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## An Academic Perspective on Codification and the Arkansas Code of 1987 Annotated

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AN ACADEMIC PERSPECTIVE ON CODIFICATION AND  
THE ARKANSAS CODE OF 1987 ANNOTATED

*Morell E. Mullins\**

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## I. INTRODUCTION

Every codification should have a chronicler. If nothing else, a first-hand account describing the work and thinking which went into a new code preserves an important chapter in the history of a state and its legal system. Of more immediate and tangible benefit, a contemporary explanation of the codification process and the features of a new code can be of significant help in understanding, using, and interpreting that code. Vincent Henderson's recent article, *The Creation of the Arkansas Code of 1987 Annotated*,<sup>1</sup> performs this doubly valuable service for Arkansas and contributes to a small but important body of works dealing with state codification efforts.<sup>2</sup>

This article is designed to complement Mr. Henderson's by offering some observations, from an academic perspective, about codification in general and the Arkansas Code of 1987 Annotated in particular. It should be emphasized that this article does not purport to be a complete or definitive treatment of codification. Rather, the goals here are to provide a general introduction to some basic concepts and to examine a few legal issues regarding the new Arkansas Code. By and large these issues are related to, and are the consequence of, special problems associated with the transition to a "code" in a state which for most of its history has relied upon compilations to provide a usable publication of its statutory law.

## II. PUBLICATION OF STATUTES

In order to explain codification it is worthwhile to begin by considering the need for publication of the acts of a legislature. For practical purposes the enactment of a new law is only a first step.

1. Henderson, *The Creation of the Arkansas Code of 1987 Annotated*, 11 UALR L.J. 21 (1988-89).

2. See, e.g., Dowling, *The Creation of the Montana Code Annotated*, 40 MONT. L. REV. 1 (1979); Oddi & Attridge, *The Indiana Code of 1971: Its Preparation, Passage and Implications*, 5 IND. LEGAL F. 1 (1971).

Publication, and publication in usable form, is imperative if there is to be a workable legal system. (That the laws should be published, of course, is also a tenet of basic fairness, with definite constitutional implications.<sup>3</sup>)

The legislative process spews out hundreds, and sometimes thousands, of acts during the course of a legislative session. Collectively, these acts represent substantial changes in a jurisdiction's statutory law. Individually, these acts may be original in form, adding new law; they may be amendments of existing laws; or they may contain both original and amendatory provisions.<sup>4</sup> Publishing these acts in the form of session laws<sup>5</sup> does little to make them a usable part of the legal system. The session laws are merely bound volumes reproducing the acts passed during each session, and arranging them, usually, in the order of their enactment.<sup>6</sup> Over a period of even a few decades, the task of finding all the statutory law governing a particular issue, including all amendments, repeals, and enactments relevant to the issue, would become impossible. Every volume of the session laws would have to be consulted. One can best appreciate the enormity of such a task by imagining the problems which one would encounter if trying to conduct research on a topic in a large library which arranged its holdings solely by the dates on which the periodicals and books were published.

A more usable publication of a jurisdiction's statutory law, based on classification by subject matter, is therefore imperative, and for every state there is such a publication, in the form of a code or a compilation of its statutes.<sup>7</sup> At some risk of oversimplifying the matter, one can thus begin—but not necessarily end—by viewing codification merely as one of two basic ways to publish a usable version of

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3. See *Armstrong v. Maple Leaf Apartments, Ltd.*, 436 F. Supp. 1125, 1145-46 (N.D. Okla. 1977) (statute not published in the United States Code), *aff'd on other grounds*, 622 F.2d 466 (10th Cir. 1979), *cert. denied*, 449 U.S. 901 (1980). See generally Murphy, *The Duty of the Government to Make the Law Known*, 51 *FORDHAM L. REV.* 255 (1982); Murphy, *Effective Access to the Law*, 10 *J. OF LEGIS.* 313 (1983).

4. A very informal and unsophisticated survey of 100 Acts of the 1983 Arkansas General Assembly indicates that somewhat more than one-half of the enactments were purely amendments to existing laws, while about 40% contained no amendatory provisions and less than 10% contained both original and amendatory provisions. M. MULLINS, *A HANDBOOK FOR LEGISLATIVE DRAFTERS* 147 (1986).

5. 1A J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 28.02 (4th ed. 1985).

6. *Id.* See also M. PRICE, H. BITNER, & S. BYSIEWICZ, *EFFECTIVE LEGAL RESEARCH* 28-29, 122-23 (4th ed. 1979) (general discussion of session laws) [hereinafter cited as PRICE & BITNER]; *BLACK'S LAW DICTIONARY* 1230 (5th ed. 1979) (definition).

