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French Codification and “Codiphobia” in Common Law Traditions

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This Article argues that the classical approach or taxonomy used by comparative lawyers in distinguishing the common law and civil law traditions has failed in showing that both legal traditions have more similarities than differences. Besides, some of the differences have poisoned the relationship between civil law and common law, giving rise to an inaccurate dichotomy between them. More specifically, this Article refers to the classical concept whereby, according to some comparative lawyers, civil law is linked to codification, whereas common law is not. The author maintains that, if codification has erroneously been considered a peculiarity of the civil law tradition, and hence somehow incompatible with the common law, this is because Napoleon’s codifications have, unfortunately, been presented as the model of civil law codification, a mythical idea and prejudice that have constituted a remarkable obstacle for codification in many common law jurisdictions.

This work does not aim at offering a particular notion of codification but at making clear that the French codification is neither the model of the civil law tradition codification, nor the model of the codification method. The author asserts that the time is ripe for legal historians to admit that codification neither belongs to the civil law tradition nor constitutes a peculiarity of the civil law tradition, as if it were incompatible with the common law tradition unless common law itself is abrogated altogether. Thus, there is no abstract model of codification, only codification practices and discourses. It is true that on that empirical basis, one may discuss comparatively these practices and discourses in different jurisdictions, but this should not be done within the framework of a theoretical, mythic—and thus, inexistent—model of codification.

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I. INTRODUCTION

When the project of codifying English criminal law collapsed in 1854, Andrew Amos, one of the Criminal Law Commission’s most active members, argued that “Codiphobia” infected both the English government and the lawyers who undermined codification efforts.¹ Perhaps this is too strong. There was, however, genuine suspicion and distrust of codes and codification. In England, some of this antipathy was directed towards the efforts of Jeremy Bentham (1748-1832). An Englishman, Bentham spent his entire life promoting legal reform through a comprehensive code of law that he called a “pannomion” (i.e., “a complete body of the law”).² Ironically the term “codification” was also first coined by Bentham.

The subject of codification is important to both comparative law and legal history. It “touche[s] on many issues at the core of how lawyers regard[] the law and themselves.”³ Indeed, codification elicits many different responses among common lawyers. Some are indifferent, viewing codes as foreign and strange entities linked to the civil law traditions. Others recognize that codification has, in fact, often been “a burning question” even within Anglo-American legal history.⁴ For some

1. Andrew Amos, *Ruins of Time: Exemplified in Sir Mathew Hale’s History of the Pleas of the Crown* (Deighton, Bell and Co, 1856) xvi, xix (quoted by David Lieberman, “The Challenge of the Codification in English Legal History,” paper given at the Research Institute of Economy, Trade and Industry, Rieti, July 12, 2009, available at <http://www.rieti.go.jp/en/events/bbl/09061201.pdf>, last visited 20.7.2018).

2. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Athlone Press, 1970 [1789]), JH Burns and HLA Hart (eds), 7, 305.

3. Andrew P. Morriss, ‘Codification and Right Answers’ (1999) 74 *Chicago-Kent Law Review* 355, 391.

4. ‘Mr Justice Brown on Codification’ (1894) 28 *American Law Review* 258, 258.

of these lawyers, however, codification has been seen “as a more or less transparent attack upon the foundations of” the common law.⁵ In analyzing common lawyers’ arguments against codification in the 1970s, Hein Kötz noted:

[T]he standard argument proceeded in three steps. First, it was assumed implicitly that codification in England would be more or less tantamount to what it is on the Continent. Secondly, Continental codes were described as being based on a number of distinctive and uniform characteristics. Thirdly, it was concluded that legislation in England following the patterns would be alien not only to English legislative practice but also to the spirit of the common law.⁶

Views of this sort explain the defensive attitude of some common lawyers,⁷ as if codes were “monsters,”⁸ savage and nontrainable animals,⁹ or constituted a dangerous threat to the spirit of the common law.¹⁰ This may also explain why the controversy on codification was usually more passionate than scientific.¹¹

In fact, continental codes are not the only form of codification. There is no single model, but only particular codes. Codes are not alien to the common law. This is clear to legal historians and especially obvious to comparative legal historians. Both emphasize the importance of understanding codes and actual application in particular geographical and chronological contexts. By rejecting a monolithic interpretation of codification, accepting that there is no “uniformity of opinion about the

5. AE Anton ‘Obstacles to Codification’ (1982) *Juridical Review* 15.

6. Hein Kötz, ‘Taking Civil Codes Less Seriously’ (1987) 50 *Modern Law Review* 2.

7. According to Peter Stein, this defensive attitude was already present in the thirteenth century:

The defensive attitude adopted by Bracton, and by Granvill before him, suggests that certain clerics, familiar with the new Roman law coming out of Bologna, had been sneering at the presumption of English lawyers in claiming that their law was worthy of comparison with the authoritative texts of the *Corpus Iuris*.

Peter Stein, *Legal Institutions. The Development of Dispute Settlement* (London, 1984), p. 81.

8. Harry Lawson, ‘A Common Lawyer Looks at Codification’ in Lawson, *Selected Essays: Many Laws* (North-Holland Publishing Company, 1977), i.48.

9. D Tallon, ‘Codification and Consolidation of the Law at the Present Time’ (1979) 14 *Israel Law Review* 1, 12.

10. Roscoe Pound, *The Spirit of the Common Law* (Beacon, 1966 [1921]), 146 and 170.

11. On this matter, considerably more detail can be found in Masferrer, ‘The Passionate Discussion among Common Lawyers about postbellum American Codification: An approach to its Legal Argumentation’ (2008) 40 *Arizona State Law Journal* 173 and ‘Defense of the Common Law against postbellum American Codification: Reasonable and Fallacious Argumentation’ (2008-2009) 50 *American Journal for Legal History* 355.

nature of codification, or a philosophy and objectives of codification,”¹² prejudices and barriers about codes may collapse. Common law codiphobia might also be better understood. The “myth” of the French Civil Code is particularly important here.

II. THE IDEOLOGICAL IMPACT OF FRENCH CODIFICATION IN THE COMMON LAW

A. *The Predominance of French Codification in the Civil Law*

Comparative lawyers often distinguish the civil law and common law traditions by, among other things, the codified and uncoded character of their respective laws.¹³ In doing so, the French *Code Civil* (1804) or Civil Code has frequently been regarded as the standard of continental codification. This is inaccurate. Other models exist. In addition to the *Code Civil*, the German *Bürgerliches Gesetzbuch* (BGB, promulgated in 1900) is also important and distinctive. Indeed, these different codes are part of the distinction sometimes made within the civil law between the “Romanistic” and the “German” legal families.¹⁴ And there are many other types of codes on the European continent as well.

In addition, the *Code Civil* can itself be interpreted in different ways. The so-called “Exegetical School” dominant in France in the mid-nineteenth century suggested a mechanical adjudication that required neither judicial nor doctrinal creativity. Their view differed considerably from the interpretive approach of Jean-Étienne-Marie Portalis (1746-1807), the best-known redactor of the *Code Civil*. Similarly, the original meaning of the *Civil Code of California* (1872) was different from its eventual judicial use and interpretation. Such deviations make it essential to study specific codes in their particular geographical and chronological contexts. This is far more realistic than the consideration of theoretical

12. Joseph Dainow, ‘The Civil Code and the Common Law’ (1957) 51 *Northwestern University Law Review* 719, 731.

13. Cf Peter Stein, ‘Civil Law Reports and the case of San Marino’ in Stein, *The Character and Influence of the Roman Civil Law: Historical Essays* (Hambledon Press, 1990). Some mixed systems maintain an uncoded private law rooted in the civil law tradition. (Scotland and South Africa). See, eg, W Tetley, ‘Mixed jurisdictions: common law v civil law (coded and uncoded)’ (2000) 60 *Louisiana Law Review* 677.

14. In this regard, while common lawyers have tried to emphasize the differences between their own legal tradition and—what they named—the “Continental” or “civil” law tradition, within Continental Europe, German legal doctrine has fostered the distinction between the *Romanistic* and the *German* legal family. On this matter, see K. Zweigert/H. Kötz, *An Introduction to Comparative Law*. Vol. I: The Framework. North-Holland Publishing, 1977, p. 133; a further explanation of the notion of “legal styles” can be found in the 3rd edition (Zweigert/Kötz, *An Introduction to Comparative Law*, Cambridge, 1998, 67-73).

models that neither exist in reality nor reflect the significance of the code over the course of its history.

Despite the variety of European codes, the *Code Civil* has, because of its great influence,¹⁵ been regarded by common lawyers as the model of continental codification. Common lawyers don't ignore other European codes but focus on that of France rather than of Germany, Italy, the Netherlands, or Switzerland. This narrow focus of the French model is evident in both common law scholarship and debates on codification. This might appear understandable, given the fact that France was the first continental country to achieve a genuinely modern code. It has been a notable success. But this obsession is no less a problem than, for example, identifying "constitutionalism" with American law without respect to English, French, or German models.

The reader may think that this tendency is understandable, considering the fact that France was the first Continental country to embark and complete a really modern codification, which has proved to be notably successful. However, what the reader might not be aware of are the consequences of such a tendency, particularly concerning the concept or notion of codification. If it would be incorrect—and also uncomfortable for many European countries—to regard the French Civil Code as the model (i.e., the paramount exponent of a technique and legal tool), let us think what would happen if this occurred within the common-law world, where the legal systems differ greatly in some codifications' aspects that touch precisely what civil lawyers may consider to be uncompromising and nonnegotiable.

