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SECTION I.

THE FUNDAMENTAL PROBLEM: ARTFUL INTERPRETATION OR "META-CODE" CONCEPTS

Written (enacted or statutory) law shares with the unwritten (case or common law) a characteristic which accounts for most

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This article was submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University.

For their direction, suggestions and encouragement in the preparation of this article, I express my sincere appreciation to Professors E. Allan Farnsworth, Albert J. Rosenthal and William F. Young, Jr. They generously devote their scholarship and time as members of my doctoral committee. For the opportunity of the association, I thank Columbia Law School and Walter Gellhorn, University Professor Emeritus.

† EDITOR'S NOTE: Professor Nickles' study analyzes two conflicting methodologies for interpreting the Uniform Commercial Code and applying it to "doubtful cases" arising under the Code. One method deriving from section 1-102 suggests a liberal, analogical approach emphasizing "artful interpretation" of intra-Code principles. The other urges the introduction of ideas, i.e., "meta-Code" concepts, based on
law suits. H. L. A. Hart calls it an open texture.\(^1\)

Whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture. . . . [U]ncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open textured.\(^2\)

Open texture along the borderlines of statutes is inevitable because “we are men, not gods.”

It is a feature of the human predicament (and so for the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim.\(^3\)

extra-Code, common law principles and derives from section 1-103. The methodological tension between these two provisions causes a dispute about the hierarchy of sources of law under the Code, and his article investigates the reasons for the dispute. He admits the limited applicability of both interpretative methods, but he objects to the application en bloc of either to the Code.

Part I of the study is devoted primarily to establishing the comparative antecedents of section 1-102 and the method it suggests and to giving reasons why that methodology is inappropriate for deciding all doubtful commercial law cases. A second article, to appear in the next issue of this REVIEW as Part II of this study, is similarly designed but has as its subject section 1-103. Part II concludes with a resolution of the methodological tension by structuring an approach based on a proposed new section which unites the language and method of sections 1-102 and 1-103 and which arranges the sources of law hierarchy according to the broadest and ultimate purpose the Code was designed to advance.

2. Id. at 124-25.
3. The relation between these two human failings is explained by Professor Hart, and he illustrates the open textured character of legal standards and the inevitable choice among interests which arises in applying them.

Plainly this world is not our world; human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy of aim. When we are bold enough to frame some general rule of conduct (e.g. a rule that no vehicle may be taken into the park), the language used in this context fixes necessary conditions which anything must satisfy if it is to be within its scope, and certain clear examples of what is certainly within its scope may be present in our minds. They are the paradigm, clear cases (the motorcar, the bus, the motorcycle); and our aim in legislating is so far determinate because we have made a certain choice. We have initially settled the question that peace and quiet in the park is to be maintained at the cost, at any rate, of the exclu-
The primary problem in applying any statute including the Uniform Commercial Code is its application not to the clear cases falling within its express letter and intent but to those cases which arise on its open textured borderlines. Hart called these cases the "unenvisaged." Professor Dworkin, who succeeded Hart in the Chair of Jurisprudence at Oxford University, refers to them as "hard cases." Whatever name is chosen to describe them, they create doubt about the scope of a statute and its application to them. For present purposes they will be denoted simply as "doubtful" cases. The term indicates instances of statutory "gaps" and "unprovided for" cases. It also suggests (1) cases in which the language of the statutory provision assumed to be applicable is ambiguous and (2) cases in which the legislation is clear but the result dictated by its application seems unjust, inappropriate or inconsistent with the general tenor of the whole scheme of the statute. The problem of the doubtful case essentially is "one of finding grounds for reaching a decision of a case where those grounds are not directly and clearly supplied by existing rules and precedents."
The object of this study is to investigate methods for resolving doubtful cases under the Code. The specific objective is to evaluate for application en bloc to the Code contrasting judicial methodologies for interpreting it which reflect different attitudes about which of two principal "sources of law" should be consulted in framing a rule to apply to the doubtful case.

The Code is recognized as a source of commercial law and not merely as a collective statement of legal standards and regulations confined in their applicability to cases clearly cov-

D'ETUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANCOIS GENY
503, 504 (1935).

8. Professor Farnsworth has noted that one of the "subtle and sophisticated problems of statutory interpretation under the Uniform Commercial Code" is determining when there are gaps in the Code, i.e., statutory gaps presenting a type of "doubtful" case as defined herein. Farnsworth, A General Survey of Article 3 and an Examination of Two Aspects of Codification, 44 Tex. L. Rev. 644, 656 (1966). Generally, a case should be considered a doubtful one when reasonable opposing arguments exist about the source of law (see pp. 4-5 and note 9 infra) to consult in resolving the case. It is not within the scope of the present study, however, to discern whether particular cases or classes of them are doubtful but only to discuss methods for resolving cases once it is determined that they are.

9. In this study the definition of "sources of law" is confined narrowly to mean simply the sources from which judicial organs are to derive the rules of law to be applied in resolving individual cases. Its use herein is further confined. The principal concern of this study is with what Professor Patterson has termed the authoritative sources of forms of law, i.e., legislation and case law. E. Patterson, Jurisprudence 196 (1953).

Statutes are a source of law because it is for the courts to say what their words mean. Professor Gray wrote, "That is, it is for them to interpret legislative acts; undoubtedly there are limits upon their powers of interpretation, but these limits are almost as undefined as those which govern them in their dealings with the other sources. And this is the reason why legislative acts, statutes, are to be dealt with as sources of law. . . ." J. Gray, The Nature and Sources of Law 124 (2d ed. 1921). The other sources of law mentioned by Gray are judicial precedents, opinions of experts, customs, and principles of morality (using morality as including public policy). Id. The Code being a statute is no less subject to interpretation than other legislative acts and therefore serves as a source of law in deciding cases arising under it.

The common law as a source of law under the Code is confirmed by the explicit direction of § 1-103 that the principles of law and equity are to supplement Code provisions except where its provisions have displaced those principles.

The concept of "sources of law" has other meanings and, as suggested by the reference to Gray's writing, includes sources in addition to those focused upon throughout this study. See, e.g., R. Dias, Jurisprudence 29-163 (3d ed. 1963); H. Silving, Sources of Law 1-7 (1968); Pound, Hierarchy of Sources of Forms in Different Systems of Law, 7 Tul. L. Rev. 475 (1933). For an exhaustive and definitive treatment of custom, precedent, equity and legislation as sources of law, see C. Allen, Law in the Making 67-605 (7th ed. 1964).
erected by them. Section 1-102 and its commentary provide in part:

SECTION 1-102. (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

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OFFICIAL COMMENT 1. This Act is drawn to provide flexibility so that, since it is intended to be a semipermanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in light of unforeseen and new circumstances and practices.

Courts have been careful to keep broad acts from being hampered in their effects by later acts of limited scope. . . . They have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act. . . . They have done the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general. . . . They have implemented a statutory policy with liberal and useful remedies not provided in the statutory text. They have disregarded a statutory limitation of remedy where the reason of the limitation did not apply. . . . Nothing in this Act stands in the way of the continuance of such action by the courts.

In its next section, however, the Code sanctions the continuation of unwritten law (case law, common law) as a source of commercial law.

SECTION 1-103. Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

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OFFICIAL COMMENT. . . . [T]his section indicates the continued applicability to commercial contracts of all suplemental bodies of law except insofar as they are explicitly displaced by this Act . . . .

A main issue in deciding a doubtful case under the Code is which of these sources of law is to provide the rule of decision, the statute as liberally construed\(^\text{10}\) and analogically developed\(^\text{11}\).

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10. For a thorough explanation of liberal interpretation and the distinction between it and strict construction, see 3 C. Sands, Statutes and Statutory Construction: A Revision of Sutherland Statutory Construction §§ 58.01-58.06 (1975).

11. The interpretative technique of reasoning by analogy from statutes is considered at various points in Section II of this study, The Civil Law Comparison; but for a brief discussion of interpretation by analogy, how it is distinguished from other rules, and its application in common law systems generally, see 3 C. Sands, supra note 10, at §§ 53.01-53.02.
or the legal and equitable principles of the common law. The Code binds the courts so far as it goes; but it is for the court to decide in any particular case whether and to what extent the Code has displaced common law principles of law and equity and when resort is to be had to the latter source of law in resolving doubtful cases.

Most commercial law questions and transactions regulated by the Code are clear ones. This is true in the sense either that its provisions are without doubt the appropriate source of law from which to obtain the rule of decision, or that the case is one to be decided according to express directions of the Code by resort to the common law. Examples of the latter instance are the determinations under Article 2 of what constitutes "voidable title" and the definition of "fixture" under Article 9's notice-filing requirements. However, in some cases arising under the Code, i.e., doubtful ones, the legislation may be unclear about which is the proper source of law to be consulted; and the resolution of the litigious issue may vary depending upon whether the rule of decision is derived from the statute or from the common law. The methodology employed by courts in deciding cases of this type is the focus of this study.

Consider this illustrative problem. P, the purchaser of an automobile, properly revokes his acceptance of the car pursuant to section 2-608. Between the times of revocation and return of the car to the seller, the buyer continues to use the car but not to an extent effecting a material change in its condition. P eventually returns the car and then sues the seller to recover his purchase price. What is the proper amount of P's recovery? A "liberal" construction of P's remedy as afforded by section 2-711 would permit the buyer to recover the contract price with

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12. These two sources of law are the most prominent ones under the U.C.C., and their relationship is the focus of this study. But they are not the only sources of law recognized by the Code itself. For instance, "custom" is a source of law of great importance in Article 2, see, e.g., "usage of trade" as defined in § 1-205(2); and one of the purposes of the U.C.C. is to permit the continued expansion of commercial practices through "usage" as well as through custom and agreement of the parties. See U.C.C. § 1-102(2) (b).
13. See Id. § 2-403.
14. See Id. § 9-313.
15. Id. § 2-711. "(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (§ 2-612), the buyer may
no accounting for the value to P of the use of the car after revocation and before its return to the seller. Yet some courts have considered this case a "doubtful" one, and under the authority of section 1-103 they have looked to the common law as a source of law and have allowed the seller a setoff equivalent to the use value of the automobile.\textsuperscript{16}

Here is another example. A and B perfect competing security interests in debtor's machinery—in the order suggested by their names. A claims priority over B not only for his initial advance, but also for one made after B has perfected his interest, both obligations being covered by his initial security agreement as allowed by section 9-204(5) of the 1962 Official Text [9-204(3) of the 1972 U.C.C.]. A has knowledge of B's expectation of obtaining a senior interest. This hypothetical is given because two authorities in the field of secured transactions have disagreed about the source of law to be consulted in resolving the relative priorities of A and B.\textsuperscript{17}

Adhering strictly to the letter of the Code, Professor Grant Gilmore would decide in favor of giving A full priority regardless of knowledge concerning B's security.\textsuperscript{18} Calling this result "a bit thick," Professor William Young would resort to the common law and introduce concepts possibility to deny A's priority as to the second advance.\textsuperscript{19} The difference in the approach of these two scholars is not limited to this particular case. Commenting on Gilmore's monumental treatise, Security Interests in Personal Property,\textsuperscript{20} Young notes the author's

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\item[17.] Professor William Young of Columbia gives this example in his review of G. Gilmore, Security Interests in Personal Property (1965). See Young, Book Review, 66 Colum. L. Rev. 1571, 1576-77 (1966). Professor Gilmore's treatise focuses on the 1962 U.C.C. Official Text and Comments. The priority under that Code version of future advances against an intervening secured party has been debated and is subject to disagreement. The changes in the 1972 version in § 9-312(5) and the addition of § 9-312(7) still do not resolve completely the issues involved and do not diminish the significance to this study of the debate between Gilmore and Young about the sources of law to consult in resolving the problem presented.
\item[18.] Young, supra note 17, at 1577, n.26.
\item[19.] Id. at 1577.
\item[20.] G. Gilmore, Security Interests in Personal Property (1965).
\end{itemize}
propensity to read the language of the U.C.C. with an artistic flair.\textsuperscript{21} Gilmore prefers to fill a fissure in Article 9's comprehensiveness by "cast[ing] about for an analogy to another section or article of the Code."\textsuperscript{22} Gilmore's apparent predilection is to provide for almost any unforeseen situation in Article 9 by extrapolating or analogizing to a solution from within the confines of the statute. Professor Young concedes "there is nothing pernicious in these modes of argumentation,"\textsuperscript{23} but he considers that Gilmore invokes them indiscriminately\textsuperscript{24} and gives "short shift" to the use of "meta-Code" concepts in resolving Article 9 questions not anticipated by its drafters.\textsuperscript{25}

Professor Young laments the book's lack of emphasis on section 1-103 of the Code\textsuperscript{26} and the author's assumption that statutory provisions effect a near-total displacement of law and equity.\textsuperscript{27} He suggests that "[s]ome discussions, particularly in relation to priorities, would have been smoother—truer to the spirit of the Code, and less embarrassed about the letter—if Professor Gilmore had demonstrated at the outset that many 'principles' are not 'displaced' by the Code rules."\textsuperscript{28} Young's advice to courts beset by unanticipated problems—dubtful cases—under Article 9 is to develop "meta-Code" concepts and solutions, e.g., "ideas about reliance interests, unjust enrichment, and standards of diligence," which are "responsive to the necessities of the Code but not dictated by it."\textsuperscript{29}

The issue of the proper methodology for resolving doubtful cases under the U.C.C. could not be illustrated better than in the disagreement between Gilmore and Young. Their dissonance concerns the degrees of inversely proportional emphases which each assigns to the use of intra-Code interpretative maneuvers, i.e., artful interpretation, and extra-Code principles of law and equity, i.e., meta-Code concepts. Both approaches admittedly have applicability under the U.C.C., but how to decide when to apply which method is a problem pervading the entire Code.

\begin{footnotesize}
\begin{enumerate}
\item Young, supra note 17, at 1574.
\item Id.
\item Id. at 1575.
\item Id.
\item Id. at 1576.
\item Id. at 1574.
\item Id. at 1576.
\item Id. at 1574.
\item Id. at 1576.
\end{enumerate}
\end{footnotesize}
The artful interpretation approach implies a methodology which stresses the expansive and almost exclusive importance of the law as written and enacted in the U.C.C. as a source of law in doubtful cases. This type approach no doubt can be founded upon the requirement of section 1-102 that the "Act shall be liberally construed," which together with the accompanying commentary sanctions the use of reasoning by analogy.\(^{30}\) Sec-

30. U.C.C. § 1-102(1) and relevant portions of its Official Comment are quoted herein, see supra pp. 4-5.

The drafting of the Code began with revising the Uniform Sales Act of 1906 (See Braucher, The Legislative History of the Uniform Commercial Code, 58 Colum. L. Rev. 798 (1958), 2 Am. Bus. L.J. 137, 139 (1964), and it is in the 1940 draft of the Uniform Sales Act by the National Conference of Commissioners on Uniform State Laws that the present U.C.C. § 1-102(1) finds its origin. None of the earlier uniform acts superseded by the Code contained a provision calling for a liberal construction or analogical development of statutory precepts, but § 2 of the Uniform Sales Act (1940) provided:

This Act shall be construed as stating the true common law principles of sales and of contracts to sell; and its provisions may be applied or developed by analogy where such procedure would be judicially appropriate in the application of common law principles stated in judicial decisions in equivalent terms; and construction by courts of other jurisdictions shall be given the weight due them in view of the dominant purpose of the Act to make uniform the law of those jurisdictions which enact it.

Committee on the Uniform Sales Act, Report to the National Conference of Commissioners on Uniform State Laws on the Uniform Sales Act and Draft for a "Uniform Sales Act, 1940" (1940).

The accompanying commentary recognized "a growing body of influential judicial decision which has properly and wisely viewed the principles of Uniform Commercial Acts as warranting development and extension by analogy in the same manner in which judicially stated common law principles are developed and extended." Id. at 14. The drafters stated that the purpose of § 2 is "to give recognition and furthermore to this appreciation by the courts that a common-law based Uniform Commercial Act covering a whole general field of law is not legislation of the ordinary type, but is instead and in essence a fresh statement of common law principle, intended not to bind, but to fertilize decision." Id.