7. SUTHERLAND, *supra* note 5, § 28.01, at 468.

state statutory law. The other way is to publish some form of compilation. As will be discussed in Part III, below, a codification ordinarily involves affirmative legislative enactment of a "Code" which supplants, to a greater or lesser extent, prior statutory law.<sup>8</sup> A compilation, typified by the old Arkansas Statutes Annotated, is merely a convenient, edited collection of the state's statutory law, and the compilation itself is, at most, prima facie evidence of the law.<sup>9</sup>

### III. CODIFICATION V. COMPILATION

#### A. Some History of Codification and Its Americanization

In order to view the Arkansas Code in proper perspective, additional background information, some of it historical, is needed. Actually, it may be impossible to explain adequately some aspects of the concepts underlying the Arkansas Code without a general overview of codification as it has evolved in this country.

During the first half of the nineteenth century the word "codification" denoted the total restructuring of a legal system, and the enactment of a comprehensive set of written laws which replaced virtually all prior law.<sup>10</sup> "Codification" often accompanied political and ideological movements as part of their agenda.<sup>11</sup> The revolutionary regime in France, for example, tinkered with several abortive drafts of a code, but it was Napoleon who commissioned the drafting of the French Civil Code and who overcame opposition to its enactment by the expedient of reorganizing the government in a virtual coup.<sup>12</sup> Napoleon's Code served as a model during the nineteenth century for most of the new countries of South and Central America, and for Spain, Italy, Holland, Greece, and Rumania, among others.<sup>13</sup> In Germany, codification was very much a function of that country's political unification<sup>14</sup> and supposedly embodied the *Volksgeist*, or

8. See *infra* text accompanying notes 71, 81, 111.

9. E.g., Act of Feb. 14, 1945, No. 50, § 4, 1945 Ark. Acts 98, 100. See *infra* text accompanying notes 110-11.

10. See Warthen, *The Non-Emergence of the Anglo-American Law Code*, 6 LEGAL REF. SERVICES Q. 129, 134-36 (1986). See generally J. MERRYMAN, *THE CIVIL LAW TRADITION* 27-34 (1969) (introductory summary emphasizing ideological and historical bases of differences between continental European codifications and present American "codes").

11. See J. MERRYMAN, *supra* note 10, at 27-34.

12. Pound, *Sources and Forms of Law*, 22 NOTRE DAME LAW 1, 54-55 (1946).

13. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2 ST. LOUIS U.L.J. 335, 342-43 (1953).

14. Lawson, *A Common Law Lawyer Looks at Codification*, 2 INTER-AM. L. REV. 1 (1960).

German national spirit, among other things.<sup>15</sup> As one writer put it, there was a "codification movement which conquered all continental Europe and swept the world in the course of the nineteenth century."<sup>16</sup>

The sweep was not complete, however. England and the United States (except for Louisiana<sup>17</sup>) rejected the continental European type of "codification," which would have supplanted judicially created common law with an overarching "code" that was comprehensive, systematic, and pre-emptive.<sup>18</sup> Nevertheless, complete codification pre-emptive of common law had its proponents.

Foremost among these proponents was Jeremy Bentham, the English utilitarian philosopher whose extreme position probably harmed the cause of codification more than it helped.<sup>19</sup> Bentham, who is generally credited with coining the word "codification,"<sup>20</sup> maintained that a code of laws, based on his utilitarian principles, could and should be so utterly clear, complete, and self-contained that interpretation would be unnecessary. The "law" would be found only in his code. Anything not in his code would not be the law.<sup>21</sup> A Benthamite code not only would render common law defunct but also would reduce judges basically to performing the ministerial tasks of applying the codified laws. If perchance a Benthamite code were unclear on some point, a judge would have to refer the issue to the legislature.<sup>22</sup> Today, even the contemporary supporters of a Bentham-style codification concede that the old boy's ambitions in this regard were unrealistic.<sup>23</sup>

Many in Bentham's own era regarded him as an eccentric who spouted gibberish.<sup>24</sup> Also, he was an extremely harsh, unremitting critic of the law as he found it in late eighteenth and early nineteenth century England, and there was indeed much to criticize.<sup>25</sup> Educated

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15. Warthen, *supra* note 10, at 136.

16. Wagner, *supra* note 13, at 340.

17. See, e.g., Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 TUL. L. REV. 351, 388-90 (1942-43).

18. See Warthen, *supra* note 10, at 134-36.

19. Morrow, *supra* note 17, at 382-83.

20. Alfange, *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58, 77 (1969-70).

21. *Id.* at 70-71.