Indeed, a number of questions about codification arise: Is French codification the only model? What defines a code? What did Portalis and the Exegetical School say? Such considerations have been important in common law jurisdictions considering law reform since the nineteenth century.¹⁶ The answers to these questions, from both common lawyers and civil lawyers, have been inconsistent, sometimes through ignorance,

15. On this matter, see, for example, Tetley, "Mixed jurisdictions: common law v. civil law (codified and uncoded)," pp. 600-601; Jean Limpens, "Territorial Expansion of the Code," Bernard Schwartz (ed.), *The Code Napoleon and the Common-Law World* (New York, 1956—I use the The Lawbook Exchange edition, Union-New Jersey, 1998), pp. 93-109; see Schwartz book's review in Joseph Dainow, "The Civil Code and the Common Law" (1956-1967) 51 *Nw. U. L. Rev.* 719; an old, Anglo-American view on the impact of the French codification can be seen in Charles S. Lobinger, "The Napoleon Centenary's Legal Significance," (1921) 55 *Am. L. Rev.* 665.

16. Debates on pre-modern codes began in common law jurisdiction much earlier. See, eg, Barbara Shapiro, 'Codification of the laws in seventeenth-century England' (1974) *Wisconsin Law Review* 428; see also Roscoe Pound, "Codification in Anglo-American Law," Schwartz (ed.), *The Code Napoleon and the Common-Law World*, pp. 267-268.

sometimes as a conscious strategy rooted in self-interest. The latter has often been more ideological and impassioned than intellectual and scientific. In any event, the narrow focus on French codification, its use as the benchmark for all continental codification, distorts our understanding of codification.¹⁷ It has frequently poisoned codification debates.

B. How a Common Lawyer Looks at Codification: An Approach to Some Anglo-American Jurisdictions

As noted, our understanding, or rather misunderstanding, of codification often has little to do with legal science. Napoleon's role in the redaction and promulgation of the *Code Civil* is especially significant here.¹⁸ Eva Steiner noted a decade ago that "the almost myopic perception of codification by a number of common lawyers as an ideological enterprise rooted in Napoleonic Europe has greatly contributed to the current circumstances where codification . . . is [in] abeyance."¹⁹ In presenting this thesis, Steiner states that ideological misconceptions belong to what could be called the "mythology of codification," whereby the "standard of code is the continental Napoleonic civil code,"²⁰ and consequently, "for the English the model of a code is the Code Napoleon."²¹ Many common law lawyers cannot envisage the possibility of codifying without Napoleon in mind.²²

The question is more complicated than it may seem. I do not think it is just a matter of perception from one side, that is, how a common law

17. For Spain, see, for example, Aniceto Masferrer, "Was the French Civil Code 'the Model' of the Spanish One? An Approach to the Uniqueness of the Spanish Civil Code," *GLOSSAE. European Journal of Legal History* 15 (2018), pp. 99-124.

18. Anglophones still typically refer to the *Code Civil* interchangeably as the *Code Napoléon*. But the French Civil Code was enacted on 21 March 1804 as the *Code civil des Français*. The title was changed to *Code Napoléon* in 1807. In 1816, after the fall of Napoleon, the Code took the original title again. In 1852 it was yet again named *Code of Napoleon* by a decree of Louis Napoleon, Napoleon III. Since 4 September 1870, however, it has been referred to as the *Code Civil*.

19. Eva Steiner, 'Codification in England: The Need to Move from an Ideological to a Functional Approach—A Bridge too Far' (2004) 25:3 *Statute Law Review* 209, 212-213.

20. *Ibid.*, p. 213.

21. D Tallon, 'La Codification dans le Système de Common Law' (1998) 27 *Revue Droits* 39, 40.

22. Cf. Pierre Legrand, 'European Legal Systems are not Converging' (1996) 45 *International and Comparative Law Quarterly* 52 and 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44, 59.

lawyer looks at codification.²³ It is also a matter of how a civil law lawyer looks at codification, and whether he really thinks that common law traditions cannot embark in legal codification unless they cope with the “Continental model,” as if there were no other way to properly codify the law.²⁴ Whereas some civil and common law lawyers seem to have a good perception,²⁵ others do not at all. Whereas some civil law lawyers seem not able to conceive and accept a common-law codification without the “Continental” seal or stamp, some common law lawyers can neither envisage the possibility of codifying without reluctantly looking at the “Continental” or “Napoleonic” codification.²⁶

Even the question of who has the right perception or notion of codification could be a source of controversy if one is not willing to accept the existence of different kinds of codification. Others would settle the matter by making an artificial—and unnecessary—distinction between a first-rate (civil law) and a second-rate (common law) codification. Not surprisingly, some debates on the need to codify the law in common law jurisdictions came to an end without agreement upon the notion of codification,²⁷ which reveals the difficulty for some common law lawyers to detach themselves from “Continental” model codes. Some common lawyers regard codification as a characteristic feature of the civil law tradition, hence incompatible with the common law, considering the matter as a struggle between the common law and the civil law tradition.²⁸

Inasmuch as codification is an undeniable reality and has spread throughout the common-law world,²⁹ it would not be accurate to state that

23. Following Frederick H. Lawson’s perspective in his famous lectures delivered at the University of Michigan (November 16-20, 1953), *A common lawyer looks at the civil law* (University of Michigan, 1953).

24. A clear example of this perspective can be seen in Jean Louis Bergel, “Principal Features and Methods of Codification,” (1987-1988) 48 *La L. Rev.* 1073.

25. A.T.H. Smith, “A Case for a Code” (1987) *Crim. L. R.* 285; he argues that common law jurisdictions have no need to follow the pattern of civil law tradition (p. 292).

26. See, for example, the view of the civil lawyer P. Legrand, “European Legal Systems are not Converging,” (1996) 45 *ICLQ* 52; *ibidem*, “Against a European Civil Code” (1997) 60 *MLR* 44, 59: “The Idea of a European Civil Code to another era. It is a remnant of the authoritarian world of Napoleon. It is a legacy of the simplified and mechanistic universe of positivists.” (quoted by Steiner, *supra* note 19, at 214). The fact that I’m—and will be—referring to the “Napoleonic Code” as the “Continental model” does not mean to deny the existence of other “Continental” codes which may be regarded as “model” as well (German BGB, the Dutch, the Swiss, Italian, etc.); it just reflect the arguments and discourses which can be found in the sources I’ve used, explaining thus both the topic and title of this work.

27. Masferrer, *The Passionate Discussion among Common Lawyers*. . . , pp. 194-201.

28. *Ididem*.

29. On this matter, see Tallon, “La Codification dans le Système de Common Law,” cited in the footnote 18; Bruce Donald, “Codification in Common Law Systems,” (April, 1973) 47 *The*

codification has been linked to “Continental” or “Napoleonic” codes everywhere and, consequently, continue regarding it with reluctance. Moreover, in some common law jurisdictions, positive references to the French codification can be found. It seems to me that negative or prejudiced references appear particularly in those territories that have resisted the codification pressure. In this sense, England and New York are paramount. Regarding the former, where the codification movement started early,³⁰ it has been rightly said, “At the heart of the failure to codify the law in England lies a series of ideological misconceptions associating codification with the Napoleonic era, together with the fear that codification will consequently herald the death toll of the common law.”³¹

C. *The United Kingdom*

In England, the fear of codification has been present since the beginning of the nineteenth century when it was the subject of fierce controversy, especially with respect to criminal law.³² This has long been

Australian Law Journal 160-177; S.J. Stoljar, “Codification and the Common Law,” *Problems of Codification*. The Australian National University, Canberra, 1977, pp. 1-15; G.A. Weiss, “The enchantment of codification in the common-law world” (2000) 25 *YJIL* 435; Alberto Cadoppi, “The Zanardelli Code and Codification in the Countries of the Common Law,” (2000) 7 *JCULR*, 116-190; in the USA, see M. Cook, *The American codification movement: a study of antebellum legal reform* (1981); Martin L. Friedman, “Codification in the Commonwealth: Earlier Efforts,” (1990) 2 *Criminal Law Forum* 144 (later or, published in 1992 18 *Commw. L. Bull.* 1172; John W. Head, “Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America,” 13 *Duke J. Comp. & Int’l L.* 52-88 (2003); see also my articles, cited in the footnote n. 11; for Australia and New Zealand, see Jeremy Finn, “Codification of the Criminal Law: the Australian Parliamentary Experience,” B. Godfrey & G. Dunstall (eds.), *Crime and Empire 1840-1940. Criminal Justice in Local and Global Context* (William Publishing, Cullompton, England, 2005), 224-237 (also available at http://ir.canterbury.ac.nz/bitstream/10092/1828/1/12590980_Codification%20of%20the%20Criminal%20Law.pdf, which I consulted on August 20, 2010; all my quotations of this article will refer to this pdf version); Stephen White, “The Making of the New Zealand Criminal Code Act of 1893: A Sketch” (1986) 16 *VUWLR* 353-76.

