law*.³⁷⁵ Carter viewed a code as growing out of "despotic countries," whereas in "free, popular States, the law springs from, and is made by, the people."³⁷⁶ Field responded with a pamphlet entitled *A Short Response to a Long Discourse* in 1884.³⁷⁷ On the two occasions on which the Civil Code had passed both houses, the governors, influenced by the bar, refused their signatures. When in 1885 and in 1886 the Civil Code was again introduced into the legislature, the opposition, led by Carter, prevailed. Finally, the Civil Code died and the private law of New York remained uncoded.³⁷⁸

California Civil Code, 10 CAL. L. REV. 185, 185-87 (1922).

373. For the influence of the Historical School on the American codification movement, see Reimann, *supra* note 3, at 95-119.

374. The validity of the Thibaut/Field and Carter/Savigny parallel is shown by Reimann, *supra* note 3, at 101-07. For a comparison of Field and Bentham, see Roscoe Pound, *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM, *supra* note 347, at 3, 5-6.

375. JAMES C. CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW: A PAPER PREPARED AT THE REQUEST OF THE COMMITTEE OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK, APPOINTED TO OPPOSE THE MEASURE* (New York, Evening Post Job Printing Office 1884) [hereinafter CARTER, *PROPOSED CODIFICATION*]. Other papers followed. See, e.g., JAMES C. CARTER, *THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW: AN ADDRESS DELIVERED AT THE ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION, AT WHITE SULPHUR SPRINGS, JULY 25, 1889* (New York and Albany, Banks & Bros. 1889).

376. CARTER, *PROPOSED CODIFICATION*, *supra* note 375, at 6. For Carter's role and arguments in the codification movement, see SCHWARTZ, *supra* note 153, at 338-39, 353-63.

377. DAVID D. FIELD, *A SHORT RESPONSE TO A LONG DISCOURSE: AN ANSWER BY MR. DAVID DUDLEY FIELD TO MR. JAMES C. CARTER'S PAMPHLET ON THE PROPOSED CODIFICATION OF OUR COMMON LAW* (New York, 1884).

378. The codification movement in New York resulted in the enactment of a Code of Civil Procedure, a Code of Criminal Procedure, and a Penal Code, while the Political Code and the Civil Code failed. See LANG, *supra* note 5, at 148.

b. *The Pros and Cons of Codification in New York*

As in the English example, it is necessary to take a closer look at the reasons for the Civil Code's failure in order to figure out what the attitude to codification really was. Sobotka's work on Field and the Civil Code provides a thorough account of the arguments expressed in favor of and against Field's codification plans.³⁷⁹

c. *For Codification*

Codification, advocates argued, would make the law more accessible, more efficient, and more comprehensible. Presently contentious issues would be decided by codification. Future legislative reforms would be undertaken more easily and more effectively. Codification would implement the separation of powers, and would also facilitate unification of the law in the United States. Furthermore, it was believed that the experience with the Civil Code in California, in effect since January 1, 1873, was positive. Advocates asserted that an examination of history revealed no example of a code that was abolished once it had been enacted.

d. *Against Codification*

Codified law, opponents argued, would be inflexible compared to the common law. Unclear and ambiguous interpretation of the code's provisions would increase legal uncertainty rather than mitigate it. Codification for future cases would be impossible, thus gaps would inevitably result, which would lead to legal uncertainty. The need for frequent revision of the codes would undermine the stability of the law. Instead of assimilation and integration of the laws of the states, there would be many different laws. Codification would mean more work and would save no money. Advocates against codification contended that the actual draft of the Civil Code was of low quality and the California experience was negative.

Further explanations have been given to explain why the Civil Code was never enacted. These explanations go beyond the reasons expressly discussed during the historical debate.³⁸⁰ Richard Hyland, for example, tried to explain the historical reluctance in American law to enact a civilian style codification with the dichotomous structure of the common law.³⁸¹ The tension between law and equity, between the restrictive understanding of the role of the courts

379. See Sobotka, *supra* note 79, at 92–107.

380. See LAWSON, *supra* note 12, at 49–51; KARL N. LLEWELLYN, PRÄJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA 24 (1933); MERRYMAN, *supra* note 12, at 26–33; 3 POUND, *supra* note 165, at 704, 732; Harrison, *supra* note 372, at 187; Sobotka, *supra* note 79, at 122–27 (particularly referring to RENÉ DAVID & JOHN C. BIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 449 (3d ed. 1985)). For more recent studies, see COOK, *supra* note 5, at 201–10; REIMANN, *supra* note 213; Reimann, *supra* note 3, at 115, 116; and most recently, Richard Hyland, *The American Restatements and the Uniform Commercial Code*, in TOWARDS A EUROPEAN CIVIL CODE, *supra* note 8, 55–70.

381. See Hyland, *supra* note 380, at 61–64.

at law and the more expansive vision derived from equity, he argued, cannot be reduced to a single system in a code. Hyland's argument is not convincing, however, because the civil-law world is also affected by a similar dichotomy, namely—as the German Civil Code demonstrates most clearly—detailed systematic regulation vis-à-vis general clauses. Furthermore, Hyland does not explain why the civil-law version of law and equity is fundamentally different from the common-law version. Thus, it is hard to understand why this tension should explain the difference between the European and the American attitudes towards codification.³⁸²

Another common objection to a code in a common-law system is that there is no method of developing legislative texts and that the method of interpretation is not sufficient.³⁸³ It was also remarked that the classic circumstances for codification were missing in the United States.³⁸⁴ There was neither a revolution in the United States with an urgent need for quick reform, nor discordant legal systems, nor was it necessary to repulse or import another legal system. One may add that, unlike Europeans, Americans were more distrustful of the sometimes corrupt legislature than of the learned judges.³⁸⁵

Another reason for opposition to codification is that the need to clarify and to systematize the common law had already decreased when the draft of the Civil Code was published in 1865.³⁸⁶ The writings of James Kent and Joseph Story had provided a more stable basis for the common law in the mid-nineteenth century.³⁸⁷ In this respect, Kent's *Commentaries* had the same effect in the United States as Blackstone's *Commentaries* had in England. Even if digests and treatises might not be the final and best solution, they surely made the law more accessible.

For many scholars, however, the conservatism of the legal profession was an important, if not the most important, obstacle to codification of the common law in nineteenth-century New York.³⁸⁸ The New York Bar Association was responsible for the final failure of Field's Civil Code, which illustrates that this failure was, to a large extent, a victory of conservative lawyers and tradition. Recent studies on the connection between the German Historical School and the common law also argue in favor of this explanation.³⁸⁹ Carter and his supporters were hostile to any legislation in private law. This was not hostility to codification as the form of the law, but

382. See generally HÜBNER, *supra* note 84 (showing that the role of judges under codes developed as a permanent struggle for striking the right balance in adjudication between strict application of the law and the rule of equity ("Billigkeit"/"aequitas")).

383. See, e.g., 3 POUND, *supra* note 165, at 735.

384. See, e.g., LAWSON, *supra* note 12, at 49–50.

385. See, e.g., MERRYMAN, *supra* note 12, at 34 (describing the common-law judge as a "culture hero").

386. See COOK, *supra* note 5, at 208–10; Harrison, *supra* note 372, at 187.

387. Kent wrote the prominent four-volume work, *COMMENTARIES ON AMERICAN LAW* (New York, Halsted 1826–30), and Story published numerous treatises on a wide range of fields. For an overview of the legal literature produced by these two central jurists in nineteenth-century American legal history, see SIMPSON, *LEGAL THEORY*, *supra* note 178, at 67–91.

388. See, e.g., COOK, *supra* note 5, at 206; DAVID & BRIERLY, *supra* note 380, at 402; LLEWELLYN, *supra* note 380, at 24.