The second draft, the Revised Uniform Sales Act (1941), de-emphasized within the actual text the use of analogy, but reference to the technique was retained in the comment to the pertinent section.

SECTION 1-A. CONSTRUCTION OF PRINCIPLES HEREBY AND PROMOTION OF PURPOSE OF UNIFORMITY.

(1) In the construction of this Act, it shall be deemed to state the common law principles of sales and contracts to sell; and its provisions may be applied, developed or limited as in the application, development or limitation of common law principles by judicial decisions; . . .

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COMMENT to Section 1-A. (1) Principles declared, and to be developed . . . (c) The demonstrated attitude of the Courts in the past decade has been to pay careful attention to intelligible legislative purposes, in the process of developing
tion 1-102(1) and its Comment have been cited by other scholars as supporting the notion that techniques of statutory interpretation in civil law systems are applicable to the U.C.C.31

An approach which emphasizes the coexistence and viability of the unwritten common law, i.e., general principles of law and equity, as a source of law in commercial disputes arising under the Code has its basis in section 1-103.32 The substance of section 1-103 is traceable to similar provisions contained in

the legislation to cover those relevant matters which are not explicitly covered by the language. But it is bad engineering to force all such matters into the framework of a supposedly fixed and absolute legislative intent, when the circumstances require, instead, that such intent be confined to the essential reason of the rules laid down, as in the case of common law principles. Indeed, "When the reason leaves off, the rule leaves off, as well" is as solid a part of the best common law tradition as "The rule expands or shifts direction according to the reason which is its life."

The substance of the section is, indeed, in this, a statement of the course of the better case-law as it has already taken shape under the Uniform Commercial Acts, and under the original Sales Act in particular. Quite apart from the cases which follow the prior construction of other courts, in order to further uniformity, there is a growing body of influential decision which has properly and wisely viewed the principles of Uniform Commercial Acts as warranting development and extension by analogy in the same manner in which judicially stated common law principles are developed and extended. . . .

In sum, this section attempts to give recognition, furtherance and consistency to an established appreciation by the Courts that a common-law based Uniform Commercial Act covering a whole general field of law is not legislation of the ordinary type, but is instead and in essence a fresh statement of common law principles, intended not to cripple, but to fertilize decision.

REPORT TO THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND SECOND DRAFT OF THE REVISED UNIFORM SALES ACT (Incorporating Results of Discussion in Committee of the Whole at the Conference of Commissioners on Uniform State Laws) 46-48 (September 24-27, 1941).

The 1944 version of the Uniform Revised Sales Act stated a rule of construction most similar to the present U.C.C. § 1-102(1), and the early drafts of the Code itself adopted this theme with some rephrasing. Section 1(1) of the Uniform Revised Sales Act (1944) provided:

This Act is remedial and shall be liberally construed and applied to promote its underlying reasons, purposes and policies. One of the main purposes is to make uniform the law among various jurisdictions.


32. This section and pertinent commentary are quoted herein, see p. 5-6 supra.
prior uniform acts\textsuperscript{33} which are superseded by and subsumed within the Code, but its history extends even further to clauses contained in certain commercial codes of England.\textsuperscript{34} The existence of a provision such as section 1-103 in commercial law "codifying" statutes is peculiar to the Anglo-American common law experience and reflects attitudes different from those of civilians operating in civil law systems about the relationship among sources of law in deciding "code" cases.

The presence in the U.C.C. of both a section 1-102 (the interpretation of which is influenced by civilian methodology) and section 1-103 (which is a direct product of common law methodology) illuminates the omnipresent but elusive issue on which this study focuses and which is woven intentionally or otherwise into the design of the Code. Is there a methodological relationship and hierarchy between sections 1-102 and 1-103 of the Code and among the contrasting approaches to interpretation and application relating to them? In doubtful cases does the better U.C.C. methodology require that techniques of artful interpretation common to civil law systems must be exhausted before recourse can be had to supplemental principles of law and equity? The central issue from which those previously mentioned are deduced is this: what is the extent of displacement required by Code provisions to preclude resort to "meta-Code" concepts? Essentially, the issue translates into a dispute over the hierarchy of sources of law in deciding commercial law cases under the Code, which is caused by the methodological tension between sections 1-102 and 1-103.

The answer—if there is one—ultimately requires an examination of problems of sources of law relationships under the U.C.C. in the contexts of specific articles and sections. Prior to seeking solutions on a problematic basis within the confines of

\textsuperscript{33} See, §§ 2 and 73, Uniform Sales Act (1906); § 196, Uniform Negotiable Instruments Act (1896); § 56, Uniform Warehouse Receipts Act (1906); § 51, Uniform Bills of Lading Act (1909); § 18, Uniform Stock Transfer Act (1909); § 17, Uniform Trust Receipts Act (1933).

The exact wording of U.C.C. § 1-103 was adopted from § 2 of the 1944 draft of the Revised Uniform Sales Act as promulgated by the National Conference of Commissioners on Uniform State Laws. The undertaking by the Conference to revise the Sales Act was the beginning point and foundation for the Code project. See note 30 supra.

\textsuperscript{34} The common law "saving clauses" contained in the English commercial codes are discussed in Section III of this study, "The Codes of England," in the subsection denoted "E." Section III is contained in Part II of this study to be published in 31 Ark. L. Rev. — (Summer 1977).
individual provisions, however, it is helpful if not necessary to devote considerable attention to the relationships among sources of law in analogous comparative and historical contexts.

The Code is the product of a series of efforts to make uniform by legislation the commercial laws of the various states of the United States. The drafters were influenced in the writing and arranging of the text by previous uniform acts and the experiences under them, and these earlier laws themselves were promoted to some extent by the efforts in England during the last years of the nineteenth century to unify certain of that country's commercial laws. The English were prodded to a degree by the on-going movement toward codification on the Continent. No one questions that the content and form of the Code were influenced by comparative and historical method and substance. To better understand the relations between Code and supplementary common law this study examines similar relationships in comparative and historical settings.

Civilian lawyers have been debating for centuries the relationship between enacted and other sources of law. Conversely, the interaction of legislation and the common law under Anglo-American uniform acts and "codes" is a comparatively recent phenomenon, and questions relating to their relative priorities as sources of law in doubtful cases both in the abstract and in particular instances are far from answered. Efforts to provide information and analyses for the resolution of these questions should be helpful to the continuing maturation of the methodology used to interpret and to apply the Code. The primary purposes of this study, then, are to examine the sources of law relationships and problems under the civilian code system; to review the growth in England and America of enacted written law and, especially, of uniform laws and "codes"; and to study attitudes about the displacement of traditional common law reasoning and principles under these Anglo-American uniform laws and "codes."

Approaching the topic in terms of the historical and foreign antecedents to the U.C.C. is intended to clarify the existence of and reasons for problems of sources of law relationships under the Code; to support by analogies from past and foreign experiences the inherent thesis that Code methodology is influenced significantly by the way in which lawyers and judges conceptualize and attempt to solve these source of law problems; and
to indicate differences in comparative and historical conceptions and attitudes which no doubt contribute to a lack of uniformity in methods of dealing with doubtful cases under the Code. This sort of nonuniformity surely is a significant obstacle to achieving one of the avowed purposes and policies of the U.C.C., which is to establish and to preserve uniformity in the commercial laws of the various jurisdictions.\textsuperscript{35}

SECTION II.

THE CIVIL LAW COMPARISON

A.

Distinctive Characteristics Of Civilian Legal Systems
And The Methodology Of Civilian Courts

William D. Hawkland, a distinguished commercial lawyer and scholar, has concluded that the proper methodology for deciding doubtful cases under the Uniform Commercial Code is one patterned, to a large extent, on methods and techniques commonly applied to civil law codifications.\textsuperscript{36} The logic of his reasoning is set forth simply and clearly.

A "true code," he first explains, "is a pre-emptive, systematic, and comprehensive enactment of a whole field of law,"\textsuperscript{37} and civil law codes supposedly are prime examples. Hawkland then proceeds to establish to his satisfaction that the U.C.C. is a "code" in this "true" sense. He does so primarily by attribut-

\textsuperscript{35} U.C.C. § 1-102(2) (c).


\textsuperscript{37} Id. at 292. Hawkland adopts Professor Grant Gilmore's definition of a code and its difference from a "statute" as expressed in Gilmore, Legal Realism: Its Cause and Cure, 70 Yale L.J. 1037, 1043 (1961): A "statute," let us say, is a legislative enactment which goes as far as it goes and no further: that is to say, when a case arises which is not within the precise statutory language, which reveals a gap in the statutory scheme or situation not foreseen by the draftsmen (even though the situation is within the general area covered by the statute), then the court should put the statute out of mind and reason its way to decision according to the basic principles of the common law. A "code," let us say, is a legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law; the pre-Code common law is no longer available as an authoritative source.
ing to the Uniform Commercial Code the characteristics of a "true code." His reasoning is syllogistic:

MAJOR PREMISE: Methods applicable to civilian codifications, principally the use of analogical methodology, are applicable to all "true codes."

MINOR PREMISE: The Uniform Commercial Code is a "true code."

CONCLUSION: Methods applicable to civilian codifications, principally the use of analogical methodology, are applicable to the Uniform Commercial Code.

A major supposition forming the basis of Hawkland's thesis is that lapses in the Code's comprehensiveness, i.e., "gaps" and "unprovided for cases," are to be handled according to the "French approach." The French approach is to "put the principles of the code in action and 'by wise and reasoned application' extend them to cover the 'unforeseen' situation." This process of analogically developing code principles is said to be founded on U.C.C. section 1-102. Professor Hawkland does not mention section 1-103 as a "gap" filler; and, in fact, he

38. Hawkland, supra note 36, at 299-313.

39. Hawkland concludes on the basis of the U.C.C. being a "true code" that courts in construing it should make three changes in their standard legal method: "They should: (1) use analogy, rather than 'outside' law to fill code gaps; (2) rely somewhat more heavily on the decisions of other code states in making their own decisions; and (3) give their own decisions somewhat less permanent precedential value." Id. at 313.

He justifies the use of analogy alone to fill gaps in the code not only because that technique is "standard code methodology" under a true code but, also, because he believes that the analogical approach will enhance uniformity of decisions among jurisdictions. On the other hand, he believes that "[f]ree resort to outside law . . . not only makes possible the utilization of different analogies, but brings into play different rules of law and social policies, inevitably reducing the chances of uniform decisions." Id. at 314. This argument overlooks the fact that techniques of analogy are in themselves neutral devices, i.e., they do not assist in deciding when an analogy properly is to be drawn from a text or what considerations should influence the development of the analogy. The court in any case will be influenced by factors which are as peculiar to its jurisdiction as are the different rules of law and social policies which Hawkland indicates are brought into play by resort to outside law to fill gaps. He admits that it is "too much to hope that all courts will use the same approach in developing the Code analogically." Id. It seems that uniformity remains an equally elusive goal whether gaps are filled by applying civilian methodology or by having "free resort" to outside law. A "good" decision by any court will have as much persuasive value in a sister jurisdiction regardless of its having been reached on the basis of analogy or meta-Code concepts of the common law.

40. Id. at 302.

41. Id.

42. Id.
ments the section just once and then only to support the
notion that the Code is superior to common law legal princi-

43. *Id.* at 312. According to Hawkland, the true functions of §
1-103 evolve from the following characteristics of a true code:

(1) Relevant outside law, of course, must be used from time
to time, because . . . no law or set of laws can exist in isolation.

(2) A true code, for policy reasons of its own, may inten-
tionally put beyond its scope certain rules falling squarely
within its field of law. *Id.*

Hawkland attempts to draw a clear line between all law within the Code,
including that potentially to be developed by analogy, and all law with-
out the Code. His proposal is to fill all "gaps" in the law within the Code
by developing intra-Code law analogically. Uncodified law is to
be used only with respect to matters which the Code almost explicitly
indicates should be decided on the basis of common law. The example
he gives is the problem of priority for sales warranty purposes which,
he writes, "is consciously left to the case law . . . ." (U.C.C. § 2-313,
comment 2; and U.C.C. § 2-318, comment 3). *Id.* Hawkland's opinion
in this regard is based partly on an interpretation of the wording of section
1-103 supporting the Code as a "general" body of law entirely pre-empt-
ing the common law. *Id.* at 309-13. He borrows the interpretation
from Dr. Mitchell Franklin, whose opinion on this issue is challenged
in the concluding portion of this section of the study. See pp. 48-53 *infra.*

44. See, e.g., L. Deemer, Legal Method and Judicial Creativity:
What Changes Has the U.C.C. Wrought? (unpublished LL. M. Thesis,
Columbia University, 1971); Franklin, *On the Legal Method of the Uni-
discussion of a similar approach urged by Professor Gilmore respecting
the interpretation of Article 9, see, Young *supra* note 17.

45. See *infra* at p. 47 et seq.

The immediate objective then is to examine the civilian ideology of codification. To develop a working knowledge of it requires (1) an examination of the place of legislation among other sources of law in civil law systems and (2) a review of the techniques and methods of code interpretation which reinforce enacted law as the primary source of law in civilian countries. The primary reason for this undertaking is to illustrate that full-fledged endorsement of civilian methodology to interpretation under the U.C.C. means rejecting common law legal and equitable principles as a major source of law in deciding doubtful cases arising under the Code.

As the following discussion reveals, civil law codes and methods are intentionally designed in most cases to preclude as thoroughly as possible resort to other sources of law all of which are considered subordinate to that contained within legislative enactments themselves. By adopting en bloc civilian techniques for the interpretation of the U.C.C., a similar design and subsequent subordination is attributed to the Code. The attribution should not be accepted until one is fully aware of the reasons which support that intention in civil law systems and until one has decided that similar reasons are present in the situation of the Uniform Commercial Code and render such an intention either mandatory or desirable. From differences in the character of the written law under common and civil law systems "flow consequences which both the legislator and the interpreter should bear clearly in mind, if they would avoid mischief."

B.

Legislation As The Supreme Source Of Law In
Civil Law Systems

The primary authoritative source of law in civil law sys-


48. The term "civil law system" broadly denotes one in which the jurisprudence and bodies of law derive from or are based on Roman law in contradistinction to the common law of England. Although it is difficult precisely to classify nations according to legal systems, "[b]y way of a broad initial generalization it can be said that the whole of continental Europe this side of the Iron Curtain (with the possible exception of Scandinavia) and the countries of continental South and Central America are looked upon as the core of civil law jurisdictions." R. Schlesinger, Cases and Materials on Comparative Law 252 (3d ed. 1970).
tems is legislation. It is superior to every other source of

Schlesinger warns that outside of this core area even the most elementary generalizations become hazardous. Id.

civil law jurisdiction which partly has become overlaid with Anglo-American law has been characterized as a "Common Law cuckoo" or a "mixed" legal system. A scholar and writer on Scots law coined these phrases to indicate a jurisdiction wherein both the civil law and the common law have been received. See, T. Smith, Studies Critical and Comparative 89 et seq. (1962), also, see Smith, The Common Law Cuckoo: Problems of "Mixed" Legal Systems With Special Reference to Restrictive Interpretations in the Scots Law of Obligations, 1956 Butterworth's S. Afr. L. Rev. 147 (1956). The prime examples of mixed legal systems are the American state of Louisiana, the Philippines, Quebec, Scotland and South Africa.

Remarks in this study about civil law systems are primarily intended to describe the codified civil systems of the Continent, particularly France and Germany. Some specific references also are made to other civilian jurisdictions and to mixed systems, particularly that of Louisiana. Most of the generalizations contained herein are believed, however, to apply mutatis mutandis to the civilian conception of law and its interpretation and application.

The whole of this study, in the main, relates to American commercial law, but the reader will discover that the comparative discussions tend to center on the traditions, provisions and interpretations of the foreign Codes Civil. The apparent inconsistency is not real. First, most of the generalizations regarding the civil codes are applicable as well to civilian commercial codes. Second, the objectives of this comparative law section are to examine the place and use of civil law codes as special forms of legislation, methods of code-interpretation and the relation of enacted law (primarily codes) to other sources of law. The substantive law differences in the content of the codifications are not relevant except in so far as they bear on the present objectives. Anyway, "[1]o a certain extent the content of the U.C.C. corresponds to the content of civil codes." Franklin, supra note 44, at 339.

