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# Legislation in a Common Law Context

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## Legislation in a Common Law Context\*

My aim in this paper is to examine some of the distinctive ways in which legislation and legislative reform have figured in English jurisprudence. Of special interest is the broad question of the relationship between the common law and Parliamentary statute. I first consider the treatment of “statute law” developed by jurists in the seventeenth and eighteenth centuries, the period when the law of England received its classic and long-influential exposition. I then turn to the decades of the 1820s and 1830s, when legislation and legislative reform occupied considerable public and Parliamentary attention.

For later reformers and historians of English law, the first decades of the nineteenth century seemed to mark an important break in legal development, the opening chapter of an extended process of Victorian law reform through the vehicle of legislative enactment.<sup>1</sup> But as I hope to show, this episode of reform can also be usefully explored in terms of its continuities with earlier orthodoxies. A valuable, recent paper by Michael Lobban on ‘the concept and practice of law reform, c. 1780-1830’ provides a helpful frame for my own discussion here. Lobban emphasizes how much of the agenda for early-nineteenth century law reform had taken shape in much earlier periods of English history. Areas of legal change that were of greatest concern to private litigants – such as the high costs of common law process; the fees and sinecure offices attached to the central courts of Westminster Hall; the absence of efficient and inexpensive tribunals to deal with debt and small claims; the need for local registries for deeds – had all been identified for attention by the middle decades of the seventeenth century. Other goals –

such as the moderation of penal sanctions and the redaction and rationalization of historical legal sources – had likewise been canvassed in the same Stuart period. In legal matters, England's 'age of reform', Lobban notes, frequently 'provided an impetus to implement ideas that had been in circulation for much longer.'<sup>2</sup>

The discussion of 'legislation' in English law, of course, is never a purely historical or antiquarian issue. At a comparative level, the relative absence of one prominent kind of legislative material often appears a defining feature of England's legal tradition itself. 'If common law stands for anything, it is the absence of codes, and likewise civil law stands for codification.'<sup>3</sup> And even in the case of modern law, where so much of the legal fabric comprises an amalgam of case law interpretation of statutory enactments and of statutory revisions of case law rules and doctrines, 'the relationship between the common law and statute law' still remains a point of jurisprudential attention and perplexity. 'Does our law', as P.S. Atiyah poses the issue, 'constitute, in some sense, a single coherent, integral body of law, or does it consist of two separate entities, two streams running on parallel lines one of which occasionally feeds into the other, but which are destined for ever to retain their separate identities?'<sup>4</sup>

### 1. Classical Common Law Theory

During the course of the seventeenth and eighteenth centuries, the law of England received its most influential exposition in the writings of such celebrated jurists as Edward Coke, John Selden, Matthew Hale and William Blackstone. These, of course, were figures steeped in the materials and learning of the common law, and their professional careers spanned the offices of lawyer, antiquarian, judge and legislator. In

later years, their compositions would be retrospectively assembled into a classical canon of common law jurisprudence, in a manner that tended to flatten the significant differences of genre and purpose, and immediate political context, which orientated their compositions.<sup>5</sup> Taken together, their major writings can be treated as ambitious exercises in legal rationalization, in which the disparate and technical materials of England's early-modern legal practices were given shape, order and system.<sup>6</sup>

In modern jurisprudence, common law tends above all to be understood as judge-made law. But for present purposes, it is useful to retain earlier orthodoxies and identify common law as a species of custom. In Blackstone's mid-eighteenth century formulation of the established doctrine, England's common law or '*lex non scripta*' comprised 'general customs,' 'particular customs of certain parts of the kingdom,' and 'those particular laws that are by custom observed only in certain courts and jurisdictions.'<sup>7</sup> To identify this common law as '*lex non scripta*' was in part to distinguish it from the other principal branch of English law: Parliamentary statute (the *lex scripta*). But the term also disclosed something of what was customary and traditional about the common law. Although materials of common law were in no sense 'at present merely oral,' common law itself still displayed 'a great affinity and resemblance' to those purer examples 'of an oral unwritten law, delivered down from age to age, by custom and tradition merely.'<sup>8</sup>

In some settings, the content of the custom that was taken to comprise common law was associated with the social practices and social usages of the community over which the law governed. Although the precise historical origins of common law could not be definitely established, the law itself began with those settled social routines that came through time to acquire the force of law. Most usually, however, the custom that

was common law was understood in more specifically juridical terms: common law as the custom of courts and legal officials charged with the administration of justice, and utilizing specific tribunals and specific procedures. Common law's 'starting-point,' observes S.F.C. Milsom, 'is in customs, not the customs of individuals but the customs of courts governing communities.'<sup>9</sup> The juridical understanding of legal custom was, of course, well established previously in the materials of Roman and canon law (a point not without irony, given the common lawyers insular judgment that the customary nature of England's common law rendered it superior both these non-customary systems of jurisprudence). But common law orthodoxy offered an unusually capacious understanding of legal custom.

This idea of custom as the practices 'of courts governing communities' can be explicated by returning to the categorization of common law, adopted by Blackstone, into the three main component parts of 'general customs,' 'particular customs' and 'particular laws.' The third category - particular laws - provides the most striking example of the juridically constituted nature of common law custom. Here custom referred to specific bodies of foreign and international law and legal procedure adopted into the practice of specific English courts of justice; as in the case of the utilization of Roman and canon law in England's courts of admiralty, court martial and ecclesiastical tribunals.<sup>10</sup> Such law, of course, was neither social usage nor even unwritten; nor, of course, was it English. Nonetheless, it formed part of England's customary law on account of its having been adopted 'by custom' into the practice of those particular courts - just as in other courts of justice, alternative rules of procedure were 'by custom' adopted for legal decision-making.