389. See REIMANN, *supra* note 213; Reimann, *supra* note 3, at 115–16.

rather the rejection of the content of such codification. Consequently, it seems to be most proper to assess the various reasons by concluding that there was a strong preponderance of *political* reasons:

Behind the proffered jurisprudential reasons (mainly the “legal science” argument) lurk manifest political preferences. For both Savigny and Carter, legislation suggested social change. While the change each feared and fought was of a different nature, they shared a conservative attitude and both dreaded social and political innovation. Both Savigny’s and Carter’s aversion to legislation rested ultimately on political conservatism.³⁹⁰

Since New York was the leading state in the United States, the failure of codification in New York was a bitter setback for the codification movement. It is often emphasized that success of the Civil Code in New York probably would have led to a different development in the entire United States.³⁹¹

3. *The Civil Codes in Georgia, Montana, California, and the Dakotas in the Nineteenth Century*

The scholarly literature has concentrated on the development of codification in New York, which was the intellectual center of the American codification movement in the nineteenth century. But a history of codification also developed in America after Field built on the practical foundations he had established. This post-Field history of codification has not yet been explored thoroughly.³⁹²

Codes of Civil Procedure were enacted in thirty-seven states and territories, Penal Codes in twelve states, and even Civil Codes in five states, including California, during the second half of the nineteenth century.³⁹³ But merely counting codes is a weak way of measuring the importance of codification in a legal system. Instead, a brief examination of the civil codes can help us understand the extent to which codification developed in the United States during that period of time.

a. *Georgia*

In 1858 the legislature of Georgia appointed a commission to prepare a code that would embrace the state’s common law, the Constitution, the

390. Reimann, *supra* note 3, at 115–16. Reimann’s point is further elaborated in REIMANN, *supra* note 213, at 224.

391. See COOK, *supra* note 5, at 181; JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 71 (1950); Sobotka, *supra* note 79, at 118–19. On writing alternative history, see, for example, Robert N. Strassfeld, *If: Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339 (1992).

392. Cook’s account is limited to the antebellum development of codification and covers in depth only the period from about 1820–1850. See COOK, *supra* note 5, at x. It may be too early for a final assessment. Contemporary legal history is particularly problematic. See, e.g., JURISTISCHE ZEITGESCHICHTE—EIN NEUES FACH? (Michael Stolleis ed., 1993); STORIA CONTEMPORANEA E SOCIOLOGIA GIURIDICA (Mario G. Losano ed., 1997).

393. For a list of the states in which codes were enacted, see EMILY KEMPIN, *DIE RECHTSQUELLEN DER GLIEDSTAATEN UND TERRITORIEN DER VEREINIGTEN STAATEN VON AMERIKA: MIT VORNEHMLICHER BERÜCKSICHTIGUNG DES BÜRGERLICHEN RECHTS* 27–75 (Zürich, Orell Füssli 1892); and LANG, *supra* note 5, at 131, 158.

statutes, the decisions of the Supreme Court, and the statutes of England in force in Georgia.³⁹⁴ This was to be done without any important change of the law. The actual code that the Commission drafted was meant to encompass great fundamental principles from all available sources. It contained about 4700 sections and was subdivided into a first part dealing with the political and public organization of the state, a second part comprising a civil code, a third with a code of practice, and a fourth with penal laws and criminal procedure. Methodologically, it is remarkable that each section of the code not only directed the lawyers and judges expressly to all the original sources of the code whenever the code was silent, but also by annotation to the relevant original case law and statutory law. Except in the case of criminal law, the code was not meant to be the exclusive source of law. In the wide spectrum of the different forms of law, it fell somewhere between a digest and a codification. The code was accepted by the legislature in 1860 and came into force in 1861, even earlier than the publication of Field's Civil Code in New York. Apart from the early colonial codes and the Louisiana Code, the Georgia Code was the first civil code in the United States. It was the first codification of substantive common law.³⁹⁵

b. *North and South Dakota*

The territory of Dakota came into the possession of the United States in 1803 as part of the Louisiana Purchase, after having previously belonged to Britain, Spain, and France.³⁹⁶ One year after its completion in 1865, Dakota adopted almost verbatim the Civil Code prepared by the Code Commission in New York. In 1889, the territory was divided into the two states of North and South Dakota. The Civil Code of Dakota continued in force in both states.

c. *California*

The most important of the states that enacted a civil code is California.³⁹⁷ Originally a Spanish possession, California later became part of the Republic of Mexico and was annexed by the United States in 1848. Soon thereafter, the law of Mexico was largely replaced by the common law of England after the civil law of Louisiana was rejected. In 1868, a commission was appointed to codify the law. This led to the enactment of a Political Code, a Penal Code, a Code of Civil Procedure, and the Civil Code, all of which have been in force since January 1, 1873. In 1874, another commission

394. For the history and form of the Georgia Code, see FRIEDMAN, *supra* note 177, at 405–06; and LANG, *supra* note 5, at 149–52.

395. See Marion Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178 (1930).

396. For the history of the Dakota codes, see LANG, *supra* note 5, at 152–54; and Andrew P. Morriss, "This State Will Soon Have Plenty of Laws"—Lessons from One Hundred Years of Codification in Montana, 56 MONT. L. REV. 359, 372–75 (1995).

397. For the history of the California Code, see LANG, *supra* note 5, at 154–56; Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617–40 (1994); and Rosamund Parks, *The History of the Adoption of the Codes of California*, 22 L. LIBR. J. 3, 8 (1929).

revised the Civil Code thoroughly. In both the 1868 and the 1874 commissions, Stephen Field, David Field's brother, played an important role.

d. *Montana*

This large state in the Northwest had a muddled set of statutes and laws. It urgently needed a modern legal system. To pursue this goal quickly, Montana chose codification.³⁹⁸ In 1869, five years after Montana's creation out of the Idaho Territory, the first step was taken by appointing the Territorial Supreme Court judges as a commission to codify the law. But it took several more efforts until the legislature adopted a Political Code, a Code of Civil Procedure, a Penal Code, and the slightly modified Californian version of the Field Civil Code as a Civil Code—"more than 170 pounds of laws, an estimated 784,000 words, during forty-two days in 1895."³⁹⁹ Surprisingly, these were enacted in almost complete ignorance of the experience and problems with the codes already enacted in California and the Dakotas and the intense debate in New York.

e. *Why the West?*

In addition to the arguments that were raised in the East, exceptional factors in the West explain why codification succeeded there.⁴⁰⁰ The Western states were young, without a developed common law and legal tradition. Codification seemed to provide a quick way to elaborate a legal system. Recalling the reasons why the Civil Code failed in New York brings up another reason: the different situation with respect to the position of the bar. Indeed, the bar did not oppose codification in any of the Western states. There was less conservative interest in continuing with the old rules. Finally, for California, where the code was not immediately enacted, another explanation may be given. The infant state first embraced the country's common-law tradition because it quickly needed an effective legal system. Instead of accepting the civil-law tradition of the previous rulers, the California government wanted to establish the state's American character. Lewis Grossman has recently presented material indicating that, once the United States had gained enough stability and confidence, California wanted to become a kind of avant-garde state.⁴⁰¹ California intended to move ahead of the other states by creating its own code, which would later serve as a model for the whole country.

398. For an account of the background and history of the Civil Code of Montana, see LANG, *supra* note 5, at 157–58; Morriss, *supra* note 396, at 378–417; and Natelson, *supra* note 368, at 42–44.

399. Morriss, *supra* note 396, at 360.

400. See generally FRIEDMAN, *supra* note 177, at 406–07 (discussing reasons in general); Grossman, *supra* note 397, at 617 (discussing California); Harrison, *supra* note 372, at 187 (discussing the Dakotas); Morriss, *supra* note 396, at 406–09 (discussing Montana); Natelson, *supra* note 368, at 17 (discussing Montana).

401. See Grossman, *supra* note 397, at 621–25.

4. *Evaluation of the Nineteenth-Century Codification Movement*

In the legal literature, evaluations of the nineteenth-century codification movement and its results are inconsistent, ranging from "an overall failure"⁴⁰² to "tradition in triumph—almost"⁴⁰³ to "no clear-cut victor."⁴⁰⁴ The following overview may provide some conclusions.

As in the English case, the mere fact that there were such intensive discussions about codification, especially in the nineteenth century, is remarkable. The persistence of codification as an idea in America justifies seeing it as an important strand of American nineteenth-century legal thought. The practical efforts were not fruitless. Much more was achieved than in England. In numerous states, codes were enacted for civil procedure, penal law, and even for civil law. The number of successfully enacted codes is impressive. However, this number has to be qualified in two respects.

First, instead of assuming that these American statutes were in fact codes, it is possible that they just borrowed the code label. Whether they show the core elements of codification as developed in Section II.B of this Article and whether they can be called codes in a technical sense is a question that can only be answered after an analysis of these codes "in action." Second, codification of the civil law had no success in the most prominent state of the nineteenth century, New York. Therefore, while codification did not fail as completely as in England, it was still a failure. As in the English case, however, the *process* and the *reasons* for this failure are telling.

Regarding the *process* of the failure, it is important to take into account that the reform had already made considerable progress. The civil code was no mere dream of some unimportant and uninfluential scholars; it came close to enactment in the 1880s.

With respect to *the reasons* for the failure, the main argument was not that legally binding precedents, judge-made law, and codes were regarded as incompatible. The history of the failure does not prove that common law was regarded as inherently impossible to codify.⁴⁰⁵ Instead, this failure more likely represents a victory of the conservative bar, in resisting changes to the present law. As in England, there were certainly additional reasons. But the way in which the New York Bar stopped the Civil Code in the very last minute is striking when compared to the ways in which codes overcame the legislative hurdles in states where the bar was weak.

