

CHOOSING A LAW TO LIVE BY ONCE THE KING IS GONE

INTRODUCTION

Law is the expression of the rules by which civilization governs itself, and it must be that in law as elsewhere will be found the fundamental differences of peoples. Here then it may be that we find the underlying cause of the difference between the civil law and the common law.¹

By virtue of its origin, the American legal profession has always been influenced by sources of law outside the United States. American law schools teach students the common law, and law students come to understand that the common law is different than the civil law, which is prevalent in Europe.² Comparative law courses expose law students to the civil law system by comparing American common law with the law of other countries such as France, which has a civil code.³ A closer look at the history of the American and French Revolutions makes one wonder why the legal systems of the two countries are so different.

Certainly, the American and French Revolutions were drastically different in some ways. For instance, the French Revolution was notoriously violent during a period known as “the Terror.”⁴ Accounts of the French revolutionary government executing so many French citizens as well as the creation of the Cult of the Supreme Being⁵ make the French Revolution a stark contrast to the American Revolution. Despite the differences, the revolutionary French and Americans shared similar goals—liberty and equality for all citizens and an end to tyranny. Both revolutions happened within approximately two decades of each other and were heavily influenced by the Enlightenment. In the early days of the American republic, America and France even had close ties to each other before the French Revolution became excessively violent.⁶

¹ Peter J. Hamilton, *The Civil Law and the Common Law*, 36 HARV. L. REV. 180, 192 (1923).

² Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 447 (1975) [hereinafter Jones, *Uncommon Common Law*].

³ *Id.* at 447–48.

⁴ According to one source, 12,000 people were executed after being tried, and an additional 8,000 were executed without any sort of trial. LEO GERSHOY, *THE FRENCH REVOLUTION AND NAPOLEON* 276 (1964).

⁵ Maximilien Robespierre was the leader of the French government during the Terror. He held a national celebration on June 8, 1794, and officially proclaimed France’s new state religion, requiring belief in a “Supreme Being,” to replace traditional Roman Catholicism. GERSHOY, *supra* note 4, at 286–87.

⁶ See BERNARD FAY, *THE REVOLUTIONARY SPIRIT IN FRANCE AND AMERICA* (Ramon Guthrie trans., Cooper Square, 1966) (1927). For instance, the French admired what the Americans had accomplished in the American Revolution and wanted to model their own

Considering the similarities between the two nations and analyzing why each country adopted its particular legal system after its revolution is worthwhile because the study provides an example of what causes a nation to choose one legal system instead of another. Furthermore, an understanding of civil law will help American legal professionals be better positioned to understand and to navigate an increasingly global legal environment. America still operates under a legal system derived originally from English common law over two hundred years after its fight for independence. France, on the other hand, is now a civil law country whose legal system is significantly different from the law under the French monarchy before the revolution. This forms an interesting contrast between two sister republics⁷ that begs an important question: Why did Americans keep the common law they brought from England after the American Revolution,⁸ while France changed its law considerably by adopting a civil code after the French Revolution? This Note seeks to answer that question by comparing America's and France's adoption of their post-revolutionary legal systems.

One factor in America's decision to retain English common law was that Americans viewed the common law as a protector of freedom—one that could be used against the king. The French, on the other hand, felt that the law under the monarchy was unfair; they wanted reform. England had already reformed its law during the 1600s, allowing Americans to inherit the product of legal reform and a well-developed concept of constitutional liberty. French liberty, however, was not as well advanced as English liberty when the French Revolution began. Secondly, the most important difference between America and France in directing the kind of legal system each country would adopt was France's Emperor, Napoleon Bonaparte, whose rise to power in 1799 ended the French Revolution.⁹ He implemented France's new legal system by ordering that a civil code be drafted. America had no comparable authoritarian ruler after the revolution that could force a civil code on

revolution after the revolution in the United States. Thomas Jefferson even traveled to France as Minister of the United States and assisted the Marquis de La Fayette during the French Revolution. *Id.* at 255, 257.

⁷ Technically, France's modern government is not the same as the government that was instituted after the French Revolution. French government has undergone many changes since the French Revolution, including a restoration of the monarchy in the 1800s. Still, the French Revolution was the first time that France had a republican form of government, and the French enjoy a republican form of government today. *See infra* Part II.B.

⁸ As one author put it, "We denounced the English sovereign, tarred and feathered English tax collectors, and cried a sturdy colonial pox on English manners and nobilities, but we received the English common law." Jones, *Uncommon Common Law*, *supra* note 2, at 445.

⁹ *See* discussion *infra* Part II.B.

the states. Finally, different religious experiences influenced the way Americans and the French viewed the law. While American colonists sought and enjoyed religious liberty, French religious history was characterized by violence and oppression.

This Note is divided into three sections, each devoted to one of the three major factors mentioned above. Part I concerns the liberties of citizens before the revolutions for independence and the impact those liberties had on the legal systems France and America adopted. Part II discusses the early governments of America and France and the process of adopting their respective legal systems. Finally, Part III highlights the impact of the Enlightenment and religion on the American and French post-revolutionary legal systems.

PART I: FREEDOM UNDER THE FORMER LEGAL SYSTEM

A. America

Americans enjoyed a greater degree of constitutional liberty when the American Revolution began than the French at the start of the French Revolution because the Americans had inherited the fruits of the English Revolution¹⁰ during the 1600s.¹¹ The English Revolution took place from 1640 to 1689 and revived traditional English constitutional freedoms by limiting the monarchy's power.¹² During this time, Parliament changed English law by asserting certain freedoms, and these changes became pillars of the American legal system.¹³

Like other European nations, including France,¹⁴ England was governed by an absolute monarchy before 1640.¹⁵ In such a system, the king or queen is the ultimate governmental authority of a nation.¹⁶ Kings such as Henry Tudor VIII (1509),¹⁷ James Stuart I (1603),¹⁸ and Charles

¹⁰ The English Revolution is also known as the Glorious Revolution. See HAROLD J. BERMAN, *LAW AND REVOLUTION* II 206 (2003).

¹¹ As discussed further in this section, Americans felt that the common law was an "inheritance" or "birthright." Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 21 AM. L. REG. 553, 553 (1882) (quoting *State v. Campbell*, 1 Ga. 60, 61 (Ga. Super. Ct. 1808)).

¹² See BERMAN, *supra* note 10, at 206–07.

¹³ See Harry W. Jones, *The Common Law in the United States: English Themes and American Variations*, in *POLITICAL SEPARATION AND LEGAL CONTINUITY* 91, 110 (Harry W. Jones ed., 1976) [hereinafter Jones, *Common Law in the United States*]; see also MICHAEL S. PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 20 (2010).

¹⁴ R.C. VAN CAENEGEM, *AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW* 91, 94 (1995).

¹⁵ BERMAN, *supra* note 10, at 207.

¹⁶ See VAN CAENEGEM, *supra* note 14, at 91–92.

¹⁷ See BERMAN, *supra* note 10, at 208–09 (proclaiming himself the head of the Church of England).

Stuart I (1625),¹⁹ abridged the liberties of English subjects.²⁰ For example, King Charles I did not call Parliament into session for eleven years, taxed the people heavily, and imposed Catholicism on English subjects—even though Catholicism was unpopular in Protestant England at the time.²¹ It was Charles's abuses that eventually led to the English Revolution.

