The Family Affinities of Common-Law and Civil-Law Legal Systems

Craig M. Lawson
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By CRAIG M. LAWSON*

A.B., Yale University, 1970; J.D., University of California, Hastings College of the Law, 1974; Associate Professor, College of Law, University of Nebraska—Lincoln.

I. INTRODUCTION

Comparative lawyers have devised many schemes to group the world’s legal systems into families according to their similarities and dissimilarities. This taxonomic debate has been one of the staples of modern comparative scholarship. Although the debate seems at times abstruse, disputes over classification are nonetheless important, since they result in structures of thought which greatly influence the ways foreign legal systems are studied and understood.

There is general agreement among comparatists in characterizing common law and civil law as two distinct groups within the handful of major families of legal systems in the world today. The historical and geographical importance of the common-law and civil-law families is certainly not to be denied. What is doubtful is their independence. Recent comparative scholarship has so clearly underlined the convergence of common law and civil law and has shown them to be so fundamentally alike that it is time to re-examine whether these two families

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1. See generally R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (2d ed. 1978). All references herein are to a more recent French edition of René David’s great treatise, R. DAVID, LES GRANDES SYSTÈMES DE DROIT CONTEMPORAINS (8th rev. ed. C. Jauffret-Spinosi 1982) [hereinafter cited as DAVID]. Translations from this work and from other foreign works are the author’s, unless otherwise noted.

2. Most recent surveys accept common law and civil law as distinct major families of legal systems, see, e.g., 1 P. ARMINJON, B. NOLDE & M. WOLFF, TRAITÉ DE DROIT COMPARÉ (1950); DAVID, supra note 1; 1 K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW: THE FRAMEWORK (1977) [hereinafter cited as Zweigert & Kötz], but it has occasionally been suggested that both actually belong to a larger occidental family. See, e.g., R. DAVID, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL COMPARE 224 (1950); David, Deux Conceptions de L’Ordre Social, in I IUS PRIVATUM GENTIUM: Festschrift für Max Rheinstein 53 (E. Von Caemmerer, S. Mentschikoff & K. Zweigert eds. 1969) [hereinafter
might not better be joined as two distinct branches of a single larger group of legal systems, the Western liberal democratic legal family.  

II. TAXONOMY OF CONTEMPORARY LEGAL SYSTEMS

Comparatists do not agree on the criteria for grouping legal systems into a global order. Indeed, several major obstacles to the comparison and grouping of entire legal systems are readily apparent. One obstacle is the high degree of internal specialization characteristic of all the world’s contemporary legal systems. As a result, two legal systems may belong in the same group when one set of their institutions is compared, but they may belong in different groups when another set of institutions is compared. For example, the comparison of Anglo-American and European private law yields three groups: a common-law family, a Romanistic legal family, and a Germanic legal family. The comparison of their constitutional law results in only two groups, not the traditional common-law and civil-law groups, but rather one group comprising systems which possess institutions exercising judicial control over the constitutionality of law and another group whose

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3. The position taken in this Article cannot for reasons of space be exhaustively defended here. Rather, the position taken is meant to renew the debate among comparatists on the subject and to stimulate thought on such topics as the structural influence of concepts and terminology on Western legal families.

The name, “Western liberal democratic legal family,” was chosen because it encompasses the modern Western conception of law and important elements of the history of common law and civil law. No attempt has been made here, however, to define the complete membership of the family or its internal subgroups. Other legal scholars, while not expressly recognizing the existence of a Western family, have suggested subgroupings for the Western legal systems. For example, Professor David’s categories include the Anglo-American, Romano-Germanic, and a hybrid of either or both. DAVID, supra note 1, at 23-26. Zweigert and Kötz divide the West into common-law, Romanistic, Germanic, and Nordic families. ZWEIGERT & KÖTZ, supra note 2, at 63. Malmström, on the other hand, proposes the following occidental subdivisions: the occidental family of continental (European) legal systems; the Latin American family of legal systems; the Nordic family of legal systems; and the common-law family of legal systems. Malmström, supra note 2, at 147.

4. The comparison of entire groups of legal systems is often referred to as macrocomparison, a term sometimes used in this Article, in contrast with microcomparison, the comparative study of particular legal institutions, doctrines, or other parts of legal systems. See Rheinstein, Legal Systems: Comparative Law and Legal Systems, in IX INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 204, 207-09 (1968).
members possess no such institutions.  

A second obstacle is the evolving focus of comparative legal scholarship. Since different generations of comparative lawyers have different interests, one would expect them also to have different intuitive pictures of the legal systems which they study. In addition, legal systems are continually changing, although this process will probably alter the microscopic terms of comparison more quickly than it alters the macroscopic groupings of any global taxonomy. Glanvil in the twelfth century and Bracton in the thirteenth century recognized that the leges Anglica\textae and the leges Romanae differed fundamentally. By the fifteenth century in England, there was a distinct sense of rivalry between the common law and Roman law. The modern comparison of common law and civil law has inherited the larger features of this early sense of distinction, although the finer terms of the comparison have no doubt changed. A final obstacle is that any taxonomy of legal systems must schematically simplify these systems for the sake of manageability, and the more simple picture may be less accurate. 

Despite these obstacles, the complexity of the world's legal systems that makes taxonomy difficult also makes it important. The world's legal systems are so numerous and diverse that they require analytical frameworks to facilitate understanding and study. Thus, the major purpose of any global taxonomy is to organize knowledge of foreign law into a workable order. To suit that purpose, one must find a taxonomy which compares fundamental features—those which are more likely to be enduring and widely dispersed—and features which broadly represent the range of laws and institutions within a legal system. In selecting representative features, one aims for relative completeness, depth, and longevity.

What features of legal systems most clearly define these systems and allow them to be grouped on the basis of their similarities and differences? There is no widely accepted answer to this question. Nev-

5. Zweigert & Kötz, supra note 2, at 59; see also Malmström, supra note 2, at 139 n.2. On the subject of classifying institutions of judicial review, see generally M. Cappelletti, Judicial Review in the Contemporary World (1971).


7. The approach to taxonomy taken in this Article draws together most of the important topics of modern macrocomparative debate. Like other approaches to taxonomy, it is pluralistic, but unlike others, it ranks the criteria of classification according to their order of importance. See Zweigert & Kötz, supra note 2, at 61-66; Malmström, supra note 2, at 130, 142-44.
ertheless, one can select several descriptive elements which often appear in macrocomparative surveys. These elements, in their approximate order of importance, are: history, conception of law, structural elements of the formal system of laws, and institutional elements of the legal system.

A. History

The pre-eminent current surveys of the world's legal systems, *Les Grandes Systèmes de Droit Contemporains*, by René David, and *An Introduction to Comparative Law I: The Framework*, by Konrad Zweigert and Hein Kötz, both begin their descriptions of common-law and civil-law families with summaries of their histories. Most other comparatists approve, because major legal traditions are products of their histories. Every generation of lawyers receives its legal order from the past, shaped by forces that are now largely historical. Few generations are given the opportunity to consciously refashion their entire legal order, and even those few are strongly influenced by the history of the legal order which they have undertaken to remake. Thus, history is probably the most important single factor shaping legal culture.

Although history may reveal the forces that have shaped contemporary legal systems and may alert us to a legal system's most enduring features, history is not properly a part of contemporary legal systems. History is only the starting point of comparative taxonomy. Contemporary legal systems may come to resemble one another so closely that we are forced to group them together despite major differences in their histories.

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10. Professor David does not use the term civil law to refer to the continental Western European legal systems. Zweigert and Kötz use the term but only infrequently. They do not group all these legal systems together, but rather separate the Romanistic legal family, Zweigert & Kötz, supra note 2, at 68-132, whose leading members are France and Italy, from the Germanic legal family, id. at 133-89, whose leading members are Germany, Austria, and Switzerland. David treats all these systems as a single group, but chooses the name "Romano-Germanic legal family" to call attention to the shared contributions which Romanistic thought and Germanic legal science have made to the development of the family, David, supra note 1, at 23 n.1. Legal scholars writing in English, when discussing these Western European legal systems use the terms civil law and continental law. Since the reference to the non-Marxist continental legal systems is clear, this practice is followed herein. The reader should therefore understand that the terms Romano-Germanic legal family, civil law, and continental law are for purposes of this Article interchangeable and that each term refers to Zweigert and Kötz's Romanistic and Germanic legal families grouped as one.
11. See, e.g., Malmström, supra note 2, at 144.
B. Conception of Law

If certain legal institutions, structures of thought, and attitudes about law persist long enough, their characteristics seem to be gradually absorbed into society's underlying set of assumptions about the nature of law and its role in organizing social life. Taken collectively, this set of fundamental assumptions about law constitutes a particular culture's conception of law and powerfully influences the life of the law in that culture.

The phrase "conception of law" is commonly used to describe a set of predominant attitudes and assumptions about the nature of law and the role of law in regulating social behavior. It is a somewhat misleading term in that it suggests an idea consciously entertained, when in fact most members of a culture may never consciously have formulated the ideas and attitudes described as constituting their cultural conception of law. The term also suggests a spurious singleness of idea; in fact, a culture's attitude toward law is complex, being composed of assumptions not always consistent with one another, and no single set of assumptions about law can ever obtain the unanimous adherence of all members of a particular culture. Even so, certain fundamental attitudes toward law will have been predominant and historically deep-rooted.

Individuals in a particular culture generally come to accept that law should possess certain characteristics, play a certain social role, and embody certain values. History is our clearest indicator of a culture's conception of law: those themes which have endured the longest in a

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12. As Professor Adda Bozeman has put it, "The successive generations of any given society will be inclined to think in traditionally preferred grooves, to congregate around certain constant, change-resistant themes, and to rebut, whether intentionally or unconsciously, contrary ideas intruding from without." A. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD 14 (1971) [hereinafter cited as BOZEMAN]. Professor Bozeman's discussion, "Cultures and Modes of Thought," id. at 14-33, is a particularly good general discussion of the way in which culture is largely a civilization's way of thinking. The larger work, The Future of Law in a Multicultural World, is perhaps the single best survey comparing conceptions of law and political order in the world today.


14. See, e.g., The Different Conceptions of the Law, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (R. David ed. 1975); Driberg, The African Conception of Law, 16 J. COMP. LEGIS. & INT'L L. 230 (3d ser. 1934). Professor Yosiyuki Noda has used the term "attitude to law" to mean approximately the same thing. Y. NODA, INTRODUCTION TO JAPANESE LAW 159-83 (1976). Professors Zweigert and Kötz use the more ambiguous term "ideology" in roughly the same sense. ZWEIGERT & KÖTZ, supra note 2, at 66-67.
particular legal system are most likely to have become part of a culture's assumptions about law. Unlike history, conception of law is very much a part of the contemporary legal order—perhaps the most fundamental part, for it will color all the workings of the legal order. For example, the Japanese legal system is formally quite like Western legal systems, yet in practice quite unlike them, because the Japanese conception of law causes the Japanese to use law differently than Westerners would. Because conception of law orients lawyer and nonlawyer alike to the legal system, it is impossible to accurately describe a legal family without taking it into account.