22. *Id.* See also Comment, *Jeremy Bentham's Codification Proposals and Some Remarks on Their Place in History*, 22 BUFFALO L. REV. 239, 240-42 (1972-73).

23. Bodenheimer, *Is Codification an Outmoded Form of Legislation?*, 30 AM. J. COMP. L. 15, 27 (Supp. 1982).

24. Warthen, *supra* note 10, at 141.

25. Alfange, *supra* note 20, at 58-61.

as a lawyer, he had a "completely negative attitude"<sup>26</sup> toward the practice of law. He was a visionary who devoted his life to the cause of reform.<sup>27</sup> Such activities and qualities do not make for instant success, or for acceptance of the more radical aspects of a reformer's agenda for change. Nevertheless, he had his followers and over the long run considerable influence. Quite apart from the eventual impact of his utilitarian philosophy, his proposals for many particular legal reforms gained acceptance.<sup>28</sup> Even as to codification, Bentham's ideas ultimately met with a kind of limited success in England itself, when a few statutes finally "codified" some less controversial areas of commercial law.<sup>29</sup>

In the United States, the early nineteenth century codification movement generally avoided Benthamite extremes. Actually, American proponents of codification seem to have avoided even mentioning Bentham, apparently in an effort to keep from "being tarred with a Benthamite brush."<sup>30</sup> Moreover, American codification seems to have been a "movement" only in the sense that a number of would-be reformers were traveling in more or less the same general direction. As a leading authority on early American codification expressed it, "the American codification movement manifested a diffused expression of reformist energy rather than a picture of tightly knit organizational activity."<sup>31</sup> The influential early American pro-codifiers had only a few features in common. For one thing, they were mostly lawyers or judges. For another, they insisted that the drafting of any code should be entrusted only to the most capable and learned members of the legal profession.<sup>32</sup> Also, a conservative streak was common among pro-codification lawyers. "These men were common [law] lawyers, proposing the legal change in a nonrevolutionary context, not men bent on upsetting the legal order."<sup>33</sup> Pro-codifiers, however, were still a diverse assortment of individuals, ranging from moderates such as Justice Story<sup>34</sup> to the more radical William Samp-

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26. *Id.* at 58.

27. *Id.* at 61.

28. *Id.* at 76-77; Warthen, *supra* note 10, at 144-45.

29. Warthen, *supra* note 10, at 144-45.

30. C. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 75 (1981).

31. *Id.* at 96.

32. *Id.* at 79.

33. *Id.* at 80. Even in Louisiana, acceptance of the European model of codification essentially reflected a conservative outlook, because the legal heritage of Louisiana was French and Spanish, rather than English common law. See Morrow, *supra* note 17, at 388-90.

34. C. COOK, *supra* note 30, at 80.

son, a Londonderry Protestant Irish lawyer and rebel exiled from England to America, where he continued to manifest zeal for the underdog by representing the forerunners of labor unions.<sup>35</sup> Nevertheless, even the “radical” element of the codification movement was radical only as a matter of degree. “[T]hey did not desire to revolutionize the existing legal equilibrium by completely remodeling . . . fundamental rights and obligations . . . . The radicals’ criticism focused on procedural aspects of the law and the complexity with which substantive rights were stated rather than those rights themselves.”<sup>36</sup>

More significantly, the early pro-codification movement foreshadowed the direction which codification in this country ultimately would take—namely, something well short of codification in the European or Benthamite sense, and a rather vague, confused something at that.<sup>37</sup> The pro-codifiers’ announced concerns were essentially pragmatic,<sup>38</sup> and shared by most of the legal fraternity—for instance, simply “keeping abreast of the law”<sup>39</sup> in a period of national change and rapid development.

To understand these concerns and their role in shaping American codification, one must try to picture the situation confronting the American bench and bar more than 150 years ago. Today’s legal research tools were either non-existent or in their infancy. Reported cases became available, but there was generally no organizing principle in their publication, other than chronological.<sup>40</sup> Locating relevant case precedent involved laboriously combing American case reports, which tended to include “the opinions handed down in all cases, however redundant, insignificant, or unique.”<sup>41</sup> In the domain of statutory law, the situation was hardly better. Most states had little or no system for organizing a growing body of statutory law in conveniently retrievable form.<sup>42</sup> Although he was from another society and era, Aristotle could have been describing the situation in the United States when he (or at least one of his translators) wrote: “in most states, most of the laws are only a promiscuous heap of legislation . . . .”<sup>43</sup> It was in this setting—widespread confusion and uncertainty regarding

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35. Comment, *supra* note 22, at 256-57.

36. C. COOK, *supra* note 30, at 84.

37. See *infra* text accompanying notes 70-87.

38. See C. COOK, *supra* note 30, at 70, 80-85.

39. *Id.* at 53.