This category, admittedly, offered what the jurists themselves recognized to be a strained example. But similar complexities apply in the cases of the other two branches as well. General customs, the first and largest branch of the common law, covered the general law of property, exchange, civil rights and obligations; areas of law for which social practice supplied important source materials. But ‘general customs’ no less described customary materials specific to the law itself, such as ‘the rules for expounding wills, deeds, and acts of parliament,’ or the institutional arrangement ‘that there shall be four superior courts of record,’ or the procedural requirement ‘that money lent upon bond is recoverable by action of debt.’<sup>11</sup>

Even the remaining branch of common law - the ‘particular customs’ applying in specific places – again presented an example of juristically-shaped custom. Here the common law concerned itself principally with those usages which had been previously settled and defined in the practices of other local courts and tribunals, and the chief task of the courts of common law was to distinguish those particular ‘customs which really form a part of the common law of the land’ from the ‘many other customs or usages’ which existed in the community but which had not been received by the relevant judicial bodies as common law.<sup>12</sup>

The theory of legal custom thus provided a formula through which an extremely heterogeneous body of legal materials – including foreign law and legislation - could be unified as component parts of England’s *lex non scripta*. These materials were all common law in virtue of being by custom received as law by an authoritative set of legal tribunals and legal actors. But in addition to clarifying the nature of common law itself, the idea of legal custom further provided the basis for what was celebrated as the unique

strengths and unrivalled achievements of England's legal order. As a system of customary practices, common law existed as a durable historical artifact, the beneficiary of incremental legal change and cumulative legal development. 'Ancient laws,' Matthew Hale maintained, were 'not the issues of the prudence of this or that council or senate,' but rather 'the production of the various experiences and applications of the wisest thing in the inferior world; to wit, time.' In such a process of protracted formation, 'day after day new inconveniences' were discovered, and these in turn stimulated 'new remedies,' so that in time the legal order came to embody 'a kind of aggregation of the discoveries, results and applications of ages and events.'<sup>13</sup> Thus, Hale responded to Thomas Hobbes's strictures against common law by insisting upon the collected wisdom embodied in long-surviving systems of customary law. 'I have reason to assure myself,' Hale maintained, 'that Long Experience makes more discoveries touching conveniences or Inconveniences of Laws then is possible for the wisest Council of Men at first to foresee.'<sup>14</sup>

The process of incremental legal development produced law, in Blackstone's phrase, 'fraught with the accumulated wisdom of ages.'<sup>15</sup> It additionally created a law which was uniquely well-suited to the community whose legal rights and obligations it maintained. The English jurist, Sir John Davies, prefaced his 1612 collection of Irish *Reports* by identifying the historical origins of England's common law in the 'honest and good Customes' which had been 'delivered over from age to age by Tradition.' With the passage of time, this law had been rendered 'so framed and fitted to the nature and disposition of this people' that it became 'connatural to the Nation' and impossible to imagine this community 'ruled by any other Law.'<sup>16</sup> Matthew Hale in his *History of the*



*Common Law of England* likewise emphasized that the processes of ‘long experience and use’ produced not only a law ‘very just and excellent ... in it self,’ but also an ‘administration of common justice’ ‘singularly accommodated’ to the ‘disposition of the English nation.’ Common law had become ‘incorporated’ into the ‘very temperament’ of the people, and ‘in a manner [became] the complection and constitution of the English commonwealth.’<sup>17</sup>

‘Long experience and use’, moreover, equipped English law with a specificity and detail that effectively prevented ‘arbitrary and uncertain law.’ Again, this degree of admirable certainty in law was beyond what the ‘wit of Man’ - lacking the benefit of gradual refinement and development - ‘could either at once foresee or aptly remedy.’<sup>18</sup>

The same dynamic ‘of long and iterated experience’ also helped to stabilize professional legal judgment. ‘It appears that men are not born common lawyers,’ Hale explained; and the kinds of practical and technical knowledge which properly regulated and coordinated the professions’ judgment were ‘gained by the habituating, and accustoming, and exercising’ of reason in the dense texture of this finely-wrought historical artifact.<sup>19</sup>

Common law decision-making, as Edward Coke notoriously instructed his sovereign, was a matter of ‘artificial reason and judgment of law,’ requiring ‘long study and experience before that a man can attain to the cognisance of it.’<sup>20</sup>

## 2. Statute and Statute Consolidation

England’s legal order, of course, contained another basic legal source: the *lex scripta* or statute law produced through Parliament’s sovereign legislative authority. As we shall see, English jurists developed an important set of arguments that served to set in

opposition Parliamentary legislation and the common law, and which presented the image of a bifurcated legal order comprising two separate and unequal parts. Nonetheless, in principle at least, there was much in the history and practice of Parliamentary law-making that might readily be assimilated into the larger structures of England's customary jurisprudence.

The constitution of Parliament itself, and the distribution and coordination of the powers and authority enjoyed by each of its three component parts (Crown, Lords and Commons), was itself a matter of evolved customary practice as opposed to written institution. In the *Commentaries*, Blackstone presented the kingdom's constitutional arrangements as part of a more general account of 'the Rights of Persons' in which the rights and duties of magistracy were hierarchically ordered through the major political offices of the kingdom.<sup>21</sup> The legal powers of public magistrates, as was the case for the civil rights of private subjects, plainly derived from a generous mixture of legislative enactments and common law sources.

By the early-modern period, Parliament had firmly emerged as a legislative body. The political struggles of the Stuart era raised and failed to resolve critical questions concerning the nature and limits of its law-making capacity – the relationship between Parliamentary authority and the royal prerogative, and the relationship of both to the kingdom's fundamental laws. But the routinization of Parliamentary government in the decades following 1688 served to reinforce both the legislative as well as the political supremacy of the King in-Parliament. Blackstone's mid-eighteenth century definition of Parliamentary sovereignty as an absolute 'despotic power' and 'uncontrollable authority' for 'making' and 'repealing' laws 'concerning matters of all possible denominations'

proved controversial and excessive for many contemporary critics.<sup>22</sup> But these debates left largely untouched the more practical realities of eighteenth-century governance in which steadily increasing numbers of individual subjects and organized groups secured the legal powers needed to realize their domestic or commercial or public goals through the mechanism of an act of Parliament.<sup>23</sup>

Yet even at this advanced stage of its institutional development, England's legislature still retained elements of its earlier designation as the 'High Court of Parliament', as each of its component parts exercised judicial responsibilities. Thus, the Crown functioned as the 'fountain of justice,' responsible for the appointment and integrity of the judges staffing the central courts of royal justice. The Lords operated directly as both a legislative and judicial body. And even the Commons at times organized itself on judicial lines, as when it settled election disputes by adjudicating the rival claims of contesting litigants. Parliamentary law-making likewise provided opportunities to blend the offices of judge and legislator. In the case of one voluminous category of English legislation – private estate acts – proposed bills were first introduced into the House of Lords, where they could be scrutinized by the common law judges before being sent on for Parliamentary consideration. According to one common professional belief, it had earlier been the practice for *all* proposed Parliamentary legislation first to be reviewed by the common law judges.<sup>24</sup>