402. SCHWARTZ, *supra* note 153, at 223.

403. COOK, *supra* note 5, at 201.

404. KING, *supra* note 328, at 335.

405. Cook, the author of the most thorough study on codification in antebellum America, wrote: "Contrary to my first assumptions, the antebellum effort on behalf of codes was not a confrontation between civilians and common lawyers . . ." COOK, *supra* note 5, at ix.

C. *Codification in Twentieth-Century America—An Idea Comes to the Fore?*

The role codification played in the United States in the twentieth century is difficult to assess. It is hard to discern whether the available evidence weighs for or against the presence of codification. In addressing this issue, I shall first discuss the fate of the nineteenth-century civil codes and then turn to the “codificatory” significance of restatements and of the Uniform Commercial Code.

1. *The Fate of the Nineteenth-Century American Civil Codes—Evidence Against Codification?*

A continental European observer will be surprised by how little attention American scholars have paid to the history of adjudication of their codes. There is little thorough analysis of how the codes were actually applied and how they have performed in everyday legal business. There are certainly statements about the role of the codes, but only a few are based on concrete analysis, while the rest are speculative. The codes have been widely neglected.

California is the most important of the states with a civil code. The fate of the California Civil Code is commonly ascribed to one man, John Norton Pomeroy, who was the principal instructor at the new Hastings College of Law in San Francisco.⁴⁰⁶ In 1884, twelve years after California had enacted the Civil Code, Pomeroy wrote an extremely influential article entitled *The True Method of Interpreting the Civil Code*.⁴⁰⁷ In this article, Pomeroy argued that judges should regard the Civil Code merely as a declaration of existing common-law rules and that they should use common-law precedents to interpret the Code rather than treating the Civil Code as the only source of law. He found judge-made law to be the only source flexible enough to keep pace with evolving society. The California courts explicitly adopted this view in 1888.⁴⁰⁸ In 1901, the legislature even amended the Code to state that if the Code contains provisions that were previously part of a statute or of the common law before the enactment of the Code, these provisions must be construed as a continuation of the previous law and not as a new enactment.⁴⁰⁹ Though there is some discussion about the extent to which it contained innovations and departures from the common law, the Code is widely regarded as unimportant for the development of the law.⁴¹⁰

406. On Pomeroy and the fate of the California Civil Code, see generally Grossman, *supra* note 397.

407. The original article was published later as JOHN NORTON POMEROY, THE “CIVIL CODE” IN CALIFORNIA (New York, Bar Assoc. Bldg. 1885).

408. See *Sharon v. Sharon*, 16 P. 345, 350, 354 (Cal. 1888), cited in Grossman, *supra* note 397, at 620.

409. Cal. Civ. Code § 5 (West 1982) (“The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.”).

410. For the discussion on the degree of substantive innovations in the Code, see Grossman, *supra* note 397, at 620 n.15. Other scholars agree with this evaluation. See, e.g., Izhak England, *Li v.*

For the other states' codes, the story is less dramatic, but they do not seem to have performed much better. It is said that the Field Code in New York "necessarily became immersed in the sea of common law."⁴¹¹ Moreover, an analysis of the Montana law of employment under the Code claims that the Code's provisions failed to alter the common law's development. The Montana courts paid little attention to these Code provisions, or else tried to avoid the results that this application of the Code would have had.⁴¹² There was "no legal culture that respected the Codes as codes."⁴¹³ Finally, for all states which enacted civil codes except for Louisiana, it was presumed that the common law did not lose its power. The code did not become the dominant source of law in any state.⁴¹⁴

It is questionable whether it is ever possible to prove satisfactorily an assertion of total insignificance and irrelevance of the codes.⁴¹⁵ A recent study on the influence of the Federal Rules of Civil Procedure and the Uniform Commercial Code, which I shall discuss later, may not directly challenge these findings regarding the civil codes. It does, however, indicate that the actual role the state codes played, and still play, in the American legal system remains open to debate.⁴¹⁶

2. *From the Restatements to the Uniform Commercial Code—Evidence for Codification?*

One of the major changes to the American legal environment in the twentieth century is the increasing importance of statutes. In 1982, Guido Calabresi wrote: "The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law."⁴¹⁷ But this does not necessarily signify the victory of codification. A sea of overdetailed and highly specialized statutes can result in the antithesis of codification. The mere fact that America is no longer predominantly governed by case law might be an important argument for a "general convergence" of common law

Yellow Cab Co.—*A Belated and Inglorious Centennial of the California Civil Code*, 65 CAL. L. REV. 4, 18–19 (1977) ("In reality, the courts to a large extent simply ignored the Civil Code. . . . Indeed, no instance can be found where a common law jurisdiction successfully turned into a mixed jurisdiction simply by adopting some measure of civil law."); see also Joseph L. Lewinsohn, *Mutual Assent in Contract Under the Civil Code of California*, 2 CAL. L. REV. 345 (1914) (claiming that the Civil Code appears not to have greatly influenced decisions).

411. Englard, *supra* note 410, at 15.

412. See Morriss, *supra* note 396, at 433–42.

413. *Id.* at 445.

414. See LANG, *supra* note 5, at 182–86.

415. The assertion of insignificance is doubtful because there are cases in which the Civil Codes were not irrelevant for the court's decision. See, e.g., *Palo Alto Town & Country Village, Inc. v. BBTC Co.*, 521 P.2d 1097 (1974).

416. See Rosen, *supra* note 98, at 1138 (doubting the common story of the insignificance of the Civil Code but admitting that his study cannot serve as direct counterevidence).

417. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982).

and civil law, yet it does not necessarily mean that the point of convergence is codification.

A quick glance at America's legal system in the twentieth century can be misleading in this respect. For example, the voluminous United States Code (U.S.C.) is called a "code," but it is actually a mere compendium. Thus, it does not support an argument for the existence of codification in the common-law world.⁴¹⁸ This "code" is published by the federal government and simply collects, without any sophisticated systematic ambition and without the idea of providing the basis for a new source of law, legislation under fifty titles such as "Arbitration" (title 9), "Coast Guard" (title 14), or "Intoxicating Liquors" (title 27). This is a common means of creating an administrative index for legislation that can be found in many developed legal systems in the world. Though this terminology is as confusing as the code label, this method is often called "formal codification."⁴¹⁹

a. *The Restatements—Substitute for and Transition to Codification*

By the early twentieth century, there was a mass of precedents produced in the courts and collected in the national reporter system. It has been estimated that in 1919, for example, there were 10,000 volumes of precedents extant, and 18,500 in 1923.⁴²⁰ America had again reached a state of law that lawyers regarded as unsatisfactory and ripe for reform.

In 1892, the National Conference of Commissioners on Uniform State Laws was founded with the goal of furthering legal unification in the United States. This institution drafts model or uniform acts which, ideally, are to be adopted by all the states via parallel legislation. The Conference was quite productive from the beginning.⁴²¹ However, because the adoption of particular

418. Law dictionaries can be another source of confusion. Note, for example, that former editions of *Black's Law Dictionary* defined "codification" as a "[p]rocess of collecting and arranging the laws of a country or state into a code, i.e., into a complete system of positive law, scientifically ordered, and promulgated by legislative authority," BLACK'S LAW DICTIONARY 324 (4th ed. 1951); whereas, the most recent edition demands less by defining it as a "process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code." BLACK'S LAW DICTIONARY 252 (7th ed. 1999).

419. On the European continent, formal codification is particularly widespread in France (known as "codification formelle," "codification à droit constant," "codification administrative," or "codification par décret"). See, e.g., Roger Saint-Alary, *Les codifications administratives et le progrès du droit en France*, 40 REVUE JURIDIQUE ET POLITIQUE 738 (1986); Christian Vigouroux, *Alice au pays de la codification à droit constant*, 82 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 187 (1997). There is a special commission dealing with this kind of codification known as "Commission supérieure de codification" in France and "Bureau de coordination du Conseil d'État de Belgique" in Belgium. For France, see, for example, Yves Robineau, *Les structures françaises: la Commission supérieure de codification*, 82 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 263 (1997). For Belgium, see, for example, Christian Lambotte, *Une Expérience: Le Bureau de coordination du Conseil d'État de Belgique*, 40 REVUE JURIDIQUE ET POLITIQUE 817 (1986). This type of codification also existed in the most extensive form in Russia with the process towards a *Svod Zakonov*. See, e.g., William E. Butler, *Toward a Svod Zakonov for the Union of Soviet Socialist Republics*, in CODIFICATION IN THE COMMUNIST WORLD 89 (Barry et al. eds., 1975).