As an informational note to readers, it should be pointed out that the civilian classification of "private law" embraces both the civil law proper ("persons," "things," and "property") and the commercial law. Yet it is not always clear which code is to be applied to a given legal controversy. See Register, The Dual System of Civil and Commercial Law, 61 U. Pa. L. Rev. 240 (1913). For a bibliography of both types of codes, see McLaury, Bibliography of Civil and Commercial Codes, 44 L. Lib. J. 83 (1951).

49. "Legislation" encompasses more than the simple statute (loi in France and Gesetz or Einzelgesetz in Germany) and the familiar code (in Germany the Gesetzbuch or the procedural codes called Ordnung). The codes themselves are sometimes amended by the legislature via auxiliary statutes (Nebengesetze), i.e., "statutes which, although pertaining to the general subject matter of a code, have been separately enacted and have not been incorporated into the code itself." R. SCHLESINGER, supra note 48, at 378.

Statutes in France also include its constitution, emergency decree laws of the legislature (decrets-loi) and ratified national treaties.

A form of French legislation inferior to the loi are general rules issued under the authority of executive agencies by power of subordinate legislation (règlements).
law,\textsuperscript{50} and "[i]t is only if the legislation does not cover the question at issue at the lawyer or judge is entitled to look elsewhere."\textsuperscript{51}

With the emergence of the modern nation-states on the Continent, the combined forces of nationalism, positivism, and sovereignty focused attention on the centralized state as the unique originator of law,\textsuperscript{52} excluding both laws of external origins and laws having customary or local origins.\textsuperscript{53} The

There is a distinct hierarchy among forms of enacted laws in France and in other civil law countries such as Germany and Switzerland. For a thorough review, see generally C. Szladits, Guide to Foreign Legal Materials—French, German, Swiss 5-11, 125-32, 358-72 (1959).

50. A typically classical statement on the theoretical authority of the written law reads as follows:

the Continental codes have assured to the written law either
an undivided authority . . . or at least a primary authority.
They thus prevent the formation of any law outside of or contrary to the codes; and thereby they have drawn the boundary between the province of the code and the judges' declarations of the law. The judges are subordinate to the commandments of the statute. They merely apply that; they may not create legal rules.

Sperl, Case Law and the European Codified Law, 19 Ill. L. Rev. 505, 508 (1925).


52. The scope of this study does not include tracing the historical development of civilian sources of law or detailing all of the factors which have contributed over many centuries to the relative priorities assigned to these sources. For the serious historian, reference should be had to the appropriate sections of C. Szladits, A Bibliography on Comparative and Foreign Law. For a generally thorough review, the following authorities are suggested: J. Merryman, supra note 46, at 1-72 (presents excellent comparison of the developments of legal and jurisprudential institutions in England, France, Germany and the United States); K. Ryan, An Introduction to the Civil Law 1-34 (1962); R. Schlesinger, supra note 48, at 203-51; A. von Mehren, The Civil Law System: Cases and Materials for the Comparative Study of Law 3-30 (1957) (particularly useful in contrasting the growth of English common law); F. Wallach, Introduction to European Commercial Law 16-31 (1953) (see regarding the growth of development of the law of commerce in civil law jurisdictions).

53. A modern French expression of this exclusion is found in the Law of the 30th of Ventose, year XII (1804), which consolidated thirty-six prior statutes into the French Civil Code. Art. 7 provides: "As of the day when these laws shall become effective, Roman law, ordinances, general and local usages, statutes and regulations shall cease to have the force and effect of general or particular laws with regard to the topics which are the object of the above-mentioned laws constituting the present Code." As cited and quoted in Serini, The Code and Case Law, in The Code Napoleon and the Common-Law World 55, 76 n.2 (B. Schwartz ed. 1956).
expansive influence of legislative and state positivism eventually dictated that "only statutes enacted by the legislative power could be law." Contemporary civilian codification is a legislative form, but is also an ideological expression which includes the precept of enacted law as the supreme source of law.

54. J. MERRYMAN, supra note 46, at 28 and, generally, Chs. 4 & 5.
55. "[I]n the last analysis codification is simply the method by which we perform a given task. This point cannot be made too strongly at the outset: codification is simply a method; it has nothing to do with the goodness or badness, the wisdom or folly of that which is codified. Not all codified law is good law and, conversely, not all uncodified law is bad. Being a method, the value to be attached to it depends upon the usefulness which it is found to have in the accomplishment of a given task." Stone, A Primer on Codification, 29 Tul. L. Rev. 303, 303 (1955).

The advantages of the method of codification are summarized as these:

(1) [I]t can be used to introduce order and system into the mass of legal concepts and ideas and so present the law as a homogeneous, related whole rather than as a series of isolated propositions. (2) ... [I]t ... demands that stock be taken of existing legal materials and so forces an examination not only of those ideas existing in the State that is engaged in codification but also in all other civilized States. (3) An "advantage comes from the bringing together of law into one place or book." (4) ... [T]he average man, if he so desires, can find and read the law that governs him." (5) Those engaged in the exposition of law "are provided with an authorized framework within which to conduct their work."

56. As earlier observed (see p. 15 supra) Professor Merryman instructs that the essential distinction between the civilian codes and the codes promulgated in the United States, e.g., the state codes of California and the U.C.C. are the different ideological conceptions surrounding them and their use. J. MERRYMAN, supra note 46, at 28. After describing the codification ideology at work in the civil law world, he describes the American conception after commenting that American codes "do not express anything like the same cultural reality." Id. at 33.

Where such codes exist, they made no pretense of completeness. The judge is not compelled to find a basis for deciding a given case within the code. Usually, moreover, such codes are not rejections of the past; they do not purport to abolish all prior law in the field, but rather to perfect it and, except where it conflicts with their specific present purposes, to supplement. Where some provision of a code or other statute appears to be in possible conflict with a deeply rooted rule of the common law, the tendency will be to interpret the code provision in such a way as to evade the conflict. "Statutes in derogation of the common law," according to a famous judicial quotation, "are strictly construed."

57. Another principle which finds expression in codification is the right of every man to know the rules which govern his actions. See Stone, supra note 55, at 303-04. This is true especially in France. The French historically have distrusted the administration of justice and have had little confidence in their courts and judges. The best protection against unfettered judicial discretion was thought to be having the law written in clear and ordinary language. In this manner, everyone would
“Codification is a form of statute law which does not regulate a specific subject incidentally, but regulates systematically and comprehensively a major part of the law . . . .” 58 A code know his rights, and the judges would be without discretion. See, Tunc, The Grand Outlines of the Code, in THE CODE NAPOLEON AND THE COMMON-LAW WORLD 19, 19-20 (B. Schwartz ed. 1956).

One of the basic concepts of the French Revolution was that freedom and liberty demanded a strong separation of powers. The law should be written and enacted by the elected representatives of the people, and the judiciary should not encroach upon this distinctly legislative function of law-making. See, Loussouarn, supra note 51, at 237.

While on the Continent the enacted law became pre-eminent partly because of this distrust of judges, the prestige of the English courts served as a factor in the growth of the unwritten common law. See, R. Dias, JURISPRUDENCE 49 (1970). For an historical analysis of the hierarchy between written and unwritten law in England and the United States, see generally Akzin, The Conception of Legislation, 21 Iowa L. Rev. 713, 724-30 (1936).


Definitions of “code” and “codification” abound, and each one is slightly different depending upon the author’s perspective and purpose. An Englishman writing against the background of the common law and considering the possibilities of its codification: “Codification . . . is an instrument of systematic development and reform in those branches of law where reform is thought to be needed . . . .” Scarman, Codification and Judge-Made Law: A Problem of Coexistence, 42 Ind. L.J. 355, 358 (1967). A comparativist attempting to distinguish codes from ordinary statutes: “A code is not a list of special rules for particular situations; it is, rather, a body of general principles carefully arranged and closely integrated. A code achieves the highest level of generalization based upon a scientific structure of classification. A code purports to be comprehensive and to encompass the entire subject matter, not in the details but in the principles, and to provide answers for questions which may arise.” Dainow, The Civil Law and the Common Law: Some Points of Comparison, 15 Am. J. Comp. L. 419, 424 (1967). A philosopher attempting to contrast legal methods of code and case law: “A code states the law comprehensively, in general principles, and the finding of the law is deductive, an application of general principles to particular facts.” W. Friedmann, Legal Theory 533 (5th ed. 1967). A definition of a particular code, i.e., the Civil Code of Louisiana: “Our Civil Code is a comprehensive, systematic, and coherent enactment regulating most of the area of private law . . . . Although sometimes containing detailed regulation when certainty is necessary . . . ordinarily the code concepts are set forth as general principles. These general principles are to be applied to particular fact situations by the use of deduction, analogy, and other processes of logic. The Code is supposed to be a self-sufficient and logically interdependent enactment, to be construed as a whole, and to regulate entirely the relationships and incidents within its scope without reference to other authoritative sources of law.” Tate, Techniques of Judicial Interpretation in Louisiana, 22 La. L. Rev. 727, 728 (1962).

Different ideas support different types of codes. A rather classical statement of three purposes urged for codes is by Dean Roscoe Pound. The view he associates with the French and German codifications is the purpose of providing “so far as possible a complete legislative statement
by design collects and formulates the law within its scope, "reducing it from a disparate mass into an accessible statement which is given legislative rather than mere judicial or academic authority." 59

No civilian code was promulgated in the absence of tradition. The draftsmen were not blind to legal history. The text itself contains more restatements of received legal principles than legal innovations. 60 The format may be a fresh logical arrangement, but the substance consists largely of restated legal principles which are founded upon experience. Yet the authority of these principles as law is not based upon their historical development and earlier acceptance into the legal system; their validity

of principles so as to furnish a legislative basis for juristic and judicial development by reasoning along modern lines; laying down rules sparingly and for the analogies they furnish, except in the law of property and inheritance, where precise rules are called for." Pound, Codification in Anglo-American Law, in The Code Napoleon and the Common-Law World 267, 282 (B. Schwartz ed. 1956). For a complete and detailed description of the types and forms of codification and problems associated with each, see Donald, Codification in Common Law Systems, 47 Austl. L.J. 160 (1973).

59. Donald, supra note 58, at 161. Although definitions of "code" may vary (see supra note 58), certain characteristics or elements are present in practically all descriptions, i.e., that it be written, lay down general principles which are grounded upon experience, be dealt with as a single fabric, be a comprehensive statement of the whole law within the field it purports to cover and thus be the authoritative and exclusive source of that law. These collectively grouped tenets are drawn from several sources; and while no one authority lists explicitly all of these requirements of a code, it is safe to say that all are present inferentially in each one's listing of the criteria of a "code." See, Scarman, supra note 58, at 358; Stone, supra note 55, at 305-06; Tunc, supra note 57, at 32-33.

60. Writing about the French Code Civil (1804), one author reports, "The Code is not based on vague and obscure (however noble and generous) principles. The foundation on which it is built is the secular experience of the ancient law modified by the ideas of the Revolution. ... [A] kind of 'restatement' of the pre-revolutionary period can be traced unmistakably in the Code." Lewy, Codification, Adaptability and Experience, in Washington Foreign Law Society Essays on French Law 1, 8-7 (1958). The French Code has been described as a "work of experience." Tunc, supra note 57, at 32.

The draftsmen never meant to make a new law. They wanted only to restate the law, having to make a choice on the basis of experience when the Revolutionary law was at variance with the previous law.

Id. The codification in Germany was preceded by intensive study of German legal history. The historical approach was engineered primarily by the German legal scholar Savigny. His idea was "that by thoroughly studying the German legal system in its historical context legal scholars would be able to draw from it those historically derived principles that were an essential part of it. These essential features of the law could
derives from being legislatively incorporated and reenacted in a code.\footnote{61}

Upon the promulgation of the Corpus Juris Civilis, Justinian sought to abolish all prior unwritten law and to establish legislation as the sole source of law.\footnote{62} This traditional theory of then be individually studied, studied in relation to other such principles, and eventually systematically restated. The result would be a reconstruction of the historically derived German legal system according to its basic principles and features. This, in turn, would provide the necessary basis for the codification of German law." J. MERRYMAN, supra note 46, at 32. The codification of Germany's law in 1896 was a scientific reconstruction of its legal system.

The German codification is, in fact, based more on tradition and historical development than is the French Code. Contrasting the revolutionary Code Civil with the BÜRGERLICHES GESETZBUCH (B.G.B.), Merryman writes that the latter is "the opposite of revolutionary. It was not intended to abolish prior law and substitute a new legal system; on the contrary, the idea was to codify those principles of German law that would emerge from careful historical study of the German legal system. Instead of trying to discover true principles of law from assumptions about man's nature, as the French did under the influence of the secular natural law, the Germans sought to find fundamental principles of German law by scientific study of the data of German law: the existing German legal system in historical context." \textit{Id.} at 33.

\footnote{61} While it is true generally that many provisions of civil law codes are restatements of historically based legal rules and principles, the reader must understand clearly that what is reported in the following passage about the Code Civil of France is true of all codifications influenced by legal tradition and experience: "[E]ven though the contents of many of its specific provisions might actually be the same as those of the pre-existing legal rules, yet the new code operated as a 'legislative innovation' in that the validity and binding force of its provisions was exclusively dependent upon the fact that they had been merged with the new enactment and were part of it." Serini, supra note 53, at 57.

\footnote{62} Justinian's Digest was intended as a restatement of Roman law, and it drew extensively from the writings of the classical period jurists. [NOTE: "The classical period. It is the second century and the first half of the third century of the empire that Roman law reached its fullest development in the hands of great lawyers who were as a rule both practitioners and writers. The period may be divided into an earlier classical period covered by the reigns of Hadrian and the Antonine emperors, and a later classical period under the Severi. Not that there is a break in the continuity of the development, but the work of the earlier age was of a more creative character, while that of the later represents rather the working out of existing principles over the whole field of law. In the Digest there are quotations from all the authors of the classical age, but those taken from two writers of the later period alone comprise about half the work." H. JOLOWICZ, \textit{HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 6} (2d ed. 1952)] The jurists were legal advisers to participants in legal process and transactions, and with their opinions and interpretations of the Twelve Tables and subsequent legislative enactments they fitted the law to the needs of practical life. By their activities they were responsible for all of the processes (except legislation) that led to the formation of new law, i.e., \textit{interpretatio}, and
a code being complete and exclusive within its area of coverage persists in the folklore of modern civil nations.\textsuperscript{63} The civilian
during this period their influence was great for the bulk of Roman law was then based on interpretatio and not legislation. Their role in the evolution of unwritten Roman legal authority seems somewhat comparable to the role of Anglo-American scholars and courts in the growth of the common law. For a discussion of the interpretatio phase of Roman law, see, Schiller, \textit{Roman Interpretatio and Anglo-American Interpretation and Construction}, 27 Va. L. Rev. 733, 734-45 (1941).

Upon the completion of the Digest, Justinian became convinced of the perfection and comprehensiveness of the \textit{Corpus Juris Civilis} as the essential source of law for the Roman Empire. His confidence in this belief led him to forbid the preparation of commentaries and recourse to any literature outside of the Digest though "each fragment states in full its provenance, source, whole, abounds in the citation and discussion of the views of named authors." J. Nicholas, \textit{An Introduction to Roman Law} 41 (1962). In short, Justinian sought to abolish all prior law. J. Merryman, \textit{supra} note 46, at 28.

Justinian's belief in the purity of the \textit{Corpus Juris} was based more on egotistical pride than on truth. The arrangement of the Digest often is haphazard; contradictions and ambiguities abound; and it proved incomplete. \textit{See generally} J. Nicholas, \textit{supra} note 62, at 39-46. Though the unwritten (not legislatively enacted) interpretatio formed the primary basis of Justinian's written law, the latter was intended to supersede and pre-empt the former. The Roman lawyer must have become increasingly frustrated as he struggled to understand and to apply a statutory passage annotated with citations to authorities from which it derived but official reference to which was forbidden. The problem of civilian lawyers in adjusting the priorities and relationships between written and unwritten sources of law did not decline with the Roman Empire.