Standard accounts of the kingdom's legal history likewise served to join together the kingdom's legislation and its customary law. Matthew Hale, in his *History of the Common Law*, speculated that the ancient Saxon customs which formed the original materials of English law, were themselves in fact Parliamentary statutes whose original

written formulation had since been lost.<sup>25</sup> Later in the *History* he celebrated Edward I as ‘the English Justinian’, who had secured dramatic improvements in the administration of justice through a combination of royal leadership backed by judicial and Parliamentary contributions. In the chapter-length historical survey with which he concluded his *Commentaries*, Blackstone repeated these specific points of praise for England’s Justinian.<sup>26</sup> In this setting, Edward I’s achievements appeared as one important moment in a grander narrative that supplied the central theme of the kingdom’s legal history: the heroic process by which the common law, and especially common law liberty, was retrieved and redeemed from the ‘scheme of servility’ introduced by the Norman Conquest and the Norman lawyers.<sup>27</sup> For Blackstone, the process had depended throughout on Parliamentary interventions in support of the common law, and its history could be charted through a series of momentous enactments - Magna Carta; the Charter of Forests; the Petition of Right; and especially the legislation that accompanied the Restoration of the Stuart monarchy, such as the statute abolishing military tenures and the Habeas Corpus Act (which together formed ‘a second magna carta’), the Triennial Acts and the Test and Corporation Acts.<sup>28</sup>

All this might suggest a unified and integrated legal order of written and unwritten sources, operating through the authority of customary legal institutions and functioning to refine and advance the law through a steady process of incremental growth and adjustment. Yet, ironically, such a benign vision of the relationship between common law and statute was all but submerged by a professional orthodoxy that celebrated the achievements of the common law by measuring them against the failures of statute. In this reading, the kingdom’s law separated into two unequal parts, in which

the common law was foundational and primary, and in which legislation often appeared as much a hindrance as an aide to England's law.

The case for common law's primacy rested on a several, nested lines of argument. It drew in part upon the blunt reality that most of the leading parts of England's law, such as the rules and doctrines governing property and obligations, were plainly the handiwork of the common law courts and not the sovereign legislature. 'The judgments of Westminster Hall are the only authority we have for by far the greatest part of the law of England.'<sup>29</sup> But the principal claims concerned the qualitative superiority of the common law. The same qualities of incremental growth and correction that gave customary law its special strengths, Matthew Hale explained, made the task of positive legal change especially delicate and difficult. The 'greatest business of a reformer' was 'not only to see that his remedy be apposite,' but that it 'doth not introduce some other considerable inconvenience' or 'takes not away some other considerable convenience' which the unreformed law enjoyed. Accordingly, 'great knowledge' and 'vast circumspection' were required for effective legal improvement, which in turn meant that legal change in England was best supervised by 'the judges and other sages of the law.'<sup>30</sup>

When measured by such challenging standards, Parliamentary statute was readily found overwhelmingly wanting. Not only had English legislation itself failed to achieve the kind of cumulative growth and refinement that distinguished common law, its enactments frequently revealed the lack of specific expertise and care that English jurisprudence required. Thus, Coke condemned the numerous statutes 'overladen with provisions and additions, and many times of a sudden penned or corrected by men of none or very little judgment in law;' and held such enactments responsible for many of

the confusions that afflicted English law.<sup>31</sup> These strictures received regular invocation and amplification from later jurists. Blackstone compared the law to ‘other venerable edifices of antiquity’ which stood vulnerable to the legislative interventions of ‘rash and unexperienced workmen.’ He cited Coke’s testimony and extended his judgment in that

... almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of Parliament.<sup>32</sup>

Indeed, for Blackstone, English legislation consistently failed to achieve its purposes whenever it departed from the structures of the common law.<sup>33</sup>

The case against the statute law operated on many levels, some of which reflected little more than the legal profession’s self-interested hostility to outside interference. Much of it referred to the faulty composition, uneven expression and increasing volume of particular and piecemeal additions to the body of English legislation that frustrated legal certainty regardless of the merits of the legal policy individual statutes were designed to advance. The burden of the case rested on the scarcely-contested judgment of the substantive superiority of common law, and the often-expressed presumption that - whatever the past and easily-recognized increasing pace of Parliamentary legislation - common law would in future continue to supply the basic form of law in England. ‘Who that is acquainted with the difficulty of new-modelling any branch of our statute laws (though relating but to roads or to parish-settlements),’ Blackstone insisted, ‘will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequents, and set up another rule in its stead?’<sup>34</sup>

This bifurcated image of the legal order received further rehearsal and entrenchment in the profession's favored program for the reform of English legislation, which came, by the eighteenth century, to be standardly termed, statute 'consolidation'. The project received its most important exposition in the early seventeenth-century in the writings of Francis Bacon. Bacon's *De Augmentis Scientiarum* contained an elaborate discussion of legislative composition and form, which he considered in terms of the larger goal of securing 'certainty' in law. Legislative consolidation – or what Bacon termed 'Digests' of the law – addressed the legal uncertainty created by verbose and disorganized legal sources. It comprised a systematic review of existing legislation and a dramatic contraction of its volume through the repeal of obsolete and unused materials; the reduction of excessive penal sanctions; and the consolidation, according to shared subject-matter, of the remaining Parliamentary enactments into uniform and consistent statutes.<sup>35</sup> In the 1610s, Bacon composed two reform tracts that likewise pressed the case for a systematic rationalization of the statutes. Dated and unused statutes, which formed 'a gangrene' on the 'wholesome laws', required repeal; and the remaining laws, currently 'heaped upon one another', would be reorganized and redrafted into 'one clear and uniform law.'<sup>36</sup>

In two crucial respects, Bacon's Digest program constituted an avowedly restricted exercise in legislative reform. First, the scheme's primary objective concerned the verbal expression and organization of English legislation. In Bacon's formulation, the Digest did not alter 'the matter' of the law, but only the 'manner' of its 'registry, expression and tradition.'<sup>37</sup> And second, the Digest preserved the structural division of English law by only addressing Parliamentary statutes. Bacon recognized that England's common law

also required its own program of reform to improve and clarify its historical sources. But this was a different and separate project, and Bacon expressly repudiated the more ambitious project of using the statutory Digest as the vehicle for transforming common law into legislative form. The latter approach he dismissed as a ‘perilous innovation’ that threatened the law’s greatest strengths. ‘Sure I am,’ he explained, ‘there are more doubts rise upon our statutes ... than upon the common law,’ and hence, ‘I dare not advise to cast the law into a new mould.’<sup>38</sup>