30. On this matter, see the footnote 16.

31. Steiner, “Codification in England,” p. 209.

32. On this matter, see A. H. Manchester, “Simplifying the Sources of the Law: An Essay in Law Reform,” *Anglo-American Law Review* (1973) 2, I (pp. 395-413), II (527-550); H. Ford Trowbridge, “English Criminal Law Reform During and After the Napoleonic Wars,” *Anglo-American Law Review* 7 (1978), pp. 243-270; Rupert Cross, “The Reports of the Criminal Law Commissioners (1833-49) and the Abortive Bills of 1853,” *Reshaping the Criminal Law* (ed. by P.R. Glazebrook). London, Stevens & Sons, 1978, pp. 5-20; Rupert Cross, “The Making of English Criminal Law: Sir James Fitzjames Stephen,” (1978) *Crim. L. Rev.* 652; Rupert Cross, “The Making of English Criminal Law: (5) Macaulay,” *The Criminal Law Review* (1978), pp. 519-528; Sanford H. Kadish, “Codifiers of the Criminal Law: Wechsler’s Predecessors,” *Columbia Law Review* 78 (1978), pp. 1098-1144; Lindsay Farmer, “Reconstructing the English Codification

discussed,³³ remains the subject of discussion,³⁴ and will likely continue to be discussed, perhaps forever.³⁵ In drafting criminal law reports, it was difficult—if not impossible—to escape from the French model.³⁶ As Hostettler shows, from the *Commissioner's First Report* (1834), it was clear that there was a will to draft a Digest, Brougham being in charge of it. Lord Wynford—not willing to follow the French code's path, since the brevity of Napoleon's code “almost put absolute power into the hands of the judges”—warned about the main difficulties of such undertaking. The notions of code and digest started to get confused, and by identifying the code with the French experience, British pride was wounded.³⁷ Later—Hostettler goes on—four kinds of codification were distinguished, namely, the Bentham Code, the French Code (immediately translated),³⁸ Partial Codes like the 1882 *Bill of Exchange Act* or the 1892 *Bill of Sale of Goods Act*, and the Stephen Code.³⁹

Debate: The Criminal Law Commissioners, 1833-45,” (2000) 18.2 *Law and History Review* (available at <http://www.historycooperative.org/journals/lhr/18.2/farmer.html>).

33. PR Glazebrook, ‘Still no Code! English Criminal Law 1894-1994’ in M Dockray (ed), *City University Centenary Lectures in Law* (Blackstone Press, 1996), 1-26.

34. See, for example, A.T.H. Smith: “Codification of the Criminal Law—Part 1: The Case for a Code,” *Criminal Law Review* (1986), pp. 285-295; particularly interesting is the following source, *Codification as a Tool of Law Reform*. A Report of a Meeting of Commonwealth Law Reform Agencies held in Ocho Rios, Jamaica, on 10 September 1986. Commonwealth Secretariat, Marlborough House, London SW1Y 5HX, which contains reports from different common law jurisdictions concerning the codification of criminal law.

35. As stressed by Lord Justice Bingham of Cornhill, “A Criminal Code: Must we wait for ever?,” *Criminal Law Review* (1998), pp. 1-3.

36. Anthony Hammond, *A Letter to the Members of the Different Circuits*. London, 1826; *The Criminal Code. Coining*. London, Printed by George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1825; Anthony Hammond noted that “this Article of the Criminal Code contains a Digest of Judicial Decisions, a Consolidation of the Enactments, the Opinions of the Texts Writers, and the Law of Scotland and of France; the former from the Commentaries of Mr. Baron Hume, the latter from the Code Napoleon (p. III), see also *The First Report from his Majesty's Commissioners on the Criminal Law, 24th June 1834* (Ordered, by The House of Commons, to be Printed, 30 July 1834) contained as Appendix, several excerpts from both the Louisiana Code (pp. 43-49) and the French Code (pp. 49-51); see *First Report from his Majesty's Commissioners on the Criminal Law (24th June 1834)*. London, 1834, en *Reports from Commissioners*, 22 volumes (8), Session 4 February-15 August 1834, vol. XXVI (1834), pp. 117-177.

37. John Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century*. Chichester, Barry Rose, 1992, pp. 39-40.

38. *Code Napoleon; or The French Civil Code*. Literally translated from the original and official edition, published at Paris, in 1804. By a Barrister of the Inner Temple. Claitor's Book Store, Baton Rouge 2, La, 1969 Reprint; the American John Rodman, a prominent member of the metropolitan bar, translated the four French codes.

39. Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century*, pp. 210-211; see also M.D. Chalmers, “An Experiment in Codification,” (1886) 2 *Law Quarterly Review* 125.

This remained true even in the twentieth century, where the fear of codification was particularly evident from 1965 onwards. In that year, a Law Commission Act approved the undertaking of a “systematic development and reform” of English law, “including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally the simplification and modernization of the law.”⁴⁰ Such codification was quickly perceived to be a savage lion or a dangerous “monster” threatening the survival of English law.

Soon after the approval of this Act, an article was published with a revealing title: *Here Lies the Common Law: Rest in Peace*.⁴¹ In Hahlo’s view, “there is no intrinsic reason why a codified system of law should be better than a noncodified system, or vice versa But in law, as elsewhere, there is nothing for nothing. Codification of a country’s law must be paid for, and the price is heavy.”⁴² After describing the different aspects that this price would entail, he seemed to be fully convinced of the existence of only two possible models of codification (the French and German Models), “starting out with doing away with judiciary law.”⁴³ This led him to ask what the global effect of codification of the common law would entail. Hahlo recognized that “it may well be that codification will preserve and perpetuate the greatness of the common law.”⁴⁴ He went on as follows:

The English civil code will have no resemblance in form to the common law. Modelled on Continental Codes, it will consist of definitions and principles, systematically arranged. The Law Commission, no doubt, hopes to preserve the substance of the common law, whilst changing its form, but in law, more than any other field, substance and form go together. Once the common law is codified, it will, of necessity, cease to be the common law, not only (rather obviously) in form, but also in substance.⁴⁵

In Hahlo’s view, codification has to be implemented according to Continental Codes, thus implying the end of the common law. He did not know nor accept what other English lawyers had distinguished between the French codification and other kinds of codes, arguing that a common

40. The Law Commission Act 1965 in (1965) 28 *Modern Law Review* 675.

41. H.R. Hahlo, “Here Lies the Common Law: Rest in Peace,” (1967) 30 (3) *The Modern Law Review* 241.

42. Hahlo, “Here Lies the Common Law: Rest in Peace,” 253.

43. Hahlo, “Here Lies the Common Law: Rest in Peace,” 255 (the quotation is taken from R. Floyd Clarke, *The Science of Law and Lawmaking*, 1898, 311).

44. Hahlo, “Here Lies the Common Law: Rest in Peace,” 257.

45. Hahlo, “Here Lies the Common Law: Rest in Peace,” 258.

law codification could overcome some problems detected in the functioning of the French model. Anthony Hammond, for example, in examining the codification enterprise to unveil some prejudices and fallacies on codification, argued that those who reject a code stating that it does not attain complete certainty and that the number of disputes increase, as seen with the Napoleonic Codes, prove that they do not know about the existence of two different kinds of codes, namely, those that create a new law, and those that pursue to reshape the law just from the formal point of view in order to attain certainty. The French Code pursued the first goal but not the second one. Therefore, it is not accurate to refer to the French Code by analogy when opposing codification. Furthermore, in Hammond's view, the increase of legal disputes in France was due to the general expressions contained in the code calling for judicial interpretation. However, this would not be the case in England, because it possesses a richer, customary and judicial tradition, being in a better condition to codify its law.⁴⁶

D. *The United States of America: The Case of New York*

Hahlo did not envisage, however, the possibility of undertaking a different kind of codification, as has been done in other Anglo-American jurisdictions. He seemed—or may have pretended—to ignore such undertakings and preferred to conclude that a choice must be made, namely, either the common law, rejecting the codification, or the code, ceasing to be common law. Such a radical, antagonistic approach to codification had occurred a century before in the United States, when David Dudley Field attempted to codify private law in the State of New York. He encountered considerable antagonism. Prefiguring Hahlo's criticisms, James Coolidge Carter's and R. Floyd Clarke's works were important in the opposition to codification.⁴⁷ Carter was especially

46. Anthony Hammond, *A Letter to the Members of the Different Circuits*. London, 1826; *The Criminal Code. Game Laws*. London, Printed by George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1828, XVI-XVIII; the idea that both the drafting and the functioning of a common law code could be better than a civil law code was also stressed by Jeremy Bentham, *Elements of Jurisprudence, being selections from Dumont's Digest of the Works of Bentham*. Translated by Thomas Dunbar Ingram; edited, with an Introduction and Notes, by W. Neilson Hancock, LL.D. Dublin, Hodges and Smith, 104, Grafton Street, 1852, p. 33.

47. James C. Carter, *Law: Its Origin, Growth and Function* (1907); *ibidem*, *The Proposed Codification of Our Common Law* (1884); *ibidem*, *The Provinces of the Written and the Unwritten Law*; *ibidem*, *Argument of James C. Carter in Opposition to the Bill to Establish a Civil Code Before the Senate Judiciary Committee* (1887); *ibidem*, *The Ideal and the Actual in the Law*: Address at the Thirteenth Ann. Meeting A.B.A. (Aug. 21, 1890); Clarke, R. Floyd Clarke, *The Science of Law and Lawmaking* 1898; *ibidem*, "The Code Napoleon," (1920) 54 *Am. L. Rev.* 391.

important.⁴⁸ Mirroring earlier German debates on codification between Anton Thibaut and Friedrich Carl von Savigny, the debate between Field and Carter was the fiercest controversy on Anglo-American codification.⁴⁹

If American lawyers lacked any considerable knowledge of the codification experiences of other countries, they easily associated the enterprise with Justinian's *Corpus iuris civilis*, the codes of France and Louisiana, as well as codification efforts in England. Later in the century, the California Civil Code, enacted in 1872, would also be an important model. Among these experiences, however, the most frequently invoked model of the early century was the *Code civil*. This resulted from the general revolutionary legacy of antipathy towards English law and institutions and a corresponding regard for French practices, as well as by the Francophilia of the Jeffersonian presidency.

More importantly, the French system of codified law, in which the entire corpus of the law was presented in a systematic but succinct manner, exercised great appeal in a legal environment characterised by the voluminous and unordered nature of Anglo-American law. The *Code civil*, in which France's entire civil law was encapsulated in 2281 paragraphs, each (in a favorite phrase of its admirers) "about as long as a Bible verse,"⁵⁰ dramatically illustrated this difference between the French and English systems. It was a shining example of the viability of codified law. It is not surprising then that most of common lawyers who favoured codification as the best tool to undertake the needed law reform in the nineteenth century praised French codification. Unlike Bentham,⁵¹ Napoleon was well considered in America.

