1. I have taught this course with relatively little emphasis on the 19th century codes. We looked at the codes as something that happened later, something which showed the continuity of the tradition, but not something toward which the tradition was leading inevitably. One of the reasons why we did this was a purely mechanical one. It is hard to justify giving a course under the auspices of the medieval studies program that has its final and logical consummation in events that happened in the 19th century. One can, however, make the argument for the continuity of the medieval legal tradition into the early modern period. The question, the answer to which we have been exploring in the last weeks of the course, is whether this argument is valid, and whether it really makes any sense to stop the course c. 1750. Obviously if one is going to do that, one has to abandon the notion that all the developments from 1500 onward were leading inevitably toward codification. They weren't; I think we've shown that. One can see how many of the things that happened over the course of the 300 years that separate 1500 from the Napoleonic Codes were, in a sense, preconditions for the Codes. The Codes could not have happened had there not been the homologation of custom, the systematization of Roman law and then the application of that system to the homologated customs, and the attempt to state pieces of the result in the statutory form of the *grandes ordonnances*. But to say that these things were preconditions for the codes is not the same thing as saying that the codes is where it all was heading. The codes are the product of the late 18th and 19th centuries.
2. They are also, if not unique to the Continental tradition at least characteristic of the Continental tradition. By and large the Anglo-American jurisdictions did not codify. That statement is too broad, because codification of commercial law, civil procedure, and substantive criminal law is very common in the Anglo-American jurisdictions. We are talking here about the codification of civil law, all of what we call family law, property, torts, contracts, and the law of succession in one code. So the question becomes what distinguishes the Anglo-American tradition from the Continental as both existed in the mid–18th century? To put the question another way, could one have predicted in 1750 that the Continental jurisdictions would codify and the Anglo-American would not? There is a large literature on the topic of the differences between Anglo-American law and Continental law. You might want to take a look at the list of differences, those offered by Raoul van Caenegem on the outline. It turns out that many of the differences, while quite real, probably don't make that much difference, or at least don't help us understand the presence of codification in one area and its relative absence in another. These include:
    a. The ambiguity of the English word "law." It means both "law" in the general sense and "statute." This ambiguity goes back to the Danes. It is a fact; one can wonder how important it is. Continentals, except for the Scandinavians who share the ambiguity, do find it odd, but I'm not sure that it reflects any real ambiguity of thought. After all we do have the word "statute" when we want to be precise. There's another linguistic difference that may have more of an effect. The ambiguity of the distinction between law in the broad sense and right in all Continental languages, except the Scandinavian.
    b. The rule of exclusion ("statutes in derogation of the common law are strictly construed") and the purported dislike of legislation that is said to exist in Anglo-American law and not in Continental. This did exist in the past, perhaps most notably in the 19th century U.S. I'm not sure that it really be said to be true any more, though I am given pause by

the fact that I found a case in the West Virginia Supreme Court in 2007 that still cited the maxim.[1]

c. Prosecution and verdict in criminal trials. Of a number of distinctions here, the jury is probably the most important. But criminal juries did appear on the Continent in the 19th century; some, like the French, abandoned them; some like the Germans converted them into lay assessors that sit with the professional judges. The procedural distinctions in the criminal area remain important. Once we get past the flag-waving there is probably much that each system can still learn from the other, and I'm not sure that the course of wisdom would not favor more adoption of the Continental system in the Anglo-American than vice versa. After all the striking feature of the common-law criminal trial in the United States is that very few criminals get it. We can only afford it in cases like O.J. Simpson's or Whitey Bulger's. 98 to 99% of those accused of serious crime plead guilty.

d. Appeal is a recent development in England; it's somewhat older in the U.S. It is much older on the Continent. This is a fact; the history suggests that its importance can be exaggerated. English law developed in a very close community of judges. Mechanisms other than appeal were found to review decisions of lower courts and to keep errant judges in line. The introduction of appeal may have served to further distinguish the difference between fact and law. The former is the role of the trail court; it takes a great deal to get an appellate court to review trial courts' findings of fact. The latter is for the appellate court, and the trial courts are supposed to follow what the appellate courts say about it.

e. English law is "a seamless web"—the importance of the codes being perceived as a break with the past. This obviously does not antedate the codes. It is a fact; our contemporary situation suggests that it may not be that important. After all the most regular historical analysis that is done today in the U.S. is done with a written document, the U.S. constitution.