C. Formal Elements of the Legal System

The formal system of enforceable rules which constitutes the positive law is perhaps the most obvious factor in the comparison of legal systems, yet individual rules of law have meant almost nothing in organizing legal systems into larger groups. Comparatists have often remarked that the multinational study of individual legal doctrines discloses that different legal systems frequently give strikingly similar answers to specific problems and differ more in their larger elements, such as categories, divisions, concepts, and techniques. Zweigert and Kōtz, however, have observed that no striking convergence of legal rules is found when studying areas of law affected by strong political or moral values. The commonly observed convergence is limited to "areas of law which are more technical and morally more neutral." Are there areas of law truly "neutral" in any global sense? Are there areas of law which either have not been influenced by fundamen-

16. It is difficult to know whether the formal elements or the institutional elements of legal systems are more important in the characterization of legal systems for taxonomic purposes. Scholars differ on the relative importance of these fundamental elements. Max Rheinstein, for example, agreed with Max Weber that more than anything else, a legal system was impressed with the character of its professional elites, whom Weber called the honoratiore of the law. Rheinstein, supra note 4, at 208-09. Each factor is an essential part of every contemporary legal system, and neither can be said to leave a more distinctive mark on the legal system than the other. Without attempting to resolve this question of priority, formal elements of the legal system will be examined first.
17. See, e.g., Lipstein, Un Juriste Anglais dans la Communauté Européenne, 30 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 493 (1978). Cf. de Vries & Lowenfeld, Jurisdiction in Personal Actions—A Comparison of Civil Law Views, 44 IOWA L. REV. 306 (1959) ("In this area of law [i.e., bases of personal jurisdiction: domicile, nationality, presence of property, etc.] differences among civil-law countries are as great as differences between civil-law and common-law countries"). Id. at 344.
19. Id.
tal social, political, moral, economic, or religious values or rest on assumptions so universally accepted as to be considered neutral or incontestable? If all the legal systems belonging to a major legal family rest on a common conception of law, one would expect that the fundamental assumptions underlying individual rules and doctrines would also be commonly held, resulting in this observed similarity of legal rules. As one progresses to the study of legal systems belonging to different legal cultures, one should find greater divergence between underlying political, economic, social, moral, and religious assumptions, fewer "morally neutral" or "technical" areas of law (in Zweigert and Kötz's terms), and therefore a greater diversity of legal rules and doctrines. This diversity suggests that one might use the comparison of individual rules and doctrines as a touchstone of taxonomy. Certain obstacles, however, exist. On the one hand, to rest a macrocomparative survey on microcomparative studies ranging over entire legal systems would be impossibly cumbersome. On the other hand, to compare only a limited number of rules and doctrines would be less valuable because rules and doctrines are the least enduring and most superficial elements of legal systems.

For these reasons the repeated observation of convergence between the rules and doctrines of two legal systems might serve as a valuable clue suggesting their membership in a common legal family and encouraging scrutiny of the larger, more permanent elements of each legal system. Nevertheless, taxonomic surveys should rely upon broader elements and not upon microcomparative studies. The elements which comparatists have most often selected for this purpose are structural: the major divisions or branches of a body of laws, its fundamental or pervasive concepts, and its terminology.20 These structural elements of every body of laws which shape the legal culture of jurists are invaluable indices of the family to which a legal system belongs.

D. Institutional Elements

Since legal systems employ distinctive institutions to formulate and apply their legal standards, it is imperative to consider institutional elements. The phrase "institutional elements" describes the animating forces in a legal system. Some of these are institutions in the usual sense—courts, legislatures, associations of lawyers, and others. The

processes in the institutional setting must also be considered. Finally, there are the attitudes and modes of thought of the jurists who fill these institutions. How are they trained? How are they organized? Most important of all, what is their professional legal tradition?21

No two legal systems will be perfectly matched in terms of history, conception of law, structure of laws, and institutional features. If it can be said, however, that the similarities between two legal systems outweigh the differences, that the differences are more superficial and rest on a common legal ground, then both legal systems should be put in the same group, and the legal family to which they belong should be described accordingly.

III. HISTORY OF COMMON LAW AND CIVIL LAW

Although distinct from one another, the histories of common law and civil law show similarities in their larger outlines and a striking convergence during the last two or three centuries. On the basis of their histories alone, they may be seen as distinct subgroups of a larger Western liberal democratic legal tradition.

The histories of common law and civil law have diverged in some important respects. Civil law never knew a set of rules akin to equity or any court system akin to Chancery.22 The Romanistic *ius commune* was never received into common law as it was into the various European laws in the sixteenth century. Consequently, the common-law lawyer is less conscious of a Roman law heritage than is the European lawyer.

Of the many bodies of law competing for position in English legal

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21. A legal tradition, as the term applies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.

J. MERRYMAN, THE CIVIL LAW TRADITION 2 (1969) [hereinafter cited as MERRYMAN]. Professor Merryman's definition of legal tradition approaches the definition of conception of law discussed in the text, but his brilliant description of the civil-law tradition seems to be a description more of the deeply rooted, historically conditioned attitudes of European lawyers, than of deep historical attitudes of the European people.

22. Many scholars have singled out equity as one of the unique features of common law. See, e.g., ZWEIGERT & KÖTZ, supra note 2, at 196-200; Weir, Structure and Divisions of the Law: III. The Common Law System, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 77, 80 (R. David ed. 1974).
history, the common law which developed in the royal courts gradually displaced even equity, its most important rival. On the Continent, however, the law administered by the royal courts gradually gave way to the Romanistic law formulated by academic jurists. The common-law forms of action, reminiscent of the ancient Roman system of actions,\textsuperscript{23} were critical to the development of the common law, yet there was no European equivalent. In its academic setting, the developing European ius commune had a substantive focus quite unlike the procedural focus of English law. The nineteenth-century ideal of codification involved setting forth the law in a rational and systematic way, eliminating the disorganization and archaism of traditional law and establishing the natural rights under the protection of an enlightened sovereign. This ideal produced no codes in England, whereas it completely changed the character of Continental law.

Yet in important respects the histories of common law and civil law have been closely parallel, even interlacing, since the twelfth century. Since the eighteenth century they have increasingly converged to the point that their characteristic historical differences have now largely been bridged.

A. Medieval Law

The history of modern law in both England and Europe alike begins in the High Middle Ages. Although the strong centralized feudal hierarchy of Norman England had no parallel on the Continent, where the regional aristocracy was relatively more powerful, the medieval idea of a society ordered through law infected English thought as deeply as it did Continental thought.\textsuperscript{24} Vacarius, an Italian teaching Roman law at Oxford during the mid-twelfth century, and Azo, an English Romanist who exerted great influence upon Bracton in the mid-thirteenth century, were among the internationally preeminent glossators.\textsuperscript{25} Although Bracton's De Legibus et Consuetudinibus Angliae was properly a work on English law, it was strikingly influenced by Roman law, especially in its larger divisions, legal definitions, and basic theories,\textsuperscript{26} and served to transmit some Romanistic thought to Eng-

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\item P. Vinogradoff, Roman Law in Medieval Europe 43-70 (1929); see generally F. Kern, Kingship and Law in the Middle Ages (1956).
\item T. Plucknett, A Concise History of the Common Law (5th ed. 1956) [hereinafter cited as Plucknett].
\item Thorne, Translator's Introduction, in 1 Bracton, On the Laws and Customs of
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land. As Holdsworth pointed out, Bracton's work was analogous to the work of the glossators proceeding contemporaneously on the continent. In their brief summary of the main characteristics of medieval English law, Pollock and Maitland effectively captured its similarities to contemporaneous French law:

Of course one main characteristic of English medieval law is that it is medieval. It has much in common with its sisters, more especially with its French sisters. Bracton might have travelled through France and talked with lawyers whom he met without hearing of much that was unintelligible or very surprising. And yet English law had distinctive features. Chief among these, if we are not mistaken, was a certain stern and rugged simplicity. . . . Gladly would we have had before us a judgment passed by some French contemporary on the law that is stated by Glanvill and Bracton. The illustrious bailli of Clermont, Philippe de Remi, sire de Beaumanoir, lawyer and poet, may have been in England when he was a boy; he sang of England and English earls and the bad French that they talked. If he had come here when he was older, when he was writing his Coutumes, what would he have said of English law? Much would have been familiar to him; he would have read with ease our Latin plea rolls, hesitating now and again over some old English word such as sochemannus; the Anglo-French of our lawyers, though it would have pained his poet's ear, was not yet so bad that he would have needed an interpreter; hardly an idea would have been strange to him.

Perhaps not until the present day were common law and civil law (especially the law of France) to resemble one another so closely as they did from the mid-eleventh to the mid-thirteenth centuries.

B. The Fourteenth and Fifteenth Centuries

Holdsworth's comparison of English and European law in the fourteenth and fifteenth centuries describes the increasingly divergent development of each against their common social background in Western history, allowing us to see the role of law both in the emergence of the modern state from the medieval social order and in the increas-

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ENGLAND 51 (1968). See also SELECT PASSAGES FROM THE WORKS OF BRACHTON AND AZO (F. Maitland ed. 1895).
27. 2 W. HOLDsworth, A HISTORY OF ENGLISH LAW 270 (rev. 3d ed. 1923).
29. 4 W. HOLDsworth, A HISTORY OF ENGLISH LAW 223-25 (1924) [hereinafter cited as 4 HOLDsworth].
ing ascendency of the mercantile order. During this period in England and on the Continent, the law hardened into particular rules of practice and styles of legal thinking that were the property of a professional class of jurists.\textsuperscript{30} Of course this similarity further reinforced the growing differences between common law and civil law by making each less flexible and less susceptible to change. Even so, in England and Europe alike, "the law has a double aspect. In its rules are contained not only the civil and criminal law of the state, but also such constitutional and political theories as the state possesses. In both cases these theories become very important in the law of the future."\textsuperscript{31} The absence in England of an authoritative text, however, and the development of the law through decided cases, rather than through the \textit{communis opinio doctorum} (the consensus of scholars), is a major contrast dating to this period\textsuperscript{32} and has important lingering effects in common law and civil law today.

C. The Sixteenth Century

During the sixteenth century in England, there was also a minor reception of Roman law somewhat like the major formal reception occurring contemporaneously on the Continent. In several important areas the authority of civil law was formally recognized. Doctors' Commons, the professional organization of the English civilians, was similar to the Inns of Court, although it was more recently established.\textsuperscript{33} The development of new courts and councils administering supplementary or rival bodies of law—almost all of them strongly Roman-influenced—was one of the ways English medieval legal and political ideas were adapted to the needs of the modern state.

Another adaptation occurred within the common law itself. Common-law lawyers turned again to the older books of authority, above all to Glanvil, Bracton, Britton, and Fleta, whose medieval English texts showed a heavy Roman influence.\textsuperscript{34} On the Continent, civil-law lawyers were under the same imperative to resolve the legal problems of a new world,

\begin{itemize}
  \item a world in which the growth of a capitalistic organization, both of foreign trade and of domestic industry, was breaking up the medieval guilds, and the medieval agricultural arrangements based on the
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\item 30. \textit{Id.} at 223.
\item 31. \textit{Id.} at 224.
\item 32. \textit{Id.} at 224-25.
\item 33. \textit{Id.} at 236-39.
\item 34. \textit{Id.} at 285-86.
\end{footnotes}
manor and feudal tie between lord and tenant; a world in which the competition between the several states of modern Europe emphasized the need to organize all industry, agricultural or commercial, with a view to national power. . . .\textsuperscript{35}

The civil-law lawyers found the intellectual equipment for their modernization in the work of their medieval forebears,\textsuperscript{36} as did the English. As a result, the glossators' medieval legal thought and that of their English contemporaries, who so strikingly resembled them, dominated both the private and the constitutional law of the Renaissance as well as its political theory in England and on the Continent. Holdsworth summarizes as follows:

England, it is true, retained her common law; but that common law was, like the Roman law which the sixteenth century received, formed amidst medieval ideas, and it was supplemented by rules and principles, the addition of which was due to the same causes as those which had brought about the continental Reception. Though, therefore, English law was fundamentally unlike that of the continent, it was sufficiently akin to render possible a science of comparative law.\textsuperscript{37}

\section*{D. Common Legal History}

Both in England and on the Continent, legal history reflected the history of Western civilization. Although the histories of common law and civil law did indeed diverge, they drew from a fund of distinctly Western legal ideas. Even their divergent elements were by and large comparable. Western law accommodated itself to such social changes as the growth of a complex feudal social order, the gradual dissolution of that feudal order as the modern state slowly emerged from the competition between the claims of the regional nobility and national monarchy, the increasing centralization of state power, with its accompanying centralization of justice, and the rise of mercantilism and the growth of the legal rights of the bourgeoisie as against both the nobility and the monarchy. These and other common social features served to limit the degree to which common law and civil law could in fact diverge.