40. *Id.* at 50-51.

41. *Id.* at 56.

42. *Id.* at 62-63.

43. ARISTOTLE, *THE POLITICS* 333 (E. Barker trans. 1948).



what the law on any particular point might be<sup>44</sup>—that the codification movement gained a foothold.

Consequently, American codification was remedial, rather than doctrinal, in its outlook. The influential pro-codification figures were pragmatic lawyers and judges, whose announced priority was cleaning up a messy legal environment.<sup>45</sup> They were not theoreticians wedded to some fixed or rigid ideas of what codification should do or be. "The codifiers *improvised* their own *concept of codification* by borrowing selectively and, with equal discrimination, by rejecting a variety of elements found in the sources available to them."<sup>46</sup> For their models, they even looked to "legal configurations not usually considered codifications," such as state constitutions and particular pieces of legislation which had been passed to consolidate and improve particular areas of the law.<sup>47</sup> In short, the American codification movement itself essentially redefined codification while espousing relatively modest reforms. The most influential pro-codifiers themselves generally<sup>48</sup> departed from the Benthamite and continental European concept of a comprehensive, pre-emptive "code" which would comprise a near-exclusive source of the "law" and supplant the common law.

None of this is to say that the codification movement could have been successful if it had been more ambitious, aggressive, and Benthamite. Codification faced powerful opposition.<sup>49</sup> A more extreme posture on the part of the pro-codifiers probably would have backfired, in much the same way that Bentham's extremism was counter-productive,<sup>50</sup> by generating even stronger and more effective opposition.

However, by offering codification as a way to remedy a then-current state of confusion and uncertainty in the law, pro-codifiers not only rendered themselves vulnerable to being co-opted by alternatives to codification but also risked reducing their cause to the level of a

44. See C. COOK, *supra* note 30, at 49-63.

45. *Id.* at 70, 80-85.

46. *Id.* at 78 (emphasis added).

47. *Id.*

48. As with any generalization, there are of course exceptions. For instance, Edward Livingston was more of a Benthamite and more successful in achieving a continental European style of codification in Louisiana. However, he also was operating with the benefit of a legal environment where continental European traditions, rather than English-bred common law, already were dominant. Morrow, *supra* note 17, at 388-90. More typical of the extreme, but less successful, pro-codifiers was New York's David Dudley Field. See, e.g., Warthen, *supra* note 10, at 150-53, and *infra*, text accompanying notes 59-64.

49. C. COOK, *supra* note 30, at 201-02.

50. See *supra* text accompanying notes 19-23.

clean-up and repair effort. By retreating from the goal of supplanting the common law, they risked limiting the role of codification to one of periodically revising and reworking already-enacted statutory law. All of those risks came to pass.

The American codification movement—to the extent that it was a “movement” at all—was co-opted and lost momentum when improved research tools became available, thus alleviating the extreme confusion and uncertainty which many had perceived in the law during the first decades of the nineteenth century. Digests and treatises proliferated after 1830,<sup>51</sup> and “[b]y their numbers and usefulness in making the law accessible, digests and treatises obviated the pressing need felt for codified law. Interest in codified law waned as the number of legal texts increased.”<sup>52</sup>

Ironically, its own success in stimulating and supporting efforts to clean up and repair defective statutory systems<sup>53</sup> also blunted the codification movement. The result was “partial codification,” an apt term used by a leading historian of American codification.<sup>54</sup> For example, one of the most extensive repair jobs culminated in the New York Revised Statutes, prior to 1830. The New York legislature gave the commissioned revisors great latitude in re-wording, re-working, and re-organizing the statutes of New York;<sup>55</sup> indeed, the New York Revised Statutes became something of a model for other states, both as to the procedures for revising statutes and for their substantive provisions.<sup>56</sup> Although the New York revisors wrought extensive changes, the revisors altered only the existing statutory law of New York. They left the common law intact.<sup>57</sup>

Other “partial codifications” set the pattern and tone for the future of codification in this country. Some states approached the model of the New York Revised Statutes, but with a less generous commission to the revisors or a less comprehensive revision.<sup>58</sup> Others engaged in “partial codification” by revamping only selected statutory subjects which were most in need of reform. New York itself, for instance, responded to the efforts of David Dudley Field by enacting

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51. C. COOK, *supra* note 30, at 203-08.

52. *Id.* at 206.

53. *Id.* at 137, 167, 178-79.

54. *Id.* at 209.

55. *Id.* at 141-53.

56. *Id.* at 168-70.

57. *Id.* at 146.