Later proponents of statute consolidation did little to alter the basic goals or strategy of this Baconian program for legislative consolidation. Instead, the emphasis – especially in the case of Blackstone and like-minded eighteenth-century commentators – was on supplying the program with additional intellectual credentials and increasing political urgency. One particularly weighty contribution came in the form of the first sustained history of English legislation, Daines Barrington’s 1766 *Observations on the More Ancient Statutes*. Barrington’s study, which went through five editions by the end of the century, scrutinized the record of Parliamentary law-making from Magna Carta to the first decades of the seventeenth century. His researches did much to confirm the strictures of Coke and Blackstone concerning the damage caused to English law in general, and to common law in particular, by poorly-conceived and rashly-executed acts of Parliament. In a concluding essay, he took up the need for a constructive program of improvement. Like Bacon a century and a half earlier, he urged a systematic review and consolidation of English legislation. ‘The reformation of the Code of Statutes’, through the ‘repeal of obsolete’ and ‘dangerous laws’, along with the consolidation by subject - matter of ‘different acts of Parliament’ into ‘one consistent statute’, he maintained, had



‘almost become a necessary work.’ But again, as in Bacon’s case, Barrington’s legislative program carefully eschewed the more radical idea of using statute reform as a mechanism for unifying the whole of English law. ‘By the term *reformation*’ he did not mean to suggest ‘that there should be a new arrangement and institute of the whole body of the law, as in the time of *Justinian*, or a *Code Frederique*.’ More specifically, legislative reform was explicitly not to touch the common law. Even were such a scheme thought ‘practicable’, Barrington would not ‘presume to make any innovation with regard to what is founded in the deepest wisdom.’<sup>39</sup>

### 3. Legislative reform in the early nineteenth century

Recent historical scholarship has alerted us to the various forms and efforts at law reform pursued through the course of the eighteenth century.<sup>40</sup> Nonetheless, it is not surprising that Victorian law reformers and later commentators should have found much novelty in the reform projects of the 1820s and 1830s. In these decades, law reform enjoyed a rare level of sustained Parliamentary attention and public discussion. The future Lord Chancellor Henry Brougham’s six-hour speech on law reform to the House of Commons in February 1828, provided a convenient marker for the new ambition and publicity that attended the issue. Only a few years earlier, the Home Secretary, Robert Peel, had secured legislation to repeal and modify many of the most egregious examples of excessive penal severity on the statute book, thereby realizing a reform objective that had been agitated in Parliament since the 1810s. In 1824 a Chancery Commission was appointed to resume consideration of long-established complaints concerning the costs

and abuses of justice in the Court of Chancery. There still remained, however, wide areas of the law for Brougham in 1828 to identify as demanding Parliamentary attention: reform of the superior courts of common law and of common law pleading; the need for inexpensive and accessible local courts; for reform of the laws governing debt, bankruptcy and tenures. In the aftermath of Brougham's marathon speech, two Royal Commissions were established with broad mandates to recommend changes in the law: one addressing the common law's notoriously complex law of real property, and the other covering the criminal law.<sup>41</sup>

These Parliamentary initiatives, moreover, were closely monitored by the profession and by the great political reviews of the era – the Tory *Quarterly Review*, the Whig *Edinburgh Review*; and the lessprestigious, radical *Westminster Review* – each of which provided lengthy essays on law reform, as did such recently-launched elite law journals as the *Law Magazine*. Accordingly, a significant literature came to be assembled on law reform in England, ranging from Parliamentary speeches and official reports to extended professional commentaries and tendentious polemics. The two Royal Commissions, in particular, not only advanced proposals for substantive alterations to the law, but also raised the general question of the legislative forms through which these changes might best be secured. Indeed, this period witnessed the most extensive discussion of and proposals for legislative codification in English legal history. Enthusiasts for comprehensive law reform, such as Jeremy Bentham, saw in the publication of such contemporary compositions as James Humphrey's 1826 *Observations on the ... English Laws of Real Property, with the Outlines of a Code* nothing less than 'an epoch: in law certainly' and perhaps even 'in history'. Humphrey's reform proposal,

Bentham explained, marked the moment in England that ‘*code* and *codification*’ lost the stigma of ‘rank *theory*’ and instead became the object of ‘*practice*’ and ‘praise’.<sup>42</sup>

Critics, in turn, stimulated by the same reform efforts, composed comprehensive attacks on the idea of codification as a vehicle for law reform in England, repudiating the legal form as a mode of rigid, static and authoritarian jurisprudence utterly repugnant to native legal practices.<sup>43</sup>

These literary materials, as well as the Parliamentary debates and proposals that often stimulated them, reflect the new institutional settings in which discussions of legislation and reform now proceeded. And there was much in the intellectual orientation of the discussion that was equally distinctive. Jurists of an earlier era, seeking to contrast the restrictive role for English statute with bolder legislative programs, invoked the negative examples of Justinian or Frederick the Great.<sup>44</sup> By the 1820s, of course, it was the example of the Napoleonic Code and the post-Napoleonic debate over Enlightenment codification, as well as the most recent codification experiments in the U.S., which informed such discussions. It was in the context of the 1820s debates over codification, for example, that the young lawyer and editor, Abraham Hayward, embarked on his translation of Savigny’s *Zum Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*.<sup>45</sup> No less important, English law reform had acquired its native voice for systematic legislative codification in the jurisprudence of Jeremy Bentham.<sup>46</sup>

Bentham had begun his career in legislative theory many decades earlier. By the mid-1780s, he had developed a detailed plan for a comprehensive code of law, uniformly organized and expressed, whose content could be shown to display ‘the dictates of utility in every line.’ Bentham termed this form of law a ‘*pannomion*’ - meaning ‘a complete

body of law'.<sup>47</sup> In explicit contrast to Bacon's Digest and the conventional project of statute consolidation, Bentham's *Pannomion* was designed to reform both the content as well as the form of the law, and to codify the entire legal order, thereby turning common law into legislation. Bentham, however, did not achieve a public audience for his legislative science until the early nineteenth century, when his Genevan editor, Etienne Dumont, published the three-volume version of *Traité de législation civile et pénale ... Par M. Jérémie Bentham, jurisconsulte anglais*.<sup>48</sup> In the post-Napoleonic period, Bentham himself promoted his ideal of a unified 'all-comprehensive body of law,' and himself as its codifier, in several tracts expressly directed at a large international audience.<sup>49</sup> By the 1820s, in his native country, the elderly jurist was as notorious for his advocacy of radical Parliamentary reform as for his radical codification scheme.