48. For detailed discussions of Carter's career, see Lewis A. Grossman, "Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification," 19 *Yale J. L. & Human.* 145 (2007); *ibidem*, *The Ideal and the Actual of James Coolidge Carter: Morality and Law in the Gilded Age* 389-97 (2005) (unpublished Ph.D. dissertation, Yale University) (on file with author); see also my articles, cited in the footnote n. 11.

49. The former influenced the latter. See, eg, Mathias Reimann, 'The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code' (1989) 37 *American Journal of Comparative Law* 95; for a broader reconstruction of this controversy, see my articles, cited in the footnote n. 11.

50. Charles M Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Greenwood Press, 1981), 71; David Hoffman, *Legal Outlines* (1829), p. 471; David Hoffman, an early advocate of codified law, pointed to the infrequency of legal disputes in France concerning titles to real estate compared to America where, due to an extremely intricate and archaic land law, such real property disputes were a staple of legal life.

51. There was a deep antipathy towards Bentham among American lawyers. Perry Miller, in his *The Life of the Mind in America*, p. 23, records the judgments of a number of contemporary American lawyers including one that he (Bentham) was "so thoroughly mad that we

In pushing for codification, David D. Field made explicit references to the French codification. He compared the New York Codes with the most famous codes of the modern world, including, among others, the codes of France.⁵² Some of his affirmations were as follows:

If in France, and other parts of continental Europe, where codes prevail, the people are found better acquainted with their laws than our people with ours, it is because they have them in a form accessible to all.⁵³

There is as much reason why the American people should have their laws in four or five pocket-volumes as there is why the French people should have theirs.⁵⁴

The Code of Justinian performed the same office for the Roman law, which the Code Napoleon performed for the law of France; and following in the steps of France, most of the modern nations of continental Europe have now mature codes of their own. We have now arrived at that stage in our progress, when a code becomes a want The age is ripe for a code of the whole of our American law.⁵⁵

There are in the United States, it is supposed, 70,000 lawyers for 55,000,000 of people; in France, according to the best information I can get, there are 6,000 lawyers for 40,000,000 of people; in the German Empire, 5,000 for 41,000,000.⁵⁶

Field, thus, used the French code to encourage and call for codification: “[I]f in Holland, or in Germany, or France, a Civil Code has been found beneficial, much more is it likely to be beneficial to us [Americans].”⁵⁷ In doing so, he tried to call upon American pride by referring to foreign achievements: “Not possible to form a Code of American common law! Are we inferior to Frenchmen, Germans, or

really think it would be no injustice to shut him up and keep him on bread and water until he should be brought by depletion, to some tolerable measure of common sense.” Charles Cook, in his *American Codification Movement*, p. 74, stated that any association of Bentham with codification became a “serious promotional liability.”

52. David D. Field, “Codification of the Law,” 1 *Speeches, Arguments, and Miscellaneous Papers* (A. P. Sprague ed., 1884), 358-359.

53. David D. Field, “Reasons for the Adoption of the Codes,” in 1 *Speeches, Arguments, and Miscellaneous Papers*, 372.

54. *Ibidem*, 377.

55. David D. Field, *Legal Reform. An Address to the Graduating Class of the Law School of the University of Albany* (1855), 23, 30.

56. David D. Field, *Codification. An Address delivered before the Law Academy of Philadelphia, in the Hall of the Historical Society of Pennsylvania, April 15, 1886* (1886), 7, 17, 18; at 26-27 he refers to the codification that had taken place in “continental Europe, from the Mediterranean to the frozen sea.”

57. David D. Field, *Introduction, The Civil Code of the State of New York* (Albany, Weed, Parsons 1865), xxix-xxx.

Italians?”⁵⁸ The same idea was expressed when arguing about the practicability of a civil code:

Is a civil code practicable? The best answer to this question should seem to be the fact that civil codes have been established in nearly all the countries of the world, from the time of the Lower Empire to the present day. Are we not as capable of performing a great act of legislation as Romans or Germans, as Frenchmen or Italians? The very doubt supposes either that our abilities are inferior or our law more difficult. The suggestion of inferior abilities would be presented as a national insult; and who that knows anything of it, believes that Roman, French or Italian law is easier to express or explain than our own?⁵⁹

Is it important, however, to understand that Field did not specify French codes as the precise model for American codification but as a general example that codification was both feasible and practical. As has been said, “Field saw legal codification in distinctively American terms, not as an imitation of a French style or even in imitation of a Benthamite style, but as an independent production and in opposition to the English law.”⁶⁰ However, this has not always been properly understood.

Even advocates of codification could oppose the approach taken with the *Code civil*. For example, the famous lawyer Sheldon Amos, a well-known codification advocate, had bitterly criticized it.⁶¹ But those opposing codification were particularly harsh. Carter, for example, “attempted to portray Field’s Civil Code as an arrogant, grand scheme that would render New York’s legal system indistinguishable from that of Napoleon’s.”⁶² Codes, he said, “were characteristic of despotic states, whereas the common law typified democracies and free societies.”⁶³ In this regard, he distinguished between “free, popular States,” in which “the law springs from, and is made by, the people,” and “despotic countries,” in which “the interests of the reigning dynasty are supreme; and no reigning dynasty could long be maintained in the exercise of anything like absolute power, if the making of the laws and the building up of the

58. Field, *Codification. An Address delivered before the Law Academy of Philadelphia*, 17.

59. Field (n 26) 26-27.

60. David Gruning, ‘Vive la Différence? Why No Codification of Private Law in the United States?’ (2005) 39 *Revue Juridique Themis* 153, 177.

61. Sheldon Amos, *An English Code: its Difficulties and the Modes of Overcoming them, a Practical Application of the Science of Jurisprudence* (Strahan and Co, 1873), 125. See also Amos, *Codification in England and in the State of New York* (W Ridgway, 1867), at 28-35.

62. Lewis A Grossman, ‘Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification’ (2007) 19 *Yale Journal of Law & Humanities* 149, 166.

63. *Ibid.*

jurisprudence were entrusted, in any form, to the popular will.”⁶⁴ Of the *Code civil*, he said that the “leading motive with the Emperor Napoleon was political and dynastic,”⁶⁵ not the improvement of the law, because “in the way of establishing a system of law certain, easy to be learned, and easy to be administered, it must be pronounced a failure. In neither of these respects will it bear comparison with the system of our Common Law.”⁶⁶ He argued, too, that codes influenced by the *Code civil*, like the Civil Code of Louisiana (which utilised the *project* of the *Code civil*), carried the same defects.

The hostility towards the French codification among Field’s proposed civil code opponents was radical and the criticism was merciless: “[L]ooking to what the code Napoleon may have accomplished . . . it must be pronounced a failure.”⁶⁷

Carter recognized that “the natural development of the law of France had, for many centuries, in some degree followed the direction of codification”;⁶⁸ hence he admitted that in this case, “[t]he process was more in accordance with the law of its growth than could be the case with any nation inheriting the methods of the English Common Law.”⁶⁹ Furthermore, Carter emphasized two aspects. First, “the leading motive with the Emperor Napoleon was political and dynastic.”⁷⁰ Second, he concluded the intent of the French Code with regard to “establishing a system of law certain, easy to be learned, and easy to be administered, . . . must be pronounced a failure. In neither of these respects will it bear comparison with the system of our Common Law.”⁷¹

In Carter’s view, if it was clear that “all experiments in codification, hitherto attempted, have proved to be failures,”⁷² the French case was not an exception:

64. 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* (Evening Post Job Printing Office, 1884), 6; Masferrer, “The Passionate Discussion among Common Lawyers about Postbellum American Codification,” p. 197.

65. Carter, *The Proposed Codification of Our Common Law*, 61.

66. *Ibid.*, 62.

67. Carter, *Origin*, p. 303.

68. Carter, *Proposed Codification*, p. 61.

69. Carter, *Proposed Codification*, p. 61.

70. Carter, *Proposed Codification*, p. 61; see Fowler’s reply to Carter in Fowler, *Codification in the State of New York*, p. 13.

71. Carter, *Proposed Codification*, p. 62.

72. Carter, *Proposed Codification*, p. 63; Fowler, in his *Codification in the State of New York*, responded comprehensively to Carter’s view, offering quite a different picture of the French codification experience. Leaving aside the scattered references to France in his work, Fowler argued that it was “unnecessary to attempt to refute in detail . . . that the modern specimens of

No one of the advantages which I have enumerated as being those asserted for codification by its advocates has been gained in France; and there is no unprejudiced observer who would not admit that the jurisprudence of England, and of the older States of America, was far superior to that of France, and pre-eminently so in the cardinal point of certainty.⁷³

Consequently, all the codes that may have been influenced by the French one would fall into the same shortcomings. The Code of Louisiana, for example, had plenty of defects because what was “actually adopted was substantially borrowed from the Code Napoleon.”⁷⁴

As has been stated elsewhere, “Positions for and against the French experience reflected clearly how authors regarded the convenience of whether or not to codify the common law.”⁷⁵

One may ask why code opponents took such a radical position, and why they did not accept the possibility of codifying the law following their own way, detached from the French model. In fact, Field tried to make clear that his proposal was different from that of the French codes, but his claim was not taken seriously at all.⁷⁶

Concerning the first question, code opponents tended to prove that because of the French codification’s failure, it did not make any sense to follow that path of legal reform. Alternatively, in a less radical way, they could also have suggested that while it may be convenient for France, it might not work in the American legal system. In practice—rather than in

codification, adopted by France and Germany, are practical failures, and that the motive which led to their adoption was purely dynastic or imperialistic but not reformatory.” (p. 31) Relying on the opinion of various authorities, he demonstrated not only the falsity of Carter’s affirmation that the French codes were imperialistic in design, a thesis “long ago made and refuted in this State,” (p. 32) but also that these “codes have proved most satisfactory in the actual administration of the French system of laws.” (p. 33) Otherwise, they would have “taken deep hold in most of the European countries adjacent to France.” (p. 33); see Masferrer, “The Passionate Discussion among Common Lawyers about Postbellum American Codification,” pp. 237-238.