420. See LANG, *supra* note 5, at 22–23; VARGA, *supra* note 2, at 161.

421. For the regulation of commercial transactions in the early decades of the Conference, see

uniform acts is optional, one state might adopt them while another rejects them.⁴²² Moreover, on important topics, such as agency and trusts, there was no uniform law.

In 1923, the most distinguished group of lawyers the United States could offer convened in Washington D.C. to found the American Law Institute.⁴²³ This time, no single hero like Bentham or Field, but a group of 300 prominent scholars, gathered to resolve the problem of the uncertainty and complexity of the law.⁴²⁴ Though drafting a code was one of the remedies considered, another method was finally chosen. The founders decided to "restate" the law.

A "Restatement" intends to reduce and reformulate systematically the governing legal principles of various fields. The first completed projects dealt with agency (1923–1933), conflict of laws (1923–1934), contracts (1923–1932), property (1927–1944), restitution (1933–1937), torts (1923–1939), trusts (1927–1935), security (1936–1941), and judgments (1940–1942).⁴²⁵ Later, the Second and Third Restatements comprised many more areas of law including, for example, U.S. foreign relations law (1954–1965, 1978–1987), suretyship and guaranty (1989–1996), and law governing attorneys (1986–present).⁴²⁵ The idea has been to replace the multiple large layers of cases. But a Restatement is not limited to a mere compilation of cases and statutes:

We speak of the work which the organization should undertake as a restatement; its object should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life. The character of the restatement which we have in mind can be best described by saying that it should be at once analytical, critical, and constructive.⁴²⁶

Restatements, however, are not enacted by the legislature. The American Law Institute produces them as a private institution. Though they are

the Uniform Negotiable Instruments Law (1896), *reprinted in* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, AMERICAN UNIFORM COMMERCIAL ACTS 136 (1910); the Uniform Warehouse Receipts Act (1906), *reprinted in id.* at 185; the Uniform Sales Act (1906), *reprinted in id.* at 70; the Uniform Bills of Lading Act (1909), *reprinted in id.* at 213; the Uniform Stock Transfer Act (1909), *reprinted in id.* at 122; the Uniform Conditional Sales Act (1918), 3B U.L.A. 480 (1992); and the Uniform Trust Receipts Act (1933), 3B U.L.A., *supra*, at 588.

422. For the problems in harmonizing the law in the early decades of the twentieth century, see, for example, Herman, *supra* note 17, at 425–26.

423. On the history of the American Law Institute and the Restatements, see, for example, James Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140 (1981); N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & HIST. REV. 55 (1990); and G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1 (1997). For a selective bibliography on the ALI and its activities, see Harry G. Kyriakodis, *The Institute in Legal Literature—A Selective Bibliography* (visited Feb. 20, 2000) <http://www.ali.org/ali/AR99_bibliograph.htm>.

424. Hull, *supra* note 423, proves convincingly that the common description of this circle as an assembly of mostly conservative formalists is wrong. Progressive law professors who were avid for reform were the driving force. *See id.*

425. For a list of all past and present ALI projects see the ALI's official website, *Past and Present ALI Projects* (visited Feb. 20, 2000) <http://www.ali.org/ali/AR99_PastPrj.htm>.

426. *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute* (Feb. 23, 1923), *reprinted in* THE LIFE OF THE LAW 145, 148–49 (John Honnold ed., 1964). For an analysis of the drafter's goals, see Hull, *supra* note 423, at 55–96.

sometimes very influential in practice, Restatements do not bind courts.⁴²⁷ Thus they lack at least one of the central elements of codification: legislative authority. They are persuasive instead of authoritative. Apart from that, they are close to codification as bodies of law that are systematic and relatively comprehensive in certain fields.

Restatements serve two goals. First, they are substitutes for codification.⁴²⁸ Restatements try to embrace the basic advantages of codification while avoiding the form of legislation. The idea is to have an instrument that responds in a flexible way to both new judge-made law and new legal problems. In practice—though not in positivistic theory—it may even turn out not to matter much whether the text is given legislative authority or “merely” achieves high actual authority, like the Restatement of Contracts. Both devices, Restatements and codes, can have the same function of providing lawyers a “place to begin,” or a “common starting point” in order to reduce the difficulty of having to consult masses of different sources for each case.⁴²⁹ Second, if one regards the lack of legislative authority as crucial by emphasizing the difference between a descriptive and a normative view, Restatements can yet have another function, shifting the law even closer to codes. Restatements can serve as the basis for “real” codes. For example, the Restatement of Trusts Second is the basis of a “real” code in California and for the proposed Uniform Trust Act.⁴³⁰

At least the latter function shows how similar the instruments of Restatement and codification are, and why the Restatements are called “transitional to codification,”⁴³¹ “Codes Without Legislation,”⁴³² and an “unofficial form of codification.”⁴³³ Over the decades they have been in this sense code-like, though their appearance has changed following dramatic changes in underlying legal theory.⁴³⁴ Restatements have always mirrored the dominant legal thought of their times. The first Restatements were created in the spirit of the late nineteenth century. The first published Restatement, that of Contracts in 1932, contained only black letter paragraphs with a particular rule and omitted any commentary or citation. In the 1920s and 1930s, legal realism started to become the dominant movement in American legal theory

427. See Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817, 819–20 (1996) (noting that the Restatements' impact on courts is unknown and difficult to discern).

428. On the intent that Restatements function as a substitute for codification, see, for example, VARGA, *supra* note 2, at 161–65; Berger, *supra* note 14, at 154; and George A. Bermann, *La codification aux États-Unis*, 82 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 221, 223–25 (1997).

429. Gordley, *supra* note 423, at 140, 156–57.

430. See RESTATEMENT SECOND OF TRUSTS (1959); Californian Trusts Act, CAL. PROB. CODE §§ 15,000–19,403 (West 2000); Uniform Trust Act (Draft, National Conference of Commissioners on Uniform State Laws, 1999). Note that the National Conference itself calls the proposed Uniform Trust Act “the first comprehensive national codification.” Uniform Trust Act, *supra*, at 1.

431. Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367, 1367 (1934).

432. THE LIFE OF THE LAW, *supra* note 426, at 144 (1964).

433. Von Mehren, *supra* note 15, at 669.

434. For the development of the Restatement in light of the changes in legal theory, see White, *supra* note 423.

and practice. With a legal theory that asserts that judges respond primarily to the stimulus of the facts in the concrete cases before them rather than to the stimulus of legal rules, the early black letter Restatements that consisted of abstract rules with little connection to the facts of a real case were not acceptable.⁴³⁵ The Second Restatements mirrored this change in legal theory: The black letter substance was changed and much greater emphasis was put on commentary. A new generation of realist scholars started to participate in the future shaping of not only the Restatements, but also many uniform laws, one of which stands out up to the present day: the Uniform Commercial Code (U.C.C.).

b. *The U.C.C.—An American Codification?*

From 1937, the famous legal realist Karl Llewellyn (1893–1962) devoted his energy to remodeling American commercial law. German Romanticism and the work of Levin Goldschmidt (1829–1897), the nineteenth-century German commercial lawyer and first German professor of commercial law, influenced Llewellyn.⁴³⁶ In 1940 the American Law Institute and the National Conference of Commissioners realized that Restatements would not be enough to provide a stable and predictable framework for the business community.⁴³⁷ On December 1, 1944, they formally agreed to co-sponsor the project of a Uniform Commercial Code with Llewellyn as the chief reporter. Instead of striving for as precise and narrow a wording as possible, Llewellyn provided for general provisions that left part of the work to judges.⁴³⁸ Llewellyn, as a legal realist, was well aware of the limited success of oversophisticated exact concepts and definitions.⁴³⁹ He instead

435. See Brian Leiter, *Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 270 (Dennis Patterson ed., 1996) (referring to a statement by Herman Oliphant).

436. For the influence of Goldschmidt and the "Germanisten" on Llewellyn, see James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987). On the impact of German legal ideas on Llewellyn in general and Jhering and Goldschmidt in particular, see Herman, *supra* note 17, at 427–31; and Ulrich Drobnig, *Llewellyn and Germany*, in RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT: KARL N. LLEWELLYN UND SEINE BEDEUTUNG HEUTE 17 (Ulrich Drobnig & Manfred Reh binder eds., 1994). Llewellyn is in this respect not exceptional among the legal realists. Legal realism is one of many examples in which the close connection between American and German legal thought is striking. See, e.g., James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987).

437. For a brief account of the history of the U.C.C. see, for example, Herman, *supra* note 17, at 427–32 (providing further references). For a detailed account of the history from 1940 to 1949, see Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940–49*, 51 SMU L. REV. 275 (1998).