In England, common law judges and Parliament resisted absolutism beginning with the reign of King James I.²² The highest common law courts of England were known as the king's courts; nevertheless, the judges of these courts fought the Stuart kings' abuse of power.²³ Sir Edward Coke, one of England's well-known common law jurists, led the judiciary's battle against the monarchy.²⁴ These judges fought to preserve the common law because the common law embodied traditional English liberties.²⁵ Like the judiciary, Parliament fought absolutism by drafting resolutions with measures to defend an English subject's rights against illegal arrests, the denial of habeas corpus, forced quartering of soldiers in private homes, and summary trials under martial law.²⁶ Eventually, a civil war erupted in England in 1642.²⁷ A Puritan Member of Parliament named Oliver Cromwell became a leader in the opposition to King Charles.²⁸ Cromwell led an army against the king and ultimately defeated him.²⁹ Because Cromwell and his followers wanted to hold the monarchy accountable to the people of England, Charles was tried and executed for his abuses of power.³⁰

¹⁸ See *id.* at 214 (taxing England heavily and sending Parliament Members to prison for opposing him while Parliament was in session). King James even published a book laying out his theory of absolutism in response to Parliament's and the judiciary's challenge to his authority. *Id.* at 213.

¹⁹ See *id.* at 215. Charles I's reign was known as the "Eleven Years' Tyranny." *Id.*

²⁰ See *id.* at 206. When the Puritans overthrew the government and executed Charles I during the English Revolution, one of their goals was to restore historical English freedoms. *Id.* at 205–06.

²¹ *Id.* at 215–16.

²² *Id.* at 213–15. England was not the only country where the judiciary opposed the absolute monarchy. In other parts of Europe, judges saw themselves as preservers of liberty, custom, and law. VAN CAENEGEM, *supra* note 14, at 95.

²³ BERMAN, *supra* note 10, at 213–14.

²⁴ *Id.* at 214. Later, when Sir Coke became involved in Parliament, he continued the fight against absolutism from there. *Id.* at 215.

²⁵ *Id.* at 214.

²⁶ *Id.* at 215.

²⁷ *Id.* at 217.

²⁸ G.E. AYLMER, *THE STRUGGLE FOR THE CONSTITUTION: ENGLAND IN THE SEVENTEENTH CENTURY* 128 (3d ed. 1971).

²⁹ *Id.* at 128–29.

³⁰ *Id.* at 138.

After Cromwell won the civil war and took control of England, the English tried to reform their law.³¹ A body of Englishmen known as the Hale Commission made several goals: to eliminate lawyers' monopoly over the law, to codify English law, to institute elections for judges, to provide legal aid to the needy, and to institute civil marriages.³² The English wanted to simplify the disorganized jumble of common law rules and make the legal system more democratic.³³ Although much of the legal reform did not last after the monarchy was restored, the English made *some* permanent changes in the law.³⁴ Trials were conducted in plain English;³⁵ judges became more independent with life tenure;³⁶ notoriously corrupt courts were abolished; and the common law doctrine of stare decisis developed more fully.³⁷ Yet the most important legacy of the English Revolution was several documents produced by Parliament—documents that reasserted English constitutional liberties.

Unlike the American Constitution, England did not have a written constitution.³⁸ Instead, throughout English history, various important documents have contained assertions of English liberty and have become part of the traditional English (unwritten) "constitution."³⁹ Beginning in 1066 with William of Normandy, the kings of England agreed from time to time to limit their powers in some way to recognize rights held by the English people or by Parliament.⁴⁰ One of the most famous of these documents is the Magna Carta (1215), an agreement between King John and his nobles that John would adhere to English law.⁴¹ In response to tyrannical practices by the monarchy, Parliament later added the Petition of Right of 1628, the Habeas Corpus Act of 1679, the English

³¹ For more information about the Hale Commission, see R.C. VAN CAENEGEM, *JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY* 45–46 (1993).

³² *Id.* at 46, 78. Interestingly, van Caenegem calls the Hale Commission's goals a "foreshadow" of the French legal reforms in the late 1700s and early 1800s. *Id.* at 46.

³³ *Id.* at 77–78.

³⁴ *Id.* at 79.

³⁵ *Id.* at 46–47. Before this reform, old French was spoken in court, and only a few legal professionals could understand it. *Id.* One can imagine how difficult it would be for a juror to participate in a trial conducted in a foreign language.

³⁶ BERMAN, *supra* note 10, at 207.

³⁷ *Id.* at 207–08. Stare decisis is the common-law method of adhering to prior cases. Jones, *Uncommon Common Law*, *supra* note 2, at 455–56.

³⁸ PAULSEN, *supra* note 13, at 20. England still does not have a written constitution today. VAN CAENEGEM, *supra* note 31, at 20.

³⁹ PAULSEN, *supra* note 13, at 20.

⁴⁰ *Id.* at 20–21. William of Normandy agreed to recognize English laws and freedoms under the former Anglo-Saxon government. *Id.* Later in 1100, King Henry I put this concept into writing with an important constitutional document called the Charter of Liberties. *Id.* at 20.

⁴¹ *Id.* at 20.

Bill of Rights of 1689, and the Act of Settlement of 1701 to England's magnificent collection of constitutional documents.⁴²

With the Petition of Right of 1628, the Parliament asserted some of the rights previously mentioned such as habeas corpus⁴³ and freedom from illegal arrests.⁴⁴ Parliament also preserved a person's right to be released from custody on bail.⁴⁵ The Habeas Corpus Act of 1679 denied the monarchy the power to imprison someone without a jury trial.⁴⁶ The English Bill of Rights of 1689 was also "rooted in ancient rights and liberties of the English people,"⁴⁷ and it established the superiority of the law over the monarchy by prohibiting a king or queen from suspending laws.⁴⁸ Finally, the Settlement Act of 1701 ensured that English judges would be independent from the monarchy by giving them life tenure.⁴⁹

English colonists in America naturally brought English law with them.⁵⁰ In fact, in 1775, Americans felt they were being denied their legal rights under English law, which partly caused the Revolutionary War.⁵¹ When the time came, Americans used the law to resist the English monarch's abuse of power.⁵² Resolves from the First Continental Congress included the "sturdy assertion" that Americans were "*entitled* to the common law of England,"⁵³ and American colonists thought of the

⁴² *Id.*

⁴³ A writ of habeas corpus is a petition asking a court to order the person in custody of a prisoner to bring the prisoner before the court in order to inquire into the legality of the prisoner's detention. BLACK'S LAW DICTIONARY 778 (9th ed. 2009).

⁴⁴ See BERMAN, *supra* note 10, at 215.

⁴⁵ *Id.*

⁴⁶ PAULSEN, *supra* note 13, at 20.

⁴⁷ See BERMAN, *supra* note 10, at 226.

⁴⁸ PAULSEN, *supra* note 13, at 20.

⁴⁹ BERMAN, *supra* note 10, at 227.

⁵⁰ Jones, *Common Law in the United States*, *supra* note 13, at 93–94 (quoting *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829)).