The initial historical assessments of the reform debates of the 1820s and 1830s tended to highlight the most immediate intellectual contexts and to neglect longer-term juridical traditions. Henry Brougham, in his 1828 Parliamentary speech on law reform, made no mention of Bentham or of his reform program - an omission in a six-hour oration that could scarcely be attributed to lack of time. But his 'Historical Introduction' to the 1838 republication of the great speech began by celebrating Bentham's influence and authority, identifying the jurist as 'the father of the most important of all the branches of Reform.'<sup>50</sup> John Austin, in his *Lectures on Jurisprudence* - originally delivered to a tiny London University audience in 1828 and only reaching its more permanent audience through posthumous publication in 1863 - singled out Savigny and 'his specious but hollow treatise' as the critical target for his own cautious defense of codification in England.<sup>51</sup> Courtenay Ilbert, the Parliamentary draftsman whose 1901 *Legislative*

*Methods and Forms* remains a valuable survey of nineteenth-century legislative reform, likewise framed his initial chapter on ‘Codification’ in terms of the antagonistic approaches of Bentham and Savigny.<sup>52</sup> Yet, in the early-nineteenth century Parliamentary debates on law reform, this particular intellectual framework scarcely surfaced. Instead, the earlier and more traditional set of English authorities and preoccupations shaped the discussion.<sup>53</sup>

Unfortunately, the relevant sources make it impossible to chart these reform debates in terms of any tidy clash between traditional statute consolidation and more comprehensive codification, or between the Baconian Digest and the Benthamic Pannomion. As several scholars have rightly emphasized, the relevant categories were simply too varied and unsteady in their usage to provide the needed clarification.<sup>54</sup> The term ‘codification’ might be deployed specifically to refer to the project of unifying common law and statute law into a single body of legislation. But it also circulated more loosely as equivalent to the traditional project of statutory consolidation. Opponents of codification tended to assume that ‘codification’ necessarily involved sweeping changes in the law according to some abstract legislative ideal. Codification’s advocates insisted that codification, like consolidation, need alter only the form and ordering of existing legal materials, and in this way worked to preserve established rules and doctrines. Again, there was important disagreement over the relationship between the two legislative programs. Typically, consolidation and codification were juxtaposed as competing approaches to legislative reform. But, for others, codification appeared as the culminating complement of statute consolidation: existing statute law needed to be

condensed and ordered by consolidation, preliminary to substantive reform through the mechanism of codification.<sup>55</sup>

“Where the impact of the older approaches to legislative reform appears most plainly is in the continuing relevance of and preoccupation with those distinctive challenges to law reform in England that Bacon placed in the foreground in his own presentation of the Digest project. Two questions proved especially critical. First, what, if anything, would legislative rationalization do to the primacy of the common law? And second, what substantive changes, if any, would legislative rationalization introduce into the content of the law? The significance of these questions can be revealed through a brief and selective examination of the fates of criminal law reform during the first decades of the nineteenth century.

The Royal Commission on the Criminal Law, appointed in 1833 by Lord Chancellor Henry Brougham, was given a sweeping mandate to reform and codify England’s criminal law. It was created:

“For the purpose of digesting into one statute all the statutes and enactments touching crime, and the trial and punishment thereof, and also of digesting into one other statute all the provisions of the common or unwritten law touching the same, and for inquiring and reporting how far it may be expedient to combine both those statutes into one body of the criminal law ... or how far it may be expedient to pass into a law the first mentioned only of the said statutes ...”<sup>56</sup>

The Commission contained five members, three of whom (unusually for this institutional setting) were academic lawyers. These included, John Austin, the one avowed disciple of

Bentham among the Commissioners. Austin, frustrated with the Commission's labors, resigned in 1836, at which point only two of the eventual eight *Reports of His Majesty's Commissioners on Criminal Law* had been issued. The Commission's final report was submitted in 1845, when a second Criminal Law Commission was appointed to advise Parliament on the legislation proposed by the first Commission.

In terms of the traditional categories of English law, the radical features of the Commission's task was the assignment to produce a legislative rationalization of the common law (in addition to a legislative rationalization of the statutes) and to explore 'how far it may be expedient to combine both those statutes into one body of the criminal law.' These instructions took the project well beyond the self-imposed limitations of the Baconian Digest, and the Commission provided sustained commentary on the nature and difficulties of this larger program. Throughout its decade of deliberation, the Commission was certain that the common law of crime and punishment needed to be condensed and ordered no less than the corresponding statute law. Never the less, the *Reports* reveal an interesting trajectory in terms of which the Commissioners seemed to retreat from the bold codification program its original mandate allowed, and instead moved closer to the conventional program of consolidation.<sup>57</sup>

The *First Report* of 1834 emphatically endorsed the benefits and near necessity of a program to unify existing common law and statute into a single legislative composition. The Commission revealed little patience for a criminal law lacking authoritative written formulation. The two branches of the law in this area of jurisprudence proved so interdependent, and the relevant acts of Parliament so presupposed the categories and terms of the common law, that 'one Digest ... would be

imperfect without the other.’ The ‘certainty and precision’ of the criminal law could not but be increased ‘if the two Digests were united.’<sup>58</sup> In 1839, the aspiration for single law unifying common law and statute survived, though the *Fourth Report* of that year emphasized the ‘great difficulty’ encountered in the effort to rationalize the common law sources, given the ‘numerous volumes of authority, which have been the produce of several centuries.’ The Commissioners took even greater pains to explain that their program did not include a plan for the substantive transformation of the criminal law. Even though the Commission had been ‘authorized to make *partial* alterations’ in the law, its work was not to be confused with ‘the construction of a new Criminal Code.’ Rather, what was attempted was ‘limited to the reduction and consolidation of the existing Law of England ... concerning Crimes.’<sup>59</sup> By the time of the *Seventh Report* in 1843, the Commission appeared to reverse its earlier evaluation of the weaker condition of the common law materials. It now reported that notwithstanding ‘the mass’ of relevant historical ‘authorities’, the rules of common law enjoyed a clarity and precision that made them more ‘susceptible of ... arrangement under appropriate heads’ than the altogether scattered and episodic ‘statutory enactments.’ Accordingly, one of the Commission’s goals of its Digests thus had become the preservation of the superior achievements of the common law.<sup>60</sup>

For all its labors and increasing caution over the nature of its proposals, at mid-century the first Criminal Law Commission became a massive casualty to professional opposition. Legislation, based on Commission’s work, ‘to consolidate and amend the criminal law of England’, was introduced in Parliament in 1848 and fitfully progressed through a succession of select committees. But the 1854 decision of the then Lord