Some of the differences turn out to be important differences but not Anglo-American vs. Continental:

f. England is a land without a written constitution—but written constitutions are of quite recent origin in Europe. And, of course, the United States is a land with a written constitution, the oldest continuing written constitution in the group.

g. Consequences of parliamentary absolutism (no judicial review of legislative action). Again, this distinction may be important but can hardly be called an Anglo-American vs. Continental distinction. Germany has judicial review; Belgium does not. The U.S. has it; England, at least until quite recently and then only quite reluctantly, did not.

h. The haphazard development of substantive criminal law. This distinction has largely been removed in the United States by the abolition, in most places, of common-law crimes. England still has them, and English substantive criminal law is a real mess, but the most serious offenses are quite carefully defined in case law.

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[1] Phillips v. Larry's Drive-in Pharmacy, 220 W.Va. 484, 647 S.E.2d 920 (2007).

i. So we're left with the dependent variable: a law uncodified. Both England and the U.S. thought about codification in the 19th century. Actually, a few U.S. jurisdictions adopted civil codes in the 19th century. California is notable. Most Anglo-American jurisdictions did not, however, codify. There was too much Roman law in the existing codes, and codification was associated with Napoleon, not a popular figure in most Anglo-American countries. Those jurisdiction that did codify came to treat their codes as if they were precedential decisions of courts. Codification, of course, is a relatively recent phenomenon. Indeed, it is remarkable how many of these so-called fundamental distinctions are no older than the 19th century.

j. That leaves us with one major difference. The oracles of the law in England are the judges not the jurists or the law professors. This is probably less true in the US than it is in England, but law professors, even in the US, do not have the role in the system that they do on the Continent. This distinction goes a long way back. Hence, it is not a surprising that VanC spends the rest of his book on the last distinction.

3. VanC's possible explanation for the last:

a. National spirit—in addition to all the usual problems with defining what we mean by 'national spirit', we have a chicken and egg problem: does the national spirit of England require that judges rather than law professors be the oracles of the law or does the fact that judges rather than law professors are the oracles of the law define, in part, the English national spirit?

b. Authoritarianism (the Continent) vs. democracy (England)—but English law is not democratic it is oligarchic. VanC was, of course, tweaking the noses of his English hosts when he said this.

c. Political explanations—The power of the judge or the legislator fits an oligarchic country. The professors' law fitted the chaotic situation of northern Italy throughout most of its history, 16th–19th century Germany, the Northern Netherlands in the days of Grotius, France of the *coutumes*. What do these places have in common? In most weak central authority. In France where the central authority was strong, it didn't get going until later than in England so there was no unified custom, and the jurists had to provide what unity that there was. After the exegetic school of the 19th century the professors took over again in the civil-law countries.

d. The problem with this explanation is that it may fit England, but it doesn't really seem to fit the United States.

4. There's one more difference that I'd like to add, one that I think is quite important.

a. The first year of legal education in common-law jurisdictions is very different from the first year of legal education on the Continent. If we greatly exaggerate the extent to which law in practice in the Anglo-American jurisdictions is based on uncodified case law and the extent to which law in the Continental jurisdictions is based solely on the codes, we are not exaggerating at all what happens in the first year of legal education in the two types of jurisdictions. And I would suggest that not only does education have a profound effect on how one thinks about the profession that one practices but also that what one learns first has the profoundest effect. However much the case method is supplemented in Anglo-American law schools with statutes and theory, we convey the

impression that the case is where it's at. And however much the Continental law schools, at least the more adventurous of them, have added some theory, some comparative law, and even some case analysis to their curricula, the students get the impression that the code is where it's at.