⁵¹ See *id.* at 128. Among the grievances listed in the Declaration of Independence are some of the same legal problems addressed by English constitutional documents, such as deprivation of jury trials, dependent judges, and unfair taxation. See Jones, *Common Law in the United States*, *supra* note 13, at 122 (pointing out that trial by jury was one of the grievances leading to the Revolution); see generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁵² Peter R. Teachout, *Light in Ashes: The Problem of "Respect for the Rule of Law" in American Legal History*, in LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 167, 188–89 (Hendrik Hartog ed., 1981). This was possible partly because Americans exercised control over local legal institutions, including jury trials. *Id.* at 181–82, 184. Legislators were also accountable to the colonists. *Id.* at 182–84. Furthermore, in some places like Massachusetts, local law disfavored the British in authority. Hendrik Hartog, *Losing the World of the Massachusetts Whig*, in LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 143, 146–47 (Hendrik Hartog ed., 1981).

⁵³ Jones, *Common Law in the United States*, *supra* note 13, at 110 (emphasis added).

Magna Carta, the Petition of Right, the English Bill of Rights, and the Act of Settlement—all affirming English constitutional liberty—as part of their common-law heritage from England.⁵⁴ This common-law heritage was so important that the Founders preserved several of its doctrines in the Constitution—for example, the guarantee of trial by jury.⁵⁵

B. France

Before the French Revolution, French subjects were ruled by a monarch whose power resembled the English absolute monarchy before the English Revolution more than it resembled the reformed English monarchy that later governed the American colonies before America's independence. After a movement known as the *Fronde*⁵⁶ rose in opposition to the French monarchy in the mid-1600s, the French monarchy assumed absolute power with kings possessing vast authority.⁵⁷ Much like the English Revolution, the *Fronde* was a result of the French monarchy's abuses. Yet, it was unsuccessful, leaving major legal reform to the French Revolution approximately 140 years later.⁵⁸

Before the *Fronde*, France had established royal courts called *parlements*, which were the highest courts within their jurisdictions.⁵⁹ The most important of these high courts was the Parlement of Paris, which often opposed the French monarchy.⁶⁰ This competition for power produced a tense relationship between the French judiciary and the monarchy.⁶¹ Eventually, the tension grew into the *Fronde* (1648–1652), a movement composed of French nobles and the *parlements*.⁶² The aristocracy and the courts opposed Queen Anne of Austria and Cardinal Jules Mazarin, who were the temporary rulers of France while Anne's son Louis Bourbon XIV was too young to assume the throne.⁶³

During the *Fronde*, the Parisian courts proposed reforms to stop illegal arrests, taxes imposed without the approval of the Parlement of Paris, and certain administrative and financial abuses by the

⁵⁴ *Id.*

⁵⁵ *Id.* at 123.

⁵⁶ The word *fronde* means “sling.” During the movement, street children in Paris joined in the opposition by using slings to throw rocks or mud. This is where the movement got its name. GEOFFREY TREASURE, MAZARIN: THE CRISIS OF ABSOLUTISM IN FRANCE 123 (1997).

⁵⁷ DALE K. VAN KLEY, THE RELIGIOUS ORIGINS OF THE FRENCH REVOLUTION: FROM CALVIN TO THE CIVIL CONSTITUTION, 1560–1791, at 47 (1996).

⁵⁸ See GERSHOY, *supra* note 4, at 6.

⁵⁹ VAN KLEY, *supra* note 57, at 43.

⁶⁰ *Id.*

⁶¹ *Id.* at 45.

⁶² GERSHOY, *supra* note 4, at 5–6.

⁶³ *Id.*; ARTHUR HASSALL, LOUIS XIV AND THE ZENITH OF THE FRENCH MONARCHY 8–9, 13 (1972).

monarchy.⁶⁴ The *Fronde*'s adherents maintained that any monarch loses his or her authority when he or she disobeys the law.⁶⁵ According to some, absolute power in a monarchy did not conform to either French tradition or the national religion, Christianity.⁶⁶ Unlike the English Revolution, however, the *Fronde* ultimately failed to limit the power of the monarchy.⁶⁷ In fact, the *Fronde* resulted in the very thing the parlements had resisted—a strong absolute monarchy instead of a monarchy with more limited power.⁶⁸

After the division and anarchy caused by the *Fronde*, the succeeding French kings used the theory of absolutism to bring stability to France and to unite the people.⁶⁹ Young Louis XIV saw the turmoil produced by the *Fronde*, and it made an impression on him.⁷⁰ Because of his experience during the *Fronde*, King Louis XIV would not tolerate opposition during his reign.⁷¹ Just as the French people would later accept Napoleon's authoritative rule after the chaos of the French Revolution, the French people were willing to accept a strong monarch in Louis XIV after the chaos of the *Fronde*.⁷² Although the *Fronde* failed and an absolute monarchy governed France until its revolution, the judiciary did not cease resisting the monarchy.⁷³

Similar to England's unwritten constitution based on ancient tradition, France also had a body of "inalienable" customs and standards derived from tradition that formed a sort of unwritten French "constitution."⁷⁴ These vague principles included public law governing

⁶⁴ VAN KLEY, *supra* note 57, at 46. The illegal arrests and king-imposed taxes are some of the same issues that instigated the English Revolution. *See supra* Part I.A.

⁶⁵ *Id.* at 46.

⁶⁶ *Id.* at 47.

⁶⁷ *Id.* For this failure, Van Kley blames the many different groups fighting the king during the *Fronde*. He points to the lack of a religious element to unify the people against the king. *Id.* In England, Cromwell and the Protestant revolutionaries were united in opposition to a monarchy sympathetic to Catholicism. *See* BERMAN, *supra* note 10, at 217–18.

⁶⁸ VAN KLEY, *supra* note 57.

⁶⁹ *Id.*

⁷⁰ HASSALL, *supra* note 63, at 31.

⁷¹ *Id.*

⁷² VAN KLEY, *supra* note 57. King Louis XIV became a powerful monarch who ruled France wisely but extravagantly during France's "Golden Age." He watched the French nobility closely in order to ensure that no one opposed him. He became known as the "Sun King." Louis XIV's wars and excesses caused France to suffer financial ruin, and this eventually led to the French Revolution. GERSHOY, *supra* note 4, at 6–8.

⁷³ VAN KLEY, *supra* note 57, at 45.