73. Carter, *Provinces*, pp. 22-23; in Carter’s view, Pothier then “wholly failed to secure any of the fancied benefits which codification seemed theoretically to promise,” which led Carter to deduce “with a certainty which should satisfy all practical minds, that there is some error in the theory which views such an enterprise as feasible and expedient.” (Carter, *Proposed Codification*, p. 64).

74. In Carter’s view, although the Louisiana Code had plenty of defects because it had borrowed from the Code Napoleon, in practice the Louisiana legal system was working considerably well, since, “imbued with the principles and methods of the English Common Law,” the Code permitted and has “fully adopted its maxim of *stare decisis*.” (Carter, *Proposed Codification*, p. 65)

75. Masferrer, “The Passionate Discussion among Common Lawyers about Postbellum American Codification,” p. 238.

76. Masferrer, “The Passionate Discussion among Common Lawyers about Postbellum American Codification,” pp. 194-199.

theory—most of the code opponents took the radical position, following in Carter’s footsteps. Perhaps, because they thought it was the best—and most drastic—way to show the impracticability of any civil code. In other words, to Carter, all civil codes needed to be a failure; otherwise, his argumentative strategy simply would collapse. Besides, denying any code’s success, he could argue that this was due to the distinction between the provinces of unwritten (private) and written (public) law.

There is still another important reason that seems to lead code opponents to deny the practicability of any code, namely, the superiority of the common law over the civil law. It is evident that Carter tended to link the practicability of any code with the superiority of the common-law tradition over the civil-law one.⁷⁷

In this sense, Carter was fully aware that “[t]he examples of Rome, of France, of Prussia, or of Louisiana, are frequently cited as proof that Codes of private law should everywhere be adopted.”⁷⁸ However, he also thought that such arguments had no force unless two other things were proven:

[F]irst, that the judicial administration of private law in the countries referred to has actually been under the control of written Codes; and second, that such judicial administration is superior to our own. But such proof is not even attempted. It would be impossible to make it; the argument, however, tacitly and falsely assumes the fact.⁷⁹

Patriotic pride, passion and ideology pervaded Carter’s conclusion, which was clear and unquestionable: code proponents’ argumentation is wrong for it “tacitly and falsely assumes the fact” that the American judicial administration is not necessarily the best one.⁸⁰

77.

In Carter’s view, the failure of any codification seems to be observed from the perspective of the common-law lawyer, whose prejudice about the superiority of his own legal tradition prevents him from recognizing any successful result concerning codification, perhaps as a sincere conviction, or maybe as a mere strategy to keep codification away as much as possible from the common-law system.

Masferrer, “The Passionate Discussion among Common Lawyers about Postbellum American Codification,” p. 237.

78. Carter, *Proposed Codification*, p. 44.

79. Carter, *Proposed Codification*, p. 44.

80. Carter, *Proposed Codification*, p. 44; for Carter to accept that the French codification had been both scientifically consistent and practically expedient, would have meant to “admitting and recognizing that the American common-law system was not the superior one, and that something could be learned and adopted from another country’s legal system.” (Masferrer, “The Passionate Discussion among Common Lawyers about Postbellum American Codification,” pp. 254-255). Other code opponents preferred not to go further into this way of reasoning, but to face the main question directly: “The great question after all is, not what has been done in other nations

This reveals the existence—at least, among some common lawyers—of a clear link between “codification,” the “French model” and the “civil law tradition.” It also reveals the role of passion and ideology in the debate, so that it is accurate to affirm that “the nature of the controversy on Codification was more passionate rather than scientific,” “more ideological or political, than properly scientific.”⁸¹ Carter firmly believed in “the intrinsic excellence of English jurisprudence, pre-eminent over that of any other civilized State.”⁸² Some of Carter’s statements about the civil law tradition expressed in opposition to the views of David D. Field and others reveal more than mere disregard.⁸³ Code proponents expressed similar attitudes in their criticism of the defects and shortcomings of the common law.⁸⁴ It is unsurprising, then, that such passionate confrontation and rivalry caused mutual mistrust.⁸⁵

What has been said explains why code opponents did not accept the possibility of codifying the law going their own way, detached from the French model. If “codification” was inextricably linked to the “French

and under other systems of jurisprudence, but what is best for us in this age of the world and in this country and under our present conditions.” (Hornblower, “Is Codification of the law Expedient,” p. 17)

81. Masferrer, “The Passionate Discussion among Common Lawyers about Postbellum American Codification,” 181, 191.

82. Carter, *Provinces*, p. 48.

83. Carter, *Proposed Codification*, pp. 6, 8 (“We owe to this feature of our civilization many of those priceless blessings which distinguished it to its advantage from that of the continental States of Europe.”), 45, 59-64; Carter, *Argument*, p. 7 (“Are we to go to the nations of Europe and ask what laws we should have in the State of New York?”), 17 (“... the jurisprudence of England and America, in its refinement, in its certainty, in its conformity to the ideas of the most advanced civilization, is above, far above, that of the most refined nations of Continental Europe.”), 18 (“And yet we are now advised to go to France and borrow her code in order to remedy the uncertainty of American law!”); Carter, *Provinces*, pp. 22-23 (“... and there is no unprejudiced observer who would not admit that the jurisprudence of England, and of the older States of America, was far superior to that of France, and pre-eminently so in the cardinal point on certainty.”).

84. Hoadly, *Codification in the United States*, p. 24 (“The truth is that, considered as a means of advancement, of national growth, of social progress, as a reservoir of rules promotive of development, the Common Law does not exist. It is as fabulous as the fountain of perpetual youth. Its office is to retard, not to advance . . . The Common Law is the mass of the undigested customs, not reduced to system, often clashing, not cast into form, not collected, scattered through myriads of volumes, often obsolete and outgrown, and possessing the element of uncertainty in very great measure . . . The search for the fountains of analogy at Common Law is the search for a lost coin in the desert, a weary turning over the pages of innumerable reports, digests, text-books, commentaries . . . The reduction of this vast mass within practicable compass is not impossible.”).

85. Carter, *Argument*, p. 11 (“Well, I won’t stop here to inquire whether their position [code proponents] about this code springs from bias, or what other cause.”). On mutual distrust between code opponents and proponents, see Masferrer, “The Passionate Discussion among Common Lawyers about Postbellum American Codification,” pp. 191-194.

model” and the “civil law tradition,” the consequence was clear: the incompatibility between codification and common law.

To present codification as incompatible with the common law also meant denying any scheme of codification detached from that of “Continental” Europe or France that might be regarded as compatible with the common law. In doing so, code opponents deny both the possibility of even a non-Continental code, and the idea that a code did not have to purport to provide for all future cases.⁸⁶

Carter argued that Field’s code would turn judicial activity into a mere mechanical application of the code and that Field’s code purported to be complete, anticipating future cases. Arguing in this way, he usually did not invent false points; he just pointed to extreme elements of some real features of codification or called attention to others by radicalizing them. Carter was so successful that even current literature on the American codification debate sometimes assumes his depiction of Field’s proposed codification, as if Field intended to replace the common law system wholesale with the civil-law system.⁸⁷

Carter’s identification of codification with mechanical formalism does not correspond with the historical facts in civil law countries. Carter could have had a thorough understanding of both the Prussian and the French Codes, as well as of the German Civil Code project. Carter instead used—or misused—some “Continental” models, even though not always accurately, to present the most radical face of codification, no matter whether his depiction reflected Field’s proposal or not, claiming that Field was misrepresenting, in order to promote and call attention to, his codification scheme.

Consequently, even from a strictly scientific point of view, the code opponents’ main concern was not what it seemed to be, or what they pretended it to be. To make a comparison: it has been suggested that Savigny’s real concern was not so much that a people not be governed by a premature codification, as that Germany not be governed by a French code.⁸⁸ Similarly, Carter’s authentic concern was not so much with a

86. Masferrer, “The Passionate Discussion among Common Lawyers about Postbellum American Codification,” pp. 199-201; on this matter, see Masferrer, “Defense of the Common Law against postbellum American Codification: Reasonable and Fallacious Argumentation,” already cited in the footnote n. 11.

87. Grossman, for example, suggests that: “In the decades following the Civil War, the American legal profession engaged in a heated debate about the wisdom of replacing the substantive common law with a written civil code.” (Grossman, “Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification,” p. 149).

88. Paul von Koschaker, *Europa und das Römische Recht* (1947), pp. 258-259.

private law based on custom (or a social standard of justice) and fairly applied by judges, as with a legislature involved in private lawmaking, thus avoiding the paths of European countries, in particular France, in enacting modern codes.

Neither Code opponents nor code proponents knew the view of French lawyer and politician Jean-Étienne-Marie Portalis (1746-1807), according to whom “it is impossible to regulate everything by strict rules,” and that because “it is a wise prediction to realize that it is not possible to foresee everything,” the judge should be granted broad discretion.⁸⁹

In this regard, Portalis’s statements on the powers of the judge diverged significantly from the picture of civil law codification articulated by code opponents. Portalis’s views were clear: he stated that his Code did not pretend “to govern all and to foresee all,” because “whatever one does, positive law can never completely replace the use of natural reason in the affairs of life.”⁹⁰ Consequently, judicial activity would face constant problems, unsolvable by a merely mechanical application of the Code: “Few cases are susceptible of being decided by a statute, by a clear text. It has always been by general principles, by doctrine, by legal science, that most disputes have been decided. The Civil Code does not dispense with this learning but, on the contrary, presupposes it.”⁹¹

89.