The development of law in the West from the Middle Ages to the Renaissance was characterized both in England and on the Continent

\textsuperscript{35} \textit{Id.} at 244-45.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 289.
by the emergence of centralized, nationally administered legal systems. These systems resulted from competition between royal law and other local and topical laws and the institutions which existed for their enforcement. A gradual and uneven centralization of justice accompanies the halting emergence of the modern state. Hence, the royal courts, whose role in the history of common law is often emphasized, were also extremely important in the history of law on the Continent.38

The intellectual traditions of the practicing lawyer in England and the university doctor on the Continent overlapped to a certain extent, especially in their common references to Roman law. Professor Yntema wrote that

[as] the result of a silent acceptance of ideas, more penetrating than a formal reception could be, the basic ideas as to legal system and terminology and the common legal conceptions, particularly of the law of property and commercial relations, only less obviously in English and American law than in the continental European systems, lead back to Rome.39

The great systematizers of common law, beginning with Glanvil and Bracton, were greatly influenced by Roman law.40 Blackstone, for example, used it extensively.41

E. Equity

Even the development of English equity cannot unequivocally be counted as a feature distinguishing the histories of common and civil law. The rules of equity were drawn in large part from Roman and canon law.42 The triumph of equity assured this body of Romanistically influenced thought an important place in English law. At the heart of equity was a strictly medieval conception of the relation of the imperfection of human law to the perfection of the laws of God and of

38. Professor Strayer's discussion of the gradual strengthening of the royal courts of France under Philip IV (1285-1314) is instructive. See generally J. STRAYER, THE REIGN OF PHILIP THE FAIR (1980); see also J. STRAYER, LES GENS DE JUSTICE DU LANGUEDOC SOUS PHILIPPE LE BEL (1970).


40. PLUCKNETT, supra note 25, at 297.


42. David, supra note 1, at 332-34.
This conception was not unique to English thought. One hundred fifty years after James I secured the position of equity in the English legal system, Blackstone quoted Grotius and gave equity a broad definition. This definition descended from the medieval conception of equity and was not distinguishable from what *aequitas* meant to a continental lawyer of Blackstone’s day. Since the legislator cannot provide in advance for unforeseeable cases, Blackstone wrote, equity exists to assure that when the laws come to be applied, they will not be applied in those circumstances which, had they been foreseen, the legislator himself would have excepted. “And these are the cases, which as Grotius expresses it, *lex non exacte defini, sed arbitrio boni viri permittit.*”

**F. Effects of the Enlightenment**

Since the eighteenth century, common law and civil law have increasingly converged. The spirit of the Enlightenment affected all fields of thought and joined French and English thinkers in a common stream of political and social speculation. It also crossed the Atlantic and deeply affected the law and politics of the United States. Albert Guerard captured its internationalism well in this passage:

> It has been said that Voltaire was “England’s best gift to France.” This might be extended to the whole Enlightenment. Montesquieu studied and expounded the English constitution. Voltaire's sojourn in London revealed him to himself; his first decisive contribution to liberal thought was his *Lettres philosophiques*, or *Lettres anglaises*. Diderot knew English well; the starting point of his *Encyclopedia* was Chambers' *Dictionary*. Buffon's favorite authors were Milton and Richardson. The masters of French thought then were Bacon, Locke, Newton, and secondarily, the “Deists,” Toland, Collins, Woolston, Tindal, Shaftesbury. It must be said that the England they admired had never been so Frenchified: it was the age of Addison and Pope, of whom Boileau himself would have approved. Culturally the eighteenth century was an Anglo-French condominium, and under that sign America was born. Jefferson was such a typical American because he was so true to the spirits of both England and France. Englishmen were later to revel in “the wisdom of

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43. HOLTSWORTH, supra note 29, at 279.
45. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *61 (quoting GROTIUS, *De Aequitate*. The Latin refers to cases which “the law imperfectly limits, but should, in the judgment of a good man, permit”).
prejudice." But when they take pride in their freedom from clear thinking, we cannot forget that they were the initiators and masters of the Enlightenment.  

The two strands of thought which had the greatest effect on law during this period were political theories regarding natural rights and classic economic liberalism, both of which agreed that minimum interference with individual freedom was the single greatest object of legal systems. Because the growing rights of the commercial classes threatened the old order, the late eighteenth century was a turbulent time in law and politics, an "age of democratic revolution" affecting the entire West. Out of the legal and political struggles of the time emerged our modern Western law in a form that still exists today.

The natural-law school began to develop a European public law based on English models. Its traditional major branches, criminal law, administrative law, and constitutional law, still organize the subject today in common-law and civil-law countries alike. The idea that government itself should be governed and that state action should adhere to legal standards is at the heart of modern public law, especially constitutional and administrative law. In all the Western legal systems and in others touched by them, there is a discernible trend toward enshrining the most important principles of public law in rigid constitutions protected by judicial review. Presently there are still many variants of constitutionalism, but they do not break down along common-law/civil-law lines, and as Professor Cappelletti has pointed out, they are all variations on a basic motif in our shared Western history. If the welfare state continues to grow and individual autonomy correspondingly continues to contract, then constitutionalism may well play an increasingly important role in staking out an area of individual

50. David, supra note 1, at 47.
53. M. Cappelletti, supra note 5, at 97.
choice against the collective massing of power in government. In any case, modern law is dominated in common-law and civil-law countries by the growth of public law and its increasing impingement upon the field of private law. The greater problems of administering law in the modern Western welfare state, such as the problem of controlling administrative discretion so as to avoid abuse, confront both common-law and civil-law nations. The solutions which they have adopted to solve these problems also seem not to divide along a common-law/civil-law line, hence it is probably more accurate to speak of a Western public law family, rather than a common-law or civil-law family in public law. The creation of the welfare state has largely been accomplished by legislative reform, making the statute the preeminent form of law in the twentieth century, in common-law countries as much as in civil-law countries.

The legal thought of the Enlightenment produced a new ideal of legal order appropriate to the new Europe—a Europe composed of newly emergent imperial states whose economies would be increasingly based on private trade and industry. The legal ideal which emerged comprised a public law rationalizing and limiting the new national sovereign and a private law modeled on freely bargained economic interaction. Both were united under a fundamental social charter guaranteeing popular government and private autonomy. The twentieth century has seen the gradual erosion of that ideal and its partial replacement by a new public administrative order in European and Anglo-American legal systems alike.

The European Enlightenment also gave birth to the movement for codification which, with the French Code civil (Civil Code) in 1804, marks a watershed in the history of the civil-law family. There were other early codes, but the enormous prestige and success of the Code Napoléon (Napoleonic Code) assured the codification movement a future. This assurance in turn served to divide the civil law and the common law systems along a new axis, that of codified and uncodified legal

55. See generally K. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1976).
56. Id.
57. DAVID, supra note 1, at 339, 411. Naturally there have been important bodies of developing decisional law in the field of public law, such as United States constitutional law and French administrative law (developed by and large by the Conseil d'Etat), but these two exist in common-law and civil-law countries alike.
58. The Prussian Allgemeines Landrecht of 1794 and the Austrian Civil Code of 1811 are noteworthy.
systems. Although from time to time prominent English jurists—Bentham, Austin, Pollock, Maitland, and others—favored codification, the movement never took root in England. The United States flirted more seriously with codes during the nineteenth century, and a few areas of law, such as civil procedure, were systematically codified. California actually enacted a complete system of codes, and there is relatively little California statutory law that is not contained in them. The table of contents of the California Civil Code reveals that its structure has been greatly influenced by the structure of the continental civil codes of the early nineteenth century. California lawyers, however, have not abandoned common-law ways of reasoning or common-law attitudes toward legal authorities. Even so, the major divisions of the typical European civil code—the law of persons, family, property, succession, contracts, delicts, and quasi-contract (the last three generally grouped together by civilians as the law of obligations)—are almost all recognizable divisions of common law, and most common-law lawyers would agree that they form the bulk of our private law. In common-law countries there has been a trend toward selective codification. Civil-law countries have gradually seen the transformation of their laws into a much more heterogeneous, less completely codified collection of codes (some of which are not codes in the true sense, but mere compilations), ordinary statutes, decisional law, and administrative regulations. The reconciliation between the codified civil-law tradition and the decisional common-law tradition has not eliminated the animating ideologies of each but has brought them close in practice. The battery of legal authorities to which a common lawyer will refer today looks quite like the law library of the civil lawyer.

G. The Nineteenth Century

The nineteenth century saw a movement for rationalization and systematization of the law which also brought common law and civil

61. Merryman's The Civil Law Tradition contains an excellent discussion of the civilian ideology of codification and contrasts it intelligently with prevalent common law attitudes toward codes; Merryman, supra note 21, at 27-34. See also Zweigert & Kötiz, supra note 2, at 270.
law closer in some respects. Legal science, which most strongly influenced the Germanic members of the Continental legal tradition, had important effects upon the law of the United States as well, especially in the traditional fields of tort and contract. At about the same time that legal science was making its appearance, law and equity were merged in England and the United States. Although equity has receded into the historical background, the distinction between law and equity remains. For example, the trust, equity's most successful offspring, is a vital institution in United States and English law, and in important respects its rules do show their equitable ancestry. Few if any law students in the United States, however, are systematically exposed to equity as a subject. The prevailing attitude of most contemporary law students and lawyers seems to be that equity is now a historical curiosity. There are many areas of contemporary law in which equity has left its traces, but they have been so seamlessly assimilated that few lawyers are aware of the influence of equity.

H. Summary

Even today there are reasons to preserve the distinction between common-law and civil-law families. By no means have they been fused. Their histories, however, have always drawn from a common fund of Western ideas and have increasingly converged. Their histories, although distinctive, have been but two currents in the mainstream of Western history, and were they to be compared to the histories of Soviet law, Indian Asian law, Far Eastern Asian law, African law, or Islamic law, the differences would be like night and day. One must conclude, therefore, that historically the common-law and civil-law legal traditions are two distinct but related members of a larger Western liberal democratic legal tradition.


65. David, supra note 1, at 338, 411.

66. See 1 P. Arminjon, B. Nolde & M. Wolff, Traité de Droit Comparé 55-91 (1950). Not only have there been several common stocks of legal ideas in the West, such as Roman Law, Canon Law, and Commercial Law, id., there has also been, through cross-fertilization, a sharing of technical doctrines and rules. See infra text accompanying notes 114-50.
IV. CONCEPTION OF LAW

Although one might attempt to isolate, analyze, and compare an Anglo-American and a continental conception of law and its place in the social order, almost everyone who has used conception of law as a subject of comparative study has concluded that there is one Western conception of law shared in common-law and civil-law countries alike. There are, however, certain Western assumptions about law and its place in society which do divide along a common-law/civil-law cleavage, such as common-law assumptions about judicial authority and civil-law assumptions about legislation and codification. These assumptions, however, are more in the nature of the professional legal traditions of common law and civil law and are to be distinguished from the shared conception of law described here. As stated earlier, conception of law means a society’s set of ruling assumptions about law and the role of law in organizing social life. Society’s general assumptions are to be distinguished from the traditional assumptions held by the society’s legal professionals, for their professional specialization frequently gives these persons a special conception of law with assumptions regarding law often not shared by other members of society. A legal system’s professional legal tradition exerts an enormous influence upon its law, but this influence is generally within the framework of the larger social conception of law. This section concerns those assumptions of Western legal thought which are common to and widely accepted by entire Western societies.