⁷⁴ VAN CAENEGEM, *supra* note 14, at 99. One historian explains that these unwritten principles were not exactly a constitution, although these principles seem to be the closest thing France had to a constitution before the revolution. FRANÇOIS FURET, *THE FRENCH REVOLUTION 1770–1814*, at 4 (Antonia Nevill trans., 1996).

the monarchy and its authority.⁷⁵ The French “constitution” embraced the concept of “*honnête liberté des Français*,” or the idea of regard for French subjects and their property.⁷⁶ Philosophically, French laws were divided into two categories: *lois ordinaires* and *lois fondamentales*.⁷⁷ *Lois ordinaires* (“ordinary laws”) were laws made at the king’s will, while *lois fondamentales* (“fundamental laws”) were laws of tradition and custom binding even on the king.⁷⁸ The significance of this distinction was that a *lois ordinaire* that contradicted the *lois fondamentale* was considered arbitrary.⁷⁹ Despite the philosophical limitations placed on a king’s power by the *lois fondamentales*, French subjects lacked religious freedom,⁸⁰ freedom of the press, and political freedom.⁸¹

The French monarch’s power did not go wholly unchecked, however. The Parlement of Paris and the Estates-General⁸² (comparable to England’s Parliament) provided minor limits on royal power.⁸³ The Parlement of Paris tried to prevent the king from enacting laws contrary to French tradition.⁸⁴ The king would send his proposed law to the court, and the court would register the law to make the law official.⁸⁵ When the court disapproved of the king’s law, it refused to register the law and notified the king of any complaints against the king’s law.⁸⁶ This refusal to register a law, or *droit de remontrance*,⁸⁷ could be overridden by the king, but during the 1700s, the monarchy usually acquiesced to the

⁷⁵ VAN CAENEGEM, *supra* note 14, at 99. Part of the nature of the monarchy was its traditional religion, Roman Catholicism. Protestantism was prevalent in England, but for the most part, France did not tolerate Protestants. See VAN KLEY, *supra* note 57, at 7–8 (explaining that the French monarchy was closely aligned with the Catholic Church); VAN CAENEGEM, *supra* note 14, at 100 (noting that religious intolerance in France grew after the revocation of the Edict of Nantes).

⁷⁶ VAN CAENEGEM, *supra* note 14, at 99.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* For the remainder of a king’s life, French subjects were required to obey his arbitrary laws, but upon his death, his arbitrary laws were abrogated. Van Caenegem names Louis XVI as a “possible” example of this concept because he annulled some of his father’s radical measures against the judiciary after his father’s death. *Id.*

⁸⁰ Adherents to other faiths, including Protestantism, were persecuted in Roman Catholic France. *Id.* at 100.

⁸¹ For instance, the French were not allowed to form political parties. *Id.*

⁸² The Estates-General’s function was to appropriate money when it was requested and to counsel the king. *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 101–02.

⁸⁵ *Id.*

⁸⁶ *Id.* at 102. It is important to note, however, that the Parlement of Paris did not have an *absolute* right of remonstrance; the monarchy could override the court’s refusal to register. *Id.*

⁸⁷ *Id.* at 101. *Droit de remontrance* means “right of remonstrance or protestation.” *Id.*

court's refusal to register.⁸⁸ By exercising its *droit de remontrance*, the Parlement of Paris sought to balance the monarchy's power to issue law with the rights of French subjects according to the unwritten French "constitution."⁸⁹ Jurists in the parlements even claimed to act on behalf of the French people.⁹⁰

Nevertheless, French judges (called "*councillors*"⁹¹) in the parlements did not act solely for the people, and this would eventually influence France's adoption of a civil code after the French Revolution.⁹² Councillors came from the French nobility and wealthier classes, inheriting their fathers' positions on the parlements or paying to become councillors.⁹³ When the monarchy tried to reform the law, councillors resisted the reforms because they did not want to lose privileges.⁹⁴ Immediately before the French Revolution, Louis XVI tried to reform the country's finances by taxing French subjects equally, but the Parlement of Paris obstructed the reform.⁹⁵ The Estates-General assembled, and the Third Estate, which represented the common people of France, took control of the government.⁹⁶ With that, the French Revolution began.

When the time came to decide how France would structure its legal system, after the French people had dethroned and executed King Louis XVI, the French distrusted judges and wanted a legal code to restrain the judiciary.⁹⁷ Rather than regarding law as an asset or a tool to use against the monarchy, the French considered their former law under the monarchy (the "*ancien régime*"⁹⁸) as a tool the government had used to preserve privilege and power for itself.

⁸⁸ *Id.* at 102.

⁸⁹ *Id.*

⁹⁰ See VAN KLEY, *supra* note 57, at 112–13 (citing a memoir by a French jurist in 1730 challenging the monarchy's authority).

⁹¹ VAN CAENEGEM, *supra* note 14, at 101.

⁹² *Id.* at 102–03. See *infra* Part II.B.

⁹³ *Id.* at 101.

⁹⁴ *Id.* at 101, 103.

⁹⁵ *Id.* at 102–03. The Parlement of Paris had often resisted tax reform in the past, causing serious financial consequences for France. *Id.*

⁹⁶ *Id.*

⁹⁷ See FURET, *supra* note 74, at 230; see also Shael Herman, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 U. ILL. L. REV. 597, 598 (1984).

⁹⁸ *Ancien régime* is a term French revolutionaries used for the former government under the monarchy. See FURET, *supra* note 74, at 3.

PART II: A NEW LEGAL SYSTEM FOR THE NEW GOVERNMENT

A. *America*

The American colonists did not adopt a civil law system after the American Revolution; instead, the states retained the common law system that Americans had brought from England.⁹⁹ As mentioned previously in Part I, some common-law principles were written into the Constitution.¹⁰⁰ At the state level, English common law was accepted as American law through a process termed “reception,” accomplished by state courts and state legislatures.¹⁰¹

American colonists did not systematically plan to make English common law the official law of the United States.¹⁰² In fact, for a period of time after the American Revolution, many Americans disapproved of the common law precisely because it was *English*.¹⁰³ In the early years of the American Republic, there was a movement to incorporate more of the civil law into American law.¹⁰⁴ As citizens of a new country, some argued that American lawyers should be familiar with the civil law as well as the common law system, in addition to knowing natural law, admiralty law, and other areas of law.¹⁰⁵ After the Revolution, Americans wanted to create their own system by choosing the best from a variety of legal systems, including the civil law tradition.¹⁰⁶ Judges often compared the virtues of the different systems to decide cases.¹⁰⁷ Despite its early popularity, however, the civil law movement died out.¹⁰⁸

⁹⁹ Jones, *Uncommon Common Law*, *supra* note 2, at 453. Whether there is such a thing as *federal* common law has not always been certain. According to the Supreme Court in *Erie R.R. v. Tompkins*, 304 U.S. 64, 65 (1938), there is no body of federal common law to apply to diversity cases. Later Supreme Court decisions have recognized federal common law for certain narrow issues such as military defense contractors. See PAULSEN, *supra* note 13, at 679. *But see* Jones, *Uncommon Common Law*, *supra* note 2, at 459 (“[F]ederal law is wholly legislative in origin, or virtually so.”). Regardless of whether there is or is not federal common law, both state and federal American courts, including the United States Supreme Court, adhere to the common-law doctrine of *stare decisis* by following precedent—a common-law doctrine distinct from the civil law. *Id.* at 455, 462.

¹⁰⁰ Jones, *Common Law in the United States*, *supra* note 13, at 123.

¹⁰¹ *Id.* at 92–93, 98–100.

¹⁰² *Id.* at 101–02.

¹⁰³ *Id.* at 106; Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 410 (1966).

¹⁰⁴ Stein, *supra* note 103.

¹⁰⁵ *See id.* at 406 (citing advice given to attorney John Adams).

¹⁰⁶ *Id.* at 407; *see also id.* at 419 (quoting Edward Everett’s admonition to study civil law, “the richest of these sources”).