The possibility of supplementing the law by natural truths and the right directions of common sense should be left to the judges. Nothing could be more childish than to endeavor to take necessary steps in order to provide the judges with strict rules . . . The exercise of the power to judge is not always directed by formal prescriptions. There are also maxims, usages, examples, opinions of text writers . . . The right approach, consisting in the knowledge of the spirit of laws, is superior to the knowledge of the laws themselves.

Jean-Étienne-Marie Portalis, *Code Civil*, 1803; quoted by Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2, 1952, *St. Louis U. L.J.* 335, pp. 350-351.

90. Jean-Étienne-Marie Portalis, *Discours préliminaire prononcé lors de la présentation du projet de la commission du gouvernement*, P.A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 469 (1827; reprinted 1968) [hereinafter Portalis, *Discours préliminaire*].sss

91. Portalis, *Discours préliminaire*, p. 471; as Gordley shows, Portalis’s views caused concern when they were circulated to the French appellate courts, the *Conseil d’état* and the *Tribunal*. According to some, judges would enjoy too much authority, facilitating usurpations of legislative power by the courts, and granting them a “despotic” power (James Gordley, “Myths of the French Civil Code,” 42 *Am. J. Comp. L.* 459, 488-489 (1994) [hereinafter Gordley, *Myths*]). Despite this criticism, Napoleon Bonaparte approved and enacted the Civil Code after reducing the *Tribunal* to fifty members by expelling the code’s critics; recently some scholars tend to emphasize that neither the Prussian Code nor the French Code intended to foresee all cases. They recognized that this was utterly impossible, and that judges should fill in the gaps themselves. In fact, articles 49 and 50 of the Introduction to the Prussian Code allowed judges to decide according to the

Code opponents nevertheless preferred not to confront Portalis's views, because any discussion of it would have aided their adversaries. Instead, they preferred to ignore these views on the relationship between the legislature (code) and the judiciary (with notable powers of interpretation) and emphasized other aspects, albeit in a way not necessarily in agreement with Portalis. They argued, first of all, that jurisprudence's development had to be based mainly on the decisions of judges applying the social standard of justice to each particular case, and secondly, that, if a civil code were to be enacted, judicial activity would turn into a mechanical application of it. In emphasizing mechanical application, Carter and his followers referred to the extreme theory defended by the French Code's later commentators, who, unlike Portalis, maintained that judges should refer solely to the text of the Code, creating the myth that the Code was self-sufficient.⁹²

It is unsurprising that code opponents sometimes used the most radical theories in favor of codification in order to hinder any agreement on possible schemes of codification and that more moderate positions were not being articulated in the middle of a contentious debate. When François Géný, whose *Méthode d'Interprétation et Sources en Droit Privé Positif* (1899) argued that the Civil Code could not be self-sufficient and, consequently, both judicial decisions and writings of scholars should also be regarded as sources of French law,⁹³ the New York codification debate was already over. Consequently, this authority's view had no impact on the discussion.

Carter reproached Field for pretending to provide in the code the sole basis for deciding every single case and asserted that "the code would supplant decisional law more completely than Field acknowledged and

"general principles adopted in the code." (Weiss, "The enchantment of codification in the common-law world," p. 459); on the French Code, see Gordley, "Myths of the French Civil Code," pp. 484-492.

92. Gordley, "Myths of the French Civil Code," pp. 490-492.

93. According to Grossman,

Géný was followed in the early twentieth century by the German "school of free law" (*Freie Rechtslehre*), including scholars such as Hermann Kantorowicz, Eugen Ehrlich, and Ernst Fuchs. These jurists, who were vital inspirations for Roscoe Pound and, through him, the American legal realists, expanded on Géný's arguments with reference to the German Civil Code, which went into effect in 1900. They contended that the logical and conceptual method of code interpretation was a deceptive cloak for creative judging. They urged judges to candidly embrace their role as creative law makers and, with the aid of social science, to base their decisions on sources outside the formal law.

Grossman, "Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification," p. 17, note 93.

would reduce judges' role to the mechanical application of statutory language. In doing so, Carter attempted to portray Field's Civil Code as an arrogant, grand scheme that would render New York's legal system indistinguishable from that of Napoleon's France."⁹⁴

Analyzing Carter's view of the Prussian and French Codes, it is clear that Carter would not admit that Field's code did not intend to be complete and to foresee future cases and also that Field did not think that judicial activity would devolve into a mechanical application of the code. From this perspective, Carter's persistent criticism of some aspects, which do not seem to fit with the content of Field's proposed code, can be better understood. Carter's assertion that the Civil Code's text alone would dictate the result of almost every case constitutes a good example of it.

It would be mistaken to think that the French codification constituted—still constitutes—a source of passion and ideology in all common law jurisdictions. I would dare to say that the abovementioned English and New York cases are exceptional and do not faithfully reflect what happened—and is happening—in other common law territories. A brief survey of other jurisdictions will suffice to demonstrate this point.⁹⁵

E. *Australia and New Zealand*

This negative view of codification in England and New York was exceptional. It arguably fails to reflect the view of other common law jurisdictions. The Australasian legal tradition shows several achievements and failures in legal codification,⁹⁶ a matter that has drawn interest among scholars.⁹⁷ Although Australian law students are taught in their first-year law curriculum that legislation is today the main legal source,⁹⁸ this does

94. Grossman, "Langdell Upside-Down . . .," p. 166.

95. An exhaustive description of the impact of French codification in the common law world would require a particular survey of each common law jurisdiction, distinguishing different fields of law, because, traditionally, codification of civil law has been regarded much more "Continental" than the codification of commercial law or criminal law. Since the impact of the French codification in Canada was substantial and its description would go beyond the limits of this paper, I leave this jurisdiction for another occasion.

96. For a first overview, see Alex C. Castles, *An Australian Legal History*. The Law Book Company Limited, 1982, pp. 354-355, 445-449, 480-492; Bruce Kercher, *An Unruly Child. A History of Law in Australia*. Allen & Unwin, 1995, pp. 124-127; Peter Spiller/Jeremy Finn/Richard Boast, *A New Zealand Legal History*. Brooker's, pp. 40-45, 102-105, 158-161.

97. See, for example, S.J. Stoljar (edit.), *Problems of Codification*; Donald, "Codification in Common Law Systems"; and White, "The Making of the New Zealand Criminal Code Act of 1893: A Sketch," cited in the footnote 29.

98. Kath Hall, *Legislation* (Butterworths, Australia, 2002), p. 7:

Our common law system has two main sources of law, cases (law made by judges through judicial decisions) and legislation (law made by parliament). Traditionally, case

not mean that Australia has entirely codified its law. In fact, only the criminal law has been codified and not in all the Australian states,⁹⁹ although a draft of a model criminal code has been under discussion during the last fifty years.¹⁰⁰

Parliamentary debates demonstrate that references to the French codification are few in comparison with the New York Civil code debate. It seems that, in both Australia and New Zealand, French codes were regarded with less reluctance than in England and the United States. It seems that their main concern—and fear—was more not to anticipate England in codifying the law than to sweep away their common law.

In Western Australia,¹⁰¹ where a criminal code was enacted in 1902,¹⁰² only a few references to France can be found in the parliamentary

law was considered the most important source of law in our common law legal system. Today, however, legislation has overtaken case law as the most prolific and significant source of law.

99. See Jeremy Finn, “Codification of the Criminal Law: the Australian Parliamentary Experience,” B. Godfrey/G. Dunstall (eds.), *Crime and Empire. 1840-1940 Criminal Justice in Local and global Context* (Willan Publishing, Cullompton, England, 2005, pp. 224-237); more generally, see Robin O’Regan, *Essays on the Australian Criminal Codes*. The, Sydney-Melbourne-Brisbane-Perth, 1979; Robin O’Regan, *New Essays on the Australian Criminal Codes*. The, Sydney-Melbourne-Brisbane-Perth, 1988; Eric J. Edwards/Richard W. Harding/Ian G. Campbell, *The Criminal Codes. Commentary and Materials*, being Cases and materials on the criminal law in Queensland, Western Australia and the Northern Territory. Law Book Company Limited, 4th edition, 1992.

100. On this matter, see Mathew Goode, “Codification of Australian Criminal Law,” (1992) 16 *Criminal Law Journal* 5; C.R. Snyman, “Codifying the Criminal Law—The Australian Experience,” (2000) 13 *S. Afr. J. Crim. Just.* 214; S. Bronitt / M. Gani, “Criminal Codes in the 21st Century: The Paradox of the Liberal Promise,” *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (S. Bronitt & M. Gani, eds.), Oxford, United Kingdom, 2008, pp. 235-260; see also the *Draft Criminal Code for the Australian Territories*, submitted to the Attorney-General (the Hon. N.H. Bowen, Q.C., M.P.) by the Law Council of Australia, together with Commentary by the Council’ Co-ordinating Committee. February, 1969 (The Parliament of the Commonwealth of Australia, 1969, Parliamentary Paper No. 44). Presented by Command 14 May 1969, Ordered to be printed 29 May 1969. Commonwealth Government Printing Office.

101. On Western Australia, see R.G. Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*. Seventh Edition. LexisNexis Butterworths, 2008, pp. 1-10; Enid Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979*. University of Western Australia Press, 1980, pp. 233-238; Finn, “Codification of the Criminal Law: the Australian Parliamentary Experience,” pp. 16-20.