Chancellor, Lord Cranworth, to solicit the opinions of the common law judges led to the abrupt collapse of the entire project. As on numerous other occasions in the nineteenth century, legislative improvement foundered in the face of judicial and professional opposition.<sup>61</sup> In response to this failure, one of the most active members of the Criminal Law Commissioners, Andrew Amos, protested ‘that Codiphobia’ which infected English government and the ‘disingenuous class of postponers’ who undermined pressing codification efforts.<sup>62</sup> Modern commentators have often concurred, finding in the episode England’s ‘longest and most abortive codification enterprise’ and a ‘drawn out and fruitless movement.’<sup>63</sup>

Still, there is more to the Criminal Law Commission than a story of simple failure. As K.J.M. Smith reports, the Commission’s *Reports* provided important contributions to the exposition of the principles of criminal law in England at a moment when such materials were sorely lacking. And as Lindsay Farmer particularly insists, the true significance of the Commission’s work may have less to do with its unsuccessful legislative proposals than with the innovative, positivist conception of criminal law in terms of which its work proceeded.<sup>64</sup> For the purposes my discussion here, this ‘abortive codification enterprise’ needs to be seen in comparison with the successful consolidation enterprise of the same era. As the Criminal Law Commissioners noted in their own *Fourth Report* of 1839, an important model for the reform and legislative rationalization of the criminal law had already been realized through ‘the Acts introduced into Parliament by Sir Robert Peel in 1827.’<sup>65</sup>

During the 1820s, Robert Peel, as Home Secretary, was active in a number of the law reform initiatives and successfully navigated through Parliament several statutes for

the reform of the criminal law.<sup>66</sup> Most of this legislation served to realize long-advocated and well-publicized goals for criminal law reform which had been the subject of Parliamentary debate and proposed legislation on many previous occasions. Peel's Criminal Law Amendment Acts, as a series of important enactments of 1826-30 came to be termed, advanced two general goals. The severe sanctions available in law for many crimes were moderated, particularly in the case of the capital penalties attached to minor property offenses. And significant consolidation of the statute law was achieved. Four leading statutes - dealing separately with larceny, malicious property offences, offences against the person, and forgery – together repealed and replaced over 200 earlier statutes.<sup>67</sup> Peel himself made the case for this critical 'consolidation of the criminal laws' in a lengthy Parliamentary address of 1826. There he rehearsed familiar arguments concerning the need to reduce and order the chaos of the statute book through a cautious process of legislation rationalization. What he proposed, he explained to the House of Commons by expressly quoting the words of Francis Bacon, 'tendeth to the pruning and grafting the law, and not to plowing up and planting it again; for such a remove I should hold indeed for a perilous innovation.'<sup>68</sup>

Peel, no doubt, had ample pragmatic and even strategic reasons for thus cloaking his proposed legislation with the language and authority of Bacon's Digest project. Throughout the Parliamentary campaign, he emphasized the moderation and practicality of his reformist goals. His success at realizing a program of reform that had been previously frustrated in Parliament was a testimony to his considerable political skills, as well as to his ability to maintain the support of key constituencies, especially the common law judges.<sup>69</sup> Being able to present his proposals as conforming to a long-advocated and

well-established native legislative tradition directly served these specific and pressing political needs.

At the same time, the fact that Francis Bacon could plausibly be invoked in the House of Commons in 1826 as the single leading authority on statute reform - at a time when there were so many other more contemporary examples and theories of legislation available - carries other lessons as well. The first, of course, was the basic reality of the continuing relevance of Bacon's scheme well into the era of Victorian law reform. Ten year's after Peel's speech, yet another royal Commission on law reform reported to Parliament, this time charged 'to Inquire into the Consolidation of the Statute Law.' The Commissioners elaborated a seven-step scheme for best condensing and ordering the statute book. Their recommendations covered all too familiar ground. As the Commissioners themselves explained, their 'remedies for the defects of the Statute Law accord, for the most part' with several of Bacon's suggestions in the two-centuries old, *'Proposal for amending the Laws of England.'*<sup>70</sup> Second, for the historian, is the useful reminder that nineteenth-century legislative reform in England was never solely the story of the failure on one important legislative program: codification. It was additionally the story of the successful realization of an alternative, older and more limited legislative project: statute consolidation. As the most devoted enthusiasts for radical codification recognized, their project had to compete with other reform strategies. 'Mr. Peel is for consolidation in contradistinction to codification,' Bentham explained in correspondence in 1828. 'I for codification in contradistinction to consolidation.'<sup>71</sup>

A final perspective on these matters is supplied by a much later episode of legislative reform - the Parliamentary enactment in 1882 of a Bills of Exchange Act. The

draftsman of the act, M.D. Chalmers, considered this law to be the very ‘first code or codifying enactment’ in English legal history because the enactment – unlike ‘a consolidation Act’ – unified into legislative form both common law and statute law materials. In accounting this unique success for codification, Chalmers emphasized the importance of the instruction he received from a key Parliamentary supporter of the initiative, that his draft bill should do nothing to alter the content of the existing law governing bills of exchange. ‘A Bill which merely improves the form,’ he explained, ‘without altering the substance, of the law created no opposition, and gives very little room for controversy.’ At the same time, Chalmers glibly acknowledged that this overriding political requirement was, in fact, jurisprudentially unfeasible. ‘Of course codification pure and simple is an impossibility.’ Creating a unified law to govern bills of exchange, drawn from the materials of ‘some 2,500 cases and 17 statutory enactments’ inevitably involved substantive decisions concerning competing doctrines and gaps in the law.<sup>72</sup> A legislative rationalization of English law that altered only the expression and arrangement of the law - whether the rationalization aimed at consolidation or codification - was simply not available. Nonetheless, the political realities of Parliamentary law-making encouraged the composition of a ‘codifying enactment’ that appeared to alter as little as possible. In this respect, Chalmers’ testimony and experience serves to make visible those political dynamics that helped give such fantastic longevity to the traditional common law approaches to English legislative craft.

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<sup>1</sup> A.V. Dicey's influential 1905 *Lectures on the Relation between Law and Public Opinion in the Nineteenth Century* provides a leading example of this approach.

<sup>2</sup> Michael Lobban, "'Old wine in new bottles': the concept and practice of law reform, c. 1780-1830", in Arthur Burns and Joanna Innes (eds.), *Rethinking the Age of Reform. Britain 1780 -1850* (Cambridge, 2003), 114.

<sup>3</sup> R.C. Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge, 1987), 39.