¹⁰⁷ *Id.* at 409.

¹⁰⁸ *Id.* at 431–32. Stein lists several possible reasons for the failure of the civil law in the United States, including the fact that the main advocates for civil law in the United States were not those who practiced law in everyday life. *Id.* at 431–34.

Before the American Revolution and the movement to adopt the civil law, the common law had already taken deep root in the United States as, out of necessity, American judges sought legal guidance in the only source of law available—English statutes and cases.¹⁰⁹ Even then, judges were choosy¹¹⁰—they only used English law that adapted well to the colonial situation.¹¹¹ Judges were not the only ones who facilitated the reception of English common law in the United States. State legislatures also created reception statutes that expressly adopted English common law as the law of the state.¹¹² The states not only received principles from English judicial decisions,¹¹³ they also received English statutory law.¹¹⁴ States did not want to perpetually adopt new English law as it was enacted or decided in England; therefore, the legislatures set “cut-off dates”¹¹⁵ to mark a limit for reception.¹¹⁶

America’s government structure was also a factor in the country not becoming a civil-law country. The Founders created a political system that was both decentralized and centralized at the same time; this novel creation was federalism.¹¹⁷ After the Articles of Confederation failed to provide a competent national government, the Constitution fixed the problem by implementing a more centralized and stronger national government.¹¹⁸ Under the new Constitution, the states still retained much of their sovereignty,¹¹⁹ especially over the law that affected daily

¹⁰⁹ Jones, *Common Law in the United States*, *supra* note 13, at 92, 103, 107. These judges did not want to make arbitrary decisions or to set policy, although they were forced to at times when they had to choose which English precedent to apply to the situation. *Id.*

¹¹⁰ Dale, *supra* note 11, at 566–67 (“[T]he whole of the common law of England has been nowhere introduced . . . some states have rejected what others have adopted” (quoting *U.S. v. Worrall*, 2 U.S. (2 Dall.) 384, 394 (1798))).

¹¹¹ *Id.* at 554. For example, an early American court recognized that the English common-law rule requiring citizens to fence cattle at all times was not suited to America, whose population was much less dense and whose landmass was much larger. Therefore, the court rejected that particular common-law rule. *Id.* at 560–61 (citing *Wagner v. Bissell*, 3 Iowa 396, 401–02 (1857)).

¹¹² *Id.* at 572–73. For example, California, Illinois, and North Carolina were among states that expressly adopted English common law by statutory enactment. *Id.* at 573–74.

¹¹³ According to one early American court decision, *Marks v. Morris*, Americans adopted English common law, not English decisions. 14 Va. (4 Hen. & M.) 463, 572 (1809). This means that the common principles as a whole were what the Americans used, rather than treating specific judicial decisions as binding on American courts. *See id.*

¹¹⁴ Jones, *Common Law in the United States*, *supra* note 13, at 103. The reception of English statutes concerned those acts of Parliament that had become part of the overall English common law. *Id.*

¹¹⁵ Jones, *Uncommon Common Law*, *supra* note 2, at 454.

¹¹⁶ Jones, *Common Law in the United States*, *supra* note 13, at 103. After the cut-off date, English law was only persuasive authority. *Id.*

¹¹⁷ PAULSEN, *supra* note 13, at 681–82.

¹¹⁸ *Id.* at 19.

¹¹⁹ *See* U.S. CONST. amend. X.

life. With states being sovereign in their own spheres and with a limited national executive and legislature, it would have been difficult to impose a national code under the Constitution. Individual states were free to adopt a civil law system as long as it was consistent with the Constitution, but as already discussed, every state except Louisiana chose the common law.¹²⁰

The most important things Americans received from English common law—what defines the American legal system today—are common-law doctrines and legal reasoning.¹²¹ This includes the doctrine of *stare decisis*, which uses judicial precedent to bind subsequent court decisions in cases with similar facts.¹²² A good example of the importance of common-law reasoning in America is constitutional interpretation by the United States Supreme Court, which uses “the matching, analysis and distinguishing away of precedents” (the basics of common-law legal method) to decide constitutional cases.¹²³ Other aspects of the American legal system that came from English common law are trial by jury, the rule of law, and an independent judiciary.¹²⁴

B. France

After the French Revolution, the French people were able to change their legal system and do something they had wanted to do long before the Revolution—codify French law.¹²⁵ In fact, the French government was strengthened and unified in great part by adopting a civil code.¹²⁶ By virtue of his fascination for law,¹²⁷ Napoleon Bonaparte provided the means to accomplish this goal after taking control of France in 1799.

Before the French Revolution, French law was a collection of laws that varied by jurisdiction.¹²⁸ French law varied not only by geographical region but also by local code.¹²⁹ Customary law, similar to English

¹²⁰ Louisiana followed the civil-law tradition instead of adopting the common law tradition. See LA. CONST. of 1812, art. IV, § 11.

¹²¹ Jones, *Common Law in the United States*, *supra* note 13, at 92; see also Jones, *Uncommon Common Law*, *supra* note 2, at 454.

¹²² Jones, *Uncommon Common Law*, *supra* note 2, at 455–56. The common-law doctrine of *stare decisis* applies to statutory interpretation as well. *Id.* at 460.

¹²³ *Id.* at 462.

¹²⁴ Jones, *Common Law in the United States*, *supra* note 13, at 110–11.

¹²⁵ FURET, *supra* note 74, at 230.

¹²⁶ MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 52–54 (2d ed. 1994).

¹²⁷ *Id.*

¹²⁸ ROBERT B. HOLTMAN, *THE NAPOLEONIC REVOLUTION* 87 (1967). According to Voltaire, if one were to travel in France at the time, one would change laws as much as one would change horses. GLENDON, *supra* note 126, at 52.

¹²⁹ HOLTMAN, *supra* note 128. In fact, 366 different local codes were in place when Napoleon undertook unification of the nation’s law. *Id.*

common law, was prevalent in northern France.¹³⁰ In southern France, Roman civil law governed.¹³¹ During the Revolution, the French wanted to unify the law, and the Constitution of 1791 provided that the new government of France would create a legal code to accomplish national legal unification.¹³² Revolutionaries wanted a legal code because they believed that law from the *ancien régime* would threaten their new ideas.¹³³ The French also placed a philosophical emphasis on reason, and, as a result, desired to create an organized statement of law for the entire country.¹³⁴

In the past, the French monarchy had tried unsuccessfully to codify French law.¹³⁵ Despite being able to centralize the country politically,¹³⁶ kings had failed to unify the law because the monarchy was steeped in tradition, privileges for the nobility, and financial troubles.¹³⁷ As previously discussed in Part I, the parlements opposed legal reform, making it difficult for the monarchy to change the law. According to one scholar, unification of French law would not have been possible until government *and society itself* was changed.¹³⁸ Even the French revolutionary government was unable to accomplish a codification of French law before Napoleon came to power because the new government had too many political problems.¹³⁹

After Napoleon Bonaparte seized control of France at the end of the revolutionary period in 1799, he organized the government and centralized power in order to obtain complete control.¹⁴⁰ As part of this process, he wanted to codify French law, so he appointed a commission to draft a civil code containing a unified set of laws by which the entire country would be governed.¹⁴¹ In drafting the Code, the commission made a compromise between the ideals of the French Revolution and the French customs and traditions of the *ancien régime*.¹⁴² The French

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 88.