438. See Herman, *supra* note 17, at 429–32. Samuel Williston was a foil to the proponents of codification, like Carter in New York or Savigny in Germany. Unlike Carter and Savigny, however, Williston supported this precise way of statutory legislation backed up by decided cases, and, unlike Carter and Savigny, he lost in the controversy. See *id.* at 429 n.74.

439. See Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 331 (1951) (stating that the U.C.C. avoids the "mechanic conception of codification . . . a merely military conception of codification"). On the influence of legal realism on the U.C.C., see James J. White, *The Influence of American Legal Realism on Article 2 of the Uniform Commercial Code*, in PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS, FESTSCHRIFT FOR ROBERT S. SUMNERS 401 (Werner Krawietz et al. eds., 1994).

relied on flexible techniques like the use of general clauses—a technique of built-in flexibility that had already turned out to be critically important for the European codes' mastery of social and economic change, particularly in the German Civil Code.⁴⁴⁰

Finally, in 1951, the original U.C.C. was promulgated. It was revised in 1962, and it has seen several changes and supplements. Today, the U.C.C. comprises the following areas of law: sales (Art. 2), leases (Art. 2A), negotiable instruments (Art. 3), bank deposits and collections (Art. 4), funds transfers (Art. 4A), letters of credit (Art. 5), bulk sales (Art. 6), warehouse receipts/bills of lading and other documents of title (Art. 7), investment securities (Art. 8), and secured transactions/sales of accounts and chattel paper (Art. 9).⁴⁴¹ The U.C.C. has been enacted in whole or in part in all fifty states, as well as in the District of Columbia, the Virgin Islands, and Puerto Rico.⁴⁴² Its importance is growing. The U.C.C. is not only revised periodically, but also has expanded considerably. Soon, for example, there will be an Article 2B on Licenses.⁴⁴³

While the Restatements clearly lack one element of codification, that of legislative authority, determining whether the U.C.C. qualifies as a codification is more difficult. The U.C.C. has been labeled in very different ways, from the classification "no code"⁴⁴⁴ through "code-like"⁴⁴⁵ to "codification."⁴⁴⁶ Many scholars did and still do not categorize the U.C.C. as a codification.⁴⁴⁷ They doubt this quality because, for example, they believe that the U.C.C. would not substantially displace pre-code law.⁴⁴⁸ It is claimed that the American courts rarely use "a code approach to interpreting and filling in the law."⁴⁴⁹ Another scholar calls the U.C.C. a code, but "of course within the

440. For the great significance of general clauses ("Generalklauseln") in the German Civil Code, see *supra*, note 113.

441. See U.C.C. (amended 1996).

442. Even Louisiana adopted articles 1, 3, 4, 5, 7, and 8 in the 1970s and article 9 in 1988. In July 1993, the Louisiana legislature found a compromise between Louisiana code law and U.C.C. article 2 by enacting new civil code provisions governing the law of sales that were largely inspired by U.C.C. article 2. See Christian Paul Callens, *Louisiana Civil Law and the Uniform Commercial Code: Interpreting the New Louisiana U.C.C.-Inspired Sales Articles on Price*, 69 TUL. L. REV. 1649 (1995).

443. For an index of in-process drafts of U.C.C. acts with links to most recent drafts, see the Uniform Law Commissioners' official website: The National Conference of Commissioners on Uniform State Laws—Drafts of Uniform and Model Acts—Official Site (visited Feb. 20, 2000) <<http://www.law.upenn.edu/bll/ulc/ulc.htm>>.

444. Berman, *supra* note 428, at 223.

445. Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2201 (1991).

446. Karl N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 561 (1940).

447. But see Berger, *supra* note 14, at 154 (asserting that the U.C.C. has come the closest to genuine codification, representing the results of persistent efforts to achieve a scientific and comprehensive statement of American commercial law); Bydlinski, *supra* note 12, at 29 ("[T]he Uniform Commercial Code in the U.S.A. represents an important approach to the idea of codification even within the common law . . .").

448. See, e.g., Grant Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 286 (1966); see also Berman, *supra* note 428, at 223 (claiming that the U.C.C. is no real codification because, for example, in cases of gaps the judge may still fall back on common law and equity). But see Frier, *supra* note 446, at 2201 n.4 (criticizing this argument).

449. Arthur Rosett, *Improving the Uniform Commercial Code* (May 1997) <<http://www.cnr.it/CRDCS/rossett2.htm>>.

American frame of reference.”⁴⁵⁰ Another comparativist maintains the U.C.C. “isn’t really a Code: it’s a collection of practical solutions” because it “does not purport to contain all the law there is.”⁴⁵¹ Alternatively, the U.C.C. is called a “codification,” but it is pointed out that it is not a fully independent system of codification.⁴⁵² One author maintains that one does not find in the U.C.C. “the systematic and organic structure and the relatively high degree of generalization typical of codes in civil-law systems.”⁴⁵³ Recently, another author contrasted European codification with the U.C.C. in pointing to the “dialogic structure” of the “flexible” and “open-textured” U.C.C.⁴⁵⁴ Unlike a European-style codification, he emphasizes, the U.C.C. provides a “long term discussion with a convenient framework” and a “common vocabulary” and it does not require that all difficult legal issues be resolved before they can be codified. Lacking a clear concept of codification as well as reliable empirical data about how the U.C.C. performs in practice, such efforts to categorize often result in mere speculation. At this point comparativists tend to “apply” their preconceived categories of the world’s legal systems, including the conventional model that civil law is equivalent to codification and common law is equivalent to case law.⁴⁵⁵ Consciously or unconsciously, it is then deduced from this that the U.C.C. cannot qualify as real codification. The danger of circularity is obvious. And indeed, the following four common objections to the classification of the U.C.C. as a codification are not convincing:

1) *The U.C.C. does not cover the entire field of commercial law.* But this does not necessarily mean that it is not a codification. Most civil codes or commercial codes have never contained all the law in one field. They have always been only a substantial part of a field.⁴⁵⁶ And this is true for the present U.C.C.

2) *The U.C.C. itself does not claim to be the only source of law.* Indeed, it refers to other sources in section 1-103. But this does also not justify denying that the U.C.C. is a codification. Reference to other legal sources is a common trait of European codifications, as well. Even the most complete European codifications are at best “formally” complete in the sense that only those sources to which the code refers explicitly are accepted as sources of law. In this sense the U.C.C. is formally complete, and deserves to be labeled

450. Richard M. Buxbaum, *Is the Uniform Commercial Code a Code?*, in RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT—KARL N. LLEWELLYN UND SEINE BEDEUTUNG HEUTE, *supra* note 436, at 197, 220.

451. This assertion by Denis Tallon is explained in Diamond, *supra* note 289, at 379. Herman also doubts in this respect whether the U.C.C. qualifies as a codification, as certain subjects such as land transactions have not been regulated. See Herman, *supra* note 17, at 435.

452. DIETER BLUMENWITZ, EINFÜHRUNG IN DAS ANGLO-AMERIKANISCHE RECHT 47 (1990).

453. Von Mehren, *supra* note 15, at 668.

454. See Richard Hyland, *The American Restatements and the Uniform Commercial Code*, in TOWARDS A EUROPEAN CIVIL CODE, *supra* note 8, at 55, 60–67.

455. For the simple and sophisticated distinction theses see *supra* Section I.A.

456. See *supra* notes 117–119 and accompanying text.

a code. The only claim a theory of codification can honestly make is that the codification has to be the primary source of law.⁴⁵⁷

3) *The U.C.C. is distinct from a European-style codification in its dialogic structure, flexibility, open texture, and its ability to provide a framework for further discussion.* This argument misstates the European concept of codification. The discussion of the European understanding of codification should have demonstrated that this is precisely what European codes try to do as well.⁴⁵⁸ They combine specific provisions and general clauses. Their incompleteness is sometimes even intended and opens the code for an alliance between legislation and legal science. Their structure is therefore also dialogic, flexible, and open-textured. In promoting the internal coherence of the law and providing a conceptual framework, European codes are designed to further doctrinal, judicial, or legislative discourse. This virtue is no specific trait of the U.C.C. as opposed to a European code.