58. *Id.* at 168-69.

his Field Code of Civil Procedure in 1848<sup>59</sup> and his penal code in 1881.<sup>60</sup> New York rejected Field's other substantive codes.<sup>61</sup> (Although a few states west of the Mississippi—California, North and South Dakota, Idaho, and Montana—adopted some or all of the substantive Field codes, the state judiciaries in essence converted them into "partial codifications"<sup>62</sup> by refusing to give them pre-emptive effect relative to the common law<sup>63</sup> and sometimes by more or less ignoring them.<sup>64</sup>)

The net result was a distinctly Americanized—some might say bastardized—version of codification. Where the states accepted codification at all, the early codification movement itself fostered a pattern of "partial codification," either in the form of a "code" dealing with a particular subject area (such as the Field Code of Civil Procedure) or in the form of a more comprehensive overhauling of a state's statutory law. Pro-codifiers themselves seem to have deliberately discarded the very words, "codification" and "code," in favor of less controversial terms, still used today, such as "revision," "consolidation," and of course "Revised Statutes."<sup>65</sup>

Basically, codification in America ceased to denote a total restructuring of the legal system pre-emptive of common law and became transformed into one of the words used to describe one method of good statutory housekeeping and maintenance. This transmogrification was not necessarily a bad thing, but knowing something of why and how it occurred should be helpful in understanding some basic concepts, and confusions, at work today.

## B. Codification and Compilation Today

The heritage of codification summarized above helps to explain some of the basic features of modern American codification—and statutory law. Those who supported codification were a diverse assortment of reformers, often with moderate goals which were influenced by pragmatic considerations and which were probably adapted to meet local state conditions, local political forces, and local legislative pressures. Each state's statutory system evolved more or less independently, influenced to an indeterminable extent by a host of

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59. *Id.* at 191.

60. *Id.* at 196.

61. *Id.* at 196-97.

62. *Id.* at 198.

63. Warthen, *supra* note 10, at 152.

64. Pound, *supra* note 12, at 65-66; *see also* Morrow, *supra* note 17, at 403.

65. C. COOK, *supra* note 30, at 167.

variables, such as economic conditions, the degree and pace of industrialization, population, demographics, the composition and attitude over time of the state legislature, and the state bar. Even within a particular state there might be a rather checkered history of codifying statutes. Georgia, for example, enacted seven comprehensive codifications or recodifications between 1868 and 1933,<sup>66</sup> a rate of about one per decade, then waited until 1982 for its next codification.<sup>67</sup> Arkansas, to take another extreme, went for over a hundred years without even an attempt to do anything more than rely upon a series of digests and compilations.<sup>68</sup> Thus, any consistency among the various states' statutory systems is coincidental. Any similarities are more likely to be the product of drafters' following some available "model" patterned after another state's code or compilation<sup>69</sup> than of any overall unifying force or strategy.

In sum, there was—and remains—no real standardization of statutory systems from state to state. As discussed briefly below, this lack of standardization has resulted in: (1) confusion in terminology and concepts; (2) variations in the scope and effects of "codes" among those states where there has been codification in the sense of positive enactment of comprehensive statutory systems; and (3) some superficial resemblance between published codes and published compilations, which obscures the differences between the two.

### 1. *Confused Terminology and Concepts*

In the first place, the word "code," when used to describe current American statutory law, not only has drifted away from its continental European or Benthamite meaning,<sup>70</sup> but also is applied rather loosely to different kinds of legislative products. There are, for in-

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66. Sentell, *Codification and Consequences: The Georgian Motif*, 14 GA. L. REV. 737, 738-39 (1980).

67. GA. CODE ANN. § 1-1-1 (1982).

68. See Arnold, *Statute Revision in Arkansas*, 20 ARK. LAW. 121 (1986); Henderson, *supra* note 1, at 22. For information on the abortive "Chapters of the Digest" of 1869, an attempt at codification, see *infra* text accompanying notes 164-71.

69. See C. COOK, *supra* note 30, at 168.

70. One staunch modern pro-codifier wrote a scathing denunciation of this development, criticizing

the great majority of the American law men who glibly use the term [codification] . . . . The point cannot be made too strongly that the practice of collecting all of the related statutes in a field, perhaps even repealing some and revising others in the process, and then publishing them between the covers of the same volume and calling the result a 'code' displays utter ignorance and complete miscomprehension of the fundamental problem at hand.