102. *The Criminal Code of Western Australia, and the Criminal Practice Rules of 1902*, with Index to the Act (1 & 2 Edwd.VII., No. 14) and the Code of Criminal Law set forth in the First Schedule thereof. Perth, W.M. Alfred Watson, Government Printer, 1902; *An Act to Amend the Criminal Code* (Assented to, 20th December, 1902, Western Australia). Perth, W.M. Alfred Watson, Government Printer, 1902; *An Act to Amend the Criminal Code* (Assented to, 20th December, 1902, Western Australia). Perth, W.M. Alfred Watson, Government Printer, 1902 (it contains only a repeal of Subsection 5 of Section 19; and an Amendment of Section 319); *An Act to Amend the Criminal Code* (Assented to 14th December, 1906, Western Australia). Perth, W.M.

debates. And these references were not negative. A. Jamenson, the Minister for Lands, in moving the second reading of the Criminal Code Bill, emphasized that it was

a measure that simplifies and consolidates our criminal law, and thus is entirely in accordance with the progressive spirit of our time. Indeed, I think all progressive countries have a criminal code. I know that these remarks apply to France and Italy, and to all the Northern States of America. Both New Zealand and Queensland have a criminal code. Indeed, the criminal code of Queensland is really the source from which this code has been drawn.¹⁰³

But others had different concerns. R.S. Hayness saw it as “trouble” to enact a Bill that had not been enacted in England even after the participation of

the best judges in England, . . . includ[ing] among its members one of the very highest authorities on criminal law, Sir James Fitzjames Stephen. That commission of lawyers sat, not for a month or several months, but for years; and with the assistance of the Code Napoleon and other European codes, to which the Minister has referred, framed a code for Great Britain.¹⁰⁴

While code proponents put forward their initiative referring to other jurisdictions, both from the civil law and the common law, which have succeeded in codifying the law, others (I do not dare to call them code opponents, although some of them may deserve this name) seem to be more reluctant in anticipating England in this regard. That was the case of R.S. Hayness, who saw it as a “trouble” to enact a Bill that in England had not been enacted after the participation of

the best judges in England, and certainly included among its members one of the very highest authorities on criminal law, Sir James Fitzjames Stephen. That commission of lawyers sat, not for a month or several months, but for years; and with the assistance of the Code Napoleon and other European codes, to which the Minister has referred, framed a code for Great Britain.¹⁰⁵

Alfred Watson, Government Printer, 1902; the current code of Western Australia is the *Criminal Code Act* 1913.

103. Western Australian Parliamentary Debates (WAPD), xx.2446 [22 January 1902].

104. *Ibid.*, xx.2448 [22 January 1902].

105. Western Australian Parliamentary Debates (WAPD), vol. XX, pp. 2448 [22 January 1902]:

The trouble is this. In England a special commission has sat for many years: I cannot say for how many, but I know the commissioners have submitted their seventh report on the laws of England. I do not remember when the commission was first appointed, but the fourth report of the Criminal Law Commissioners, as they were called, delivered sometime in the seventies, made certain recommendations. Those recommendations

He seemed to be more concerned by the fact of anticipating England than by resorting to “Continental” codes.

The same can be seen in studying the drafting and passing of the criminal codes of New Zealand (1893),¹⁰⁶ Queensland (1899),¹⁰⁷ Tasmania,¹⁰⁸ and the Northern Territory.¹⁰⁹ Attempts to codify the criminal law in Victoria,¹¹⁰ South Australia,¹¹¹ and New South Wales¹¹² did not succeed. It has been suggested that common law experiments to codify

resulted in the appointment of the commission referred to by the Minister of Lands, which commission consisted of probably the best judges in England, and certainly included among its members one of the very highest authorities on criminal law, Sir James Fitzjames Stephen. That commission of lawyers sat, not for a month or several months, but for years; and with the assistance of the Code Napoleon and other European codes, to which the Minister has referred, framed a code for Great Britain.

106. Spiller/Finn/Boast, *A New Zealand Legal History*, pp. 40-45, 102-105, 158-161; White, “The Making of the New Zealand Criminal Code Act of 1893: A Sketch,” cited in the footnote 29; Finn, “Codification of the Criminal Law: the Australian Parliamentary Experience,” pp. 4-12; Finn mentions that W. Downie Stewart, a Dunedin lawyer, featured the French code as “the most complete criminal code in operation,” and also praised the Indian Penal Code of 1860 (see New Zealand Parliamentary Debates, vol. LIII, pp. 410-412 [1 September 1885]).

107. *Criminal Code Act 1899*; see Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, cited in the footnote 101; Reginald Francis Carter, *Criminal Law of Queensland* (Butterworths, 5th edition 1979, pp. 3-45, which contains *The Criminal Code Act, 1899* (63 Vic. No. 9), of Queensland), as well as all the successive amendments; see also Samuel Griffith, *A Digest of the Statutory Criminal Law in Force in Queensland on the First Day of January, 1896*, (which it is within the competence of the Parliament of Queensland to repeal or to Amend,) with A Table of the of the Statutes, prepared by The Honourable Sir Samuel Walker Griffith, G.C.M.G., Chief Justice of Queensland. Brisbane, Edmund Gregory, Government Printer, 1896; Wright, “Self-Governing Codification of English Criminal Law and Empire: The Queensland and the Canadian Examples,” already cited in the footnote 95; Finn, “Codification of the Criminal Law: the Australian Parliamentary Experience,” pp. 13-16.

108. *The Criminal Code Act, 1924* (14 Geo. V., No. 69). Tasmania, H.H. Pimblett, Government Printer [Reprinted from Butterworth’s Consolidated Tasmanian Statutes (Reprint), 1936]; see also John Blackwood, *The Tasmanian Criminal Code. Part I. General Principles, Cases and Materials. Teaching Materials in the Tasmania Law School*, 1978.

109. *Criminal Code Act 1983*.

110. Greg Taylor, “The Victorian Criminal Code,” (2004) 23 *U. Queensland L.J.* 170; instead of a code, Victoria has a more or less extensive criminal consolidation statute, *Crimes Act 1958* (Vic).

111. Although a draft code was prepared, F. W. Pennefather, *Draft of a Code of Criminal Law*, prepared for the Government of South Australia; together with Explanatory Letter, Notes, Schedules, and Tables. South Australia, C.E. Bristow, Government Printer, North Terrace, Adelaide, 1902; on this matter, see Greg Taylor, “Dr. Pennefather Criminal Code for South Australia,” (2002) 31 *Common Law World Review* 62; Finn, “Codification of the Criminal Law: the Australian Parliamentary Experience,” p. 21; instead of a code, South Australia has a more or less extensive criminal consolidation statute, *Criminal Law Consolidation Act 1935* (SA).

112. See G.D. Woods, *A History of Criminal Law in New South Wales. The Colonial Period, 1788-1900*. The Federation Press, 2002, pp. 245-261, 277, 292-298, 300-301, 308-309, 318, 345-346, 424; instead of a code, New South Wales has a more or less extensive criminal consolidation statute, *Crimes Act 1900* (NSW).

criminal law in the last nineteenth century and twentieth century represent a move away from the traditional methods of the common law towards the civil law and “as having set in train the ultimate abolition of judge-made law as an institution of the common law.”¹¹³ However, this is a typical civil scholar’s statement that understandably provokes common lawyers’ replies like that of Jeremy Horder, who notes that the driving intellectual force behind the codification movement in part has been “the wish to snuff out once and for all the flickering flame of judicial creativity in the field of criminal law.”¹¹⁴

Only one attempt was made in the Australasian context to codify the whole law of a jurisdiction, but it failed. It was in Victoria and led by Edward W. Hearn.¹¹⁵ Hearn’s style reminds the great codifiers who seem to have received a “heavenly” call to devote their whole life to get a code enacted. In October 1879, in presenting his first codification Bill, he concluded his speech by invoking the images of Justinian, Napoleon, and Francis Bacon. While this imagery was probably intended to attract support for his codification programme through an appeal to “patriotic pride,” it is probably not unreasonable to infer a belief that future commentators might speak of a quadrumvirate of great codifiers.¹¹⁶

113. Cadoppi, “The Zanardelli Code and Codification in the Countries of the Common Law,” p. 117.

114. J. Horder, “Criminal Law,” P. Cane / M. Tushnet (eds.), *Oxford Handbook of Legal Studies* (Oxford University Press, 2003), p. 227 (quoted by Bronitt / Gani, “Criminal Codes in the 21st Century: The Paradox of the Liberal Promise,” p. 237).

115. On Hearn, see John Waugh, *First Principles*. The Miegunyah Press, 2007, pp. 30-41; J.A. La Nauze, “Hearn, William Edward,” *Australian Dictionary of Biography*. Melbourne University Press, 1972, vol. 4, pp. 370-372; see also William Edward Hearn, *The Theory of Legal Duties and Rights: An Introduction to Analytical Jurisprudence*. Melbourne, John Ferres, Government Printer, 1883; *The General Code 1885: Being a Bill to Declare Consolidate and Amend the Substantive General Law*. Prepared and Brought into the Legislative Council of Victoria by William Edward Hearn. Melbourne, John Ferres, Government Printer, 1885.

116. Referring to Napoleon, Hearn declared that

[i]t was not to the trophies of Austerlitz or of Wagram that the first Napoleon looked for posthumous renown. It was not as the ruler of a conquered Europe that he expected to be known to later ages. ‘I will go down to posterity with my code in my hand.’ . . . The great conqueror knew that long after the last echoes of the thunders of Marengo and of Lodi had died away, he would be remembered, even down to many succeeding generations, by the Code Napoleon.

(Victoria Parliamentary Debates, vol. 31, p. 1612). Four years later, in *The Theory of Legal Duties and Rights*, p. 361, Hearn was to quote the remark of a contemporary commentator that “the formal amendment of the law is indeed one of the most useful services which can be rendered to the human race, and one which never fails of an ample reward of fame.” and to wryly comment that “I fear that this remark is true only of Royal personages, of the Justinians and of the Napoleons, and not of the actual labourers in the field of law.”