67. See, e.g., Bozeman, supra note 12, at 35-49; David, supra note 1, at 461-62; R. David, Traité Elementaire de Droit Civil Comparé 222-24 (1950); Zweigert & Kötz, supra note 2, at 66-67. Zweigert and Kötz use the term “ideology,” but the context makes it clear that conception of law, as the term is used here, is what is intended. Deux Conceptions, supra note 2; Sawyer, supra note 48. See also P. Stein & J. Shand, Legal Values in Western Society (1974) [hereinafter cited as Stein & Shand]. Professor David thinks that not only has there existed a common Western conception regarding law’s place in the social order, but that the consciousness of certain shared Western values (“une conscience plus nette des affinités qui existent entre les pays européens attachés à certaines valeurs de la civilisation occidentale”) is one of the factors responsible for the recent convergence of common-law and civil-law legal systems which so many comparatists have noted. David, supra note 1, at 339.

68. For the best description of the civil-law tradition, see generally Merryman, supra note 21.

69. See supra text accompanying notes 12-15.

70. See generally Merryman, supra note 21. For perhaps the most thoughtful and the most famous discussion, see Max Weber on Law in Economy and Society 198-223 (ch. VII, “The Legal Honoratiore and the Types of Legal Thought”) (Rheinstein ed. 1954).

71. For discussion of professional legal tradition, see infra text accompanying notes 206-07.
Many conceptions of law have competed for acceptance in the course of Western history. One of the hallmarks of Western intellectual history is the enormous body of speculative thought which it has produced regarding law and society, probably as a function of the primacy of law in Western social order. The resulting modern Western conception of law reflects the richness and complexity of its history and encompasses a remarkable variety of fundamental legal values not always consistent with one another or with actual practices of law in the West today. The present analysis of the Western conception of law focuses on the common fundamental assumptions regarding law in four general categories: the place of law in the social order, the form law takes, its application, and its substance.

A. Place of Law in the Social Order

Perhaps the single most important feature of Western legal thought is the primary place accorded to law in the social order. In Western societies, social control has been exercised by law, and social order has in turn been reflected by law to an extent not found elsewhere in the world. No other system of beliefs or institutions in Western societies exerts a degree of social influence equal to that of law. In every Western nation, an enormous variety of social controversies is submitted to judges for resolution based upon established legal princi-

72. Sawer, supra note 48, at 47. Professor Bozeman has stated:

No word in the political vocabulary of the West has exercised the imagination as consistently as “law.” From the times of classical Greece to the middle of the twentieth century, men in this civilization have tried not only to catch in a durable definition the essence of what has been generally known as law, but also to discover its sources and to delineate its functions. They have speculated ceaselessly about the relations between law and nature, law and reason, law and tradition, law and religion, law and justice, law and power, and law and society, and have been profusely inventive in creating a great variety of actual legal processes and institutions.

Bozeman, supra note 12, at 35-36.

73. See infra text accompanying notes 75-84.

74. For a historical review of the Western conception of law, see Sawer, supra note 48. For a discussion of the Western legal values of order, justice, and personal freedom, see Stein & Shand, supra note 67.

75. In the Islamic world, the Shari'a (Islamic law) also plays an important role, but it is quite unlike Western law in other respects. The Shari'a is the path laid down by the Creator; in following it men will find both moral and material well-being. The Shari'a regulates in great detail the dealings of individuals with each other and with the community; it encompasses all man's duties to God and his fellow-man.

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Ples of general application. Professor David, who calls the occidental nations "countries of law," points out that the West continues to believe that social order must be founded essentially on law,76 a belief with which other cultures have disagreed.77 Law has not only been a paramount reference in Western society, but it has also been a popular and respected one. As Professor Geoffrey Sawer remarked, "A respect for and even a demand for the legal approach to the structuring or ordering of social relations has kept triumphing over the periodic dissatisfaction with the particular structure or order achieved at a particular time and place."78

Both in the Far East and in Africa, processes of conciliation and mediation often displace legal institutions of dispute resolution, and those legal institutions which do exist are often regarded suspiciously.79 While law has been the primary source of social cohesion in the West, social order in Asia and Africa has traditionally been dominated and effectively maintained by such forces as "respect for religion, etiquette, the stabilizing function of war and conflict, or the superior wisdom regularly imputed to selected men."80 The socialist conception of law, which is like our Western conception in so many other respects, follows Marx's thought in looking toward the gradual withering away of law as a last vestige of bourgeois society.81

An interesting aspect of the Western conception of social order is that while only the state makes law, the state is a creature of that law and is structured in accordance with a higher law limiting its power. Other cultures have not always associated law with the political organization of the state. In Islamic thought, for example, there is an uneasy tension between the *Shari'a* (Islamic law), which is respected and revered, and government, which has tended to be feared and distrusted.

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76. "Pays de Droit." *Deux Conceptions*, supra note 2, at 55, 62. Professor Geoffrey Sawer finds the characterization vague. Sawer, supra note 48, at 46. If, however, one takes "law" to mean approximately what it does in the West, one will readily concede that most cultures today have had some experience with law in that Western sense, and many reject it as a social reference. The author believes this is what Professor David intended, and it is a point worth making.

77. See, e.g., Bozeman, supra note 12, at xiii.

78. Sawer, supra note 48, at 48.


80. Bozeman, supra note 12, at xi.

81. For more and less utopian positions on the withering away of state and law, compare Pashukanis' *The General Theory of Law and Marxism* with his later *State and Law Under Socialism* in *Pashukanis: Selected Writings on Marxism and Law* 37, 346 (Beirne & Sharlet eds. 1980).
but tolerated as a necessary evil.\textsuperscript{82} In African societies, the state has
developed fairly recently, and law is most closely associated with kin
and tribe.\textsuperscript{83} Both traditional Russian and Chinese societies had
 equivalents of modern state-administered legal systems, but neither
conceived of the state itself as being a creature of law.\textsuperscript{84}

Law in the West has also achieved a high degree of autonomy and
professional specialization and has gradually absorbed the values of
nonlegal social institutions, thereby displacing them. Most of the im-
portant functions in Western legal systems are carried out by persons
who are professionally trained and who devote their working lives to
the law. There is even specialization within the law, for example, be-
tween judges and lawyers.\textsuperscript{85} As a result of this specialization, Western
law has acquired a fair amount of doctrinal autonomy. Its doctrines
have been extensively and directly influenced by the theorizing of its
own professional specialists, thus acquiring a certain independence
from other social influences.\textsuperscript{86} This independence, however, has also
been partially secured by borrowing values from outside the legal sys-
tem, making the law representative of community moral sentiment.
Western ideals of contract, for example, have absorbed and reflected
confidence in the future and in the promises of others, thus illustrating
this "systematic, deliberate way in which legally crucial norms have
been borrowed from ethics, philosophy, or religion, to be carefully
transposed into reliable maxims of law."\textsuperscript{87} Moreover, "law has been
consistently trusted in the West as the main carrier of shared values, the
most effective agent of social control, and the only reliable principle
capable of moderating and reducing the reign of passion, arbitrariness,
and caprice in human life."\textsuperscript{88}

B. Form of Law

Another fundamental set of commonly held assumptions about the
nature of law relates to its form. Perhaps the most important of these
assumptions is the belief that law should be written. Our Western legal
tradition has been a literate tradition, although other legal traditions

\textsuperscript{82} See Bozeman, supra note 12, at 58-75, 91-98.
\textsuperscript{83} Id. at 91-98.
\textsuperscript{85} Sawer, supra note 48, at 46.
\textsuperscript{86} Id.
\textsuperscript{87} Bozeman, supra note 12, at 37-38.
\textsuperscript{88} Id. at 38.
have not. Traditional African customary law, for example, was oral. Writing has made possible a number of the characteristics of Western law: the development of law beyond the capacity of memory; the careful analysis, criticism, and reconstruction of legal principles; and the conscious evolution of law as a complex system of abstract norms. Literacy gives Westerners a distinctive relation to language and hence a different relation to law. When thought cannot be memorialized in writing, communication demands the immediate presence of others. As a result, language develops as an instrument more of action than reflection and becomes especially dependent upon the needs of the moment and the particulars of each personal encounter. Oral communities are thus not as well equipped for the impersonal normative generality of Western legal thought.

The Western conception of legal literacy also distinguishes the West from other literate societies with developed legal systems. Most comparisons of Western and non-Western legal thought have noted the high degree of abstraction, formalization, and conceptual complexity exhibited in Western law. The roots of Western legal formalism spring from classical Roman law, noted for its high "degree of distinctness, normative and procedural vigour and sophistication, and conceptual richness." Those roots are deep enough that even though twentieth-century legal realism has thoroughly discredited nineteenth-century mechanical jurisprudence, most Westerners still assume that the law should be a highly systematic and rather logical system of rules. This assumption, however, is not shared by all legal systems. In fact, some legal systems have regarded law as primarily comprising processes of dispute resolution unregulated by any system of rules.

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92. See, *e.g.*, Bozeman, *supra* note 12, at 36; Sawyer, *supra* note 48, at 46.


94. Compare, for example, the traditional Japanese distaste for submitting disputes to rigorous logical analysis. The Japanese feel this process degrades human relations. Kim & Lawson, *supra* note 13, at 502.

unlike the Western idea of law as a system of rules of behavior and institutions to assure compliance.

Western law is also regarded as secular, despite the importance of canon law in Western legal history. Only the socialist legal systems also adopt this conception. In the Indian, Islamic, Far Eastern, and African conceptions, law is inextricably tied to the larger scheme of life, earthly and divine. None of these legal orders recognizes a distinction between law and religion.

C. Application of Law

Certain elements of seventeenth- and eighteenth-century concepts of natural law concerning the application of law have spread to all the major nonsocialist Western legal systems and are now an established part of the Western conception of law. Among these elements is the impersonal generality of law, that is, the notion that all persons, regardless of ethnic background, social class, religious belief, or political viewpoint should stand in a position of formal equality before the law. The application of law in other legal traditions, such as the Chinese and the Indian, has been explicitly status-determined. Law


97. Islamic law (known in some parts of the world as “Muhammadan law”) is a body of rules which gives practical expression to the religious faith and aspiration of the Muslim. Total and unqualified submission to the will of Allah is the fundamental tenet of Islam, and the law which is associated with the religion defines the will of Allah in terms of a comprehensive code of behaviour covering all aspects of life. All aspects of life: for ritual practices, such as prayer, fasting, alms, and pilgrimage, the subjects of permissible food and styles of dress, and social etiquette generally are as vital and integral a part of the system as those topics which are strictly legal in the Western sense of the term. Known as the “Shari’a,” a derivative of an Arabic root word meaning “track” or “road,” this law constitutes a divinely ordained path of conduct which guides the Muslim toward fulfillment of his religious conviction in this life and reward from his Creator in the world to come. Coulson, Islamic Law, in AN INTRODUCTION TO LEGAL SYSTEMS 54 (J. Derrett ed. 1968).

98. See supra note 79.

99. See supra note 75.

100. See supra note 48, at 39. See MAX WEBER ON LAW IN ECONOMY AND SOCIETY 145 (M. Rheinstein ed. 1954) for Weber’s interesting explanation of “[the] ever-increasing integration of all individuals and all fact-situations into one compulsory institution which today, at least, rests in principle on formal ‘legal equality.’” Id.

101. Fa, the ancient system of Chinese criminal sanctions, was related to social standing. Affront to status, rather than any conception of individual moral wrongdoing, triggered punishment. Hence, punishment varied according to one’s social rank. Similarly, dharma, the ancient yet still highly influential Indian concept approximating our concept of legal duty, was defined by one’s caste. BOZEMAN, supra note 12, at 124, 144-46.
in the modern Western conception is also expected to be applied impartially, an assumption closely related to the expectation that it is to be applied generally and impersonally. Perhaps these assumptions may best be summarized in the following comparison: the application of law in the Far East, in Africa, and in Islamic societies appeals to a sense of the individual's place in the cosmic order; the application of law in the socialist world appeals to class power programmatically applied; and the application of law in the common-law and civil-law worlds appeals to eighteenth-century rationality.