Morrow, *supra* note 17, at 404.

stance, "codes" dealing with particular legal subjects: a Uniform Commercial Code, a Probate Code, a Water Code, a Criminal Code, *ad nauseam*. These "codes" may, or may not, purport to encompass completely the law on their purported subject in a particular jurisdiction. Then there are codes in the treatise-writer's sense of the entire or nearly entire body of a jurisdiction's general statutory law, arranged by subject and affirmatively enacted for the purpose of creating a comprehensive statutory system.<sup>71</sup> Unfortunately, legislatures do not always heed the textwriters by limiting their usage of the word "code" to affirmatively enacted statutory publications. A prime example is the United States Code. Some volumes or titles of this "Code" are nothing more than official compilations; others are codified in the sense that their provisions have been affirmatively enacted into positive law.<sup>72</sup> Further compounding the confusion, privately published compilations are sometimes labeled "codes."<sup>73</sup>

In the second place, and coming from the other direction, there are legislative products which are equivalent to, if not indistinguishable from, a "code" in the sense of a comprehensive enacted statutory system, but which bear a title such as "Revised Statutes."<sup>74</sup> Some precedent or pattern for this was established during the first half of the nineteenth century in New York, as noted above.<sup>75</sup> Thus, not only is the word "code" loosely used to describe various statutory products, but different terms are used to describe statutory enactments which properly could be called "codes."<sup>76</sup> Simple browsing

71. J. SUTHERLAND, *supra* note 5, at § 28.02.

72. See 1 U.S.C. § 204, and Preface at VII (1982). See generally J. SUTHERLAND, *supra* note 5, at §§ 28.02, 28.04 (discussing official codes and compilations, respectively).

73. J. SUTHERLAND, *supra* note 5, at § 28.03. One introductory work on legal research has even gone so far as to state that the words "revisions, consolidations, compilations, and codes" are terms which "have no definite meanings as applied to a compilation form." M. PRICE & H. BITNER, *supra* note 6, at 29.

74. COLO. REV. STAT. § 2-5-101 (1980 & Cum. Supp. 1987); NEB. REV. STAT. § 49-603 (1984 vol. IIIA).

75. See *supra* text accompanying notes 54-57.

76. Strictly speaking, a purist could insist that there are some differences between a statutory codification and a statutory "revision." "Revision" sometimes carries the connotation of a process which goes beyond "codification" by correcting, improving, and rewriting existing statutory text, rather than simply reorganizing and restating it. BLACK'S LAW DICTIONARY 1187 (5th ed. 1979); Choate, *The 1947 Codes of Montana*, 7 MONT. L. REV. 19, 20 (1946). However, the same BLACK'S LAW DICTIONARY, in the usual muddling manner so characteristic of this area, elsewhere defines "code" as "[a] systematic collection, compendium or *revision* of laws . . . ." BLACK'S at 233 (emphasis added).

Nevertheless, any differences between codification and revision appear related to the process of production, rather than the end product itself. "Revision" may be used to denote a more extensive revisory process of statutory repair than "codification" and may involve delib-

through the statutory materials in a law school library will disclose a random hodge-podge of terminology on the spines of statutory publications, which may—or may not—be codifications: Massachusetts General Laws Annotated; Michigan Compiled Laws Annotated; Maine Revised Statutes Annotated; Kentucky Revised Statutes; McKinney's Consolidated Laws (New York). Dipping a bit deeper into a particular jurisdiction's statutory publication, one may uncover word usage which resembles something produced by a kitchen blender. "The *compilation* of statutory laws and nonstatutory material provided for in this article shall be entitled "Colorado Revised Statutes 1973 . . . ."77 And this "compilation" of "Revised Statutes" was enacted "as the positive and statutory law of a general and permanent nature of the state of Colorado . . . ."78 Thus, in two sections of these "Revised Statutes," the publication is referred to as a "compilation," is entitled "Revised Statutes," and is enacted with the effect of a statutory codification.

If such slipshod usage never had any consequences, one could dismiss this criticism of confused terminology as the quibbling of a bemused academic. Unfortunately, more is at stake than an academic's concern with niceties of the legal vocabulary. As a matter purely of common sense, loose usage of language inevitably breeds confusion in concepts and meaning. Moreover, adverse consequences are demonstrable in the "real world." At least one state supreme court in modern times seems to have demonstrated the practical consequences of such confusion when, in the course of holding a statutory provision unconstitutional, it concluded that the entire Indiana Code of 1971 was "in reality nothing more than an *official* comprehensive compilation . . . ."79 A critic of the court's decision in that case noted, quite appropriately, the court's failure to comprehend some rather basic concepts, such as the significance of the affirmative enactment of the Indiana Code coupled with the Code's explicit (but judicially thwarted<sup>80</sup>) repeal of the source laws on which it had been based.<sup>81</sup>

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erate changes in the meaning of statutory text. But the end product is hardly distinguishable—a comprehensive body of affirmatively enacted statutory law.