In Hearn's view, the fact that Victoria could anticipate England in enacting a code was a motive for pride,¹¹⁷ since that code would become a model for other common and civil law jurisdictions:

If [the codification programme] were carried out with reasonable care and with reasonable energy, we would have a code of laws which, as lord Bacon has told us, is a gift worthy of a king—a code which would bring to us honour and possibly imitation, not only in England, but over the whole of Europe and America—a code which our children and our children's children would look to with admiration and pride.¹¹⁸

Such an ambitious codification project had hardly any chances to be successful, but it shows the different approaches to “patriotic pride,” depending on the common law territories: while Amos in England and Field in New York never would have dared to praise Napoleon and the French codification, Hearn thought that an appeal to the emotions rather than the intellect would be most likely to secure the adoption of his program and that patriotic pride in future glory would be the most effective way to get his code enacted. He was probably wrong, but he would not even have dared to use this strategy had he lived in late nineteenth-century England or New York.

III. CONCLUDING REMARKS

The classical comparative-law approach or taxonomy, to which I referred at the beginning of this Article, whereby the civil law tradition is a codified system and the common law tradition is a noncodified system, needs to be revised and rectified for several reasons. First, because it does not reflect the reality, which is much richer and complex than it may seem. Secondly, it is misguided to present the French codification as the model code for both civil law jurisdictions and Western legal traditions. There

117. William Edward Hearn, *Address by the Hon. William Edward Hearn on the Amendment of the Law*. Melbourne, John Ferres, Govt. Printer, 1882 or 1883:

... , that we should not feel some thrill of pride if it were indeed the case that the great work of codification, which for a hundred years has been talked about in England, and about which the talking is there still going on, should to some considerable extent be actually carried into effect in Victoria. There is now a Bill before our Parliament which—all imperfect as it doubtless is, and needing in its numerous details correction from more learned and skilful pens than its author could supply—at least professes to deal exhaustively with one great division of our law. No English Bill has ever ventured upon so wide a field, and the measure, while it is complete in itself, may serve hereafter as the first chapter of the Code of Victoria.

118. Victoria Parliamentary Debates, vol. 31, p. 1612.

are different kinds of codes in both civil law and common law jurisdictions.

I do not share the view of those who maintain both that codification constitutes a peculiarity (or trait) of the civil law tradition and that the French codification is the model of the civil law codification. The link codification/French model/civil law tradition has negatively affected and considerably distorted the scholarly discussion on the impact of the French codification in both the civil law and common law traditions.¹¹⁹ In addition, the French civil code has not been properly described and the view of its commentators of the School of the Exegesis has been more emphasized than that of its drafters. Some legal historians have rightly shown that the French Civil code was not what its commentators wanted it to be, and pointed out what its drafters had in mind when preparing the draft. It is true that the distorted presentation of the French civil code had a historical basis inasmuch as it reflects its commentators' legal thinking. The problem was that the commentators' idea of the code was disseminated so much that an important part of Western legal historiography has continued presenting a distorted view of the French Civil code. Some common lawyers made a considerable contribution to disseminating this view, thus trying to defend the common law from any scheme of codification that might sweep away their own legal tradition. The case of the James C. Carter and other code opponents in countering Field's proposed civil code is paramount.

It is time to make clear that the French codification is neither the model of the civil law tradition codification nor the model of the codification method. The French codes simply constitute the first major achievement in modern legal codification of a Western legal tradition. The time is ripe for legal historians to admit that codification neither belongs to the civil law tradition nor constitutes a peculiarity of the civil law tradition, as if it was incompatible with the common law tradition unless common law itself is abrogated altogether. Thus, there is no abstract

119. Aniceto Masferrer, "Tradition and Foreign Influences in the 19th-century Codification of Criminal Law. Dispelling the Myth of the overall French Influence in Europe and Latin America," *The Western Codification of Criminal Law: The Myth of its Predominant French Influence Revisited* (Aniceto Masferrer, ed.), Dordrecht-Heidelberg-London-New York, Springer (Collection 'History of Law and Justice'), 2018, pp. 3-50; for the Spanish case, see also Aniceto Masferrer, "The Myth of French Influence over Spanish Codification. The General Part of the Criminal Codes of 1822 and 1848," *The Western Codification of Criminal Law: The Myth of its Predominant French Influence Revisited* (Aniceto Masferrer, ed.), Dordrecht-Heidelberg-London-New York, Springer (Collection 'History of Law and Justice'), 2018, pp. 193-242; see also footnote n. 17.

model of codification, only codification practices and discourses. It is true that on that empirical basis, one may discuss comparatively this practice and discourse in different jurisdictions, but this should not be done within the framework of a mythic—and thus, inexistent—model of codification.

It is undeniably clear to me that to present codification as a legal method or technique common to both the civil law and the common law traditions is not an easy enterprise. Several obstacles need to be overcome.

The fact that a code is—or has been, historically—a legal tool consisting of a legislative enactment, seems to support the idea that codification is closer to the civil law tradition than to the common law tradition. However, it is undeniable that the distinction whereby civil law is based on legislation and common law is developed mainly through case law has considerably changed. In this regard, the fact that the Harvard law school—like other Anglo-American law schools—introduced some years ago a course on “Legislation and Regulation” in the first-year students’ curriculum,¹²⁰ and that first-year students are taught that today “legislation has overtaken case law as the most prolific and significant source of law,”¹²¹ shows that there is a gradual process of convergence on this matter. I do not mean that this distinction has disappeared completely, but that the legal systems are gradually converging.

Nonetheless, the main obstacle to be overcome is the ideological one, which is inextricably related to culture. Inasmuch as culture constitutes the origin of deep feelings, preferences, and prejudices, ideology necessarily emerges and seems to be deeply rooted in the legal mind of lawyers, scholars, and politicians. It is true that legal theory constitutes a scientific undertaking that should exclude nonrational aspects. But this is just theoretical. In practice, though, lawyers are human beings, and hence attached to a specific culture whose origin is found in a geographical context. That being the case, when a scientific matter has been poisoned by the seed of ideology, the bridging of positions becomes particularly

120.

Entering Harvard Law School as a first year student (a “1L”) is an exciting experience. You are immediately immersed in learning the basics of the law. In the beginning, your academic schedule is straightforward. Every 1L takes the required first-year courses: Civil Procedure, Contracts, Criminal Law, Legislation and Regulation, Property, Torts, Problem Solving Workshop, and Legal Research and Writing (LRW).

<http://www.law.harvard.edu/academics/curriculum/academic-advising-at-hls/index.html>

121. See footnote 98.

difficult—if not impossible—and legal argumentation and discourse become more passionate than scientific.¹²²

From what has been analyzed and explored in this Article, the conclusion is clear: namely, that the ideology, which stems from a biased attachment to a peculiar culture, constitutes the main obstacle in reshaping the notion of codification in the Western legal traditions. In this sense, the attempts to codify the criminal law in England and in Australia, as well as Field's attempt to codify the civil law in New York, are examples that reveal to which extent the codification debate can be pervaded by passion and ideology. In studying the sources, including parliamentary debates, legal doctrine, drafts, articles in newspapers, pamphlets, etc., it can be seen how some common lawyers look at codification and to which extent the French codes were—and are—regarded as a model that some try to impose upon a legal tradition that is not compatible with codification. To some common lawyers, codification is, even today, considered to be a civil-law and, consequently, a foreign notion, to be regarded with a certain degree of coldness or indifference, if not reluctance or annoyance. As said, Western lawyers need to move from an ideological to a functional approach to codification,¹²³ from a passionate to a more scientific one.¹²⁴ This necessity can be particularly perceived in some of those territories in which codification's attempts failed, where codes were seen as a threat to the common law system.

Let it not be mistaken that I blame common lawyers for such an ideological perspective of codification. I do think that such a prejudiced, ideological notion of codification can be found among both civil and common lawyers. Bergel's distinction between a civil-law "substantive" codification and a common-law "pure formal" codification exemplifies what a civil lawyer should avoid in studying codification,¹²⁵ so it may be easier for common lawyers to take codes less seriously.¹²⁶

122. It is undeniable that, since everybody has his/her own ideas, scholars cannot achieve objective knowledge (unlike Leopold von Ranke suggested). However, it is clear that some topics have been notably poisoned by the seed of ideologies which made considerable efforts to reconstruct history and legal development with biased outcomes. It is not a matter of presenting oneself as scientific and others as not, since this would not further historical understanding. It is rather a matter of understanding to which extent political, cultural and ideological reasons may constitute the driving force of some scientific debates; on this matter—and concerning the codification's debate—see the references cited in the footnote 11.

123. See footnotes 19 and 20.

124. See footnotes 11, 81 and 85.

125. See footnote 30.

126. Kötz, "Taking Civil Codes Less Seriously," already cited in the footnote 6.

Controversy on codification continues today. The enterprise of codifying private law in Europe and the two-century-long attempts to codify criminal law in England give clear evidence of it.¹²⁷ In order to overcome the ideological view of codification, the ethnocentrism of the French and British legal cultures must go through a gradual change, allowing other jurisdictions to develop and enhance the peculiarities of their own legal traditions.¹²⁸ Otherwise, codification will continue to be a “burning question.”¹²⁹

127. See footnote 22; it is revealing that even when talking about criminal law codification in the common law system, some common law lawyers refer to civil law codification in the civil law tradition, without paying much attention to the distinction between the provinces of private law and criminal law, as if codification would necessarily need to be approached from ‘civil’ (or ‘private’) and ‘Continental’ law perspectives.

128. Aniceto Masferrer, “Codification as Nationalization or Denationalization of Law: The Spanish Case in Comparative Perspective,” *Comparative Legal History* 4.2 (2016), pp. 100-130; see footnote n. 17.

129. See footnotes 4 and 119.