b. One obvious result of this fact is that it affects what a lawyer thinks about first when he or she is looking at a problem. A striking feature of US private law is the number of cases in which there was a relevant statute that was simply ignored in presenting the case to the court. I suspect that similar examples in the reverse, a relevant prior case ignored in presenting the case, could be found on the Continent. I know that Continental legal historians have a tendency to ignore case material in their writing. But I think that the result of this basic difference in legal education is more profound than simply a question of sources of law. I think that it affects the way lawyers think. By and large, Anglo-American lawyers are quite good at analyzing facts in their relation to rules of law. Give me a hypothetical case and a result and I'll immediately start varying the facts in order to test the limits of the rule suggested by the case. Since reasoning by analogy is so important for law, it is important that Anglo-American lawyers tend to reason by factual analogies. Now, I'm not saying that Continental lawyers can't do that, but they frequently don't start there when they are trying to solve a legal problem. They start with the code provision, and if they can't find one on point, they look to analogous sections of the code. When they are trying to test the limits of the rule they again look to analogous sections of the code to see how general the provision is meant to be. In short, they reason by statutory analogies rather than factual ones. Of course, Anglo-American lawyers do the same thing when they are dealing with statutes, but, again by and large, they are not as good at it as the Continental lawyers are. This system of statutory analogy lay at the heart of what the French exegetical school did, and it has survived long after the demise of that school's political and jurisprudential beliefs.

c. Hence, I would suggest that if we are entering an era of decodification in Europe, in order to make it happen and particularly in order to make the connections between the Anglo-American and Continental systems more apparent, there is going to have to be a profound change in the system of educating lawyers. I would also suggest that the change is going to have to be much more profound than simply teaching some more legal history—which is about as far as most of the enthusiasts for a modern *ius commune* have gotten.

d. Important as this difference is, however, it does not help to answer our basic historical question: why did the Continental jurisdictions codify and the Anglo-American, by and large, did not. The differences in the educational systems are the product of that fact, not an explanation of it, at least not without much pulling and hauling.

5. Now let's take a look at another list of differences, this time offered by Alan Watson.

a. Like VanC, he first offers codification.

b. Like VanC, he points to the role of the jurist as opposed to that of the judge.

c. Unlike VanC, he points to differences in the style of deciding cases (relative absence of citation of previous cases; attempts to decide in a strictly deductive fashion; bare recital of the facts; little or no consideration of policy).

d. Unlike VanC, he notes the separation of civil from commercial law.

e. And unlike VanC, he notes that on the Continent there are separate tribunals for administrative law and for private law, whereas in the Anglo-American jurisdictions the same courts deal with both types of issues.

6. Watson's Roman-law thesis

a. Now the interesting thing about this collection of differences is that all of them are derived from the influence of Roman law in Watson's estimation. Codification is the most complicated, but he sees it as a product of a complicated intellectual development, including the teaching of Roman law in a world that had no legal unity, homologation of custom, the institutes of national law, the development of the natural law school and, in particular, the Enlightenment. The role of the jurist is seen then not in political terms as VanC sees it, but in intellectual terms. Only the jurist knows the law. The style of deciding cases derives from the attempt to be timeless, to find a rationale that transcends time and place but is rooted in authority. The last two differences are derived from the nature of the Digest itself. A commercial law that works in the 19th century cannot be based on Roman law, though a basic law of sale can be. Private and public law are sharply separated in the Digest, and relatively is said about the latter. As Watson sees it, a fundamental difference in system is caused by a fundamental difference in intellectual approach.

b. Now we might approach this in another way. We might ask the question whether the differences that turn out to be real are really fundamental. Certainly if we look at the two systems in the 18th century before codification, we see that the systems have much in common. I'm not at all sure that the lesson to be learned from the history is that the difference between common law and civil law is one that is greatly exaggerated and that one of the important reasons why we see the difference is the product of peculiar developments in late 18th century France. But that makes another question all the more puzzling; why did western legal development happen the way it did? For if we compare the western legal system to developed legal systems elsewhere (Jewish law and Islamic law come immediately to mind; the legal system of China might be another one to compare) – if we make those comparisons, what will strike us is not the difference between the Anglo-American legal system and that of Continental Europe but rather how much the western systems have in common that is not shared by the others.