4) *The U.C.C. does not substantially displace pre-code law.* Generally, the argument goes, there is no code-style theory of adjudication and interpretation.⁴⁵⁹ This last and most important argument claims, in other words, that the U.C.C. shares the (purported) fate of the Western states' civil codes in that there is no legal culture that respects and treats the U.C.C. as a code. First, however, the U.C.C. was meant to be the central source of law and, thus, to be a codification and not a mere digest, compilation, or collection. This can be shown by an analysis of the drafters' thoughts and ideas.⁴⁶⁰ Second, scholars have already demonstrated that case-law method does not necessarily exclude code-law method. Instead, in theory, combination and harmonization of both approaches proved possible.⁴⁶¹ Third, in legal practice, the U.C.C. has been treated as a codification to a considerable extent. Proving this is difficult. In 1994, however, Mark Rosen published a valuable empirical study on this topic, of which hardly anyone seemed to take note.⁴⁶² It is worth discussing briefly here. Rosen tries to find out what impact recent American codifications have had on both the application and the development of the law. His study was motivated by the

457. See *supra* Subsection II.B.2.

458. For a discussion of the European concept of codification, see *supra* Section II.A.

459. See Rosett, *supra* note 449.

460. See generally Herman, *supra* note 17. Llewellyn liked to use the somewhat unusual term "codificatory Act." Llewellyn, *supra* note 446, at 561. He wrote: "A codificatory Act covering a large body of private law must not be treated as ordinary legislation. . . . Such a codificatory Act is in a peculiar sense permanent legislation; it enters into the commercial structure of the country." *Id.* For an interpretation of this passage, see Imad D. Abyad, *Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429, 436-38 (1997).

461. For the most developed effort towards harmonization of both approaches, see Wolfgang Fikentscher, *Eine Theorie der Fallnorm als Grundlage von Kodex- und Fallrecht (code law and case law)*, 21 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 161 (1980).

462. See Rosen, *supra* note 98. There is another empirical work covering more than 300 cases. In these cases subsections 1-102(1) and (2) of the U.C.C., which establish the prominence of purpose and policy in the construction and application of the Code, were expressly cited. See Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, OHIO ST. L.J. 419 (1997) (presenting an "empirically informed guided tour" of several of the available sources of Code policy). Alces and Frisch conclude that "comments are potentially the single best source for determining purposes and policies." *Id.* at 458.

critique that "a piecemeal codification of the bulk of the common law has occurred during the last sixty years, and, surprisingly, the academy has given hardly any attention to the consequences and wisdom of this recent switch from common law to code."⁴⁶³ After providing a definition of four models of codification, Rosen reports the results of an empirical study of the codes in practice. He examines the U.C.C. and the Federal Rules of Evidence based on two hundred randomly selected opinions of courts and attorneys general that involved interpretation of code provisions. Half of the cases involved the U.C.C. and the other half concerned the Federal Rules of Evidence; half of the cases were drawn from the codes' early years and the other half from more recent cases.

Rosen explores the courts' use of the codes in determining the law by categorizing different approaches to code interpretation and identifying the frequency with which different categories were employed by courts in resolving cases.⁴⁶⁴ He creates two main categories: (1) looking solely to the text of the code and not citing any legal materials external to the code (he finds that 40.8% of issues raised in cases were resolved using such an approach) and (2) code interpretation involving citations to legal materials outside the code ("extra-code hermeneutics").⁴⁶⁵ After examining both categories, Rosen determines that 82% of the code issues were resolved by techniques that used the code's text as the primary source of the rule.⁴⁶⁶ Rosen concludes that the codes, not pre-code or post-code case law, have been the main sources of law.⁴⁶⁷

Not everything, of course, can be reduced to a statistic. It might still be true that decision makers even under the U.C.C. showed an attitude towards the structured integrity of the code that was different from their European

463. Rosen, *supra* note 98, at 1119.

464. *Id.* at 1141-46.

465. *Id.* at 1144-60. The second category is further subdivided into eight interpretive approaches that courts have used when consulting extra-code materials, which span the range of having no impact on the primacy of a code's text to significantly imperiling the centrality of the code. The groups are (a) citing to case law and articles to buttress unambiguous readings of the code and official comments on the code (the "belt and suspenders" approach, 21.3% of issues were resolved by reference to extra-code materials) (b) citing to pre-code legal materials to clarify the legal context in which the code rule was born ("contextualization," 6.7%) (c) using case law and articles for the purpose of "concretizing" application of the code's abstract terms ("concretization," 41.4%) (d) relying on extra-code materials to resolve ambiguities and conflicts in the code itself (4.3%) (e) citing to case law and articles to fill intended or unintended lacunae in the codes (1.5% when a U.C.C. provision was considered, 2.8% when a provision of the Federal Rules of Evidence was analyzed) (f) utilizing case law as a supplement to the code (3.2%) (g) using case law as a "substitute" for the codes themselves (8.5%, but only very few significant alterations of the rule) and, finally, (h) relying on case law to "transform" the rule articulated by the code (0.3%). *See generally id.* Only the relatively rare cases of (g) and (h) threaten a codification, the others are common features of codification familiar to codified European legal systems.

466. *See id.* at 1160. The author mentions one objection to his method, *see id.* at 1142-1143, 1160, which hardly makes his claim weaker. The study only considers cases in full-blown litigations that were reported by specialized reporter services. The sample therefore is unrepresentative of practitioner's everyday experiences in ascertaining the law. However, practitioners are probably even more prone to rely heavily on the text of the codes.

467. Parts III and IV of Rosen's study provide further evidence regarding the significance of the codifications, also including the Model Penal Code. *See id.* at 1161-1253.

counterparts. Rosen's analysis cannot show the extent to which the decision maker really obeys the code or just pretends to do so and how sophisticated his theory of interpretation is. And yet Rosen's evaluation provides successful *prima facie* evidence that the codes' texts play a significant role in the process of legal decision making. Rosen has shifted the burden of proof to those who still want to maintain that such bodies of rules and principles are insignificant and unimportant in the American legal system.

Further analysis of the interpretive techniques in applying the U.C.C. provided more evidence, although less empirical than the Rosen study, that the U.C.C. is treated similarly to the way the European codes are treated. Pound's early objection to a code in a common-law jurisdiction was that the common law does not have a well-developed technique of statutory interpretation adequate to the application of a code.⁴⁶⁸ This is becoming more and more questionable given the reality of the U.C.C. in action. A study comparing the main features of interpreting codes and interpreting the U.C.C. suggested that the U.C.C. encouraged a kind of legal culture which no longer regards legislation as intrusive, but gives way to "[a] new ethos of cooperation in the development of law."⁴⁶⁹ For example, Americans, under the U.C.C., now have general clauses like European codifications, instead of old English doctrines of narrow statutory interpretation.⁴⁷⁰ Much more importantly, courts often refer to the legislative history of the code and stretch the code's scope by teleological projections and analogies.⁴⁷¹ Of course, this is no quick and easy change. Even under the U.C.C. there are cases in which courts still stick to the old common-law method of statutory interpretation.⁴⁷² And where courts were open to new methods of interpretation it is argued that the various methodologies have resulted in inconsistent decisions.⁴⁷³ However, this does not distinguish U.C.C.-interpretation fundamentally from European code interpretation. Common-law scholars overestimate European codification and

468. See Roscoe Pound, *Sources and Forms of Law*, 22 NOTRE DAME L. REV. 1, 76 (1946). For today's version of the same argument, see Rosett, *supra* note 449.

469. Frier, *supra* note 446, at 2214. For further sources on methodology under the U.C.C., see, for example, Bergel, *supra* note 14, at 1076; Callens, *supra* note 442, at 1659-67; John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 376 (1988); and William D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 300.

470. Compare U.C.C. § 1-203 (1996) with BGB art. 242. Looking at case law on each, however, shows that U.C.C. § 1-203 is less important for the U.C.C. than BGB art. 242 is for the German Civil Code. In part, this can be explained by the fact that the U.C.C. is much younger and that the U.C.C. has already been supplemented substantially. General clauses, therefore, were less important to deal with fundamental changes in law and society than they were in case of the German Civil Code. See generally Allan E. Farnsworth, *The Concept of "Good Faith" in American Law* (April 1993) <<http://www.cnr.it/CRDCS/farnswrt.htm>> (explaining that it has been found difficult to adopt a general concept of good faith in England, while the United States has had a generally accepted concept of good faith for decades); Roy Goode, *The Concept of "Good Faith" in English Law* (March 1992) <<http://www.cnr.it/CRDCS/goode.htm>> (same).