Justinian himself failed as a codifier, but he succeeded in attaching importance to the idea of a collected and cohesive array of statutes serving as a principle source of law. Roman substantive law survived and eventually became the common law for much of the Continent. See, Lipstein, \textit{The Doctrine of Precedent in Continental Law with Special Reference to French and German Law}, 28 (3d ser.) J. Comp. Leg. & Intl. L. 34, 39 (1946). And, centuries later, Justinian's technique was perfected to the extent of raising codified schemes of legislation to the level of the primary authoritative source of law.

\textsuperscript{63} The principle laid down in the classical doctrine is that "a statute is capable of indefinite extension and that the function of the judge in each particular case is limited to discovering the meaning of the statute." Bonnecase, \textit{The Problem of Legal Interpretation in France}, 12 (3d ser.) J. Comp. Leg. & Intl. L. 79, 90 (1930). According to orthodox theory: "The continental European judge is bound to 'find' the law implicit in the statutes, never to invent a law theretofore non-existent. His judgments are accordingly in the logical sense of the word 'Erkenntnisse': a taking cognizance, through sound understanding and construction, of the legal order that lies outside of all adjudications. They are an echo of the statutory will; not declarations of the judge's own legal will . . . . In short an application, not a creation, of law." Sperl, \textit{supra} note 50, at 516.

The singular role of the judge to find the law was defined largely by the civilian desire for a clear separation of powers (see \textit{supra} note
judge in each new case must look to the appropriate code for his rule of decision; a judgment normally cannot be refused under the pretext of silence, the obscurity, or the inadequacy of the statute," and a judge's failure to resolve a controversy may result in some countries in criminal prosecution of him.

In fact, however, the experience and imagination supporting any code cannot forestall the inventiveness of reality.

57). Also, the drafting of the German Code and late 19th century interpretations of the French Code were influenced by the "method of exegesis," i.e., the conception that all law is the creation of the legislator's conscious will. Professor von Mehren has described it: "The positive law of a given country and period was viewed as a self-sufficient whole, embodied in codes and taken to contain, in the form of logical principles inherent in its structure, its own method of development. The judge was merely to apply the legislatively given text or, where the text was obscure, to discover the legislator's intent. . . . Codes were, in short, to ' . . . be enlarged out of [themselves], out of the system of justice (they) contain . . .' " von Mehren, The Judicial Process: A Comparative Analysis, 5 AM. J. COMP. L. 197, 204 (1956).

Current methodology in civil law systems rejects the idea of codes being perfect, complete and self-contained, and denies that the nature of the judicial process is fundamentally mechanical. Judges make law on the Continent in spite of the folklore about the comprehensiveness of codes and because of their incompleteness. For example, "With all of the law of torts comprehended in five brief sections of the French Code, it necessarily follows that there is quite as much judge-made law in the field of torts in France as there is with us (Anglo-Americans). The same situation exists in varying degree in other phases of private law. In the field of public law there is no administrative code; all of the public law in France is judge-made." Vanderbilt, The Reconciliation of the Civil Law and the Common Law, in THE CODE NAPOLEON AND THE COMMON-LAW WORLD 389, 395 (B. Schwartz ed. 1956).

64. French Code Civil art. 4 (1804).
65. Consider these provisions of three civilian codes:
   "A judge who refuses to decide a case on the pretext that the law is silent, obscure, or insufficient may be prosecuted as being guilty of a denial of justice." French Code Civil art. 4 (1804).
   "Any court which refuses to render judgment on the pretext of silence, obscurity or insufficiency of the law, shall incur liability therefore." Puerto Rican Civil Code art. 7 (1902).
   "A tribunal that refuses to apply the law on the pretext of the silence, obscurity and insufficiency of the laws will incur criminal responsibility." Spanish Civil Code art. 6 (1889).

66. The reason both for the inevitability of any single form of law to fail as the exclusive source of legal authority and for the necessity of juridical interpretation is stated aptly in this quoted passage:
   [m]an can set up a legal order only for such future conflicts which he knows from experience are likely to arise, or which he is able to imagine. But experience and imagination do not match the inventiveness of reality. At the root of the problem of interpretation we thus find man's limited ability for exact statements and his inability of genuine prophecy. Whereas in these cases the ambiguity of legal language is unintentional, there may be instances where it is calculated—usually, where the legislator does not have a solution for a problem known to
“Gaps” (lacunae, non-existent provisions) in a code and cases within its scope for which no provision has been made inevitably will appear.67 The text may be ambiguous, or it may be literally clear but its application to the particular facts doubtful. Provisions within the code may conflict. Many codes,68 therefore, him, and therefore relies on courts and professors to find it in the course of time.


67. A principal defect of a code is said to be that it is “struck off at a single time in a single age by men who are necessarily products of that age.” And linked with this defect is the criticism successful methods are lacking to keep the code up to date. See, Stone, supra note 55, at 309. Therefore, there are surely to be in the later years of a code a large number of unprovided for cases which must be decided by the mores of an earlier age. The classical piece of literature opposing the idea of codification is that of a German, F. K. von Savigny, and his theory encompasses this criticism, i.e., that codification entails of necessity an unhealthy crystallization of the law. See generally F. von Savigny, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (A. Hayward transl. 1831).

Codes are modernized, of course, by amendments (see supra note 49). Subsequently in this section of the study, the extent to which social changes are accounted for by judicial interpretation of the enacted law will be discussed (see p. 32 et seq. infra). In sum, the opposition to codification on the grounds mentioned above has proved to be unfounded, except to the degree that any legal system is susceptible to the desire for certainty in the law over-balancing the need for its flexibility and growth. The common law system has not been immune from a form of “mechanical jurisprudence.” The early twentieth century legal realists and sociological jurisprudents in America argued to correct such an imbalance. As illustrative examples, see B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921); Llewellyn, Legal Tradition and Social Science Method—A Realist’s Critique, in BROOKINGS INSTITUTION ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES 89 (1931); Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908).

68. A surprising but familiar exception is the French Code Civil (1804) which sets out in its text no theory of sources of law. The projet of 1800 proposed an Art. 11 with this language: “In civil law matters, where there is no express law, the judge is a minister of equity. Equity itself is an appeal to natural law and to received usages where positive law is silent.” This suggested provision was not incorporated into the Code.

The chief objections to its adoption have been summarized as follows: “a) that its terms ‘sanctioned the power of the judges to complement and to supplement the law, consecrating judge-made law as a direct, even if subsidiary, source,’ b) that the preliminary title of the Code, in which the article would have been contained, already had an ‘excessively philosophical character,’ and c) that ‘the reference to equity would justify the use of English equity, so that the French courts could dispense with or negate the new Code Civil.’” Ramos, “Equity” in the Civil Laws: A Comparative Essay, 44 Tul. L. Rev. 720, 721 (1970).

Professor Ramos reported that this proposed article must have seemed unnecessary since the positive law contained in the codes was supposed to have an answer to every legal problem. The supposition was
explicitly provide directions to the courts for recourse to supplementary sources of law. These ostensible sources common to

incorrect. "[A]t the beginning the second one-third of the twentieth century, Josserand wrote that, if literally interpreted without the help of jurisprudence in the sense of case-law, the Code Civil could not have survived the social evolution of that country during the 19th century [citing L. Josserand, Evolutions et Actualites 67 (1936)]; and according to Savatier, with respect to some matters French civil law is no longer written law, but rather is 'case-law' [citing Savatier, Destine du Code Civil Francais, 16 Revue International de Droit Compare 643 (1945)]. This, of course, should not be understood as describing a system like the Anglo-American law, based on judicial precedents, but rather a system in which the law is created by the judge in a particular case, without regard to the doctrine of stare decisis." Id. at 721-22.

69. Argentine Civil Code art. 16 (1869). "If a civil controversy cannot be resolved, either in terms of the words or the spirit of the law, it will be controlled by the principles of analogous law; and if the question still remains in doubt, it will be resolved by the general principles of the law, taking into consideration the [special] circumstances of the case."

Austrian Civil Code art. 7 (1811). "Where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases and to the principles that underlie other laws regarding similar matters. If the case is still doubtful, it shall be decided according to the principles of natural justice, after careful research and consideration of the individual circumstances."

Introduction to Civil Code of Brazil (Wheless' trans. 1920). "In cases of omission, the provisions concerning analogous cases are applied, and when there are none such, the general principle of law."

Italian Civil Code art. 12 (1942). "In interpreting the statute, no other meaning can be attributed to it than that made clear by the actual significance of the words according to the connections between them, and by the intention of the legislature.

If a controversy cannot be decided by a precise disposition (i.e., a law precisely in point), it will be settled by a law that controls a similar case or an analogous matter; if the case still remains in doubt, it will be decided according to the general principles of the body of laws of the state."

Louisiana Civil Code art. 13 (1870). "When a law is clear and free from all ambiguity, the letter is not to be disregarded under a pretext of pursuing its spirit."

Art. 21 (1870). "In all civil matters, where there is no express law, the Judge is bound to proceed and decide according to equity. To decide equitably, an appeal is made to natural law and reason, or received usage, where positive law is silent."

Puerto Rican Civil Code art. 7 (1902). "When there is no law applicable to the case, the court shall decide in accordance with equity, which means that natural reason, as embodied in the general principles of the Law, and established usages and customs, shall be taken into consideration."

Spanish Civil Code art. 6 (1889). "When there is no law exactly applicable to the point in controversy, the customs of the place shall be observed, and in the absence thereof, the general principles of law."

Swiss Civil Code art. 1 (1907). "The Civil Code applies to all cases as to which it contains provisions either according to its letter or its
most civil law systems are custom\textsuperscript{70} and general principles.\textsuperscript{71}

spirit. In default of an applicable provision, the judge shall decide according to customary law, and in default of custom, according to such rules as he would enact if he were the legislator. He may inspire his decision by solutions sanctioned by doctrine and by the course of judicial decision."

70. Custom was a principal source of law in the countries of Europe prior to their respective codifications. The same is true of the role of custom under Roman Law. But, "[t]he scope of custom diminishes as the formulation of legal rules becomes more explicit and as a more elaborate machinery is set up for the making and administering of law. Though minor customs and usages spring up even nowadays, especially in commercial relationships, the great formative period of the more important customs belongs to the past. Ancient customs, however, are still an integral part of modern law, and the courts frequently have to deal with them." C. Allen, Law in the Making 129 (7th ed. 1964).

"Customary law is a rule which develops slowly and spontaneously from social habits and practices habitually exercised with regard to some social relation, and which becomes binding without intervention of the legislator." C. Solomos, European Legal Systems 178 (unpublished selected readings prepared by the Parker School of Foreign and Comparative Law, Columbia University, 1972). Another definition is given by the Louisiana Civil Code art. 3 (1870): "Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent." In civil law countries, a party's reliance on custom as legal authority requires that he prove the existence and force of the custom; and there is considerable divergence of opinion on what social facts constitute customary law.

The French Code Civil art. 7 repealed all legislation and custom on the same subjects existing prior to the enactment of the code, but the question remained open on the validity of custom arising subsequent to the Code's enactment. Today, custom praeter legem (custom as to a matter not covered by legislation) is admitted to be a source of law.

Art. 2 of the French Commercial Code did not expressly repeal previous commercial custom. Louisquain, supra note 51, at 250-51. As to commercial codes and customary law in general, "[t]he text of the commercial code determines its relation to customary law. Some Continental codes include customary law in their systems, some praeter legem, some contra legem, some both. Some codes include customary law, but only where a gap exists in the legal system of the code." F. Wallach, Introduction to European Commercial Law 13 (1953). The Austrian Commercial Code (1862), as is true with the German code of commerce, concedes to "commercial usages the quality of legal rules," but, nevertheless, both of them grant custom "a position of secondary authority inferior to statutory rules." Sperl, supra note 50, at 507.

While custom is important, its role as a source of law is limited and, according to Professor Merryman, is decreasing. J. Merryman, supra note 46, at 23.

71. The concept of "general principles" is used here to refer generically to that source of law recognized in many civil law systems and articulated in their codes as "general principles of the law," "principles of natural justice," "general principles of the body of laws of the state," "natural law and reason," and "equity." See note 34 supra. Courts generally are referred to these principles as sources of law in finding solutions for cases when the code, according to its text and its projection,
In reality, case law\textsuperscript{72} is also a source, and doctrine\textsuperscript{73} if not a

and custom fail to supply answers. Professor Szladits quotes a leading French textbook on the subject: "‘‘To state precisely what is the nature of general principles and their place among the sources of law is unquestionably a most delicate enterprise.’’" C. Szladits, supra note 70, at 205. It is beyond the scope of this study to attempt such a statement, and the reader is referred to Szladits' discussion of the topic for a comprehensive review of general principles as a source of law, particularly in France and Germany. \textit{Id.} at 205-14.

The present objective simply is to emphasize the fact that "general principles" stand as another source of law in most civil law systems, but in each system the content of these principles as sources of law will depend upon respective historical development and judicial ascertainment and application of appropriate precepts. For example, art. 6 of the Spanish Civil Code (1889) provides that in the absence of a provision of the law or a local custom the judge is to apply the general principles of the law. It has been noted, however, that these general principles "are not synonymous with the abstract rules of natural justice." Brown, \textit{The Sources of Spanish Civil Law}, 5 INT'L. & COMP. L.Q. 364, 366 (1956).

The Code is not invoking . . . ley and costumbre: rather it is appealing to those principles which are implicit in Spanish law and of which the written law and the customs are the external and incomplete expression.

. . . [T]he general principles of the law to which the Code refers are today largely, but not completely, identified with the case-law of the courts. Or, more precisely, a general principle of the law must be evidenced by a particular number of decisions in the same sense emanating from a particular court.

\textit{Id.} In France, on the other hand, equity—as a source of law and as a guide for the judge when the enacted law is insufficient—has been influenced heavily by evolving and changing theories of natural law and its effect on positive law. \textit{See generally} Loussouarn, \textit{supra} note 51, at 262-89. For a discussion of "equity" in civil law systems and, particularly, in relation to the mixed jurisdictions of Louisiana and Puerto Rico, see Ramos, \textit{supra} note 68. Finally, contrast the German conception of general principles, which "may be derived from the legal system itself, or may also originate in extra-legal spheres (moral principles)." C. Szladits, \textit{supra} note 70, at 211. The most important of these extra-legal principles are the "sense of justice" (Rechtsempfindung), the nature of things (\textit{Natur der Sache}), and the natural law (\textit{Naturrecht}). \textit{Id.}.

Regardless of the origins and content of "general principles" as determined by the jurisprudence peculiar to the particular country, they generally stand in most civil law systems as a source of law to be consulted in the event no solution to doubtful cases is provided by the superior sources of legislation and custom.

72. Theoretically, civilian courts merely apply the written law, but in their applications of codes they must interpret the legislatively enacted provisions. "[I]n the process of interpretation the court may well extend the scope of the law considerably beyond that originally contemplated. By this method of interpretation and by filling in gaps where the written law is silent or insufficient, the civil law court can be considered as 'making' law, interstitially." Dainow, \textit{supra} note 58, at 426. As a matter of theory, case law—\textit{Jurisprudence} in France, \textit{Gerichtspraxis} in Germany and \textit{Usum Fori} in Roman Law—then is not a source of law in civil law systems. Yet, as a practical matter, prior decisions are indispensable to the civilian lawyer on points of interpretation of the written
source of law, is certainly more influential in finding and interpreting the law than it is in the common law experience.

texts. For an illustrative discussion of the influence of court decisions on the interpretation of statutes, see Baur, The Place of Court Decisions in a Codified Legal Systems, 4 Tex. Int'l L.F. 340 (1968) (emphasis on Germany).