7. My own answer to the question why western law developed as it did, the one that I've tried to expose in this course, is eclectic. I am attracted to the notion that Watson offers that whenever one is dealing with an activity that is as cut off from the rest of society as much as law has been in the West since the 12th century, internal explanations of developments should be preferred to external ones whenever they are convincing. There is, however, in my view too much in the comparative history of Western law that cannot be explained internally that we can afford not to look around to what was going on at the time that the developments we are seeking to explain took place. Sometimes these exogenous variables are in the realm of ideas, and perhaps we should always look here first, since we are usually trying to explain a phenomenon that is of the order of intellectual. Sometimes the exogenous developments are political, and perhaps this is where we ought to look to second, because conscious legal change, at least in the west, has normally been promulgated by political organs. There is enough, however, that lies below the political in the realm of the social and economic that we

cannot ignore developments in this area too. Finally, change is never the product of impersonal forces. Individuals make changes; individuals resist changes. Frequently we can't find out much about the individuals, but sometimes we can, and sometimes what we learn about them helps to explain what is otherwise quite inexplicable. Let me offer, then, a brief review of some of the topics that we have considered in this course, viewed in the light of the possible forces that might explain why they were the way they were:

a. Roman law, and later the *ius commune* generally. There can be no doubt that this was a powerful force in shaping European law, and that much that is different about English law can be explained by the fact that the learned law was less influential in England, particularly in the critical period from 1300–1500. Roman law simply won't go away if that's what every university-trained jurist learns. It affects his habits of thought in ways that he can hardly perceive. We have seen how the simple divisions of the *Institutes* between public and private law, and within private law among persons, things and actions, and within the law of things among individual things, succession, and obligations have continued to influence everyone who has tried to shape an overall view of law. We have also seen how specific pieces of Roman law, like the rule of occupation of wild animals, have appeared over and over again, influencing such broad concepts as the relation between ownership and possession, the theory of the origins of property, even the theory of the origins of the state. Two creations of the learned law of the Middle Ages, powerfully influenced by Roman law, Romano-canonic procedure and the consent theory of marriage, have also proven extraordinarily lasting. The former because it provides a means for resolution of any kind of dispute, the latter because it seems so timeless, so reductionist. Ideas spawned in areas quite outside what we normally think of as law, however, impinged on these developments.

    i. Were it not for the fact that a French theologian named Hugh of St. Victor had espoused a notion of the dual sacramentality of marriage, an idea that was picked up and popularized by Peter Lombard, it is hard to imagine that Alexander III would have come to the conclusions about the formation of marriage that he came to, and even if he had, it is hard to imagine that they would have been accepted.

    ii. The humanist movement had been in operation for almost two centuries before it came to affect the lawyers, but when it did so, it did so profoundly. The Roman texts were read more historically, prompting, on the one hand, a search for principle that went beyond the particular but, on the other, study of customary and non-Roman law in its own right. Fascination with the origins of property and the origins of the state in the 17th century produces dramatically different takes on the law of wild animals depending on whether one follows Thomas Hobbes, as Pufendorf did, or John Locke, as Barbeyrac did. Only the area of procedure seems relatively immune from such outside intellectual influences, though we certainly may see, as Kenneth Pennington does, a general concern with individual rights being reflected in procedural ideas about the minimum necessary for a process to conform to natural law.

b. The rise of the national territorial state. I know that some of you felt that I must be teaching a course in Western Civilization or European History Survey because of the amount of time that I spent on the political history that led to the formation of the modern

nations of Europe. But the end result is by no means obvious from the start: by and large today we have a single body of law for each country. True, some European countries are still federal in some aspects. Until quite recently, for example, Swiss civil procedure was codified at the cantonal level. But I suspect that the main story from this century that will be told in Continental legal history in the 22nd century will be the painful unification of the laws of Western Europe under the rubric of the European Union. On the topic of our three stories, each one was affected by the rise of the territorial state in different ways. In the case of wild animals, the story was one of how the Roman law solution came into conflict with varying local customs about hunting and finally was embodied in the national codes with the important qualification that hunting was subject to national as opposed to feudal regulation. In the case of witnesses, the story was one of how the national procedural codifications, going back in France to the 17th century were able to impose a uniform practice over a multiplicity of courts. In the case of marriage the story was intimately connected with the competing role of the church, competing against the monopoly of legal power in secular authorities. Thus, while in the other two areas the nation-state was able to use pieces of the learned law to unify local custom; in the case of marriage we are dealing with the dismemberment of a transnational body of law, brought down to the level of the nation-state. Although a number of countries attempted to bring religion into their marriage law, only Spain of the countries that we looked continued to look to a supranational legal system to get its law, and even there not completely.