¹³³ *Id.*

¹³⁴ *Id.*; FURET, *supra* note 74, at 230; *see also infra* Part III.B.

¹³⁵ FURET, *supra* note 74, at 230.

¹³⁶ GLENDON, *supra* note 126, at 52. France was the first modern nation on the continent of Europe. *Id.*

¹³⁷ FURET, *supra* note 74, at 230.

¹³⁸ HOLTMAN, *supra* note 128, at 88; *see also infra* Part III.B.

¹³⁹ FURET, *supra* note 74, at 231.

¹⁴⁰ HOLTMAN, *supra* note 128, at 27, 88.

¹⁴¹ *Id.* at 88.

¹⁴² FURET, *supra* note 74, at 231–32 (“moderating the French Revolution with a pinch of *ancien régime*”). This was possible because the people desired peace and stability after the tumult of revolution. Jean Leclair, *Le Code civil des Français de 1804: une transaction entre révolution et réaction*, 36 REVUE JURIDIQUE THÉMIS 1, 46 (2002) (Can.).

revolutionary government preceding Napoleon had already made great strides in developing a legal code, so the most difficult work was done.¹⁴³

Napoleon was zealous to give France a civil code.¹⁴⁴ In fact, he wanted to be remembered as “a great lawgiver,”¹⁴⁵ and he personally participated in many of the drafting sessions.¹⁴⁶ Napoleon was not legally trained; therefore, he helped influence the creation of a concise and simple code whose text could be understood by those who were not in the legal profession.¹⁴⁷ The Civil Code, originally named the *Code civil des français* (the “civil code of the French people”),¹⁴⁸ was completed on March 21, 1804, and it was the first modern civil code.¹⁴⁹

One purpose of the French Civil Code was to restrain judges since the judiciary was still associated with the parlements of the *ancien régime*.¹⁵⁰ After the Civil Code was enacted, a school of legal thought developed that believed judges should use only the Code to decide cases and other legal sources should not affect interpretation of the Code.¹⁵¹ One can understand the French people’s mistrust of judges, considering their perception of judicial corruption and self-interest before the Revolution.¹⁵²

When choosing a legal system, neither France nor America completely did away with the past, nor was either nation content to completely accept the former system that had been in place before the revolution. Similar to the American version of the common law system, the French Civil Code was a compromise between the *ancien régime* and

¹⁴³ FURET, *supra* note 74, at 231. Jean-Jacques Régis de Cambacérès was president of the revolutionary government when the bulk of the work on the Code was done, and he repeatedly presented several versions of the Code to the government from 1793 to 1796. *Id.*

¹⁴⁴ *Id.* at 232.

¹⁴⁵ GLENDON, *supra* note 126, at 54.

¹⁴⁶ HOLTMAN, *supra* note 128, at 88.

¹⁴⁷ *Id.* at 28, 89.

¹⁴⁸ GLENDON, *supra* note 126, at 53.

¹⁴⁹ *Id.*; HOLTMAN, *supra* note 128, at 89.

¹⁵⁰ VAN CAENEGEM, *supra* note 31, at 152–53. Even the modern French Constitution places restraints on judicial interpretation. For instance, Article 5 of the French Constitution forbids judges to generally pronounce the law. Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT’L L. 195, 196 (2003).

¹⁵¹ R.C. VAN CAENEGEM, EUROPEAN LAW IN THE PAST AND THE FUTURE: UNITY AND DIVERSITY OVER TWO MILLENNIA 68–69 (2002) (indicating that they wanted to defend the Code, which was a pure product of reason, “against all possible forms of contamination, by Roman law, canon law, ancient customs and particularly natural law.”). In fact, Napoleon did not even approve of legal treatises expounding the Code. *Id.* at 69.

¹⁵² GLENDON, *supra* note 126, at 77 (noting that the French judiciary was associated with “feudal oppression . . . [and] retarding even moderate reforms”).

the new ideas of the Revolution.¹⁵³ The Americans took English common law with its ancient principles and adapted it to address their unique situation in the New World.¹⁵⁴ The French, likewise, took those revolutionary ideas they found most important and tempered them where appropriate with prior French law.¹⁵⁵

PART III: RELIGION AND PHILOSOPHY'S IMPACT ON LAW

A. America

The Enlightenment had a significant impact on the American Revolution as it did on Europe during the 1700s.¹⁵⁶ Enlightenment philosophy had several characteristics: "belief in Man, individual Man, his Nature, his Reason, his Rights."¹⁵⁷ This philosophy caused American and French revolutionaries to emphasize individualism, rationalism, and nationalism as part of their ideals.¹⁵⁸

American revolutionary leaders had read the "Moderate Enlightenment" giants such as Charles-Louis Secondat de Montesquieu, William Blackstone, John Locke, and David Hume.¹⁵⁹ One can hardly think of Jean-Jacques Rousseau's¹⁶⁰ theory of the sovereignty of the people without thinking of the United States Constitution's Preamble: "WE THE PEOPLE of the United States."¹⁶¹ Enlightenment ideas that

¹⁵³ Leclair, *supra* note 142, at 6–7. Two examples of the revolutionary ideals found in the Civil Code are freedom to own land and use it as one wishes and freedom to trade. Herman, *supra* note 97, at 606.

¹⁵⁴ Dale, *supra* note 11, at 559–60 ("It has been repeatedly determined by the courts of this state that they will adopt the principles of the common law as the rules of decision, so far only as these principles are adapted to our circumstances, state of society and form of government." (quoting *Lindsley v. Coats*, 1 Ohio 243 (1823))).

¹⁵⁵ See HOLTMAN, *supra* note 128, at 89–90. Notably, one French revolutionary idea that was tempered was women's equality. Equality did not extend to women under Napoleon's Code; in fact, the Code hardly gave married women rights at all. Leclair, *supra* note 142, at 75.

¹⁵⁶ HOLTMAN, *supra* note 128, at 22; see generally NORMAN HAMPSON, *THE FIRST EUROPEAN REVOLUTION 1776–1815*, at 9–40 (1969) (containing Chapter One entitled "The Intellectual Climate").

¹⁵⁷ HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 32 (1983).

¹⁵⁸ *Id.*

¹⁵⁹ HENRY F. MAY, *The Constitution and the Enlightened Consensus*, in *THE DIVIDED HEART: ESSAYS ON PROTESTANTISM AND THE ENLIGHTENMENT IN AMERICA* 147, 153 (1991) [hereinafter MAY, *The Constitution*]. According to May, the men who wrote the Constitution adhered to a set of beliefs that were mostly English and more conservative than those of later periods of the Enlightenment. *Id.* at 149.

¹⁶⁰ Rousseau was another philosopher whose ideas played an important role in the Enlightenment. See HAMPSON, *supra* note 156, at 9, 36–37.