Fuller's *The Morality of Law* is a thoughtful description of the contribution that eighteenth-century natural lawyers made to the modern Western conception of the form of law and its application. Although *The Morality of Law* was part of a debate in analytic jurisprudence, Fuller himself acknowledged its relation to the natural-law thought of the Enlightenment. Most jurists in the West regard Fuller's eight principles of "the internal morality of law" as self-evident and requiring little justification, a sign that they are among the customary assumptions which constitute the Western conception of law. First, the law must achieve a certain generality if its standards are to be considered rules and if cases are not simply to be decided ad hoc. Second, when the law is promulgated it must be made public so that all who are affected by it may govern their conduct accordingly. Third, the law should apply prospectively, since retroactive legislation cannot serve as a guide to action and undercuts the integrity of prospective legislation. Fourth, the law must be clearly written. Fifth, the law must be internally consistent. Sixth, laws should not require the impossible, that is, conduct beyond the powers of the persons to be governed. Seventh, the law should not change so frequently that persons affected are unable to regulate their behavior accordingly. Finally, official action must be in accord with officially declared rules, for if government does not obey its own laws, government itself is to some extent lawless.

D. The Substance of the Law

The natural-law tradition has not only influenced the Western conception of the form law should take and the manner in which it

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102. STEIN & SHAND, supra note 67, at 74.
104. Id. at 96-97.
105. Id. at 98.
106. Id. at 39, 46-81.
should be applied, but it has also affected the Western conception of 
the law's substance. Some of the elements of the Western conception 
of natural justice may be traced to Aristotle, but the primary Western 
assumptions of substantive justice were given their modern form in the 
seventeenth and eighteenth centuries and center around two cardinal 
values: individualism and liberty. Until well into the nineteenth 
century, "philosophical as well as the sociological influences favored 
minimum interference with the individual's freedom of action as the 
principal value to be sought by legal systems." There remains today 
in Western legal systems a basic disposition in favor of freedom to bar-
gain and to make contracts, and to acquire, use, and dispose of 
property.

Western law favors individualism over communalism. It encour-
ages individual innovation and daring, rather than individual subordi-
nation to a preordained social role. By contrast, in virtually all other 
major legal orders, individualism is felt to be a disruptive force. In 
the modern Western conception, law is felt to exist largely to encourage 
individual expression and economic initiative. An expansive concep-
tion of individual autonomy is probably responsible for the central im-
portance of the person and legal personality in all Western legal 
systems. Of course, individual responsibility must balance individual 
freedom. Thus, in Western legal thought, right and duty are viewed as 
necessary correlatives and are equally enshrined in the concept of legal 
personality. The person is legally empowered to assume and exercise 
rights and to discharge obligations. These fundamental assumptions

107. See Stein & Shand, supra note 67, at 59-63. See also J. Stone, Human Law and 

108. Since the seventeenth century . . . , the problem of personal freedom has been 
expressed in terms of certain natural rights, which every society ought to guarantee 
to all its members. The theory of natural rights became associated with the mod-
ern individualist notion of an area circumscribed around the individual, in which 
he could exercise his own will. Neither the government nor the legislature was to 
encroach or allow encroachment on this area. The traditional natural rights, as 
asserted in the eighteenth-century Declarations, are freedom of the person, of 
property, of speech, and of association. They indicate the areas within which the 
individual may do as he wishes, because to deny him freedom of choice in respect 
of them is tantamount to denial of his human personality.

Stein & Shand, supra note 67, at 150.

109. Sawer, supra note 48, at 43.

110. For a comparative discussion of the central role of individualism in Western legal 
thought, as well as its relatively reduced role in the legal thought of traditional Indian, Is-
lamic, Chinese, and African societies, see Bozeman, supra note 12. For a comparison of the 
reduced role of individualism in socialist legal thought, see H. Berman, supra note 84, at 97-
100, 152-67.

111. See generally Stein & Shand, supra note 67, at 114-41.
about human nature and the individual's place in the social order come together most clearly in the institution of contract and may explain why contract became a preeminent Western legal institution.\(^{112}\)

Even so, one wonders whether the traditional liberal conception of law is not giving way to a new conception in the West, or at least retreating from the intense individualism of nineteenth-century Western legal thought. With the rise of the administrative welfare state since the middle of the nineteenth century, there has arisen a broader sentiment of social justice which would guarantee the basic necessities of life and certain other material opportunities to all persons regardless of their ability to obtain them by contract.\(^{113}\) Many regard this guarantee as a natural right or legal entitlement and not as a form of institutionalized charity. It is difficult to assess the depth and popularity of this shift in the Western sense of substantive justice. No common-law or civil-law nation has attributed as much conceptual importance to the assurance of fundamental economic and social rights as have the socialist countries, for whom these rights are important ideological building blocks in the construction of a new economic and social order, but even the Western liberal democracies now seem founded partly on a conception of state-provided social welfare.

V. STRUCTURAL ELEMENTS OF THE POSITIVE LAW

Scholars repeatedly observe that the individual rules of Western

\(^{112}\) Bozeman, supra note 12, at 36-42. The classical Roman contract law became first the frame of reference for all the many medieval associations of partnership, guild, and corporation. It then became the frame of reference for chartered political organizations from Italian republican city-states to modern nations and international organizations—all unions on a contractual basis. It may be that the Western conception of an impersonal, secular, precisely defined, liberal law encourages social relationships largely of a contractual type. Members of a contractual relationship seek a relatively precise definition of their respective rights and duties, but want the liberty to choose freely whether to contract. Whether this helps explain why the Western conception of law could have arisen only in Western civilization, it is nonetheless true that neither in modern socialist legal systems nor in more traditional legal orders (Chinese, Indian, Islamic, African) do we find this conjunction of legal values favoring individual expression and economic initiative. 'See Stein & Shand, supra note 67, at 18-20, 23-24.

\(^{113}\) Stein & Shand, supra note 67, at 67-68. A society which approximated to Rawls' ideal [as set forth in J. Rawls, A Theory of Justice (1971)] would turn out to be a constitutional democracy which guaranteed equal basic liberties to every citizen, which assured every citizen a minimum social and economic position, and which thereafter encouraged equality of opportunity. . . . [Rawls'] theory is, in our opinion, the most satisfactory explanation of the value of justice in Western society that has yet been offered.

Id. at 73.
legal systems on particular legal subjects show a high degree of convergence and that the doctrinal differences which exist do not divide along common-law/civil-law lines. This observation suggests that common-law and civil-law systems formally belong to a single Western legal tradition. A comparison of their deeper structural elements supports this position.

A. Major Categories

1. Public Law and Private Law

In examining the fundamental categories or major divisions of common law and civil law, consideration must first be given to the public-law/private-law dichotomy. Many comparatists have found this dichotomy to typify civil-law thought and to be largely foreign to that of common law. Most civil-law countries divide their national law into these two major categories, but common-law attorneys also recognize and utilize these same categories. The distinction in fact seems to be of diminishing importance in civil law. Professors Alex Weill and François Terré conclude their discussion of the many recent criticisms of the dichotomy with three observations: first, government is still largely regulated by a set of rules different from those which regulate the relations of the private person; second, the importance of traditional private law is diminishing as public law expands and the state intervenes in traditional fields of private relations; and, third, in attempting to preserve a certain measure of private initiative in public enterprises, the state itself increasingly borrows from private-law models in its forms of administrative intervention. These observations apply with similar force to the relations of public law and private law in common-law countries today.

Also, the major subdivisions of public law—constitutional law, administrative law, criminal law—are similar in common-law and civil-

114. See supra text accompanying notes 17-20.
115. See, e.g., DAVID, supra note 1, at 79-81; MERRYMAN, supra note 21, at 99-102.
116. See, e.g., WEILL & TERRÉ, supra note 52, at ¶ 56.
117. See, e.g., G. PATON & D. DERHAM, A TEXTBOOK OF JURISPRUDENCE 326-30 (4th ed. 1972) [hereinafter cited as PATON & DERHAM]; see generally Ogus, supra note 5.
119. WEILL & TERRÉ, supra note 52, at 72-75.
120. Several articles on "Le Phénomène Universel de la Publicization du Droit Privé," the universal phenomenon of the publicization of private law, can be found in 3 INTRODUCTION À L'ETUDE DU DROIT COMPARE: RECUEIL D'ETUDES EN L'HONNEUR D'ÉDOUARD LAMBERT §§ 143-147 (1938 reprinted 1973).
law countries. While administrative law in England is not the same as droit administratif (administrative law) in France, this point could also be made with equal force regarding English and United States administrative law.

Since the importance of the distinction between public law and private law in civil-law systems has diminished somewhat, and since the functional utility of the distinction is largely the same in common-law and civil-law legal systems, the distinction can no longer be said to clearly divide Western legal systems. The distinction will perhaps continue to enjoy a more important place in civil-law thought than it does in common-law thought, but the two groups are largely convergent.

2. Federal and Nonfederal Organization

In both common-law and civil-law families, there are some legal systems which are federally organized and others which are not. The distinction between state and federal law is, for example, of fundamental importance in United States law but nonexistent in English law. Similarly there are both federal and nonfederal states within the civil-law family. The comparison of Western and Soviet federalism is beyond the scope of this paper, but the Soviets have traditionally viewed their federalism as unique. Such a comparison might reveal that with respect to one more fundamental category, the division between federal and state law, it makes sense to speak of a Western family of legal systems.

121. See Paton & Derham, supra note 117, at 329; Weill & Terré, supra note 52, at 69-70.

122. David, supra note 1, at 342.

123. A comparative survey of administrative law in common-law and civil-law countries would probably disclose common patterns of administrative regulation with large variations, but with no clear breakdown in pattern and variation along a common-law/civil-law axis. This observation is certainly true with respect to Western constitutional law. See generally M. Cappelletti, supra note 5. If one compares the constitutional values of common-law and civil-law systems with those of the socialist legal systems, there appears good reason to speak of a Western public law, rather than a common-law or civil-law public law. Stein & Shand, supra note 67, at 142-63. See supra text accompanying notes 50-57.

124. Professor David recognizes this fact and discusses United States federalism extensively. David, supra note 1, at 415-28.


126. Federalism as an idea was born in the Enlightenment and is closely, although perhaps not inseparably, connected to Western constitutionalism. See Friedrich, Federal Constitutional Theory and Emergent Proposals, in Federalism: Mature and Emergent 510 (A. Macmahon ed. 1962). Professor McWhinney, one of the foremost writers on comparative federalism, speaks of Western federalism as the "classical" form of constitutional federalism. See E. McWhinney, Comparative Federalism: States' Rights and National
3. Civil Law and Commercial Law

The study of private law has dominated Western comparative law. While there is some agreement upon basic divisions, there are important differences. The primary difference is the concept of civil law as a fundamental unit. The frequent use of the term "civil law," or *ius civile*, from Justinian's *Corpus Iuris Civilis* to the civil codes of the last two centuries has deeply embedded in continental thought a sense of the inherent unity of the law of persons, the family, property, contracts, torts, and inheritance. The term "civil law" is sometimes used among common-law attorneys, most often in contrast to criminal law. Also, many common-law lawyers recognize that the law of persons, the family, contracts, torts, and inheritance are the most basic subjects of civil law. In civil-law countries, however, civil law has traditionally been distinguished not only from criminal law but also from commercial law. For example, the five seminal French codes were the *Code civil* (Civil Code of 1804), the *Code de procédure civile* (Code of Civil Procedure of 1806), the *Code de commerce* (Code of Commerce of 1808), the *Code de procédure pénale* (Code of Criminal Procedure of 1811), and the *Code pénale* (Penal Code of 1811).

During the eighteenth and nineteenth centuries, the common law of contract effectively absorbed the mercantile law. As a result, commercial law in England consists only of the application of common-law rules of contract to commercial transactions. The typical common-
law lawyer probably still conceives of commercial law as a branch of the civil law, but modern forces have blurred this distinction as well. In the United States, the existence of the Uniform Commercial Code creates the impression that commercial law is a distinct body of law. In England, commercial law also has its own distinctive flavor. In France, there is still a separate commercial law, but very little of it is contained in the Code de commerce (Commercial Code). Switzerland and Italy no longer make the civil/commercial distinction in the structure of their codes: Italy has a civil code which includes commercial law, and Switzerland has a separate code of obligations, covering what the French and Germans would think of as both civil and commercial obligations. There is an apparent tendency on the Continent for modern civil law to absorb commercial law. Civil law is becoming synonymous with private law as a whole. This trend is more in line with the way the common-law attorney would define "civil law" as a category. The commercial-law/civil-law dichotomy is more important in civil-law countries than in common-law countries, but the gap between common law and civil law in this regard is not wide.