In any event, when a leading legal lexicographer fails to maintain precise boundaries among crucial terms in the vocabulary of statutory enactments, there is further evidence that confusion in terminology and concept is prevalent.

77. COLO. REV. STAT. § 2-5-101(3) (1980) (emphasis added).

78. *Id.* § 2-5-121.

79. *Indiana ex rel. Percy v. Criminal Court of Marion County*, 257 Ind. 178, 184, 274 N.E.2d 519, 522 (1971).

80. The Indiana court nullified the Code's repeal of the source law. *Percy*, 257 Ind. at 184, 274 N.E.2d at 522.

While the court may not have completely trashed years of work which had been committed to the Indiana Code, reduction to the status of official compilation certainly defeated the major purposes of the Code.<sup>82</sup> Nonetheless, a nagging suspicion arises that the fault, if any, was not entirely the court's. The court entertained an amicus curiae brief from the President Pro Tem of the Indiana Senate, who was also the chairman of the State's code revision commission.<sup>83</sup> If a lengthy article describing the Indiana Code and co-authored by a leading legislative staff professional is any indication of what went into that amicus brief, the court's failure to comprehend a distinction between a codification and a compilation becomes more understandable. In a key section of that article, the authors at least twice characterize the Code as an "enacted compilation." Initially, the subheading of the section is entitled "*Why an Enacted Compilation was the Solution.*"<sup>84</sup> Then, in the last paragraph of the section there appears: "to enact this compilation into law," and "[a]fter the *compilation* had been enacted, actual revision . . . could be carried out . . ."<sup>85</sup>

The point of all this is not to criticize the Indiana court, the legislative staff, or anyone in particular. The point is that loose use of language to describe important concepts inevitably contributes to confusion about the concepts themselves. When a legislative professional co-authors an article which refers to the professional's own work-product as an "enacted compilation"—strictly speaking, a self-contradictory term<sup>86</sup>—confusion is not only pervasive but rampant. Such blurring of the differences between compilation and codification is clear evidence of both semantic and conceptual collapse. The differences between a compilation and a codification have become fuzzy enough<sup>87</sup> without further muddling things by writing about "enacted compilations."

## 2. *Variations in the Scope and Effect of Codes*

Another dominant feature of the non-standardized American statutory landscape goes beyond the problems of terminology and

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81. Dickerson, *The Sad Story of Superbill, or What Happened to the Indiana Code of 1917?*, 5 IND. LEGAL F. 250, 256-57 (1972).

82. *Id.* at 264-65.

83. *Id.* at 252.

84. Oddi & Attridge, *supra* note 2, at 7.

85. *Id.* at 10 (emphasis added).

86. See J. SUTHERLAND, *supra* note 5, at § 28.04; BLACK'S LAW DICTIONARY 234 ("codification"), 258 ("compilation") (5th ed. 1979). See generally cases cited *infra* note 113.

87. See *infra* text accompanying notes 103-110.

conceptual confusion. There is virtually no standardization regarding the scope and effect of a codification. One writer put it nicely when he said "codifications, however, come in many colors."<sup>88</sup> Considering the almost infinite range of colors, and the subjective aspects of color, the metaphor may exaggerate somewhat the variations in the scope and effect of codes from state to state. However, it is extremely difficult to generalize about the effect of a codification. Too much depends on the variables of judicial precedents and the language of the enacting legislation itself.<sup>89</sup> For instance, all provisions in a valid codification generally have the effect of law.<sup>90</sup> But what if the code contains provisions previously held unconstitutional? Answer: it depends. Of course, citation is hardly needed for the proposition that the mere reenactment, in a comprehensive code, of an act previously held violative of the first amendment (or some other substantive constitutional provision) would have no effect, other than wasted ink. However, a statute may have been invalid because it failed to meet constitutional requirements as to form or because constitutionally required procedures for its enactment had not been followed. A statute invalid on such grounds might, if included in a later enacted codification, be a valid, effective provision of the code.<sup>91</sup>

In determining the scope and effect of a comprehensive code, such as the Arkansas Code of 1987 Annotated, the most troublesome variable is the language of the statutory measure enacting the code. Again, the lack of standardization has practical consequences. The wording of the measure enacting a comprehensive code is crucial, but that wording varies from state to state.<sup>92</sup> A court in a state without a history of codification, such as Arkansas, will find only the vaguest sort of "black letter" law on the subject and will be unable to obtain much guidance from the precedents of other states because those precedents may be based on differently worded enactments.<sup>93</sup> Even if the wording from another state is similar, the context and legislative intent may be different, or the precedents of the other state may be the product of a different jurisprudence or of its own particular constitutional mandates.