Theoretically, stare decisis is not recognized in a civil law court. For a good discussion of the factors contributing to the rejection of the doctrine in Europe, see Lipstein, supra note 62. Art. 5 of the French Code Civ. prohibits judicial decisions having a controlling effect in the future, arrêts de règlement. Court decisions are no more than explanations of the law, and the case reporting systems of France and Germany approach the body of decided cases in this spirit. See von Mehren, supra note 63, at 209-10. There are exceptions to the rule against binding force of precedent. In Austria, for example, the supreme court is bound by its own decisions, and it cannot be released therefrom until after consideration and judgment by an especially strengthened bench. Sperl, supra note 50, at 512. Yet the classical wisdom in civil law systems generally holds that the judge is entitled to ignore the decisions of other courts and even his own. In actual practice, an inferior court which continues to follow its own opinions against the decisions of a higher court is subject to reversal, and the fear of being reversed is a universally shared one. Precedents also serve as a source of law under the civilian practice which accords the status of "custom" to a series of like decisions on the same point of law, i.e., jurisprudence constante. Yet the authority of this form of customary law is not based on recognition of the binding force of precedent but rather on the persuasiveness of reasoning which is evidenced by its being adopted by a number of courts. Hanna, The Role of Precedent in Judicial Decision, 2 Vill. L. Rev. 367, 376 (1957).

Also to be remembered is the fact that the civil law is not completely codified and statutory. See note 63 supra. "Hence, the 'case' has its place in finding out what the legal rules are to which man in a given relationship or legal transaction must conform." Deak, The Place of the "Case" in the Common and the Civil Law, 8 Tul. L. Rev. 337, 343 (1934).

In the "mixed" jurisdiction of Louisiana, decisional law and not legislation and general principles is the basis of reasoning of most lawyers and judges. The fact of Louisiana's isolation from other civilian jurisdictions is a prime factor in the decay of the pure civil law method in the state, but other contributing factors through the years have included "untrained and meagerly educated judiciary and bar; a gradually increasing lack of sympathy with civilian tradition and methodology . . . because of the influx of common law lawyers; the lack of law schools; the paucity of legal scholarship." Morrow, Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation, 17 Tul. L. Rev. 351, 394 (1943). Morrow believed, however, that the picture was brightening with the revival of civil law scholarship and the awakened interest of the modern law schools in Louisiana. Id. See also Tate, Civilian Methodology in Louisiana, 44 Tul. L. Rev. 673 (1970).

Some civil law countries have adopted an intermediate attitude toward precedent which falls between the Continental and Anglo-American views. Particularly is this true of Sweden. See Beckman, Precedents and the Construction of Statutes, 7 Scandinavian Legal Studies 9 (1963). On statutory construction generally in Scandinavian countries, see Schmidt, Construction of Statutes, 1 Scandinavian Studies in Law 155 (1957).

On the role of judicial decisions on the Continent, Professor Szladits
To the civilian lawyer or judge, the traditional theories of sources of law and their hierarchical arrangement are part of his ideology about law. This is in striking contrast to the prevailing attitude in Anglo-American jurisprudence:

concludes, "from the point of view of substantive law, case law forms an important part of Continental law and is of persuasive authority, but its formal place within a legal system has not been determined satisfactorily." C. Szladits, supra note 70, at 183. It is so persuasive, in fact, that one comparativist has advanced the thesis that case study of civil law is as necessary to the American lawyer trying to master a problem as resolved by a foreign legal system as the case study of common law. Deak, supra at 342.

Case law and precedents do serve in some instances as sources of law in civil law systems, but there is a critical difference between codified and case law systems on the basis of the relative priorities accorded judicial decisions when a lawyer begins the search to answer a legal question. It is "a difference in the way in which a problem is dealt with and solved. On the Continent a lawyer begins by searching for a section of his code under which the case can be classed. In the system of case law the lawyer searches out in the first place the precedents with which the case has the greatest affinity. A lawyer on the Continent must know before all things the various sections of the code. An English lawyer must know his precedents or how to find them at a moment's notice." Meijers, supra note 58, at 11.

73. "'Doctrines' is the opinion expressed and the ideas set forth by jurists in their work." M. Planiol, 1 Treatise on the Civil Law § 52 (12th ed., La St. Law Inst., transl. 1939). Doctrinal materials usually are presented in treatises and commentaries of legal writers. These works are "generally expressed in the form of systematic expositions and in discussions about broad legal principles," and "[t]hey formulate general theories about the basic codes and legislation, in relation to the evolution of the legal system as a whole." Dainow, supra note 58, at 428. While doctrine is not a formally recognized source of law, it is influential in the process of developing legal principles through statutory interpretation by giving "direction to the work of practitioners and to the deliberations of the judges" and by guiding "the legislators toward consistency and systematization." Id. Its ultimate authority and degree of influence in any case depends on the "validity and merit of its intrinsic philosophy." Tucker, The Code and the Common Law in Louisiana, in The Code Napoleon and the Common-Law World 346, 360 (B. Schwartz ed. 1956). The extent of its influence also depends on the very practical consideration of its availability. For example, until recently, doctrine in Louisiana has played a relatively small part in the development of that state's French-based civil law "due to the language barrier and also because of the relative paucity (two or three decades ago) of Louisiana doctrinal works." Tate, supra note 58, at 740.

Planiol writes that doctrine is not a source of law in the sense that court decisions are because "commentators do not possess the power of constraint." M. Planiol, supra note 73, at § 1270. He explains:

Doctrines play in the science of law about the same role as public opinion does in politics, and its role is considerable: it gives orientation; it prepares from afar many changes in legislation and in case law.

Id. Though doctrine is not a formal source of law, it is in the teaching of jurists "that scientific principles and juridic ideas are developed and
The common law of England, an unsystematic accretion of statutes, judicial decisions, and customary practices, is thought of as the major source of law. There is no systematic, hierarchical theory of sources of law: legislation, of course, is law, but so are other things, including judicial decisions. In formal terms the relative authority of statutes, regulations and judicial decisions might run roughly in that order, but in practice such formulations tend to lose their neatness and importance. Common lawyers tend to be much less rigorous about such matters than civil lawyers. The attitudes that let France to adopt the metric system, decimal currency, legal codes, and a rigid theory of source of law, all in the space of a few years, are still basically alien to the common law tradition.74

The civil method75 clearly recognizes the existence of sources of law in addition to codified texts, but its strict hierarchical arrangement of these sources just as clearly prescribes that every effort must first be made to reach a legal decision upon the basis of the rules and principles contained within the four corners of the relevant code. Civilian interpretative methodology applicable to codes reinforces the supremacy of enacted law as the primary source of law and seeks to preclude as thoroughly as possible the need for resort to the subordinate sources.

C.

The Interpretation of Civilian Codes

In a codified system of law, interpretation is the fundamental problem, and resolving a doubtful case under a civilian code brings into play an elaborate interpretative apparatus.76 For the

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75. What fully is meant by "civilian methodology" is summarized best by the late Professor Clarence Morrow of Tulane University. See Morrow, supra note 72, at 351, 548-55. Morrow's summarization is consolidated and discussed in Tate, supra note 72, at 674-76.
76. The present objective is merely to sketch the broadest contours of the civilian interpretation process. In order to simplify and to generalize, the process will be described in terms of stages or phases. In actuality, statutory interpretation in civil law systems is an integrated and dynamic procedure, and no court proceeds on a step-by-step basis. Yet the discussion as presented is accurate in describing the levels of interpretation through which a court traditionally progresses mentally in seeking a solution based on a statutory source of law. However, few civilian courts will ever articulate and conceptualize their efforts on such an artificially fragmented basis. For a full account of the traditional
civil law judge, the starting point is the same as that for his common law counterpart, i.e., determining the intent of the legislator. Other salient resemblances between the two systems in their approaches to the interpretation of legislation are few. The methods of the civil law are more sophisticated and extensive, and, most important, they are conceptually different. The "civilian juridical method is a socialized one, and one utilizing legislative, and not judicial conceptualism." The initial step for the civilian court is to find the appropriate code section and to apply its "words," "literal text," "plain meaning," and "clear letter." If the language is not clear, or if a strict application would lead to a result which the court believes was not anticipated by the legislature, or if the consequences of a strict application of the letter would be unjust or seemingly contrary to the law's aim, a doubtful case arises. The methods of statutory interpretation in a civil system, see the classic description by F. Geny, Méthode d'Interpretation et Sources en Droit Privé Positif (J. Mayda, transl. 1963). In the first part of Geny's treatise, he describes the traditional methods, after which he criticizes them and suggests an alternative approach to the problem of interpretation. See pp. 44-46 and note 105 infra.

77. The first sentence of one of the best known treatises on statutory interpretation in common law systems is this: "A statute is the will of the legislature, and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded 'according to the intent of them that made it.'" R. Wilson & B. Galpin, Maxwell on the Interpretation of Statutes 1-2 (11th ed. 1982). It is often said, however, that because of a feeling of unfriendliness which common law courts have harbored toward legislatures, common law judges have developed methods designed to defeat the intention of the legislature. The ejusdem generis rule frequently is cited as an example. See Elder, Interpretation of Codes and Statutes by Civil and Common-Law Courts, the Doctrine of Ejusdem Generis, 5 Tul. L. Rev. 286 (1931).

78. Morrow, supra note 72, at 553. In the histories of both civil and common methods of statutory interpretation, actual legislative intent was considered so important that at times courts resorted to asking the legislature for advice on interpretation of particular enacted provisions. See Elliott, Techniques of Interpretation, in The Code Napoleon and the Common-Law World 80, 81 (B. Schwartz ed. 1956).

79. See note 69 supra.

80. "Doubtful case" is used consistently throughout this study to include and to refer to all of these instances: a "gap" in legislation; the "unprovided for case"; the "unanticipated" case; a case in which the language of a statute assumedly is applicable but its meaning is unclear and ambiguous; and a case in which the language of an applicable statute is clear and unambiguous but the result of its literal application seems, for any reason, to be unjust or inappropriate or inconsistent with the tenor of the whole of the legislation.

In the context to which this note refers, the particular reason
court then looks behind the verbal meaning of the text to discover more fully and exactly the meaning intended to be conveyed by the legislature.

Historically, two methods for determining the legislatively intended meaning and application (ratio legis) of a particular code provision have prevailed in civil law systems—the "subjective" and the "objective."\textsuperscript{81} The former seeks the real intention of the legislator at the time and under the then prevailing circumstances of the enactment in question. The objective method is not so historically oriented, and it looks for intent as modified by changed conditions existing at the time of the enactment's interpretation.

Illustrating the application of each method accentuates the difference in approaches. A code section provides that a nuncupative testament by public act must be written by the notary as it is directed to him by the testator with witnesses present. The enactment dates from 1870. Today, a notary is likely to use a typewriter in taking a will from a person who is detailing it to him. Does the act of typing conform to the code's requirement that the will be written as it is dictated in the witnesses' presence? The answer under the subjective method of determining legislative intent is "No." The reason for the answer is the fact that the typewriter had not been invented by 1870, and, consequently, the legislature must have intended to require script. The objective method answers otherwise by reasoning that the presence of the witnesses serves to insure the accuracy of the will's content as dictated whatever the method of transcription. The aim of the legislation is to ensure the accuracy of the will without regard to the means of putting it on paper.\textsuperscript{82}

\textsuperscript{81} These methods also have been referred to as the "historical" versus the "actualizing." Zweigert & Puttfarken, supra note 66, at 709. In searching for meaning where words are ambiguous, 'should the judge look to the meaning which the historic 'legislator' intended a specific rule of law to have or which he would have given it had he known the present case? Or, on the contrary, does the judge have the authority, and consequently the obligation, to apply different, actual standards of interpretation, with the result that the law, and every rule of it, would lead to a life of its own, cut loose from the original intention of historic legislator and given its own meaning by the judge?' Id. The authors conclude that the latter approach is the better one and that modern jurisprudence tends toward the actualizing interpretation, but they note that "the intention of the historic legislator is [not] without . . . importance." Id. at 709, 712.

\textsuperscript{82} The facts presented essentially were those in the case of Prud-
The courts use both methods depending on the nature of the cases and circumstances involved. To be discussed subsequently are the propositions that deciding which method to use actually is dependent upon policy considerations and that the choice between methods for defining legislative intent is only a part of a larger socio-legal institutional issue. This larger issue is one which questions the nature of the process of interpretation, the role of the court in the process, and the variables which influence judicial interpretation of legislation when more than one interpretation is possible or several forms of interpretative technique are in competition.

No matter which approach is adopted to determine legislative intent, the court will make use of certain canons of linguistic and grammatical interpretation which appear to correspond to the familiar Anglo-American rules of statutory construction.

homme v. Savant, 150 La. 256, 90 So. 640 (1922), decided by the Supreme Court of Louisiana. The court originally adopted the "subjective" method of determining legislative intent and held the will void, but, on rehearing, the "objective" method was employed to uphold the will.

The Prudhomme case was cited and discussed in Tate, supra note 58, at 734-35. Judge Tate classified the two methods as the "functional" and the "mechanical."

By the functional approach, the application of a statute to the present conflict of interests is determined by considering whether the legal precept was intended to regulate that general type of conflict of interests and by considering the purpose for which the statute was enacted. On the other hand, using the mechanical approach, the court applies the statute according to its formal wording, without consideration of its intended social purpose; the words and not the purpose of the statute are relied upon as the guide to its application.

Id. at 733.

83. See pp. 43-46 infra.

84. The following "rules" have been described, for example, as applicable to the interpretation of the Louisiana Civil Code: language must be understood in its general and popular sense, unless terms of art or technical terms are used, which latter must be accorded their received technical meaning; where the words are ambiguous, the meaning of the law must be sought by examining the context within which they are used, or by construing laws in pari materia with reference to one another. Tate, supra note 58, at 730.

A comprehensive listing of common law "canons" of construction was compiled by Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed, 3 Vand. L. Rev. 395, 401-06 (1950). For every canon he listed, Llewellyn was able to cite an opposing one. About canons of statutory interpretation in Anglo-American common law jurisprudence, it has been concluded: "[T]hey] consist of a number of guides which largely cancel each other out, of learned formulas giving a deceptive appearance of logic which only serves to conceal the choice between opposing conclusions of equal logical validity, and of inarticulate ideological premises which depend on [general personal] predilections and on changing trends of
In contrast to the common law system, the historical records and documents relating to the enactment of particular code articles, i.e., the travaux preparatoires, are highly relevant to interpretation in a civil law country. The records of the legislative body and its committees responsible for the enactment—including the parliamentary debates which preceded the adoption of the statute—will be consulted for the purpose of ascertaining the ratio legis.85


85. The French commentator Planiol instructs that consulting the preparatory studies leading up to the making of the law is the first thing to be done in dissipating doubt about the meaning of a provision of the Code Civil, but he observes that those documents do not always have the binding force imputed to them. M. Planiol, supra note 73, at § 218.

In the first place, the speaker, the author of the report, etc., could have been mistaken, have forgotten something, or have failed to read a text carefully, etc. . . . And then, the discussions, above all in assemblies of a certain size, often reflect individual opinions, which may be contrary to the true intent of the law. And also it is frequently said that preparatory studies give arms to all parties and that all sides to a controversy there find arguments which are mutually destructive. Finally, . . . the minutes of the hearings are often too brief to be of use.

Id. Schuster cites these materials as being of assistance in the interpretation of the German B.C.B.:

(1) the several drafts of the Code; (2) the Minutes of the Proceedings of the Second Commission; (3) the "Motives" published with the first draft; (4) the Memorandum issued by the federal council accompanying the draft submitted to the Reichstag; (5) the Report of the select committee of the Reichstag; (6) the shorthand notes of the debates in the Reichstag.


The situation of the English judge regarding the use of legislative histories and the like is quite different.

He must confine himself to what the legislator has said in the statute, and can only take the surrounding circumstances into account so far as they are matters of common knowledge. He must make the best of the text and give effect to any meaning which it bears which is not manifestly unjust or fantastic, even though the result may be to defeat the intentions of the legislator. He may not consult the reports of the debates on the measure in Parliament or any other record of the ministerial or parliamentary deliberations which have led to its enactment. He must ignore the statements made to Parliament by ministers in charge of the draft bill and the reports thereon of parliamentary or governmental committees. The statute simply means what it says in a literal sense, and this is all that counts, even though the judge as an individual may be well aware that a reference to the preliminary stages of the parliamentary history of the statute would reveal the actual intention of the legislator beyond doubt.

Gutteridge, A Comparative View of the Interpretation of Statute Law, 8 Tul. L. Rev. 1, 7 (1933).