c. I have said relatively little about the role of economic forces. None of our three topics is directly concerned with much that is of obvious economic concern. Had we done much with commercial law, we would have been able to point to some relatively obvious intersections between national and international trade and local mercantile custom and international mercantile custom. By and large the history of mercantile law is not well explored, and most of what is written on the topic is imbued with a kind of mercantile Romanticism. There are some economic intersection points in what we have done, however. The relationship between the law of wild animals and the law of poaching is a fairly obvious one. Roman law here provides a poor guide for those who are seeking to restrain poaching in the interests of the lords who claim hunting rights as their economic prerogative. Those who espouse a classical liberal economic view (Demsetz) of the origins of property rights would see efficiency as being on the side of the lords, individual ownership of hunting rights encourages conservation, whereas the Roman rule encourages wasteful exploitation. Those who espouse a more Marxian version of economics, on the other hand, also have little doubt as to why it is that the lords' rights gained some recognition, but efficiency is not the reason. The ultimate solution, to recognize the Roman rule but to qualify it with national regulation, is ambiguous as to its economic impact. On the one hand, the lords lost big. On the other hand, the effects of national regulation depends on who has got the ear of the regulators. I offer the point to illustrate that economic interests do get felt in the unlikeliest of areas and also that grand economic predictive theories about law tend to fall down in particular examples.

d. We have seen much more evidence of social forces at work. The lists of excluded witnesses are a veritable mirror of social attitudes in given periods. The social forces that arranged themselves against Alexander's rules on the formation of marriage tell us much about the formation of what Lawrence Stone has called the patriarchal family in the early

modern period. The Napoleonic Code, of course, reflects a fundamental change in the social structure of France. Perhaps even more pervasive are the ways that social forces work within the interstices of the system. If the rules require that in order for William Smith and Alice Dolling to be married, they must have exchanged words of consent, then the women of Winterbourne Stoke will testify that they did so, even if we strongly suspect that they did not.

e. In the case of both the social forces and the economic ones, the phenomena of the law can seem to change in response to them, or the phenomena of the law can seem to remain the same as the forces work their way around them. It is very difficult to predict when each reaction will take place. I am more prone than is Alan Watson to seeing legal change as in some sense caused by such forces. Nonetheless, Watson makes a powerful case for the number of instances in which some piece of Roman learning is picked up wholesale and dumped down in medieval Italy or Renaissance France or 19th century Germany. Here I must disagree with him on a definitional point. The Roman law of the contract of sale, to take an example that has remained relatively unchanged across the centuries, was not the same thing in Rome as it was in medieval Italy, Renaissance France, and 19th century Germany. Granted the difference in the economies of the four places, it could not be the same. The same body of rules does not mean the same thing in the context of Roman slave trading wine on behalf of his master with a Greek merchant, as it does in the context of a Florentine merchant trading wool cloth in Bruges using and elaborate system of factors and international credit transactions, as it does with a subsidized and regulated Lyons silk factory making sales across the Alps, as it does with the sales of a newly-industrialized 19th century German iron foundry. If the rules won't change to accommodate the differences in transactions, the transactions will shape themselves around the sameness of the rules, but the end result in any meaningful social or economic sense will not be the same.

f. Finally, there are the people, the individuals who have played a role in our story. The hardest argument to make is that they made a difference. It is so easy to see the law as the product of impersonal intellectual, political, social and economic forces. Perhaps it is easiest to see the difference in the case of the great political leaders who concerned themselves with law. It is hard to imagine that Western legal history would have been the same if Justinian had not published the *Corpus Juris Civilis*, if Alexander III hadn't been so good at deciding cases, if Louis IX hadn't turned to Roman procedural but not substantive ideas in his efforts to unify the kingdom of France, and if Napoleon had been interested only in war and not also in law. In the case of the intellectuals, it is the more shadowy figures, the ones about whom legends develop, that it easiest to argue that they really made a difference. In particular, Irnerius and Gratian. We know so little about them, and yet a few years after their deaths everyone perceived that they really made a difference. Now, I'm not saying that someone wouldn't have gotten on to Roman law if Irnerius, or whoever it was, hadn't done it, or that someone wouldn't have written a teaching book for canon law to rival the *Corpus Juris Civilis*, but there is enough about Gratian's book that is idiosyncratic and enough about what we suspect that Irnerius did that is surprising that it may well be that the development would have taken a different course if they hadn't been around. The practicing lawyers are the hardest to individualize, the hardest to show that they made a difference. If, however, one looks at legislative