471. For some examples, see Herman, *supra* note 17, at 434-36.

472. See, e.g., Gedid, *supra* note 469, at 341-54.

473. See, e.g., Howard Foss, *Interpreting the Uniform Commercial Code: Methodologies Used, Misused and Unused*, 20 GOLDEN GATE U. L. REV. 29 (1990).

its underlying theory of adjudication if they assume that there is always one consistent theory or practice of interpretation.⁴⁷⁴

Regarding interpretive techniques, a recent general tendency should not go unmentioned. Traditionally, the difference between a common-law statute and a civil-law code was conceived in the following way, as expressed by Grant Gilmore:

A "statute," let us say, is a legislative enactment which goes as far as it goes and no further: that is to say, when a case arises which is not within the precise statutory language, which reveals a gap in the statutory scheme or a situation not foreseen by the draftsmen (even though the situation is within the general area covered by the statute), then the court should put the statute out of mind and reason its way to a decision according to the basic principles of the common law. A "code," let us say, is a legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law⁴⁷⁵

Today, this juxtaposition is no longer a sufficient description of adjudication and lawmaking in the common-law world as compared to the European continent. The style of interpretation seems to have changed in the common law. It has shifted away from the purely literal towards the intentionalist and purposive constructions of statutes, from a narrow-minded attitude towards legislation to a more liberal teleological approach to statutory interpretation.⁴⁷⁶ It should be emphasized that this is true not only for

474. Generations of civil-law scholars, for example, have dealt with the partially unsolved and probably unsolvable problem of the relationship between and the order of the different classical methods of interpretation—grammatical, historical, systematic, and teleological interpretation. See, e.g., LARENZ & CANARIS, *supra* note 78, at 166; Claus-Wilhelm Canaris, *Das Rangverhältnis der "klassischen" Auslegungskriterien, demonstriert an Standardproblemen aus dem Zivilrecht*, in FESTSCHRIFT FÜR DIETER MEDICUS 25, 31–61 (Volker Beuthien et al. eds., 1999) (providing various examples and emphasizing that this field of legal methodology is still underdeveloped).

475. Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1043 (1961). Several sources provide similar accounts of the difference between statutes and codes. See Callens, *supra* note 442, at 1656 (comparing the concept of "code" in civil- and common-law legal systems); Hawkland, *supra* note 469, at 292; Christopher Osakwe, *Cogitations on the Civil Law Tradition in Louisiana: Civil Code Revision and Beyond*, 52 REV. JUR. U.P.R. 179, 182 (1983).

476. See ZWIEGERT & KÖTZ, *supra* note 6, at 260–62. In England, the House of Lords changed its theory of interpretation particularly under the impression of European law which is presently discussed under the keyword "Europeanization" of the English legal style. See, e.g., *Litster v. Forth Dry Dock and Engineering Co.*, 1 All E.R. 1134 (H.L. 1989); *Pickstone v. Freemans plc*, 2 All E.R. 803 (H.L. 1988); *Buchanan & Co. v. Babco Forwarding and Shipping Ltd.*, 1 All E.R. 208 (C.A. 1977); THE GRADUAL CONVERGENCE, *supra* note 15; Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347, 369–74 (1994); and Xavier Lewis, *A Common Law Fortress Under Attack: Is English Law Being Europeanized?*, 2 COLUM. J. EUR. L. 1 (1996). For discussion of statutes and the common law from a Continental perspective, see Reinhard Zimmermann, *Statuta Sunt Stricte Interpretanda?*, 56 CAMBRIDGE L.J. 315 (1997). For a comparative overview of statutory interpretation, see the reports in INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991).

The argument by analogy, one of the oldest methods of decision making, is employed in both English and Continental legal systems to justify judicial decisions. It may even provide sufficient common grounds for a distinct European method. See Katja Langenbucher, *Argument by Analogy in European Law*, 57 CAMBRIDGE L.J. 481 (1998) (offering a normative framework for arguments by analogy in European law that combines aspects of both legal systems). But see Tetley, *supra* note 9, at 615–17 (still presenting the classic way of distinguishing both legal systems by the function of statutes,

American but also for British legal style.⁴⁷⁷ While it remains doubtful whether and to what extent this is a general shift towards Continental-style adjudication and lawmaking, the case of the U.C.C. at any rate demonstrates that twentieth-century America is able to codify, and that its courts have a general understanding of how to treat codes as codes.

D. *Summary*

American legal history is full of efforts to codify. America has been much more amenable to codification than England. America started with "little" codes but held to its English roots and the common law after independence. Louisiana, with its unique and atypical history, is the exceptional case. At the same time, the example of the French Civil Code and the idea of simplifying the mass of legal sources produced an active codification movement in the United States. It reached its peak between 1830 and 1850 in New York, the most powerful and intellectually and legally innovative state of nineteenth-century America. The strong advocate of codification, David Dudley Field, ultimately lost the struggle for codification in New York. The core of the law, the private law of New York, remained uncoded. This failure to codify was predominantly a political victory of the conservative bar and was not driven by methodological insight. The failure of the civil code in New York and thus in most other parts of the country cannot serve as historical evidence that common-law institutions, experience, and attitudes make it impossible to operate a code-based law.

The second half of the century saw efforts resulting in successful codifications. In the fields of civil procedure and, to a lesser extent, penal law, American law is now codified. Private law codes only succeeded in a few states in the West and remained piecemeal everywhere else. In the twentieth century legal unification of the law became an important issue. Two American versions of codification were developed: the Restatements and Uniform Laws. While these did not signify a complete turn towards codification, in the last decades the Uniform Commercial Code has moved toward becoming a fully qualified codification.

V. FINAL ASSESSMENT

England and the United States belong to the common-law system, but the common law is not "common" in all respects. It was therefore necessary to explore the history of codification in England separately from the history of

the style of drafting of laws, and the interpretation of laws ignoring recent developments and changes).

477. See *supra* note 476; see also Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of Pepper v. Hart*, 35 STAN. J. INT'L L. 231 (1999) (comparing the approaches to statutory interpretation that jurists commonly employ in U.S. courts with English statutory interpretation subsequent to a House of Lords decision that abandoned the bar against intentionalist interpretation). The article explains that the House of Lords did not succeed in placing principled, clear, and significant limits on such interpretation and concludes that English rules of statutory interpretation have become much more like U.S. rules. See Healy, *supra*, at 253–54.

codification in the United States. A final assessment that refers to “the common law” as a whole presupposes that the American and the English experiences were not completely divergent. It is therefore prudent to compare briefly the two histories.

A. *American and English History Compared*

1. *Some Differences*

Compared to England, America had less theoretical development of codification over the course of its history but enjoyed more practical results. England had the theoretician Bentham; America had the practitioner Field. America has been much more willing to codify than England. Unlike England, America started with codes and, unlike England, America witnessed the enactment of civil codes in several states in the West. England’s most significant experience with successfully enacted codes occurred in its colonies, specifically in British India. Above all, the different state of the law and its sources explains the difference. Particularly in the West, America needed to implement a legal system quickly to guarantee certainty of law. In this respect, the conditions in the American states that codified their private law were much more like the conditions in British India than those in England. In the twentieth century, the American sources of law also changed more easily than did the English. England started partial codification slowly, while America soon trod new paths. Instead of focusing on only one or two methodological devices for organizing a legal system—case law or statutory law—the American legal system employed several devices such as case law, statutory law, restatements, and uniform laws. For commercial law, America chose codification. During the twentieth century, the difference can be predominantly explained by America’s urgent need for legal unification. Federalism in general and the lack of a broad federal legislative power in private and commercial law in particular—along with a tremendous expansion of business and trade—caused an urgent need for unified law in the course of the twentieth century. This also explains why in the United States as well as in Europe—above all in the case of Germany—it was commercial law that was considered for codification as a matter of priority.⁴⁷⁸

At this point many more reasons may be given why the codification process played out differently in England and the United States. Instead of

478. For the German experience with commercial law codification, see CLAUS-WILHELM CANARIS, *HANDELSRECHT* 16–17 (1995), which presents a brief history of commercial law in Germany. The parallels between the history of the German Commercial Code and the U.C.C. are striking in this respect. Congress’s lack of power to impose a U.C.C. on the various states was comparable to the lack of a unitary national legislature in Germany to enact the German Commercial Code prior to the foundation of the Reich. In 1861, Parliament recommended the adoption of a commercial code by the individual states in a process of parallel legislation. This commercial code, the ADHGB (*Allgemeines Deutsches Handelsgesetzbuch*), was then enacted by most of the states. Eventually, the ADHGB became the commercial code of the German Reich in 1871. See *id.* at 17. For this parallel see, for example, Robert S. Summers, *Unification of Private Commercial Law in Europe—Possible Relevance of the American Experience*, 2 ZEuP 201, 206–07 (1999) (making further reference to Rudolf B. Schlesinger).

speculating on the impact of other political, economic, and social conditions that existed in the two countries, I would like instead to stress the parallels here.

2. *Some Parallels*

Both England and America were fascinated by the idea of codification. Both nations persistently called for codes, but eventually their general codification policies failed in the nineteenth century. At closer examination, these failures reveal further parallels. In both cases, codes failed in the final stage, when they were close to enactment. And the failures equally can be traced, to a remarkable degree, to political conditions rather than reasons of method or deeply entrenched differences in legal styles between a case law system and a code-based system. Today, although there are differences in degree, both legal systems are partially codified. And the importance of these devices is growing, as is illustrated by the role of the U.C.C. in the United States and the Law Commission's projects, including a criminal code and a commercial code, in Britain. These parallels now justify drawing some common conclusion on the role of codification in the English and the American legal systems as representatives of the common-law world.