American courts have been more liberal in recognizing legislative history as a permissible aid to interpretation, but still they are far from matching civilians on the frequency of its use. Elliott, supra note 78, at 87-88. And, as a practical matter, "[t]he use of legislative history
If the meaning of a provision and/or its application still is in doubt, a court is likely to consult doctrinal materials. For a discussion of "doctrines" as a significant influence on the interpretation of legislation in civil law systems, see note 73 supra.

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86. For a discussion of "doctrines" as a significant influence on the interpretation of legislation in civil law systems, see note 73 supra.

87. See provisions of civil codes note 69 supra.

88. See, Morrow, supra note 72, at 554. One thesis promoted by Morrow is that the whole import of the civilian interpretation process is "the ascertaining of the genuine significance of the Code text," id. at 549, and that projection, i.e., extending the "legislative text to a great variety of situations not precisely within its scope" (id. at 552) is a vital part of this process. The chief tool of projection which is discussed in Morrow's article is analogy. See, id. at 552 et seq.

89. Clearly, however, "[T]he nature of . . . a code naturally calls for a liberal construction in order that it may serve as the basis of decision for new situations." Dainow, supra note 58, at 424. Consequently,
ing language broadly or narrowly or by the more complex techniques of arguing by analogy or e contrario. Yet the mere discovery of a solution to the case by projecting the statute is not necessarily the decisive solution solely on the ground of the technical, logical soundness of the inductive or deductive reasoning which has been employed. The point will become more obvious in subsequent discussion.

A foremost French commentator termed "projection" a "great rule of interpretation." Planiol instructs that the legislative history and tradition of the law first must be researched; but if the law has been ordained and its meaning still is doubtful "something must be sought in the text, taken as a whole, which explains the doubtful point...[and] he who interprets should take into consideration the text of the law in its entirety in order thoroughly to understand its most significant passage."91

"civil law rules of statutory interpretation show a pronounced tendency toward extending the scope of application of a statute rather than toward restricting it..." Zweigert & Puttfarken, supra note 66, at 707-08.

Traditionally, the general rule in common law systems has required the strict construction of statutes and their restrictive application. See generally Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 383-86 (1908). Pound complained about a judicial attitude toward legislation which regards it "as out of place in the legal system, as an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language." Id. at 385. Some evidence exists that courts today are reappraising the role of legislation in the American legal system, and occasionally the actions of a leading jurist will confirm this tendency. See, for example, Note, The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution, 82 Yale L.J. 258 (1972).

90. M. PLANIOL, supra note 73, at §§ 218-19.

91. Id. at § 220. This approach to interpretation complements the civilian lawyer's or judge's frame of mind relative to the importance and significance of legislation. This frame of mind has been described by Andre Tunc writing about the French, but his description is appropriately applicable to all civilians generally.

[He]...looks at the articles of a Code not as mere rulings, but as particular expressions of more general rules. Therefore, if no express answer to a certain problem is found in the Code, it is not improper to consider various articles in order to induce from them a more general rule and to apply this rule if it can give a solution. It has sometimes been said that articles of a code are not only law, but sources of law. This is true, not only in the sense that the courts may, by deduction, decide on the implications of a certain article, but also in the sense that the courts may, if necessary, use induction to discover the general rules implied in the provisions of a code and then, reverting to deduction, develop the full potential of these rules in the solution of the problem at hand.

Tunc, supra note 57, at 31. In stark contrast stands the frame of mind of the common law lawyer, as described by Roscoe Pound.

[A] frame of mind which habitually looks at things in the con-
The court's task in fulfilling this requirement is "to penetrate the spirit of the rules in order to apply or to extend the proper one to the proper case, so as to bring about the solution that would have been desired, or if necessary, the one that would be desired today by the legislator."92

Two principal logical techniques prescribed by the classical doctrine to be used in deriving rules from the spirit of a code and thus in dispelling the uncertainty of a doubtful case are *argumentum a fortiori* and the argument by analogy. The former consists "in the application to the case at hand of a rule legislatively prescribed for a similar case on the ground that the reasons for its prescription for that case apply with even more force to the case to be decided."93 Reasoning by analogy is "the application 'in constimili casu' of a general principle which is derived from rules developed in a different factual context."94

crete, not in the abstract; . . . which prefers to go forward cautiously on the basis of experience from this case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals; . . . the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas.


94. R. Schlesinger, *supra* note 48 at 397. "The arguments *a fortiori* and by analogy . . . differ not so much in their essential nature," concludes Dean Loussouarn, "as in the extension recognized for the principle behind the rules legislatively prescribed and to be formulated by the judge for the particular case." Loussouarn, *supra* note 51, at 242.

Analogical and extensive interpretation are similar, and "in a given case it may often be doubtful whether we deal with one or the other method. In principle, however, extensive interpretation means that the judge applies a norm to the facts because such norm still covers the facts; by way of analogy, he applies the norm to the fact although he finds that the norm does not cover the facts." R. Schlesinger, *supra* note 48, at 394 [quoting Staudinger-Riezler, *Commentary on the German Civil Code* 34 (10th ed. 1936)]. According to one authority, analogy is a very legitimate tool because of the structure and philosophy of a civil law code.

No law can be complete in the sense that it has for every conceivable relationship falling within the limits of the legal material handled by it an obvious, directly applicable provision. It would be a mistake to strive for such completeness. The Civil Code must, in case of need, be enlarged out of itself, out of the system of the law that it contains. It does not contain a dead mass of legal principles placed in conjunction with each other, but instead an organic structure of innately related norms. The principles that are basic to the Code carry the germ of further development in themselves. This development is by way of analogy.

A. von Mehren, *supra* note 52, at 64 [quoting 1 Motive zu Dem
The two techniques are of the same essential nature and effect, but a fortiori looks for a derivative rule from among provisions covering like factual patterns while analogy is not so limited.

Even with the aid of analogy, civilian doctrine and procedures recognize that a code cannot be extended ad infinitum. A code provision arguably may be limited to cases expressly covered by it and its analogical application to other cases logically prohibited. The expression of this prohibition is argumentum e contrario, i.e., "since of all apparently similar cases, the legislator regulated only one specific case, he intended all others to be

Entwürfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich 14-17 (1888)]. The above justification for the decision of cases not provided for by the text on the basis of analogy is what one writer calls a "metaphorical explanation." Wurzel, Methods of Judicial Thinking, in The Science of Legal Method: Selected Essays 286, 325 (E. Bruncken & L. Register transl. 1969).

[O]ne may hear of the organic nature of law, or about an intrinsic consistency which is not necessarily logical but organic. For the law is said to be an organic compound composed of members connected with each other and possessing a power of growth by which it is capable of developing into a complete whole harmonious in itself; therefore it must be perfected out of its own intrinsic nature.

Id. at 324. Wurzel discounts this justification, as well as another one. Traditionally, it has been said that analogy is the result of logical operations of induction and abstraction practiced upon the legal rule actually contained within the legislation. This process then produces additional rules of equal value as positive law with the express rules on the basis of which the process proceeded. Consequently, it is said that the new rules so produced are as much the intention of the legislator as are the laws actually promulgated and enacted. Id. at 321. This explanation of analogy is based upon the doctrine of ratio juris.

[T]he 'ratio juris' is nothing but a form assumed by the process of juridical thinking to furnish an apparent reason, while in reality it was led by entirely different motives and impulses. "Ratio juris" is not at all the justification for the application of a rule by analogy, but merely a convenient instrument for giving a sophistical reason, convenient to handle on account of its vagueness and elasticity; an instrument the use of which often saves one from digging out the true reasons of one's conviction as to what the law is regarding this or the other state of facts.

Id. at 324.

The official and customary justification for the use of analogy, writes Wurzel, lies in the "ratio" of the law. The ratio legis, i.e., the reason of the law, is the customary explanation to justify a deviation from the sense of the text of a statute obtained according to the ordinary rules of language, i.e., grammatically. Id. at 319. He complains:

In theory it is customary to set certain limits to the applicability of this doctrine of ratio legis, but in practice lawyers recognize almost no bounds to its employment in justifying the application of the "logical" method of interpretation. Every time anybody wishes to deviate from the letter of the statute he calls in the ratio legis to justify him.

Id. at 319-20. Yet he suggests that the truer explanation and justification for the use of analogy is a species of ratio legis not contained within the
excluded from this regulation." In order to prevent an undesirable or impossible consequence of a law it may also be nec-

body of the rules itself but which underlies it. "It may therefore well be called a higher rule, or a principium generale, a higher principle of which one or more of the existing rules of law are merely the results, or the logically deductible consequences." Id. at 321. This explanation seems to approach what has been termed "analogy of law." "Analogy of law is based on the assumption that the legal order is a whole from the "spirit" of which the decision is to be derived when statutory analogy yields no result." STAUDINGER-RIEZLER, 1 COMMENTARY ON THE GERMAN CIVIL CODE 34 (10th ed. 1936), in R. SCHLESINGER, supra note 48, at 394. This form of analogy is to be distinguished from "statutory analogy" which is "based on the view that the particular Code or statute at hand constitutes a systematic whole, an organic structure of interconnected norms." Id.

85. Zweigert & Puttfarcken, supra note 66, at 714. American lawyers may be more familiar with this rule of statutory interpretation expressed as inclusio unius est exclusio alterius, i.e., "the inclusion of one is the exclusion of another." BLACK'S LAW DICTIONARY 906 (rev. 4th ed. 1968). Another form is expressio unius est exclusio alterius, i.e., "expression of one thing is the exclusion of another." Id. at 692. See generally C. D. Sands, supra note 10, at § 47.23. This rule of statutory construction in the common as well as the civil law is intended to aid in the determination of legislative intent, but it—like all others—has exceptions and limitations. See generally id. at § 47.25.

Just as civil law courts interpreting codes will be faced with the decision either to expand a provision by analogy or to limit it by arguementum e contrario, common law courts applying the U.C.C. face an identical problem. Here is an example. Section 4-402 provides, "A payor bank is liable to its customers for damages proximately caused by the wrongful dishonor of an item." [emphasis added] "Customer" is defined as "any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank." § 4-104(1)(e). Persons are individuals and organizations, § 1-201(30), and "organization" is defined to include a variety of entities including corporations, partnerships, and associations. § 1-201(26).

Some courts have held that the person to whom the bank is liable under § 4-402 is only that entity in whose name the account stands. Therefore, individuals entitled to draw from that account who are injured by a wrongful dishonor are not entitled to damages under § 4-402. See e.g., Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191, 3 UCC Rep. 709 (1966); Farmers Bank of Delaware v. Sinwellan Corp., 367 A.2d 180, 20 UCC Rep. 1267 (Del. Super. 1976) [same holding in the case when before the court on defendant-bank's motion to dismiss, 345 A.2d 430, 18 UCC Rep. 178 (Del. Super. 1975)]. In effect, then, these decisions define the affected individuals as non-customers, and they must be based on reasoning which concludes that since § 4-402 specifies "customers" it excludes "non-customers."

Other courts have held differently, though generally by finding the affected individuals to be "customers" within § 4-402 regardless of the name appearing on the account. See, e.g., First Nat'l Bank of Springdale v. Hobbs, 248 Ark. 76, 450 S.W.2d 298 (1970); Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 949, 128 Cal. Rptr. 848, 17 UCC Rep. 1270 (1975). In the latter case, the court held that shareholders or officers of a corporation could recover under § 4-402 for the
essary to limit the application of a code provision in another manner. The technique of "restriction" derives from the spirit of the code a sense of intended limitation of a provision's applicability. Though it resembles simple restrictive interpretation in its consequences, the method of restriction relies on the spirit of the law and not the text for the limitation. Restriction (abandernpe Rechtsfindung, Retriktion) normally is employed only after other interpretative devices have been exhausted.96

The real battle ground for civilians in solving the problem of the doubtful case and the true struggle over interpretation concerns the projective value of code articles.97 The fact that the interpreter must employ techniques of liberal, expansive in-

wrongful dishonor of a corporation check. Clearly, the court preferred to expand the Code by analogy and not to restrict it by any technique or rule supporting a limitation on it. Citing the New Mexico opinion in Loucks, the California Court of Appeals decided not to "elevate form over substance," 17 UCC Rep. at 1276, and stated:

Such a narrow and technical reading of the statute and the term "customer" does not seem warranted. The purpose of the statute—to hold banks accountable for damages proximately caused by wrongful dishonors—is more readily served by allowing a flexible and reasonable interpretation of the word "customer."98

Id. at 1275.

Indeed, authority exists for the proposition that the result in Kendall Yacht Corp. and similar cases is justifiable on the basis of common law principles, more particularly "some common-placed legal doctrines, and settled principles." See, Macrum v. Security Trust & Savings Co., 221 Ala. 419, 129 So. 74, 76 (1930) (reversing lower court which sustained demurrer to complaint in tort by plaintiff who was manager of a deposit company and who was jailed as a result of bank's wrongful dishonor of check drawn by the plaintiff-manager on the company). If a common law principle does exist, the decisions in Loucks and Simuellan must be interpreted as concluding that the Code has displaced it. See U.C.C. § 1-103. Therefore, once again the "central issue" in this study is raised.

96. C. Szladits, supra note 70, at 244-45.

97. The "battle" characterization is supplied by comparativist Mitchell Franklin, and he has summarized the reasons for the struggle. It may be that the problem pressing for adjudication is not controlled by the code article. . . . Nevertheless, the orthodoxies of civilian technique call for the use of a code text by way of analogy to meet the problem of the unprovided case. This is a striking difference from the British tradition, where we encounter theories that statutes should not be given effect in situations that they actually control. The civilian, however, is accustomed to regard a code text as having the same sort of projective value as the common law regards the decisions of the judges as having. Thus, the statutory text enjoys a vitality even greater than it was intended to have. The technique of the civilian in solving the unprovided case, thus becomes a struggle over the projective value of code articles.

terpretation, including the use of analogy, does not necessarily permit the conclusion that their use will resolve the doubt and produce a solution satisfactory to the court. Questions such as these arise:

Should the analogy of the text be accepted? Or is the text *ius singulare*? Or is there an argument a *contrario*? Or is there a competing textual analogy? Or may all analogies be rejected, and a fresh starting point invented? 98

A judge in deciding these questions necessarily will exercise discretionary powers, and in making his decision he will be making law in spite of orthodox doctrine which denies the civil law court a creative, rule-making authority. Even at this juncture, however, the ideological premises upon which the written law is predicated in civilian systems require that the court's decision proceed on the basis of a legislative conceptualism, 99 and "[i]through it all a code text remains central." 100 After grammatical and logical analyses fail clearly and with certainty to reveal a code's application to a case, the court's next step is to answer questions of this sort:

[W]ether the concrete conflict of interest to be decided was intended to be regulated by the legal precept in question, which resolves into the abstract conflicts between interests based upon certain notions of policy which underlie and justify the precept. . . . [W]ether the legislature intended the precept in question to be an immutable rule to be applied without variation or exception . . . no matter how inequitable the result, or whether instead the legislative precept was more in the nature of a standard, permitting some discretionary individualization of application by the courts in order to achieve the gen-

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98. *Id.*

99. The discretionary power of courts is limited in the sense that it must be exercised within the scope of the written law and in the manner provided by it. As observed by Professor Serini:

Codes, together with the statutes whereby they are implemented and amended, constitute the framework within which the solution of each particular problem is to be found by the courts. Since the written law is self-sufficient, courts may not rely on legal principles that are not in the written law itself or to which reference is not made by it. . . . [C]ourts must find the rule of decision for each particular case in the written law and through the written law, not beyond it. . . . [W]henever the express provisions of the written law seem to have left open a gap, it is to be filled by the process of either expanding the meaning of some provision or of reasoning by analogy from one or several provisions. But the judge is never permitted to add or to go beyond the provisions of the written law; written law constitutes, therefore, the fountainhead of, but also the limit to, any creative function that the courts may have in the decision of cases.


100. Franklin, *supra* note 97, at 1379.
eral aim of the statute in consonance with general principles of fairness, or whether instead the enactment was intended to furnish a principle to be classified somewhere between the immutable rule and the general standard insofar as preventing or permitting judicial discretion in its application.  