4. The Traditional Branches of Private Law

Everywhere in the West, private law is the most traditionally fundamental subject of study, especially its core of property, contract, and tort. That these three subjects have so transfixed Western lawyers is probably an indication of the importance of the individual and private enterprise in the Western conception of law. That they continue to be so important is perhaps unfortunate in view of the growth of the modern administrative welfare state in the West. Although the common-law lawyer and the civil-law lawyer join in their attachment to these three fundamental categories, the civilian thinks of torts (delicts) and contracts as being but two subdivisions of the larger subject of obligations, a typifying structural feature of civil-law systems which has no real counterpart in common-law systems. The issue whether to include the category of civil procedure among the major divisions of pub-

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132. Id. at 111.
133. Tallon, supra note 63, at 34-35.
134. David, supra note 1, at 90-91.
135. Merryman, supra note 21, at 108. But see David, supra note 1, at 91.
136. In this regard, see the lament of a teacher of public law, Ogus, supra note 51, at 42.
137. David, supra note 1, at 84-85.
lic or private law has arisen in both common-law and civil-law systems. Both regard civil procedure and criminal procedure as the two major divisions of procedural law. However, due to the importance of the jury in common-law procedure, the law of evidence is a central procedural category here, whereas it is of relatively little importance in civil-law systems.

B. Pervasive Concepts

The pervasive concepts of typical Western legal systems also show fundamental similarities. There are, however, few if any thorough comparative studies of the conceptual frameworks of major subjects of Western law. Consequently, the following remarks are tentatively made.

Many of the most basic conceptual components of the law are found throughout the West: obligation, rights, rights in rem, rights in personam, and the concept of the legal rule itself. Other fundamental concepts which run through Western law include act, intention, capacity, consent, will, person, personality, thing, fact, demand, exception, interest, and association. There are many others. Although

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138. PATON & DERHAM, supra note 117, at 329.
139. WEILL & TERRÉ, supra note 52, at ¶ 58 n.2.
140. DAVID, supra note 1, at 363. As previously mentioned, the law/equity distinction in the common law distinguishes common-law from civil-law legal systems, but the importance of the distinction has diminished in the last century. It remains, but will probably continue to diminish steadily in importance until some future generation of lawyers recognizes it no more; see supra text accompanying notes 64-65.
141. In French, droit subjectif. See, e.g., WEILL & TERRÉ, supra note 52, at ¶¶ 68-72. The Italian equivalent is diritto soggettivo. See, e.g., A. TRABUCCHI, ISTITUZIONE DI DIRITTO CIVILE 7-8 (21st ed. 1975) [hereinafter cited as TRABUCCHI].
142. Droits réels, WEILL & TERRÉ, supra note 52, at ¶ 243; diritti reali, TRABUCCHI, supra note 141, at 53-54.
143. Droits personnels, WEILL & TERRÉ, supra note 52, at ¶¶ 246-247; diritti di obbligazione, TRABUCCHI, supra note 141, at 53-54.
144. See DAVID, supra note 1, at 92-99, 365-71.
145. For comparative purposes, it would be interesting to set a modern structuralist philosopher to work on a linguistic and conceptual analysis of such concepts as they appear in the law of selected common-law and civil-law countries. Such a study might analyze the broader intellectual history of their many meanings in different contexts. The outcome of such a study might be that these concepts would be found to have a fundamentally similar content with common cores of meaning, but with important differences in shading and peripheral usage. For example, though no comparatist could assume that a French lawyer meant by règle juridique what a United States lawyer meant by the term "legal rule," the central similarity of the two would justify their inclusion in one conceptual family. An effective elucidation of these concepts might ultimately describe the Western conception of law. For a discussion of structuralist thought in anthropology, linguistics, history, and literature, see STRUCTURALISM AND SINCE: FROM LEVI-STRAUSS TO DERRIDA (J. Sturrock ed. 1979).
any such study has yet to be done, an analytic history of these concepts would doubtlessly reveal that they have appeared in so many different contexts in Western law because they encapsulate some enduring meanings in Western legal thought. In all likelihood, an effective elucidation of these concepts would ultimately describe the Western conception of law. In any case, this undertaking would provide a valuable line of inquiry into the macrocomparative classification of common-law and civil-law legal systems.

While certain basic concepts form a pool from which the Western legal systems have drawn, other concepts, especially complex doctrinal ones, serve to distinguish common-law from civil-law systems. For example, the common-law concept of the trust has no civil-law equivalent. The civil-law juridical act has no common-law equivalent. Consideration in the common law of contract is not the same as cause in the civil law of contract. Such doctrinal concepts illustrate the distinct conceptual frameworks within which common-law and civil-law attorneys handle legal problems. These doctrinal distinctions suggest again that it would be wise to preserve a common-law/civil-law subdivision in any larger grouping of Western liberal democratic legal systems. The possibility, however, of a larger Western grouping is not ruled out. Upon closer investigation it may turn out that many conceptual dissimilarities in doctrine mask conceptual similarities in theory. Tort and delict may be one such case. It would be absurd to suppose that all differences will dissolve upon close inspection, but minor technical distinctions are more appropriate for microcomparative than for macrocomparative studies.

146. See Zweigert & Kötz, supra note 2, at 274-84.

147. For a good general introduction to the concept of the juridical act, see Merryman, supra note 21, at 81-84. See also Weill & Terré, supra note 52, at ¶¶ 313-41; Trabucchi, supra note 141, at 130-33.

148. But see Markesinis, Cause and Consideration: A Study in Parallel, 37 Cambridge L.J. 53 (1978), for a persuasive argument that the two concepts are nonetheless parallel in many respects.


150. It should also be observed that some of the major legal categories discussed above, see supra text accompanying notes 115-139, reflect the importance of certain metalegal concepts, that is, certain fundamental social concepts which appear pervasively in Western law. Property and contract are the two most obvious, and their great importance in common law and civil law distinguishes the Western legal systems from all other contemporary families of legal systems. The same could also be said of the concept of a constitution and of a number of other pervasive Western legal concepts with wider social importance.
C. Law and Western Languages

There are also important similarities among the languages of Western law, although this topic has received little comparative analysis. Most comparatists have simply noted that cognate legal terms in Western languages often carry different meanings, a caution to be observed carefully when reading and translating foreign law. The mere existence of this problem of cognate words reveals something about the linguistic backgrounds of the languages of Western law. In studying the legal systems outside the West, similarities of language are much less commonly found, because the degree of linguistic difference is so much greater. The languages of Western law—the most important of which are English, German, French, Italian, Spanish, and Latin—are the languages of Western civilization. All have descended from an older common ancestor or ancestors, and all have been used in cultures which have had long and close associations in history, enabling them to borrow from one another. A study of the forms and derivations of the vocabularies of Western legal systems conducted by a modern historical linguist might well uncover reasons to classify these vocabularies as one Western group. Linguistic structures are the law's most basic structures, so this is another interdisciplinary line of inquiry which would be invaluable in comparing entire legal families.

VI. INSTITUTIONAL ELEMENTS

Upon examining the institutional settings of common-law and civil-law systems, convergence is once again found. In the West, the rise of the welfare state and the growth of modern movements for social reform through law have resulted in a proliferation of legislation and administrative regulation with the consequence that public law now outweighs private law in importance. In the common-law countries, this phenomenon has enhanced the status of statutes relative to

151. See R. Schlesinger, COMPARATIVE LAW 815-27 (4th ed. 1980) [hereinafter cited as Schlesinger]; David, supra note 1, at 341. Dual meanings are not unknown even in common law, the one family of legal systems based on a common language, English. For example, "Attorney General" has different meanings in English and United States law. David, supra note 1, at 430.

152. Schlesinger, supra note 151, at 817.

153. For example, the various types of interest in real property are represented in the West by abstract nouns; by contrast, however, the Akan, a major tribe in Ghana, represent property interests by verbs. A. AlloTT, LAW AND LANGUAGE 28 (1965) (inaugural lecture delivered on March 2, 1965, at the School of Oriental and African Studies, University of London).
judicial decisions. In the civil-law countries, it has compromised the traditional ideal of codification.

A. Source-of-Law Theory

It might once have been maintained that civil-law systems are codified legal systems while common-law systems are systems of decisional law. This traditional dichotomy of systems of codes and systems of precedent has produced a massive literature contrasting "source-of-law theory" in common- and civil-law systems.

The modern civil-law ideal of codification may be traced to Justinian, whose Corpus Iuris Civilis was intended as a sweeping reform of Roman law. The later European Romanists, especially the humanists and the natural lawyers of the Enlightenment, also saw codification as a way to modernize and rationalize the law into a systematic and self-sufficient repository of legal principle. Ideally, the law of a civil-law country should be entirely contained in a handful of complete, coherent, and clear codes. Like many other ideals, this one has eluded attainment.

The law in common-law countries, by contrast, has not been devised as a complete, rational system brought into existence by an act of legislation. Rather it has developed by the gradual accretion of particular precedents made binding for the future by the doctrine of stare decisis. The civil-law lawyer, it might be said, applies the law to a case by finding the relevant code provision, applying it to the particular case, and deducing the result logically therefrom. The common-law lawyer, by contrast, applies the law to the case by finding another case decided under the same or similar circumstances, discovering its ratio decidendi, and applying the ratio analogically to reach a result.

These images of common-law and civil-law source-of-law theory are of course highly caricatured, and much recent comparative study

154. "[T]wo great systems of law," Lord Macmillan boldly proclaimed, "divide the civilized world, the system of codified law and the system of case law." ("Les deux grands systèmes de droit qui se partagent ainsi le monde civilisé, le système du droit codifié et le système du droit jurisprudentiel...".) Macmillan, Deux Manières de Penser, in 2 INTRODUCTION À L'ÉTUDE DU DROIT COMPARÉ: RECUEIL D'ÉTUDES EN L'HONNEUR D'ÉDOUARD LAMBERT 3, 6 (1938 reprinted 1973) [hereinafter cited as Macmillan] (translated from a lecture delivered by Lord Macmillan at the University of Oxford, May 9, 1934) (English quotations are translations from a translation).


156. MERRYMAN, supra note 21, at 27-34 discusses European ideologies of codification.

has been devoted to demonstrating just how unreal they are today. "[T]he technical expression of Western law has tended to converge towards a mixture of codes or partial codes, specialized statutes of a heterogeneous character, and reported judicial decisions which in their own terms, or as handled by academic legal commentators, fill out and develop the basic law."\(^{158}\) Today, important statutory law in Europe is to be found less and less in codes properly so called and more and more in ordinary legislation. The authority of legislation as a whole has lost its supereminence, and important bodies of law are almost entirely judge-made. As a result, European lawyers have begun to treat judicial decisions, at least when they form a *jurisprudence constante*,\(^{159}\) as an increasingly independent and important source of authority. A European judge will follow the relevant decisions of the highest courts much as an Anglo-American judge will. Although there are still differences in the role of judicial decisions in common-law and civil-law countries, commentators seem to agree that these differences are more a matter of detail than of basic principle or common practice.\(^{160}\) In the common law, legislation is becoming more important and has probably surpassed case law as a source of law reform.\(^{161}\) The common-law lawyer is also becoming familiar with more systematic, abstract, and comprehensive formulations of law which resemble codes in some respects.\(^{162}\)

The modern penchant for social regulation through law has also inflated the body of the law everywhere in the West beyond measure, and this accounts for the pervasive, if informal, authority of the treatise as a source of law. In England, on the Continent, and in the United States, lawyers expect treatises to provide a systematic and thorough development of the law relevant to a given subject, which they might otherwise have to collect from many scattered sources. In the United States, the burgeoning law of fifty-one interrelated sovereigns has called forth the American Law Institute's project of restatements of the law governing important common-law subjects. As Professors

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\(^{158}\) Sawer, *supra* note 48, at 47.