B. *The Theses Reconsidered*

1. *The Simple Distinction Thesis*

The common wisdom that civil law is equivalent to codification and common law to case law oversimplifies. The tendency to understand things in binary terms is understandable—it is a human trait.⁴⁷⁹ However, this article has attempted to provide enough evidence to show that the idea of codification has maintained a consistent historical presence, particularly throughout the nineteenth and twentieth centuries in the English and American theory and practice of law. This evidence demonstrates that a strand of codification exists in the legal systems of the two most important representatives of the common-law world.

2. *The Equation Thesis*

The equation thesis avoids the flaw of oversimplified distinction, but it produces a new one. If it claims that codification is present everywhere in every legal system of the world, it takes the edge for the core and tends to mislead. In both England and the United States, the law is still widely uncoded, and the partial codification in England and even the U.C.C. in the United States are not (yet?) representative of the entire legal system of these countries.

479. See generally CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* (1966) (claiming that binary opposition is a cognitive "structural universal" because it belongs to the structure of the primitive mind).

3. *The Reversal Thesis*

The reversal thesis is provocative, but it is hardly verifiable. As regards both Europe and America, this argument is doubtful. Accounting for the state of codification on the European continent is not the purpose of this article. But it is sufficient to its purposes to mention that the European pessimism toward codification that this thesis suggests no longer prevails. In Europe, observers regard the idea of codification as alive and well.⁴⁸⁰ The American part of the argument overstates the extent to which America embraces the utility of private law codes. Although a major part of commercial law is governed by codification, many other areas remain uncoded.

4. *The Convergence Thesis*

After reviewing the history of codification in the common law, one problem with the convergence thesis is striking. It seems to assert implicitly that there was historically a clear distinction between common and civil law expressed by the distinguishing element of codification. This story overlooks the reality that the first elaborated theory of codification came out of the common law. It underestimates the appeal that codification has always had for many scholars and practitioners in the common-law world.⁴⁸¹

480. See BYDLINSKI, SYSTEM, *supra* note 50, at 421, 423–24 (1996); RENAISSANCE DER IDEE DER KODIFIKATION: DAS NEUE NIEDERLÄNDISCHE BÜRGERLICHE GESETZBUCH 1992, *supra* note 76; PATTI, *supra* note 55; SCHMIDT, *supra* note 47; VIANDIER, *supra* note 52, at 38–41 (giving one of few comparative studies in legislation, covering 12 countries); Bydliniski, *supra* note 12, at 29; Ewoud Hondius, *Towards a European Civil Code*, in TOWARDS A EUROPEAN CIVIL CODE, *supra* note 8, at 1; Michael Klopfer, *Zur Kodifikation des Umweltrechts in einem Umweltgesetzbuch*, in KODIFIKATION GESTERN UND HEUTE: ZUM 200. GEBURTSTAG DES ALLGEMEINEN LANDRECHTS FÜR DIE PREUBISCHEN STAATEN 195 (Detlef Merten & Waldemar Schreckenberger eds., 1995); Mayer-Maly, *supra* note 40, at 213; Peter Raisch, *Zur Bedeutung einer systematisch angelegten Kodifikation für eine einheitliche Rechtsanwendung am Beispielen des Unternehmensrechts*, in STRAFRECHT, UNTERNEHMENSRECHT, ANWALTSRECHT: FESTSCHRIFT FÜR GERD PFEIFFER 887, 906 (Otto Friedrich Freiherr von Gamm et al., eds., 1988); Fritz Rittner, *Die Sicherheitsleistung bei der ordentlichen Kapitalherabsetzung*, in FESTSCHRIFT FÜR WALTER OPPENHOFF 317, 332–33 (Walter Jagenburg et al. eds., 1985); Sacco, *supra* note 55, at 120–21; Friedrich-Christian Schroeder, *Probleme der Gesetzgebung in Rußland*, in DIE NEUEN KODIFIKATIONEN IN RUßLAND 9, 26 (Friedrich-Christian Schroeder ed., 1997); Rolf Stürmer, *Der hundertste Geburtstag des BGB—nationale Kodifikation im Greisenalter?*, 51 JZ 741, 750 (1996); Klaus Tiedemann, *Das neue Strafgesetzbuch Spaniens und die europäische Kodifikationsidee*, 51 JZ 647, 647 (1996); Zimmermann, *supra* note 65, at 95; Zimmermann, *supra* note 314, at 479; cf. Andreas Voßkuhle, *Kodifikation als Prozeß*, in BÜRGERLICHES GESETZBUCH 1896–1996, *supra* note 218, at 77 (emphasizing and explaining that the process of codifying prior to actually enacting the code is valuable in many respects). But see, e.g., FRIEDRICH KÜBLER, GESELLSCHAFTSRECHT 12 (1994) (claiming a “decline of the idea of codification”); Ralf Dreier, *Mißlungene Gesetze*, in DAS MIßGLÜCKTE GESETZ 1, 7 (Uwe Diederichsen & Ralf Dreier eds., 1997) (giving a less optimistic view toward codification today).

481. Advocates of the convergence theses, see *supra* note 15 and accompanying text, sometimes also overstate on the civil-law side the changes in the role of judges when they describe the nineteenth-century judge as a mere mouthpiece of the laws applying the law in the way suggested by Bergbohm’s strict “statutory positivism” (*Gesetzespositivismus*). See, e.g., Von Mehren, *supra* note 15, at 665, 666.

5. Conclusion

My account suggests that a modified sophisticated distinction thesis is a proper description of the historical reality. While codification is a strong tradition on the European continent, it is only a strand in England and America—but it is a strand that is not unimportant. Codification, both in theory and in practice, has been discussed repeatedly for more than two hundred years. Additionally, while choosing a realistic European concept of codification as a yardstick, it was possible to find at least one important example of a codification in the United States: the U.C.C. The history of codification in England and the United States demonstrates that counting codes is not sufficient to determine the attitude of a legal system to codification at any given time. This method of evaluating the role of codification would lead to a simple conclusion: If there is no great code like the French, Austrian, or German Civil Code in a certain country, then the idea of codification cannot be alive there. This conclusion would be premature because, besides the history of successfully enacted codifications, there is a history of unsuccessful codifications. Unfortunately, this part of history is commonly neglected and underestimated.⁴⁸² It is exactly this part of Anglo-American history that turned out to be most telling. The most interesting part of the English history of codification is not that the English had codes in India, but that codification was a recurring issue in English law and politics, and that many efforts at codification failed in the legislature. The most interesting part of the American history of codification is not that there were codes in several states, but that Americans persistently called for codification, that many efforts to codify failed in the legislatures, and that Field's Civil Code was derailed in the very last stages of ratification. The history of unsuccessful codes in both England and America shows that this failure cannot easily be put down to the fact that there is a fundamental methodological incompatibility between codification as form and a common-law system.

Instead, a glance at history reveals that, regarding the idea of codification, common law and civil law are closely intertwined. First, the idea is rooted not only on the European continent but also in England. Second, the Continental idea of codification has left an important mark on the common-law world. In this respect, both legal systems should rather be regarded as emanations of a common (Western) legal tradition.

C. *Does the History of Codification in the Common-Law World Argue Against a European Civil Code?*

The rationale that codification as a device for organizing a common-law system has to be rejected *because of the historical evidence that it cannot work* is not compelling. If the claim is that the idea of codification is

482. Terré points out that even for the European continent, "l'histoire des codes avortés" has not yet been written. Terré, *supra* note 52, at 34.

anomalous or alien to common-law systems, the historical overview disproves it. The idea's persistent impact and its continuous wide appeal in England and America for centuries show that a future European civil code would not import a completely novel idea as a legal transplant into common-law systems. Certainly, those who advocated codification in England and America, in the nineteenth century in particular, failed to a considerable extent. But the claim that the historical *resistance* of common-law traditions to the idea of codification argues against European plans of a code is equally unconvincing. It neglects the reasons for such resistance. If the resistance were rooted in the insight that codes *as form* cannot work in a common-law system and if this insight into the impossibility of codes as form were deeply entrenched in the legal culture, then the argument would have to be taken seriously. But there is no such common conviction regarding the history of codification in England and America. For the most part the concerns are political rather than methodological. Supranational codification would mean that the European Union would complete what generations of common-law codifiers have already tried. These efforts were rejected with little discussion about the methodological question that is relevant today, namely, whether common-law institutions and attitudes make it impossible to operate under codification. History and experience do not answer this question in the affirmative. Active consideration of European codification should continue.