How the civil law court answers these questions will determine to a large extent whether or not the written law supplies a solution from its letter and spirit and, hence, whether or not recourse is necessary to other sources of law. How, then, are these questions answered? According to a civilian methodology which consciously and continuously urges a court to justify its decisions on the basis of the written law, the answers seemingly are to be found by further code interpretation with a continuing focus on legislative intent. This assessment would be correct if civilians believed literally that a code embodies systematically and exclusively all the positive law of a field of law and that the intent of the historical legislator is the key to its every application. This belief does not exist in modern civil law systems. Projection then “is not alone the discovery of the will of the legislator but comprises still more.”  

Discovering legislative intent and applying methods of logical interpretation for the purpose of answering the types of questions posed earlier are often (in at least the difficult cases) more fictional exercises than matters of “genuine” interpretation. By deciding whether to construe language narrowly or broadly, to accept or to reject the basis of an analogy, or to restrict or to expand the scope of a statute, the civil law court ultimately may be deciding whether to reach a solution from within the four corners of a code, or to refrain from doing so and to resort to other sources of law to resolve the doubtful case. Its decision depends, to a large extent, on information and considerations which lie outside the letter of the code and beyond even its pervasive historical spirit.

101. Tate, supra note 58, at 731-32.
102. Wurzel, supra note 94, at 369. Wurzel defines “projection” differently from the way it has been defined in this study (see supra at 38 and notes therein). According to his usage of the term, projection does not encompass the technique of analogy. Projection is a separate technique which implies “the extension of a concept found in formulated law to phenomena which were not originally contained in the concept, or at least were not demonstrably a part of the group of images forming the concept, without at the same time changing the nature of the concept as such.” Id. at 345. Analogy goes further in extending the scope of a law than does projection as defined by Wurzel. His “projection” and “analogy” are subsumed within the single definition of projection as utilized in this study.
The codes of Europe are dated, but they continue to govern the modern legal affairs of Europeans. The process of modernizing the codes to meet contemporary needs and to accommodate present values has been effected and is continuing primarily by a process of judicial interpretation which reflects a modern conception about the nature of its function. This conception recognizes the importance to decision-making of policy considerations not purely legal and which are not discoverable merely by the elaboration of codified texts through grammatical and logical interpretation emphasizing intra-code linguistics and geometric reasoning.

Notions about the role of the court in the interpretation of civilian codes today have progressed well beyond those demanded by the method of exegesis or Begriffsjurisprudenz which reached its height of acceptance during the first decade of the twentieth century.

[Exegesis] considered all law the creation of the legislator's conscious will. The positive law of a given country and period was viewed as a self-contained whole, embodied in the codes and taken to contain, in the form of logical principles inherent in its structure, its own method of development. The judge was merely to apply the legislatively given text or, where the text was obscure, to discover the legislative intent. To discover this intent, legislative history and the doctrines accepted at the time the text was adopted were to be examined. If the research proved inconclusive, the judge found a solution by applying certain analytical processes to the written text. Codes were, in short, to '... be enlarged out of (themselves), out of the system of justice ... (they) ... contain ...'

The techniques of the interpretative process as required by exegesis generally are retained by modern civil law methodology. Following the general contours of the scheme outlined throughout this discussion, courts continue, when necessary or desirable, to discover and to rely on legislative intent, to interpret liberally or restrictively, and to reason by analogy or to argue e contrario. But the ideology which gave reason and substance to the method of exegesis and its analytical logic, i.e., that the codes are complete, self-contained, perfect systems of law, has yielded to a nonmechanical conception about the judicial process of legislative interpretation. The modern civil law court interprets the written law by considering that a code is a socio-

103. von Mehren, supra note 63, at 204.
104. See, Loussouarn, supra note 51, at 243-44; Tate, supra note 58, at 737-38.
logical phenomenon as much as it is the will of a legislator.\textsuperscript{105} Legislative intent may be certain and controlling and require a particular application of code letter and spirit regardless of result;\textsuperscript{106} but when that intent is doubtful or its relevancy suspect, socio-economic factors and societal values are preferred to formalistic, mechanically logical and manipulative interpretation.

\textsuperscript{105} See generally von Mehren, \textit{supra} note 63, at 205-06.

\textsuperscript{106} \textit{Methode D'Interpretation et Sources en Droit Prive Positif}, published in 1899, by Francois Geny remains a classical statement against the mechanical approach of the exegesis method of statutory interpretation. Professor Friedmann wrote about Geny that he is "one of the first and also one of the most important leaders in the fight for a new sociological conception of the law." W. \textit{Friedmann}, \textit{Legal Theory} 328 (5th ed. 1967).

Geny demonstrated that the judicial function in interpreting the code required an investigation of the realities of social life, some but not all of which can be discovered by means of analytical legal methods.

Against the then prevailing faith in written law as the sole source of law, Geny puts three additional sources: (1) Custom; (2) Authority and tradition, as developed by judicial decisions and doctrine; (3) Free scientific research.


Geny's theory of free scientific research basically is this: "The judge is to be bound by the text of the written law only when, and to the extent that, the text is clear. In all other cases, the judge is not required to determine the legislator's intent, but must, considering the particular social and economic facts involved, try to find the most just solution for the given situation." von Mehren, \textit{Book Review}, 63 \textit{Harv. L. Rev.} 371 (1949).

\textsuperscript{106} Even Geny's method of free scientific research "does not ignore legislation where it clearly applies to the question at issue." Louisouarn, \textit{supra} note 51, at 243. Geny's basic propositions are consistent with the notion of the ultimate supremacy of legislative will in clear cases. Those propositions may be summarized as follows:

1. That the letter of the Code should furnish the primary rule.

2. That all legitimate deductions from the strict letter of the Code should be applied.

3. Failing both the preceding, he would apply the free interpretation, thus giving a freer play to the old droit coutumier than the Code warrants, and permitting the establishment of a legal atmosphere, which should supply the necessary inspiration for the judicial legislator.

as being decisive of how a code is to be read and whether it is to serve as the source of law and be applied to the doubtful case.

A correct statement of the general rule in civil law systems is that a court cannot resort to a supplementary or subordinate source of law to decide a doubtful case until it finds that the enacted law provides no answer by its plain meaning or projected value. Yet this rule is not comprehended fully until one appreciates a qualification on it: To make this finding, the court's method assumes something of a teleological character taking into account and balancing social, economic and other policy influences. The decision of a civilian court to reach a judgment based on the "artful interpretation" of a code and not on resort to extraneous sources of law is made, therefore, in the context of each individual doubtful case and in light of policy considerations dictated by community needs and values existing at the time of the interpretation. The decision in most cases is not reached on the basis of applying techniques of pure "logical" interpretation emphasizing geometrical constructions of code provisions and a priori ideas about which source of law among several always holds the best solution to doubtful cases.107

107. In the final analysis, it may be said that the modern method of code interpretation in civil law systems considers two factors to be of equal importance: the text of the code and the social end. See Bonne-case, supra note 63, at 91. Planiol warns that if judicial logic is narrow, is confined to mechanical combinations of texts, and reaches conclusions without testing their value, law schools could be closed without any great damage being done. The chambers of a solicitor, the offices of a clerk of court, and the legal departments of important corporations would suffice for the training of practitioners. A few text books, alphabetical compendiums and collections of decisions would suffice for current requirements. All human knowledge, as far as the jurist was concerned, could be compressed into a few maxims.

M. PLANIOL, supra note 73, at § 224. The disadvantage of the logical method of interpretation is that "it causes law to function as if it were a blind piece of machinery, indifferent to the good or the evil it might do. Laws, however, are made in order to obtain for man the greatest possible amount of good." Id. The logical method, Planiol therefore cautions, should not be used alone.

It should be tempered by considerations of utility and equity. There is obviously a criterion to be applied in order that the judge, who is but an interpreter, should not substitute his personal thought for the authority of the law. But there is also something to be done in order that the law should not be mechanically interpreted, so as to defeat its own purpose, which is social welfare.

Id.
D.

Factors Opposing The Application Of Civilian Methodology To The Uniform Commercial Code

A civilian lawyer trying to conceptualize the relationship between sections 1-102(1) and 1-103 of the Uniform Commercial Code probably would read them together in his mind and re-write them mentally. The sections as they appear in the Code are distinctly separate and appear to bear no graphic or other relationship except that one follows the other numerically.

1-102. PURPOSES: RULES OF CONSTRUCTION:
VARIATION BY AGREEMENT
(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

1-103. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW APPLICABLE

Unless displaced by the provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

To the civilian reading them, the sections no doubt would merge and appear as a single provision.

The letter and the spirit of this Act as liberally construed to promote its underlying purposes and policies shall apply to all cases of commercial transactions. If after projecting the text of the Act a case remains doubtful, it shall be decided according to supplementary principles of law and equity.

A deducible assumption is that such a reading of the two sections is intended by those who equate the U.C.C. with a "true" civilian code and seek to apply the latter's interpretative methodology to the former. Several considerations militate against accepting this proposal fully and adopting civil law methods to be applied en bloc to interpretations of the Code.

(1) As is consistent with the civil law heritage, the suggested reading of sections 1-102(1) and 1-103 promotes the importance of the statutory law, and by it the unwritten common law is subordinated to the statute as a source of law in every case. This distinct hierarchical relationship is not revealed as clearly, if at all, from a close reading of the provisions as they appear in the Code. Section 1-103 does provide in its last phrase that the common law is a "supplement" to the Code, implying the pre-eminence of the statute. In the first phrase of the section, however, the implication is reversed. "Unless dis-
placed by particular provisions of the Act" suggests that the common law continues as the primary source of law in the field of commercial transactions except to the extent "particular" provisions of the U.C.C. are applicable.  

Provisions of civilian codes which direct courts to look to subordinate sources of law when the text of a code is insufficient do so with the specific qualification that first the statute must be exhausted fully as a source of law for any particular case. Compliance with this type directive necessarily requires the use of expansive techniques such as analogy whenever possible. Sections 1-102(1) and 1-103 of the U.C.C. according to their letter do not demand an exhaustive interpretation of the Code as a condition precedent to the introduction and application of common law principles. Indeed, if one reads the first phrase of section 1-103 narrowly, the Act is effective to displace the common law only when particular provisions supersede legal and equitable principles and not when provisions can be read collectively to supply a solution by analogy.

Dr. Mitchell Franklin studied the relationship between sections 1-102 and 1-103 and reached a contrary view. His

108. Additionally, the comments to U.C.C. § 1-102 indicate that a liberal construction of the Code is not appropriate in all cases. Comment 1 provides, "The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved." [emphasis added].

109. See note 69 supra.

110. The comment to U.C.C. § 1-103 provides that supplemental bodies of law are to have continued applicability to commercial contracts unless "they are explicitly displaced by this Act." [emphasis added].

111. See Franklin, supra note 44. The suggested interpretation of the effect of section 1-103 and the role of the common law as a primary source of law under the U.C.C. is completely contrary to the reading and perception of Franklin. Yet the suggested reading and not Franklin's apparently is supported by both Professors Merryman and Schlesinger who are respected comparativists.

See J. Merryman, supra note 46, at 27-28, 33-34. Schlesinger compares favorably the civil law methods of interpretation and a modern trend in the U.S. to reason by analogy from statutes:

Under our system, a general principle ordinarily will be extracted from case law. Even where a "code" exists, our judges traditionally fill the gaps in the written law by falling back on the common law, rather than by extending, or analogizing from, the provisions of the "code." But this tradition is growing weaker; in the United States there is a growing modern trend toward using a statute, or a complex of statutes, as a basis for analogical reasoning. With respect to the Uniform Commercial
opinion is that section 1-102 dominates interpretative methodology under the U.C.C. and that it "displaces the legal method of the common law and substitutes the legal method of the modern Roman law."112 The aim of section 1-102, he wrote, is to make the Code "the source of law for the closing of gaps or of lacunae in the U.C.C."113 The effect of the language used in the provision is,

that the code not only has the force of law, but is itself a source of law. The formulation of fragment 1 of Section 1-102 signifies that if the text of the code falls short of deciding the controversy or problem, the code may itself be developed or 'applied to promote its underlying reasons, purposes and policies.' The fragment consecrates the general process of developing or unfolding the code, so that it decides by analogy what it does not control by genuine interpretation (construction). Other legal theorists may regard this process as extensive interpretation.114

Franklin had a problem to overcome in arriving at these conclusions. Normally in the civilian tradition, only general civil codes have general force and are general sources of law, and a commercial code "ordinarily should have only singular actual force and exceptional potential force..."115 This relationship is dictated inasmuch as a commercial code "presupposes its actual or positive civil code or civil law, and is singular law."116 Therefore, "[t]he potential or analogical force of the commercial code ordinarily should be correspondingly limited by the general potential force of the civil code or the civil law."117 If this were true in the case of the U.C.C., Franklin's contention that the Code should serve as the principal, if not the sole, source of law for filling gaps and lacunae would not be

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Code, one of the draftmen's own comments to § 1-102 invites the use of Code provisions as starting points for such reasoning. Our mental processes thus become more similar to the civilians. R. SCHLESINGER, supra note 48, at 398. However, Professor Schlesinger cites U.C.C. § 1-103 as explicit evidence that "this convergence of civil law and common law approaches has gone only part of the way" and that "lawyers brought up in the common law tradition still do not treat a 'code' the way civilians do." Id. After quoting § 1-103, he concludes: "In a civilian code system, in which each code is intended to constitute a complete statement of authoritative rules and to displace all of the pre-existing law on the subject, such a reference to the supplemental role of 'principles of law and equity' would be unthinkable." Id.

112. Franklin, supra note 44, at 342.
113. Id. at 334.
114. Id. at 333.
115. Id. at 335.
116. Id. at 337.
117. Id.
valid, and the common law necessarily would be assigned a primary role in this regard.

Professor Franklin overcomes this problem by concluding, in light of the common law tradition of the United States, that the U.C.C. should be considered as "general" law and the common law as "singular" law.\textsuperscript{118} This conclusion could only be reached, however, by explaining away the troublesome wording of section 1-103 which, he admitted, may seem to have "some limiting effect" on section 1-102.\textsuperscript{119}

The immediate problem is, therefore, whether the process of "displacement" of "supplemental" law by "particular" provisions of the UCC means that the analogical force of "particular" texts is limited to "particular" rather than to "general" analogy inspired or developed from "particular" tests, that is, the problem is whether Section 1-103 permits only Gesetzesanalogie and excludes Rechtsanalogie.\textsuperscript{120}

He resolves the difficulty in favor of his position that the Code, as liberally interpreted and analogically developed, should serve as the primary source of law for deciding doubtful cases under the Uniform Commercial Code.

Although the motifs of Section 1-103 justify "explicit" displacement, it seems that the word "particular" as used in Section 1-103 does not recognize merely "particular" analogical development (Gesetzesanalogie) . . . but also tolerates "general" analogical development (Rechtsanalogie). This interpretation of Section 1-103 is supported by the contextual formulation of Section 1-102.1, which unfetters the possibility of a general analogical development of the UCC . . . in accordance with the "underlying reasons, purposes and policies" of the project, as exemplified by "particular" texts of the UCC.\textsuperscript{121}

Dr. Franklin carefully explained and supported his reasoning regarding the relationship he perceived between sections 1-102 and 1-103, but the strength of his arguments is suspect on

\textsuperscript{118} Basically, the reasons why Franklin believes the U.C.C. should be considered "general" rather than "solitary" law are two: First, since the commercial law has been codified before the formulation of a general civil code, this "establishes the codified commercial law in a remarkably powerful situation in regard to the uncodified civil law to which it is connected and which it presupposes." \textit{Id.} at 336. Second, the Code itself, according to him, deliberately enunciates and seeks to establish that it is not solitary law through §§ 1-102, 1-103 and 1-104.

\textsuperscript{119} \textit{Id.} at 338.