\(^{159}\) *Jurisprudence constante* might loosely translate as a judicial repetition of similar decisions. The French refers to a group of cases standing for the same legal rule. See generally SCHLESINGER, *supra* note 151, at 574-75. For an extended discussion of the judicial decision in Contentional legal systems, see THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS (J. Dainow ed. 1974); for a discussion by two representative French civilistes who recognize the authoritative force of judicial decisions as a source of law, see WEILL & TERRE, *supra* note 52, at ¶¶ 196-226.

\(^{160}\) See, e.g., DAVID, *supra* note 1, at 132.

\(^{161}\) See *supra* text accompanying notes 53-57.

\(^{162}\) See infra text accompanying notes 164-65.
Zweigert and Kötz have noted, "Restatements are rather like the civil law codes in their systematic structure of abstractly-formulated rules, and in many cases the continental jurist can use them as a means of easy access to the rules of American private law in the first instance." The converse is also true: the United States lawyer who has become familiar with the systematic orderliness of the Restatements should probably not have much difficulty picking up the orientation and system of European codes. Common law and civil law alike seem to rely on legal scholarship for comprehensive, systematic, and authoritative syntheses of the law.

B. Judicial Method

The older image of a "judge-proof" mechanistic application of the codes has been abandoned, and most European commentators today recognize the "legislative" functions of the judiciary. This development may date to the famous Article I of the *Schweizerisches Zivilgesetzbuch* (Code civil suisse, Codice civile svizzero, Swiss Civil Code) which provides that legislation governs all matters to which the letter or the spirit of one of its provisions refers.

In default of an applicable legislative provision, the judge rules in accordance with customary law and, in default of custom, according to the rules he would establish if he had to act as a legislator.

He draws upon solutions sanctioned by legal scholarship and case law.

164. The authority of the Restatements is only persuasive; they have been highly persuasive, however. As of April, 1976 over 55,000 appellate decisions had cited the Restatements [and had applied the Restatement rule in "nearly 98 percent of the decided cases mentioning the Restatements"]. Few courts which cite the Restatement explicitly reject the Restatement rule. It would seem that the Restatements are becoming accepted as the authoritative statement of the common law of the United States. On the other hand, many aspects of the law covered by the Restatements have not been covered in state decisions citing them, so that categorical statements should be made with great caution.

165. This is Professor Sawer's thesis. Sawer, *supra* note 48, at 32.
166. Article 1 provides in full (in the French official version):

*Article premier* La loi régit toutes les matières auxquelles se rapportent la lettre ou l'esprit de l'une de ses dispositions.

A défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur.

Il s'inspire des solutions consacrées par la doctrine et la jurisprudence.
On the other hand, this change may be nothing more than a belated recognition of the necessary implication of Article 4 of the *Code Napoléon*, which made it an offense for a judge to refuse to decide a case on the ground that no statute applied. Some evidence indicates that the drafters of the *Code Napoléon* recognized a certain leeway within which the judiciary might create law. In any case, European judges today largely follow the judicial method outlined in Article 1 of the Swiss Civil Code. It is difficult to imagine how they might do otherwise.

C. Styles of Legal Reasoning

Many commentators have drawn pictures of the common-law and civil-law minds from an examination of each system's style of legal rea-

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167. The judge who refuses to judge, under pretext of the silence, the obscurity or the insufficiency of the statutory law, may be prosecuted as guilty of a *dénie de justice* [the French *dénie de justice*, which may loosely be translated as 'denial of justice,' has no real English or American equivalent].

In the original: "Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice." *Code civil* art. 4.

168. See, e.g., Sawer, supra note 48, at 32.

169. Professors Weill and Terré (and many others) quote Portalis, one of the principal drafters, on this point: The creative power of judicial decisions was, moreover, admitted by the drafters of the civil code themselves. Portalis, in his *Preliminary Discourse*, after having showed that the code had inevitable gaps, added: "the office of statutes is to determine, in broad strokes, the general maxims of the law; to establish principles rich in results, and not to descend into the detail of the issues which may arise on each subject. It is up to the magistrate and to the jurist, steeped in the general spirit of the law, to direct their application . . . It would no doubt be desirable if all legal subjects could have been regulated by statutes. But in default of precise texts on each subject, an ancient and well established usage, an uninterrupted line of like decisions, a received opinion or maxim, takes the place of statutes."

In the original:

Le pouvoir créateur de la jurisprudence a d'ailleurs été admis par les rédacteurs du code civil eux-mêmes. Portalis, dans son *Discours préliminaire*, après avoir montré que le code avait des lacunes inévitables, ajoutait: "l'office de la loi est de fixer, par de grandes vues, les maximes générales du droit; d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière. —C'est au magistrat et au jurisconsulte, pénétrés de l'esprit général des lois, à en diriger l'application . . . Il serait, sans doute, désirable que toutes les matières pussent être réglées par des lois. Mais à défaut de textes précis sur chaque matière, un usage ancien et bien établi, une suite non interrompue de décisions semblables, une opinion ou une maxime réçues, tiennent lieu de loi."

WEILL & TERRÉ, supra note 52, at 238 n.1.

170. ZWEIGERT & KÖTZ, supra note 2, at 14, 263-68.
soning and have thus found a further division between common-law and civil-law legal systems. The tone of this body of comparative writing is perfectly captured in Lord Macmillan’s famous paper of 1934, Two Manners of Thinking, wherein he hazarded the generalization that “all human minds, in their ultimate structure, are divided into one or the other of two types or classes, which are each characterized by manners of thinking fundamentally different and distinct.” For Lord Macmillan, common-law or pragmatic thinking was one such type, and civil-law or theoretical thinking the other. While Lord Macmillan’s paper humorously acknowledged that this simple generalization was not likely to be true, comparatists have formulated equally stark and simple propositions to describe common-law and civil-law reasoning: the common-law lawyer thinks inductively, the civil-law lawyer, deductively. Casuistry typifies common-law thought, whereas generality typifies civil-law thought. The common-law mind is traditional, the civil-law mind, rational. Common-law reasoning is concrete, civil-law reasoning, abstract. The common-law lawyer’s orientation is procedural, the civil-law lawyer’s, substantive. Common-law lawyers reason empirically, civil-law lawyers, theoretically. Common-law thinking is formalistic, civil-law thinking, antiformalistic. Common-law reasoning proceeds by a method of distinction, whereas civil-law reasoning proceeds by a method of interpretation.

Comparative work in this field commonly begins with this kind of attack and then makes qualifications. Every Western legal system has placed a high value upon rationality and systematic order and has found that legal rules, whether derived from a code or from cases, have important areas of indeterminacy which permit legal creativity by

171. See generally Macmillan, supra note 154.
172. “[T]ous les esprits humains, dans leur ultime structure, se classent dans l’un ou l’autre de deux types ou classes, qui se caractérisent chacun par des manières de penser fondamentalement différentes et distinctives.” Id. at 4.
173. Id.
174. ZWEIGERT & KÖTZ, supra note 2, at 268-72; DAVID, supra note 1, at 98-99; MERRYMAN, supra note 21, at 84-85.
175. STEIN & SHAND, supra note 67, at 39.
176. ZWEIGERT & KÖTZ, supra note 2, at 262.
177. Id. at 208; DAVID, supra note 1, at 325, 361-65.
179. ZWEIGERT & KÖTZ, supra note 2, at 64, 66.
180. DAVID, supra note 1, at 368.
181. These areas of indeterminacy are what H.L.A. Hart has called the “open texture” of law. H. HART, THE CONCEPT OF LAW 124 (1961). Hart’s discussion of this indeterminacy in
judges. These polar descriptions, in attempting to say something new about common-law and civil-law reasoning, can be criticized because they exaggerate and thereby bury any truth under fictitious overstatement. It would be much more accurate to say that the law in every Western legal system has swung back and forth between these opposing characteristics of speculative thought. For example, the casuistry of classical Roman lawyers was echoed by some of the medieval European Romanists and is reminiscent of traditional English casuistry. English law has had its systematizers, from Bracton to Blackstone. The systematization and precision of some of the United States Restatements is greater than that of many modern civil-law treatises. It should be appreciated that the legal thought of both common-law and civil-law countries today is sufficiently rich to contain a healthy degree of stylistic variety, ranging from relative casuistry to relative generality and from relative concreteness to relative abstractness. One is likely to find a tendency to casuistry in modern common law and a tendency to systemization in civil law. Also, the folklore of legal reasoning within the professional legal traditions of common law and civil law enshrines these archetypical images in a purer form than one ever finds in practice. Beyond these observations one should not rely on such outdated polar generalities.

Western lawyers are abandoning these older models of legal reasoning and are beginning to see legal reasoning in common-law and civil-law countries as essentially rhetorical. Rhetorical reasoning aims not at logical proof or scientific discovery but rather at persuasion and conviction; it rests not on axioms and rules, but rather on appeals to the community's sense of justice. The search for justice through written reason in the form of a hierarchy of accepted authoritative sources—

both codified and precedential legal systems is an indispensable reference on this subject; id. at 121-32.

182. The Restatement of Property (1936) offers a prime example, building as it does on a set of Hohfeldian definitions.

183. The ability and the desire to characterize Western legal reasoning in these terms may actually reveal fundamental affinities rather than differences between common-law and civil-law reasoning. These polar generalities reveal a fascination with logic and forms of argument not found in many other cultures. It makes almost no sense to ask whether the judge in a traditional African customary court reasons casuistically or generally when there are no written records either of cases or of broad principles. Most of these polarities make sense only as ideal types within the Western conception of law and not outside it.

Common Law and Civil Law

statutes, cases, legal scholarship, and custom—is probably an accurate characterization of legal reasoning in both common-law and civil-law systems. Within this type of legal reasoning, there is obviously room for a variety of styles. Stylistic differences, however, should not divide these two legal systems into separate families but rather should mark diverging tendencies within the larger family of Western liberal democratic legal systems.

D. Legal Professions

1. Education

The legal professions have also been an area of comparative study. Many observers, following Weber, have felt that the most important distinction between common law and civil law is the distinction between their professional elites. Weber began with legal education:

For the development of a professional legal training, and, through it, of specifically legal modes of thinking two different lines are possible. The first consists in the empirical training in law as a craft; the apprentices learn from practitioners more or less in the course of actual legal practice. Under the second possibility law is taught in special schools, where the emphasis is placed on legal theory and “science,” that is, where legal phenomena are given rational and systematic treatment.

It is obvious where this line of thought leads: academically taught civil-law lawyers are trained in the classroom to think like their professors—rationally, theoretically, generally, and abstractly. Apprenticed common-law lawyers, however, are trained in the courtroom to think like their senior colleagues—traditionally, pragmatically, casuistically, and concretely.