<sup>4</sup> P.S. Atiyah, 'Common Law and Statute Law', *Modern Law Review* 48 (1985) 1-28. On this theme, see also Roscoe Pound, 'Common Law and Legislation' *Harvard Law Review* 21 (1908) 383-406; and J. Beatson, 'The Role of Statute in the Development of Common Law Doctrine' *Law Quarterly Review* 117 (2001) 247-72.

<sup>5</sup> Blackstone provides an early example of the practice. See his characterization of his predecessors' writings in *An Analysis of the Laws of England* (London, 1756), v-viii.

<sup>6</sup> My account of common law jurisprudence has been heavily influenced by the important studies by J.G.A. Pocock, *The Ancient Constitution and the Feudal Law*

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(Cambridge, 1957); A.W.B. Simpson, 'The Common Law and Legal Theory,' in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence*, 2nd series (Oxford 1973); Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford 1986); Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford, Clarendon Press, 1991). Here I also draw on my own earlier work, especially *The Province of Legislation Determined: legal theory in eighteenth-century Britain* (Cambridge, 1989).

<sup>7</sup> William Blackstone, *Commentaries on the Laws of England* (1765-69), ed. Joseph Chitty, 4 vols. (London, 1826), 1: 63.

<sup>8</sup> *Commentaries* 4: 408. For Blackstone, the 'ancient Druids in Gaul' best exemplified the practice of purely oral law.

<sup>9</sup> S.F.C. Milsom, *Historical Foundations of the Common Law*, 2<sup>nd</sup> edition (London 1981), 1.

<sup>10</sup> See Blackstone, *Commentaries*, 1: 79-84, and the corresponding discussion in Hale, *History of the Common Law*, ed. Charles M. Gray (Chicago, 1971), 18-20. (The date of the composition of Hale's *History* is not known; it was first published posthumously in 1713.)

<sup>11</sup> *Commentaries*, 1: 67-8.

<sup>12</sup> See J.H. Balfour Browne, *The Law of Usages and Customs* (London 1875), 27-8.

<sup>13</sup> Hale, 'Considerations touching the Amendment or Alteration of Laws', in Francis Hargrave (ed.), *A Collection of Tracts, Relative to the Law of England* (London 1787), 254.

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- <sup>14</sup> Hale, 'Reflections By the Lord Chief Justice Hale on Mr. Hobbes, His Dialogue of the Law', in William Holdsworth, *A History of English Law*, 16 vols. (London 1922-66), 5: 504.
- <sup>15</sup> *Commentaries*, 4: 442.
- <sup>16</sup> John Davies, *Reports of Cases and Matters in Law* (Dublin 1762), Preface, 5 -6.
- <sup>17</sup> Hale, *History of the Common Law*, 30.
- <sup>18</sup> Hale, 'Reflections on Hobbes', in Holdsworth, *History of English Law*, 5: 504-5.
- <sup>19</sup> Hale, 'Reflections on Hobbes', 5: 505.
- <sup>20</sup> 'Prohibitions del Roy' (1607), *Reports of Sir Edward Coke* (Part 12), reprinted in *The Selected Writings of Sir Edward Coke*, ed. Steve Sheppard, 3 vols. (Indianapolis, IN, 2003), 1: 481.
- <sup>21</sup> See *Commentaries*, 1: 140-5.
- <sup>22</sup> *Commentaries*, 1: 160. For the more general treatment of Parliamentary sovereignty in this period, see the discussion in my chapter, 'The Mixed Constitution and the Common Law', in *The Cambridge History of Eighteenth-Century Political Thought*, eds. Mark Goldie and Robert Wokler (Cambridge University Press, forthcoming), especially Part 2.
- <sup>23</sup> The nature and extent of Parliament's legislative activity in the period after 1688 is explored in Paul Langford, *Public Life and the Propertied Englishman 1689-1798* (Oxford, 1991), and Julian Hoppit and Joanna Innes, 'Introduction', *Failed Legislation, 1660-1800: Extracted from the Commons and Lords Journals* (London and Rio Grande, 1997).

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- <sup>24</sup> See the comments of Lord Chancellor Hardwicke cited by Holdsworth, *History of English Law*, 11: 374.
- <sup>25</sup> Hale, *History of the Common Law*, 4.
- <sup>26</sup> Hale, *History of the Common Law*, 101-2; and see Blackstone, *Commentaries*, 4: 425-7.
- <sup>27</sup> *Commentaries*, 4: 420.
- <sup>28</sup> *Commentaries*, 4: 438-40.
- <sup>29</sup> James Ram, *The Science of Legal Judgment* (London, 1834), titlepage.
- <sup>30</sup> Hale, *Considerations touching the Amendment ... of Laws*, 262-3, 272-3.
- <sup>31</sup> Preface to Coke's Reports (Part 2), *Selected Writings of Edward Coke*, 1: 41.
- <sup>32</sup> *Commentaries*, 1: 10.
- <sup>33</sup> *Commentaries*, 1: 365 (dealing with the case of the poor laws).
- <sup>34</sup> *Commentaries*, 3: 267.
- <sup>35</sup> Bacon, *De Augmentis Scientiarum*, (English trans.), Book 8, Chapter 3, Title 1, in *The Works of Francis Bacon*, ed. James Spedding, Robert Leslie Ellis, Douglas Denon Heath, 14 vols. (London, 1857-74), 5: 101-3. The contemporary context for Bacon's proposals is treated by Barbara J. Shapiro in 'Codification of the Laws in Seventeenth-Century England,' *Wisconsin Law Review* 1974 (1974), 428-65; and 'Sir Francis Bacon and the Mid-Seventeenth Century Movement for Law Reform,' *American Journal of Legal History*, 24 (1980), 331-62. I explore Bacon's influence on later discussions of legislative reform in *Province of Legislation Determined*, chap. 9.



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- <sup>36</sup> ‘*Proposition .... Touching the Compiling and Amendment of the Laws of England*’ in *Works of Francis Bacon*, 13: 65.
- <sup>37</sup> *Proposition*, 13: 63.
- <sup>38</sup> *Proposition*, 13: 67.
- <sup>39</sup> Daines Barrington, *Observations on the More Ancient Statutes ... with an Appendix being a proposal for new modelling the Statutes* (1766), 3rd edn. (London, 1769), 497, 499-500.
- <sup>40</sup> For surveys of this reform activity, see Wilfrid Prest, ‘Law Reform in Eighteenth-Century England’, in Peter Birks (ed.), *The Life of the Law* (London, 1993), 113-23, and David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford, 2000), 9-17, 146-7.
- <sup>41</sup> My interpretation of these decades is indebted to the scholarship of Michael Lobban; see Michael Lobban, *Common Law and English Jurisprudence*, chap. 7, and ‘Henry Brougham and Law Reform’, *English Historical Review* 115 (2000) 11 84-215. See also K.J.M. Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (Oxford, 1998), 66-82.
- <sup>42</sup> Jeremy Bentham, ‘Commentary on Mr. Humphrey’s Real Property Code’ (1826), *The Works of Jeremy Bentham, published under the supervision of his Executor, John Bowring*, 11 vols. (Edinburgh, 1838-43), 5: 389.
- <sup>43</sup> See the important contributions of John Joseph Park, *Contre Projet to the Humphresian Code* (London, 1827) and John Reddie *Letter to the Lord High Chancellor of Great Britain on the Expediency of the Proposal to form a new Civil Code for England* (London, 1828).