\textsuperscript{120} \textit{Id.} As a point of clarification, "In modern Roman or civil law a distinction is made between the analogical possibility of a text having the force of law (Gesetzesanalogie) and the analogical possibility of a principle derived from and discovered in a plurality of texts having the force of law (Rechtsanalogie)." \textit{Id.}

\textsuperscript{121} \textit{Id.} at 338.
at least two counts. First, he generated misgivings about the absolute soundness of his position by failing to deal directly with express language of the Code and Comments which tends to undermine his thesis. Franklin's conclusion that the use of the word "particular" in section 1-103 does not limit analogical development based on section 1-102 merely to Gesetzesanalogie is only a "seems-to-be-the-case" conclusion. He notes the Comment's modification of the word "particular" by the word "explicit," but he offers no explanation for a seemingly obvious attempt by the draftsmen to limit further common law displacement. Also, the author admits that the "expansive force" of the Code is not unbounded and that the U.C.C. itself provides a limitation on resort to analogy. Yet his answer to this problem is only to offer an "end round" solution which would permit the limitation to be ignored: "From a formal point of view, the virtually boundless generosity of Section 1-102.1, 3, in formulating such theory of the limits of the productive force of the code, could be defended, if the lex Llewellyn were a civil code and not a commercial code."

Secondly, Dr. Franklin frequently cites the following provision in conjunction with section 1-102(1) to support the proposition that the section justifies and legitimates the general analogical development of the U.C.C.:

A provision of this Act which is stated to be applicable between merchants or otherwise to be of limited application need not

122. Id. at 335, making reference to commentary to U.C.C. § 1-102. Professor Franklin does not specifically note the exact draft or edition of the U.C.C. on which his article is based. He does refer, however, to the "projet of the Uniform Commercial Code of 1950" in the first sentence of his article; assumedly, therefore, he was analyzing the May, 1949 Draft or the Draft of the spring, 1950. The comment to § 1-102 is the same in both versions, providing:

Where situations which are governed in a commercial sense by a general applicable provision, are covered one by one, any seemingly restricted language should be expanded to fit the reason and principle of the situation.

But the comment also limits the expansive force of the Code with this language:

Where the underlying reason of an express provision of the Act does not apply to a particular situation, the effect of the provision should be correspondingly limited.

Where a section is silent on a particular point, negative inference may be justified when the reason of the situation requires or justifies such inference.

Comment 1 to § 1-102 in the present 1972 Official Text and Comments contains a similar limitation but with different wording. See note 73 supra.

123. Franklin, supra note 44, at 335.
be so limited when the circumstances and underlying reasons justify extending its application.\textsuperscript{124}

This provision appeared in an early version of the U.C.C. which was current at the time of Franklin's writing and constituted a subsection (3) of 1-102, but it is no longer a part of the Code.\textsuperscript{125} Inasmuch as Professor Franklin used this now discarded provision to reiterate and to exemplify "the principle of the potential or analogical force of the actual or positive texts . . ."\textsuperscript{126} of the U.C.C., the viability of his conclusion about the sources of law relationship between 1-102 and 1-103 is more doubtful today.

Professor Hawkland is correct when he says that civilians look at sections 1-103 and 1-104 and, undoubtedly, section 1-102, and find in them proof that the U.C.C. is a code in the Romanist sense;\textsuperscript{127} but cultural, historical and practical reasons exist which are peculiar to civilian tradition and influence their finding. One of these reasons is that provisions in civil law codes comparable to sections 1-102 and 1-103 are drafted to spell out clearly an hierarchical relationship between sources of law, which reflects the civilian ideology of legislation as the

\textsuperscript{124} Id. at 333.

\textsuperscript{125} The § 1-102(3) which Franklin quotes and relies upon was contained in the May, 1949, and spring, 1950, drafts of the U.C.C., but it was dropped from the Final Text Edition of November, 1951. The commentary to the section of the 1951 Draft does not explain the reason for the deletion of the subsection.

\textsuperscript{126} Franklin, supra note 44, at 333.

\textsuperscript{127} Hawkland, supra note 36, at 313. Professors Franklin and Hawkland (the latter having relied heavily on the former's article to support his thesis discussed at pp. 14-15 supra) place emphasis on § 1-104 as supporting their propositions. The section provides:

- This Act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

Dr. Franklin asserts that the section effectively "excludes the limiting effect of the role of . . . at least . . . unwritten ordre publique on the potential or analogical force of the new code." Franklin, supra note 44, at 337. However, he does add the caveat that a limitation, based on public order, "might be demanded if the lex Llewellyn were only ius statutum and lacked general potential force." Id.

The comment to § 1-104, under earlier and the present versions of the U.C.C., indicates only an intent that the Act "be regarded as particularly resistant to implied repeal" by subsequent legislation. There is no suggestion, implied or otherwise, that § 1-104 or its use of the word "general" to describe the Act was designed to be read in relation to §§ 1-102 and 1-103 or in any way to influence the extent to which common law principles are to be used under the Code to solve doubtful cases or to fill gaps.
supreme source of law. As has been emphasized, such is not the case with the draftsmanship of the U.C.C.; and, as will be considered in detail in the next section (III) of this study, a different conception about the place of enacted law in relation to the unwritten common law has persisted in the Anglo-American jurisprudential tradition. Reasons in addition to the one just discussed exist to explain a civil law preference for techniques of expansive interpretation of codes, such as analogy, which find no absolute comparisons in the situation of the U.C.C.

(2) Extensive and analogical methods of interpretation have been perfected under civil law codes owing in large measure to the fact that most code provisions, particularly those of civil codes, are written in the form of generalizations. The purpose of code sections is primarily to state principles rather than to prescribe rules. The function of the law in civilian systems is "to fix, in broad outline, the general maxims of justice, to establish principles rich in suggestiveness, and not to descend into the details of the questions that can arise in each subject." Civilian codes are intended to provide "a complete legislative statement of principles" and intentionally lay down rules only "sparingly" and essentially "for the analogies they furnish."

The Uniform Commercial Code consists of eleven articles and hundreds of sections and subsections. Witness the lists of detailed definitions in each article with their exceptions, qualifications and provisos. Imagine the applicable "steps" required for perfection of a security interest under sections 9-302, 9-304, 9-305 and 9-306 as "broad outlines" and "general maxims" from which analogies may radiate. Article 9's rigid formalism in this respect stops just short of dictating the type of paper on which a security agreement should be written!

128. Vivid illustrations of this fact are found particularly in the provisions of the French Civil Code (1804) and the German Civil Code (1900) dealing with the law of delictual obligations. As noted earlier (note 63 supra), for example, the French law of torts is comprehended in only five sections of the Code Civil. Translations of the French and German codifications of the law of torts can be found in A. von MEHREN, supra note 52, at 338-48.

129. A. von MEHREN, supra note 52 (quoting Portalis, Tronchet, Bigot-Premeneu & Maleville, Discours Preliminaire, in 1 LOIRE, LA LEGISLATION DE LA FRANCE 251, 255-72 (1827)).


131. U.C.C. § 9-303(1).
The U.C.C. has an ample supply of "general" provisions and concepts which are open-textured, pregnant with principle-like statements, and which beg for analogous application. Their existence does not, however, overshadow the pervasiveness of Code provisions which are rule-like and limited in their applications to specialized sets of facts and circumstances. Civilian-style interpretation is not properly applicable to the construction of such provisions. One of the reasons expansive interpretation is appropriate for civilian codes is that they are generally lacking in detailed rules of law. One who resolves in favor of applying civilian methodology to the interpretation of the U.C.C. must account for this difference between its style and that of civil law codes.

(3) Civilians—at least Continental Europeans—traditionally have distrusted courts and judges as law-makers; and this cultural-historical bias, accounts, to a large extent, for the position of enacted law as the supreme source of law in civil law systems. The methods of judicial decision-making which tend to exhaust fully the letter and spirit of statutes reflects a civilian conception of the legislature as the dominant arbiter of competing socio-economic forces and values.

In the Anglo-American common law tradition, the situation has been reversed somewhat. Events occurring at the turn of the twentieth century confirm this. During the late 1800's a consensus was developing among American jurists that "the courts should not be allowed to develop the traditional element of our law, that they should not be permitted to develop experience by reason, but that everything in the way of finding grounds for decision and practical means of adjusting relations or ordering conduct should be done and done only by legislation." The courts were not to be creative or socially responsive but were "to be confined to mechanical application of fixed rules." Leading members of the legal profession, including

132. For example, provisions like obligation of "good faith" (§ 1-203), "reasonable commercial standards," applied to merchants (§ 2-103), and the avoiding of a contract on the ground of its being "unconscionable" (§ 2-302). A very significant analogy is drawn a priori by the Code itself in Article 3. Section 3-805 provides that all the sections of the Article applicable to negotiable instruments also apply, in so far as possible, to non-negotiable instruments, except that there can be no holder in due course of such an instrument sometimes referred to as an "mercantile specialty."
134. Id.
the principal architect of the U.C.C., reacted against a "mechani-
ical" jurisprudence as depicted above. Karl Llewellyn wrote that
the principal duty of any judge is "filling social needs as they
arise."135

The civilian approach to statutory interpretation, employ-
ing liberal construction and reasoning by analogy, is based
partly on an ideology which attempts to subordinate the judicial
to the legislative development of legal principles.136 The general
style in which civilian codes are written unquestionably invites
judicial law-making, but the creativity of the courts is confined
to the development of principles which the statute will permit, as
logically interpreted without the aid of extraneous sources of
law.137 Applying civil law methods to the U.C.C. has a similar
effect, which is to limit the sources available to American courts
in developing commercial law principles. A creative role cannot
be denied them, but recognizing the Code as the primary
source of law in doubtful cases diminishes the repository of
techniques and concepts traditionally available to the courts
through the common law in "filling social needs."

This observation is not intended to have normative content
but only to describe an inevitable result which follows from
superimposing en bloc civil law interpretative methodology on
the U.C.C., which, basically, is a product of the common law.
The question to be asked is this: Is it desirable in deciding all
doubtful cases under the Code to limit the courts as far as
possible to solutions based only on intra-Code principles? A

135. Llewellyn, supra note 67, at 106.
136. This contrast between the common and civil law systems results
from a basic difference in the character of the written law under the two
systems. That difference was stated succinctly by Ernest Bruncken:
In the common law countries, the customary law, defined and
developed by the courts, is the foundation on which the legal
edifice is reared. All statutes . . . whether codified or not, are
but modifications of the customary law and must be interpreted
with a constant regard to this underlying foundation.

In the so-called civil law countries, the relation between
statutes and other forms of law are precisely the opposite.
There, every statute or rule analogous to a statute . . . is an
original statement of the law on the subject which it regulates.
. . . Invariably the statute is the rule, every other form of law
the special exception.
Bruncken, supra note 47, at 516-17. The most significant result of this
difference has been the establishment in common law systems of the
binding rule of precedent, while in civil law systems a prior court deci-
dion theoretically has only the weight inhering in its own reasonableness.
See id. at 517 et seq., and note 72 supra.
137. See Professor Serini's explanation, note 99 supra.
civilians would answer "Yes" if asked the question in the context of one of his codes. His legal heritage and the absence, until relatively recent times, of a recognized body of case law forming an alternative source of law support his view. For a common law jurist to answer "Yes" is to deny to the common law any further value in deciding doubtful cases under the U.C.C. except to the extent that it is restated in the provisions of the statute itself. An affirmative response also supposes that the better answers to doubtful cases always are to be found by extrapolating intra-Code principles and never by searching among meta-Code concepts. Surely the more rational answer is "No." Courts must decide individual cases in the light of particular Code provisions as appear germane. It is error to suggest the complete substitution of an approach which has as a reason for its existence a cultural-historical bias not active in the development of the U.C.C.

(4) The arguments to this point show that reasons exist which underly and support the use of liberal and expansive interpretation in civil law systems but which find incomplete analogies in the situation of the Uniform Commercial Code.138

138. Additional reasons exist. For instance, a civil law court is aided in the process of adjusting the scope of code provisions by the official availability and routine use of complete legislative histories of statutes. See pp. 33-36 and notes 84 and 85 supra. Civilian judges, therefore, are better able to envision the coverage of a particular section and the interrelationships between parts of a code consistent with the intent of both draftsmen and legislators. While legislative history is not controlling, certainly it is more than merely persuasive in the sense intended by common law lawyers using the word. The 1952 Official Draft of the U.C.C. expressly permitted the use of the Comments in the construction and application of the Code (§ 1-102(3) (1); but, § 1-102(3) (g) expressly disallowed the use of prior texts and commentaries in ascertaining legislative intention. Both sections are absent from the present official version of the Code. In fact, however, the Comments have been cited many times by courts interpreting the U.C.C. See, generally, Skilton, Some Comments on the Comments to the Uniform Commercial Code, 1966 Wis. L. Rev. 597 (1966). Yet other forms of legislative history of the U.C.C., including prior drafts, projects, and reports/analyses on the Code by various state legislative committees, exist, but the influence of these materials depends upon the discretion of each court. For a thorough discussion of the American position in this respect, see, N.Y. St. L. Rev. COMM., 1 Study of the Uniform Commercial Code, 30-60 (1955).

Another reason that civilian methodology emphasizes liberal construction and analogical development of legislation and precludes free resort to extraneous sources of law is that civil law codes are amended more frequently than has been the case with the U.C.C. "Gaps" in civil law codes are more apt to be filled by auxiliary statutes (see supra note 14), and require less "judicial gloss" in this regard. And, according to Professor Schlesinger, auxiliary statutes are particularly prevalent in the area of commercial law. R. SCHLESINGER, supra note 48, at 381.
Therefore, civilian methodology should not be applied en bloc to the Code because cultural, historical and practical differences between the civil and common law systems may impact significantly on the effectiveness and the desirability of doing so. A final consideration to be noted is that civilian methodology as practiced today, even if applied to the U.C.C., may not effect a marked change in traditional common law methods and may not dictate a completely subordinate role for meta-Code concepts in deciding doubtful cases under the Code.

A recurrent misapprehension among common law lawyers is that methods of "logical" interpretation inevitably yield acceptable solutions to doubtful cases arising under civilian codes. This proposition is a mistaken one, and the "exegesis school" of thought and approach to statutory interpretation no longer persists in civil law countries, or not at least to the extent that many non-civilians suppose. First, as noted earlier, sources of law in addition to legislation exist in civilian systems. Second, techniques for expanding the application of a statute, such as liberal interpretation and analogical development, have their counterparts in methods which restrict the scope of legislation. Third, the judicial decision to expand or to restrict the application of a code is made in light of socio-economic policy factors. And, fourth, modern civilian methodology places significant emphasis on sources of law beyond enacted law for the resolution of legal disputes.

In this century, leading civilian scholars, such as Geny, have denied to the enacted law a position as the sole source of law and have emphasized the insufficiency of analytical legal methods alone to discover and order the realities of social life. Also, recent legal history has witnessed the growth of a body of case law in civil law systems whose size and influence now demand that it be considered a primary source of law.

Civilian methodology among civilians has lost its character as a science which can be applied to a body of enacted laws and derive unaided a legislatively intended solution for every case. Civil lawyers have for some time recognized the inadequacy of

139. See p. 34 et seq. supra.
140. See p. 43 et seq. supra.
141. See pp. 22-32 and notes 70-73 supra.
142. See pp. 34-37 supra.
143. See pp. 43-55 supra.
144. See pp. 44-45 and notes 105 and 106 supra.
145. See p. 22 and note 72 supra.
any code to state comprehensively the law in any field; and they have altered their conception of the judicial function to include law-making as well as law-finding. To a greater degree than their common law colleagues, civilian judges still seek to exhaust the statutes as sources of law before resorting to other sources. Yet those additional sources are present, are recognized as legitimate, and are often resorted to in judicial decision-making under the codes. And the decision whether to decide a doubtful case on the basis of intra-code interpretation or on extra-code sources of law is influenced as much by policy factors as by geometrical rules of statutory construction.

At least in mature systems like the French, current methods of civilian interpretation have caused civil law legal method "to approach that of the common law," and, while legislation remains supreme as the most important single source of law (loi), "legislation has lost supremacy as the supposedly unique source of right (droit)." Civilian techniques of interpretation preclude resort to sources of law extraneous to legislation only as appropriate in the circumstances of individual cases, and appropriateness is judged by factors which include policy reasoning as well as cannons of code interpretation. Therefore, on the basis of applying civil law methodology as it exists today, the common law generally cannot be denied a prominent role in the decision of doubtful cases under the Uniform Commercial Code.

146. See discussion pp. 43-46 supra.
147. Loussouarn, supra note 51, at 247.