¹⁶¹ U.S. CONST. pmbl. The Constitution was not the only important document that espoused Enlightenment principles. In fact, one author says that Europeans were interested in America's Declaration of Independence because they saw it as a "creative and

were prominent in America included a belief in natural rights,¹⁶² emphasis on virtue and morality, belief in the imperfection of humanity, emphasis on reason rather than “revelation or mystical illumination,”¹⁶³ and a belief that the purpose of government is to protect liberty.¹⁶⁴

In America and France, secular religions emerged during the revolutions and joined the two traditional branches of Christianity—Protestantism and Roman Catholicism—that had been prevalent until the revolutions.¹⁶⁵ Despite the emergence of secular religions in America, the religious landscape of the American colonies was different than the landscape of Enlightenment France, and this contributed to the retention of English common law in the United States. The country was not unified nationally under a single religion as France had been before the French Revolution. In fact, different religious groups came to America in order to find religious freedom and tolerance.¹⁶⁶ It is true that certain religious sects, such as the Quakers and the Baptists, experienced religious persecution in the colonies,¹⁶⁷ but unlike France, widespread hostility to religion as a whole was not prevalent in America.¹⁶⁸ In short, Americans did not have an equivalent to France’s Catholic Church.¹⁶⁹ Followers of a variety of religious denominations lived in the colonies, including Puritans, Anglicans, Catholics, Baptists, and Quakers.¹⁷⁰ The American colonies had many different denominations and sects partly because the colonies were individual

unique contribution . . . to the Enlightenment vision of popular sovereignty.” The Americans put the Enlightenment principles into practice. David Thelen, *Reception of the Declaration of Independence*, in *THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT* 191, 194 (Scott Douglas Gerber ed., 2002).

¹⁶² Garrett Ward Sheldon, *The Political Theory of the Declaration of Independence*, in *THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT* 16, 16 (Scott Douglas Gerber ed., 2002).

¹⁶³ MAY, *The Constitution*, *supra* note 159, at 152. HENRY F. MAY, *The Enlightenment and America: The Jeffersonian Moment*, in *THE DIVIDED HEART: ESSAYS ON PROTESTANTISM AND THE ENLIGHTENMENT IN AMERICA* 161, 162 (1991) [hereinafter MAY, *Jeffersonian Moment*].

¹⁶⁴ See MAY, *The Constitution*, *supra* note 159, at 156.

¹⁶⁵ BERMAN, *supra* note 157, at 31.

¹⁶⁶ See EDWIN S. GAUSTAD & LEIGH E. SCHMIDT, *THE RELIGIOUS HISTORY OF AMERICA* 65, 74, 85 (2002); CLIFTON E. OLMSTEAD, *RELIGION IN AMERICA PAST AND PRESENT* 19–20, 29 (1961).

¹⁶⁷ WILLIAM WARREN SWEET, *RELIGION IN COLONIAL AMERICA* 131–32, 144 (1965).

¹⁶⁸ See discussion *infra* Part III.B.

¹⁶⁹ See BERMAN, *supra* note 157, at 24 (noting that the American Revolution was exceptional in this respect among the great revolutions in Europe and Russia); see discussion on religion in France *infra* Part III.B.

¹⁷⁰ See *generally* SWEET, *supra* note 167, at 98, 131–32, 143–44, 176 (giving a historical analysis of the origins and development of several religious groups in colonial America).

units instead of a unified nation before the Revolution.¹⁷¹ As a result, American colonists did not feel the same urgency to reject religion along with the English monarchy.¹⁷² Instead, after the American Revolution, the newly-formed states recognized God in legal documents such as their constitutions, but avoided establishing state religions.¹⁷³

Another religious influence on the adoption and formation of America's legal system after the Revolution was the Great Awakening, a religious revival that took place in America in the 1730s and 1740s.¹⁷⁴ At least some of the religious influence of this revival was still present when the Constitution was adopted, and it helped preserve Christianity's place in America.¹⁷⁵ Similarly, another "force" in society that limited the Enlightenment's influence in America was evangelical Protestantism itself, according to one author.¹⁷⁶ In fact, Protestantism's emphasis on the individual coincided with the Enlightenment's emphasis on the individual.¹⁷⁷ Consequently, although Americans retained a high respect for law, they had no need to elevate their law to a practically religious status.¹⁷⁸

Lastly, Americans had a different philosophical view of judges due to the American legal profession's common-law training. In the common-law tradition, the belief persisted that judges did not make law, they found it.¹⁷⁹ In addition, the common law doctrine of *stare decisis* meant that the common-law tradition placed its own internal restraints on

¹⁷¹ For example, Virginia's established religion was Anglicanism, but William Penn founded Pennsylvania on Quaker principles. Maryland, on the other hand, was founded with a largely Catholic population. *Id.* at 29, 33, 160–61.

¹⁷² One scholar maintains that both American and French societies were entirely transformed during their respective revolutions. According to him, the law, social characteristics, economics, beliefs, values, and historical perspectives were all "revamped." BERMAN, *supra* note 157, at 20. Still, there is a stark contrast between France's and America's societal "transformation." France went further in its purposeful secularization of government. *See also* HOLTMAN, *supra* note 128, at 122–23 (discussing the revolutionaries' distrust of organized religion).

¹⁷³ MARVIN OLASKY, *FIGHTING FOR LIBERTY AND VIRTUE: POLITICAL AND CULTURAL WARS IN EIGHTEENTH-CENTURY AMERICA* 172 (1995) ("Most new state constitutions displayed the libertarian/Christian consensus: no state church, but an honoring of the scriptural God whom virtually all either revered or thought useful.").

¹⁷⁴ MAY, *The Constitution*, *supra* note 159, at 148.

¹⁷⁵ *See Introduction to COLONIAL AMERICA: INTERPRETING PRIMARY DOCUMENTS* 24 (Karin Coddon ed., 2003) (referring to the Great Awakening as a probable "counterresponse" to the Enlightenment).

¹⁷⁶ MAY, *Jeffersonian Moment*, *supra* note 163, at 162.

¹⁷⁷ *See COLONIAL AMERICA*, *supra* note 175, at 24–25.

¹⁷⁸ *See infra* Part III.B. for discussion on France's reverence of the law.

¹⁷⁹ Jones, *Common Law in the United States*, *supra* note 13, at 101. The theory that judges "find" the law was exemplified in the writings of William Blackstone, whose *Commentaries* were studied by American lawyers and judges. *Id.*

judges in the form of binding precedent.¹⁸⁰ With the judiciary so controlled by basic philosophical limits, Americans did not feel as great of a need to reign in corrupt judges.¹⁸¹

B. France

Before the French Revolution, France did not enjoy the religious freedom that the American colonies had enjoyed before the American Revolution. The French monarchy, and consequently France, was traditionally Roman Catholic,¹⁸² and religion played a major part in French politics.¹⁸³ In 1598, King Henry IV issued the Edict of Nantes, giving French Protestants (called *Huguenots*) certain religious and civil rights, such as the freedom to worship in public in certain areas of the country, the right to a fair trial in royal courts, and financial provision for Huguenot pastors and military units.¹⁸⁴ Religious toleration did not even last for a full century, however, before Louis XIV revoked the edict in 1685 in his quest to bring France back under Roman Catholicism.¹⁸⁵ Because Catholicism was the religion of the French monarchy, when the monarchy was opposed by the parlements, religious dissenters joined the courts to oppose the monarchy.¹⁸⁶

Not only was the French monarchy deeply connected to Catholicism, the Catholic Church was a powerful force in French society as a whole.¹⁸⁷ Unfortunately, it failed to fulfill the religious and physical needs of the French people.¹⁸⁸ In addition to the French government's tax on the people and the rent owed to French nobles owning the land on which the peasants worked, the Church required the French people to pay a tithe.¹⁸⁹ The Catholic Church owned a significant amount of land from which it earned income with the upper clergy primarily gaining from the income.¹⁹⁰ The Church maintained its own ecclesiastical courts with

¹⁸⁰ Jones, *Uncommon Common Law*, *supra* note 2, at 455–56.