activity, it is remarkable how many legislative products that did make a difference are associated with a particular draftsman. Take away Michel de l'Hôpital, Jean-Baptiste Colbert, and Henri-François d'Aguessau, in 16th, 17th, and 18th centuries respectively, and very few of the *grandes ordonnances* survive. Take away the *grandes ordonnances* and it is not at all sure that Napoleon's code would have been anything like as impressive as it was. I certainly don't want leave you with the "great lawyer" theory of legal history as the sole lesson of this course, but I also don't want to leave you with the notion that changes in law are as uninfluenced by individuals as movements of prices on the Chicago Grain Exchange.

8. There is one topic that we spent some time talking about that I didn't say much about in this breath-taking summary of where we have been. We called it by various names in various periods, clearly by the end of our story, and probably from at least the later middle ages, we could probably call it without too much anachronism, political theory. It's a hard topic to fit in because it is rarely the sole preserve of lawyers. John of Salisbury, Thomas Aquinas, William of Ockham, Marsilius of Padua, Jean Gerson, Niccolò Machiavelli, Jean Bodin, Thomas Hobbes, John Locke have got to be the names we talk about if we want to talk about political theory in the Middle Ages and early modern periods, and only one of these, Bodin, was fully a lawyer, and many of them had no legal education at all. John of Salisbury was quite proud of the fact that he didn't. If we do not focus on the individuals, however, but focus instead on schools of thought, lawyers and legal thinking becomes more significant: supporters of empire vs. supporters of papacy, the theorists of papal monarchy vs. conciliarists, *politiques* and *monarchomachi*, Spanish scholastics, the natural lawyers of the northern school are all, at least in part, participants in legal movements. Whether we focus on individual thinkers or whether we focus on the movements, many of the same elements that we saw in dealing with the law in a more narrow sense can be seen to be at play here. Roman law, and here we should probably add elements of political theory derived from the Christian tradition, play a significant role. But the ancient texts are malleable, particularly when they are applied to political circumstances that the Romans or the fathers of the church could not possibly have imagined, and so the gradual emergence of nation-states has to be a significant part of any explanation of why the theory came to be the way it was at the end of the 17th century. What happens next is in many ways totally unpredictable, and the lawyers, by and large, are not a large part of it. Our account of the political theory of all but the most extreme lawyers was able to show how they were trying to come to grips with a fundamental problem of governance, how to give the power to the governing authority to do what needs to be done in the public interest while at the same time limiting that authority so that it does not become tyrannical. Different ages give different answers to this question, but it is a central problem. Now we have a tendency to associate this problem with democracy. None of the mainstream lawyers were democrats. When democracy becomes a big issue, the lawyers will have to do something else with their political theories, but that is not a story that can be told under the rubric of medieval studies. That is a story of the Enlightenment and even more so of the 19th century.

9. Now if we are entering, as many European lawyers have suggested, an era of decodification, then many of the differences between Anglo-American law and Continental law may disappear. But if the historian knows anything, the historian knows that you can't go home. In many ways the European legal system of the 18th century had more commonalty across the English/Continental divide than it does today, and that commonality was, in large measure, the

result of the absence of the codes and the presence of a common learned tradition. But 21st century Europe cannot go back to the *ancien régime* even if it wanted to, and there are very good reasons why it should not want to. Not the least of the reasons is that all the regimes in Europe today are democracies of one sort or another, whereas those of the 18th century were autocracies of one sort or another. What the vision from the 18th century does suggest is that two institutions, case law at the local level and transnational legal scholarship, may come to play a more important role in the development of a Europe-wide body of civil law. Both of those things seem to be emerging even now, and a knowledge of where it has all been may help to understand what is happening and what might happen in the future. Very recently, however, something has happened that may profoundly affect what happens. I am referring, of course, to Brexit. What happens is going to be fascinating to watch. Some of it may even happen in my lifetime; most of it will probably happen in yours. But that is definitely not yet a subject for a history course.