Common-law and civil-law systems, however, have recently con-

185. DAVID, supra note 1, at 105-06, 401.
186. MAX WEBER ON LAW IN ECONOMY AND SOCIETY 198-223 (M. Rheinstein ed. 1954). See also supra note 16.
187. See, e.g., Rheinstein, supra note 14, at 204. Cf. the comments of Professor Ehrenzweig, who felt that common law and civil law could not be distinguished by civil law’s origin in Roman law, by codification in civil law, by the law-making function of the judiciary in common law, or by their different types of legal reasoning. The “crucial difference,” he felt, was “in the position of the judge in the two legal orbits, which is not only reflected in his economic and social status, but vitally important for the making and taking of all the law.” Ehrenzweig, MALMSTRÖM’S “SYSTEM OF LEGAL SYSTEMS”: AN UNSYSTEMATIC COMMENT, in 14 ACTA INSTITUTI UPSALIENSIS IURISPRUDENTIAE COMPARATIVAE, MÉLANGES DE DROIT COMPARÉ EN L’HONNEUR DU DOYEN ÅKE MALMSTRÖM 73, 76.
188. MAX WEBER ON LAW IN ECONOMY AND SOCIETY 198 (M. Rheinstein ed. 1954).
verged in regard to professional training. While apprenticeship may once have been the typical form of training for common-law lawyers, virtually all Western lawyers today are academically trained before they are exposed to legal practice. The result, as Professor David demonstrates, is that the role of legal scholarship in England today is probably as great as it is on the Continent.189 Professors Zweigert and Kötz similarly recognize that the style of contemporary United States law is largely the work of United States legal scholars.190 It must be recognized, however, that civil-law lawyers have been trained in universities since the eleventh century, whereas the primacy of university legal education in common-law systems is fairly recent. As a result, common law still shows signs of having been developed by practitioners rather than professors; one such sign often held up for comparative scrutiny is the importance of common-law forms of action in shaping modern substantive private law.191 Even so, as long as Western legal education continues to be a university education, these lingering vestiges of the different forms of education in common-law and civil-law legal professions may be expected to recede.

2. The Judiciary

Many commentators have also differentiated the position of judges in common-law and civil-law countries.192 In civil-law countries, the judge is almost invariably a career civil servant who expects to rise in the ranks by diligent effort in his job. It is fairly rare for a civil-law judge to have been chosen for the judiciary after a distinguished career as a private practitioner. For this reason, and for other important historical reasons, the civil-law judge tends to be a less prominent social figure than the common-law judge. The structure of the judiciary in civil-law systems also enforces a certain anonymity, for only in the most unimportant cases does the civil-law judge sit alone. Moreover, as a member of a panel, the civil-law judge in many countries is not permitted to deliver dissenting opinions.193 In civil-law countries there is generally a greater number of professional judges relative to the number of trained jurists as a whole than in common-law countries.

189. See David, supra note 1, at 399.
190. Zweigert & Kötz, supra note 2, at 254.
191. See, e.g., David, supra note 1, at 323-25; Zweigert & Kötz, supra note 2, at 208-09.
192. See, e.g., David, supra note 1, at 139-40; Merryman, supra note 21, at 35-39; Zweigert & Kötz, supra note 2, at 117, 223.
193. Zweigert & Kötz, supra note 2, at 117.
Socially these judges are bureaucrats, functionaries of the state. The status of the civil-law judge contrasts strikingly with the powerful position held by the common-law judge. Thus, judicial roles represent an important distinguishing feature between common-law and civil-law systems.

3. Summary

Beyond these broad generalizations, there is a great deal of variety among legal systems with respect to the professional functions, career structures, and social roles of trained jurists. This variety suggests that a common-law/civil-law subdivision may be appropriate within the Western legal family.

E. Courts

Courts and procedures form another set of institutions which has received substantial comparative attention. For example, the civil-law court of cassation, the court of last resort in civil and criminal cases, has often been singled out as an institution quite unlike the highest courts of appeal in common-law countries. Here too, civil-law and common-law theory have markedly converged during the last two centuries.

In every Western system, there is a court of last resort reviewing questions of law in order to assure the uniformity of court decisions, clarify difficult or uncertain legal questions, and modernize the law. The French Cour de cassation (Court of Cassation or highest court of ordinary jurisdiction) remands a case whose judgment it has over-

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194. DAVID, supra note 1, at 140.
195. See, e.g., MERRYMAN, supra note 21, at 40-43, 128-29; ZWEIGERT & KÖTZ, supra note 2, at 112-16.
196. This situation did not always exist. In 1790, in reaction to the powers of courts under the ancien régime, the Tribunal de cassation was created as a special quasi-legislative body which would have no power to actually decide the cases submitted to it. The Tribunal de cassation could only overturn erroneously decided cases and send them back to an ordinary court for the entry of judgment. Thus, the Tribunal could not deliver authoritative interpretations of the applicable law, nor would the courts to which cases were remanded be bound by its decisions. In this way, its function would be legislative and it would serve as the final arbiter of difficult questions of statutory interpretation. This fiction, however, disappeared quickly. It was soon accepted that the tribunal would indicate how the lower courts had erred and what the correct legal principles were. MERRYMAN, supra note 21, at 41-42. In 1804, the Tribunal was renamed the Cour de cassation (Court of Cassation). Bellet, France: La Cour de Cassation, 30 R.I.D.C. 193, 194 (1978).
197. Tunc, Synthèse: La Cour Judiciaire Suprême, Une Enquête Comparative, 30 R.I.D.C. 5, 13-14 (1978) [hereinafter cited as Tunc].
turned to a lower court for decision. Although the lower court is not formally bound by the higher court's decision, lower courts do not in fact frequently deviate from the interpretation of the law rendered by the Cour de cassation. When lower courts do deviate, a second recourse to the higher court will result in a judgment that is formally binding on them. The more modern European high courts come even closer to the prevailing Anglo-American practice regarding courts of last resort. The interpretations of the Italian Corte di cassazione (court of last appeal)\(^\text{198}\) are formally binding upon the lower courts on first remand. The German high court, the Bundesgerichtshof (the federal court of justice),\(^\text{199}\) like typical Anglo-American supreme courts, has the full power to decide a case and enter judgment without remanding it if no further questions of fact require decision. In civil-law terms, the German court is a court of revision, not a court of cassation.

Certain features of civil law courts of cassation and revision, however, still distinguish them from common-law high courts. The typical court of cassation or revision does not watch over the entire system of national courts, as does the House of Lords or the United States Supreme Court, but only watches over the ordinary civil and criminal courts. The German Bundesgerichtshof, for example, is one of four important German high courts. There are also the Bundesverwaltungsgericht (federal administrative court), the Bundesfinanzhof (federal court of finances), and the Bundesverfassungsgericht (federal constitutional court). These are each independent high courts; no appeal from a decision of one will lie to any of the others. In 1968, a Common Chamber of these four courts was established to hear cases in which any federal supreme court wishes to depart from the decision of any other.\(^\text{200}\)

Another feature of civilian high courts not found in typical common-law high courts is their size and internal structure. The typical common-law high court has no internal divisions, whereas the typical civil-law high court has many judges divided among numerous chambers. The German Bundesgerichtshof, for example, has 107 judges sitting in five criminal-law and ten civil-law chambers.\(^\text{201}\) The Italian Corte di cassazione has 295 judges, who are also divided into numerous

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\(^{198}\) See generally Sgroi, Cour de Cassation d'Italie, 30 R.I.D.C. 293 (1978) [hereinafter cited as Sgroi].

\(^{199}\) See generally Salger et al., La Cour Fédérale de Justice de la République Fédérale d'Allemagne, 30 R.I.D.C. 311 (1978) [hereinafter cited as Salger].

\(^{200}\) Id. at 313.

\(^{201}\) Tunc, supra note 198, at 31; Salger, supra note 200, at 314.
civil and criminal sections. These are features that suggest an important common-law/civil-law distinction within the larger Western family.

F. Civil Procedure

Because of the absence of a jury in civil litigation on the European continent, civil procedure has developed along lines quite different from common-law civil procedure. In a typical continental civil proceeding, all the evidence is taken in a flexible series of meetings between counsel and a hearing judge. Issues are sharpened as counsel proceed, and surprise is generally not a factor since the hearing may easily be adjourned to another day to allow further investigation in the interim. The hearing judge prepares a summary written record, including transcripts for another judge who will decide the case on the basis of this written file and the further arguments and briefs of counsel. Common-law civil procedure, by contrast, concentrates the evidence-taking into a trial. It must do so because a jury may not easily be repeatedly convened and dismissed over a long period. The trier of fact decides the case largely on the basis of oral testimony. Continental civil proceedings tend to be less concentrated and less oral. They also tend to be less encumbered by formal rules of evidence, a feature attributable to the absence of a jury. All of these factors distinguish continental civil procedure from its Anglo-American cousin. Continental criminal procedure also has a significantly different character than common-law criminal procedure.

VII. CONCLUSION

In the institutions of common law and civil law, there are differences important enough to preserve a sense of common-law/civil-law distinctiveness, yet enough similarity and convergence to speak in terms of an encompassing Western family having the common-law and

202. Tunc, supra note 198, at 31; Sgroi, supra note 199, at 297-98.
203. See Merryman, supra note 21, at 120-31, for a brief description; Schlesinger, supra note 151, at 329-493, for a more thorough treatment.
civil-law families as its separate and primary members. It must none-
theless be admitted that the similarity and convergence are much
greater in practice than in the minds of lawyers. For instance, the rela-
tive practical importance of cases and statutes throughout the West is
roughly the same, but case analysis still receives too much emphasis in
common-law thought, and statutory interpretation receives a similarly
vestigial overemphasis in civil-law thought. Professional legal tradi-
tions seem in many respects to lag behind changes in the face of the
law. Since professional legal traditions condition the behavior of ju-
rists everywhere, they must be taken into account. The European attor-
neys' professional culture is distinct from that of their common-law
colleagues. Even so, the marked present convergence in actual insti-
tutions and practices has come about principally because common-law
and civil-law societies in the twentieth century closely resemble one
another, and their laws have developed accordingly. This kind of natu-
ral convergence is deeper and more permanent than any convergence
through conscious unification or transplantation of laws and thus is
likely to continue.

As has been shown, the affinities between common-law and civil-
law legal systems far outweigh their differences. The histories of com-
mon law and civil law are closely related major currents in the larger
stream of Western history. Since the Middle Ages, common-law and
civil-law legal systems have drawn from a common fund of Western
legal ideas, and since the Enlightenment they have so markedly con-
verged that the traditional historical distinctions between them have
greatly diminished. The historical similarities have endowed both fam-
ilies of legal systems with a single ruling set of assumptions about the
place of law in the social order, the form law takes, its proper applica-
tion, and its substance. This Western liberal democratic conception of
law not only joins common-law and civil-law families, but it also effec-
tively sets them apart from the socialist, African, Far Eastern, Islamic,
and Indian legal families. Historical similarities are perhaps also re-

205. MERRYMAN, supra note 21, at 109-19.
206. See J. MERRYMAN & D. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND
LATIN AMERICAN LEGAL SYSTEMS, CASES AND MATERIALS 61 (1978). An excellent recent
discussion of the convergence between common-law and civil-law legal systems concludes
that the most persuasive indication of their convergence is "the extent to which legal systems
in Civil Law and Common Law nations play out the fundamental values of Western cul-
ture," indicating "that the Common Law and the Civil Law are moving along parallel roads,
toward the same destination." Merryman, On the Convergence (and Divergence) of the Civil
sponsible for formal similarities in contemporary common-law and civil-law legal systems.

Microcomparative studies of the rules of common-law and civil-law systems have uncovered a high degree of convergence between them. Although little work has yet been done, comparative studies of the larger structures of common-law and civil-law families would probably also show a high degree of convergence in basic categories and divisions, pervasive concepts, and legal terminology. A similar convergence for which recent history is again responsible marks the law in action—institutions, processes, jurists, and professional traditions—in common-law and civil-law countries.

All in all, common law and civil law seem to be distinct but converging members of a larger Western liberal democratic family of legal systems. In fact, the common-law/civil-law dividing line may already have ceased to exist in the public law of Western liberal democracies, and the consensus of comparatists seems to be that the Western liberal democratic legal systems are now dominated by public law. Even though common law and civil law still differ in some respects, if either family were compared to any other major family of legal systems (socialist, Far Eastern, African, or Islamic) the magnitude of differences would be far greater. The conclusions to be drawn from this Article are therefore these: Within the Western liberal democratic family of legal systems, a common-law/civil-law subdivision exists, but the comparative criteria analyzed here indicate that the family affinities of the common-law and civil-law systems far outweigh their differences, demonstrating their common membership in a larger Western taxonomic category.

207. See supra note 123.