¹⁸¹ *Id.*

¹⁸² FURET, *supra* note 74, at 4. This was part of France's unwritten "constitution," or tradition, that the French monarchy would be Catholic. *Id.*; see also VAN KLEY, *supra* note 57, at 3 ("For to be French was to be Catholic until the very eve of the Revolution.").

¹⁸³ VAN KLEY, *supra* note 57, at 7.

¹⁸⁴ *Id.* at 38.

¹⁸⁵ *Id.* at 38–39.

¹⁸⁶ *Id.* at 7.

¹⁸⁷ In France, the social classes as represented in the Estates-General were called "estates." GERSHOY, *supra* note 4, at 28. The first class, or the First Estate, was comprised of the clergy. The nobility made up the Second Estate, and everyone else, i.e., the commoners, comprised the Third Estate. See *id.* at 35, 101, 104.

¹⁸⁸ JULES MICHELET, HISTORY OF THE FRENCH REVOLUTION 248–49 (Gordon Wright ed., Charles Cocks trans., 1967).

¹⁸⁹ GERSHOY, *supra* note 4, at 29, 43.

¹⁹⁰ *Id.* at 28–29; HOLTMAN, *supra* note 128, at 16.

limited jurisdiction, and it also kept the public records of marriages, births, and deaths.¹⁹¹

Not only did the French revolutionaries want to rid society of the monarchy and the nobility, they also wanted to free society from the Catholic Church.¹⁹² For a period of time during the French Revolution, France underwent a “dechristianization,” which included replacing the traditional Christian calendar with a secular one, instituting the Cult of the Supreme Being as the national religion, and converting churches into “temples of reason.”¹⁹³ By the time France adopted the Civil Code in 1804, some of the revolution’s radical elements had subsided, and the Code’s drafters were more moderate than some of the earlier French revolutionaries.¹⁹⁴ Still, the drafters retained an aversion to mixing religion with government, and this aversion was manifested in the secular Civil Code.¹⁹⁵

Another important influence on the adoption of the Civil Code in France was the Enlightenment.¹⁹⁶ Reason replaced custom and tradition.¹⁹⁷ The philosopher Montesquieu had written that the law should be clear, simple, concise, and direct.¹⁹⁸ The importance of reason, Montesquieu’s ideas, and a philosophical shift from regarding God as the ultimate authority to regarding the individual human as more authoritative¹⁹⁹ resulted in the popularity of a legal code that was the product of human reasoning.²⁰⁰

In addition, the writings of another French Enlightenment thinker, Jean-Jacques Rousseau, profoundly impacted the drafting of the French Civil Code.²⁰¹ Rousseau proposed the theory of a “social contract,”²⁰² an idea Napoleon adopted.²⁰³ Instead of sovereignty being deposited by God

¹⁹¹ BERMAN, *supra* note 157, at 267–68. During the English Revolution, the English relegated many matters formerly handled by English ecclesiastical courts to secular courts (common law and chancery courts). *Id.*; GERSHOY, *supra* note 4, at 28–29.

¹⁹² GERSHOY, *supra* note 4, at 286–87 (“One object of the [revolutionaries] was to commemorate the triumphs of the Republic; another, and the more important, to destroy the influence of Christianity and the Catholic Church.”).

¹⁹³ *Id.* at 286–87; *see also* HOLTMAN, *supra* note 128, at 16–17.

¹⁹⁴ FURET, *supra* note 74, at 231–32.

¹⁹⁵ HOLTMAN, *supra* note 128, at 90–91. To this day, France is a self-declared “secular” nation.

¹⁹⁶ BERMAN, *supra* note 157, at 24; HOLTMAN, *supra* note 128, at 15, 88–89.

¹⁹⁷ Leclair, *supra* note 142, at 26.

¹⁹⁸ *Id.* at 26 n.88. The drafters tried to make the French Civil Code precisely that—clear, concise, and simple. HOLTMAN, *supra* note 128, at 89.

¹⁹⁹ Leclair, *supra* note 142, at 25.

²⁰⁰ BERMAN, *supra* note 157, at 32.

²⁰¹ Herman, *supra* note 97, at 598–99.

²⁰² GERSHOY, *supra* note 4, at 74.

²⁰³ Herman, *supra* note 97, at 598.

in an earthly king, individuals are their own masters.²⁰⁴ In Rousseau's theory of social contract, the individual gives up certain natural rights in order to submit to a government that will promote the good of everyone in society.²⁰⁵ This "general will of the community" is a combination of all the individuals in society.²⁰⁶ The French Civil Code was a manifestation of the general will of the French community, and the legislator (Napoleon Bonaparte) was "unlike an earthly mortal, mystically embodied in [that] general will."²⁰⁷ After the French secularized society,²⁰⁸ law filled part of the hole left by religion.²⁰⁹

CONCLUSION

Many complicated and intricate details contribute to a country's adoption of its legal system, let alone the eruption of a country into revolution. In an effort to pinpoint the reasons for the different legal systems in America and France, this Note has only skimmed the surface of the history of two revolutions that changed the world. Taking a broad view of the legal situations in each country before and after the revolutions, the most important factors that led these countries to adopt their particular legal systems may be summarized by the following: constitutional freedom, Napoleon, and religion.

Expounding upon and comparing the relative advantages and disadvantages of common law and civil law is beyond the scope of this Note. Nonetheless, American lawyers will benefit from understanding civil law, particularly as international issues become more important to the American legal profession. This does not mean, however, that the common law is somehow outdated or incompetent in dealing with modern legal issues. As English subjects and early Americans recognized, the common law embodies America's most treasured legal traditions. James Kent, author of *Commentaries on American Law* and one of the early advocates for incorporating more civil law into American law, recognized the importance of common law in preserving liberty.²¹⁰ To this effect he wrote, "In every thing which concerns civil and political liberty, [the civil law] cannot be compared with the free spirit of the

²⁰⁴ Leclair, *supra* note 142, at 25, 27.

²⁰⁵ GERSHOY, *supra* note 4, at 74.

²⁰⁶ *Id.*

²⁰⁷ See Herman, *supra* note 97, at 598–99.

²⁰⁸ BERMAN, *supra* note 157, at 267.

²⁰⁹ Herman, *supra* note 97, at 620.

²¹⁰ Stein, *supra* note 103, at 427.

English and American common law.”²¹¹ After considering American and French legal history, I concur.

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²¹¹ 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 507 (photo. reprint 1984) (1826).