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- <sup>44</sup> See Blackstone, *Commentaries*, 3: 267, and Barrington, *Ancient Statutes*, 497.
- <sup>45</sup> Abraham Hayward, *On the Vocation of our Age for Legislation and Jurisprudence* (London, 1831).
- <sup>46</sup> Bentham's jurisprudence and its relationship to more orthodox English legal thought is examined in Lobban, *Common Law and English Jurisprudence*, chaps. 5-6; Postema, *Bentham and the Common Law Tradition*, chaps. 5-9; and my own, *Province of Legislation Determined*, chaps. 11-13.
- <sup>47</sup> *An Introduction to the Principles of Morals and Legislation* (1789), ed. J.H. Burns and H.L.A. Hart (London, 1970), 7, 305.
- <sup>48</sup> On the reception and reaction to Bentham's jurisprudence at this time, see J.R. Dinwiddy, 'Bentham and the Early 19<sup>th</sup> Century', in his *Radicalism and Reform in Britain, 1780-1850* (London and Rio Grande, OH., 1992), 293-4.
- <sup>49</sup> Bentham's efforts and writings to promote his codification program are valuably treated by Philip Schofield in 'Jeremy Bentham: Legislator of the World', *Current Legal Problems* (1998) 51: 115-47.
- <sup>50</sup> Henry Brougham, *Speeches of Henry Lord Brougham ... with Historical Introductions*, 4 vols. (Edinburgh, 1838), 2: 287.
- <sup>51</sup> Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (1863), 5<sup>th</sup> edn., 2 vols. (London, 1885), 2: 666-81.
- <sup>52</sup> Courtenay Ilbert, *Legislative Methods and Forms* (Oxford, 1901), 122-7.
- <sup>53</sup> See Smith, *Lawyers, Legislators and Theorists*, 60-1.
- <sup>54</sup> See the comments and illustrations offered in Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45' *Law*

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- and History Review* 18 (2000) 407-8; Michael Lobban, 'How Benthamic Was the Criminal Law Commission?' *Law and History Review* 18 (2000) 428-30; John Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century* (Chichester, 1992), 209-11; and Smith, *Lawyers, Legislators and Theorists*, 75.
- <sup>55</sup> See the discussion in Andrew Amos, *Ruins of Time: exemplified in Sir Matthew Hale's History of the Pleas of the Crown* (London, 1856), v-vi, xix.
- <sup>56</sup> Letter of Commission, *Parliamentary Papers* [PP] (1834) XXVI: 117.
- <sup>57</sup> The work and *Reports* of the Criminal Law Commission are surveyed in Rupert Cross, 'The Reports of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853', in P.R. Glazebrook (ed.), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (London, 1978), 5-20; Leon Radzinowicz and Roger Hood, *History of English Criminal Law and its Administration: volume 5, Emergence of Penal Policy in Victorian and Edwardian England* (London, 1985), chapter 22; and Hostettler, *Politics of Criminal Law Reform*. pp. 33-42, 192-207. My own discussion is especially indebted to the interpretation offered by Lindsay Farmer in 'Reconstructing the English Codification Debate' and the subsequent exchange with Michael Lobban in *Law and History Review* 18 (2000) 397-425, 427-32, 441-4.
- <sup>58</sup> *First Report*, PP (1834) XXVI: 145,155-6.
- <sup>59</sup> *Fourth Report*, PP (1839) XIX: 243, 239-40.
- <sup>60</sup> *Seventh Report*, PP (1843) XIX: 6.
- <sup>61</sup> See Hostettler, *Politics of Criminal Law Reform*, 196-201.
- <sup>62</sup> Amos, *Ruins of Time*, xvi, xix.

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<sup>63</sup> Cross, 'Reports of the Criminal Law Commissioners', 5; and Radzinowicz and Hood, *History of English Criminal Law*, 5: 737.

<sup>64</sup> Smith, *Lawyers, Legislators and Theorists*, 19; and Framer, 'Reconstructing the English Codification Debate', 404-5, 417-25.

<sup>65</sup> *Fourth Report*, PP (1839) XIX: 243.

<sup>66</sup> Peel's law reform efforts in Parliament are reviewed and discussed in Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750: volume 1, The Movement for Reform* (London, 1948), chapter 18; and Norman Gash, *Mr. Secretary Peel. The life of Sir Robert Peel to 1830* (revised edn., London and New York, 1985), chapter 9. Important recent and critical perspectives are offered in V.A.C. Gattrell, *The Hanging Tree: Execution and the English People, 1770-1868* (Oxford, 1994), pp.566-85, and Boyd Hilton, 'The Gallows and Peel', in T.C.W. Blanning and David Cannadine (eds.), *History and Biography: Essays in Honour of Derek Beales* (Cambridge, 1996), 88-112.

<sup>67</sup> This legislation and its impacts on the statute law are set out in detail in Radzinowicz, *History of English Criminal Law*, 1: 574-7.

<sup>68</sup> *Parliamentary Debates* (Hansard, new series), 14 (1826) 1239.

<sup>69</sup> The importance of Peel's concern to secure the support of the common law judges is stressed by Radzinowicz; see *History of English Criminal Law*, 1: 589-90.

<sup>70</sup> *Report of the Commissioners Appointed to Inquire into the Consolidation of the Statute Law*, PP (1835) XXXV: 384.

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<sup>71</sup> John Bowring, *Memoirs of Bentham*, in *Works of Jeremy Bentham*, 10: 595. For a survey of the later reforms adopted to rationalize the statute book and the methods of Parliamentary law-making, see Ilbert, *Legislative Methods and Forms*, chap. 4.

<sup>72</sup> M.D. Chalmers, 'An Experiment in Codification', *Law Quarterly Review* 6 (1886) 125-6.