Finally, a most crucial aspect of the scope and effect of a codifica-

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88. Sentell, *supra* note 66, at 737.

89. See J. SUTHERLAND, *supra* note 5, § 28.09.

90. J. SUTHERLAND, *supra* note 5, § 28.08, at 476.

91. See generally J. SUTHERLAND, *supra* note 5, § 28.08, at 476-77; 82 C.J.S. *Statutes* § 274, at 458-60 (1953).

92. J. SUTHERLAND, *supra* note 5, § 28.09, at 479.

93. See *id.*



tion—its effect on prior statutory law—is likewise confused and complicated by a lack of standardization. What a legislature encounters here is essentially a disposal problem. A comprehensive codification is to be enacted, but what is to be done with the pre-existing statutory law? The purposes behind enacting a comprehensive codification, and common sense, would indicate that a repeal of prior laws is necessary. Indeed, explicit repeals are something of a norm in codification.<sup>94</sup>

However, it is on this issue that codifiers and legislatures sometimes appear to have second thoughts. What if the codification has omitted or changed some statutory provisions? Like the family engaged in major housecleaning or preparing for a garage sale, some folks have a natural reluctance to throw away anything, on the theory that whatever is permanently discarded will be needed a week later. At a minimum, one wants to go through the drawers and boxes, lest some hidden valuables be lost. But this can be very time-consuming and, in the case of statutes, a major and expensive undertaking. The enormity of the work involved in thoroughly combing through more than a hundred years of legislation can be best appreciated by skimming a 129-page article describing in excruciating detail the preparation of the Indiana Code of 1971.<sup>95</sup>

Therefore, again, there will be considerable variation from state to state, and from codification to codification. The boldest codifications will repeal explicitly all prior statutory law which is not included in a list of limited and specific exceptions,<sup>96</sup> or will otherwise seek to enact a complete, self-contained statutory system pre-empting prior statutes.<sup>97</sup> Other codifications are less bold, and some downright confusing and contradictory. "All changes made . . . in the language . . . of any law . . . now embodied in said codes . . . are hereby legalized, approved and given validity. Nothing herein contained . . . shall affect the existence, validity, or enforcement of any act . . . omitted from, or erroneously, or inaccurately set forth in said revision."<sup>98</sup>

The net result is that determining the effect of a codification on prior law usually becomes an exercise in statutory interpretation, with all of the complexities, uncertainties, and variables involved in such

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94. *Id.*

95. Oddi & Attridge, *supra* note 2.

96. See J. SUTHERLAND, *supra* note 5, at § 28.09 (citing North Carolina General Statutes).

97. See *id.* (quoting New Jersey session laws).

98. *Id.* (quoting provisions of the Montana Revised Codes Annotated, which apparently are not contained in the current Montana Code).

an enterprise.<sup>99</sup> The judicial outcome may be unpredictable. As noted by a leading treatise, "The results are not always certain even under explicit repealers, for courts do not always obey their literal mandates."<sup>100</sup>

In any event, there are considerable variations from state to state in the language used to enact a comprehensive codification and, consequently, considerable variation from state to state in the effects of a codification. Legislatures have broad discretion in this regard, and occasionally a legislative body even dictates that prior law will control if the text of a codification is inconsistent with prior law.<sup>101</sup> As discussed later in this article, the measure which enacted the Arkansas Code of 1987 Annotated resembles this category of legislation.<sup>102</sup>

### 3. *The Narrowing of Differences Between Codes and Compilations*

A third major consequence of our American codification heritage has been a narrowing of the differences between codifications and compilations. In part, some of this narrowing is attributable to indiscriminate use of the words "code" and "compilation," as previously discussed.<sup>103</sup> Even the distinction between a "code" as affirmatively enacted legislation and a "compilation" as an un-enacted publication sometimes gets blurred.<sup>104</sup>

However, there are other reasons, stemming from our statutory heritage, for the narrowed differences between codes and compilations. When the nineteenth century American legal reformers used partial codification to remedy some of the problems created by a confused statutory environment,<sup>105</sup> codification underwent a semantic transformation and largely ceased to embody the goal of a complete, comprehensive system pre-emptive of all other law, including common law. Rather, codification was relegated to the secondary status of a tool—a means to achieve the limited, pragmatic, but worthwhile, purpose of statutory reform.

As a result, American codifications have come to serve essentially the same purpose as compilations. Both serve as methods of

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99. For a brief summary of some of the aspects of statutory interpretation, albeit from a legislative drafter's perspective, see M. MULLINS, *supra* note 4, at 30-34.

100. J. SUTHERLAND, *supra* note 5, § 28.09, at 479.

101. J. SUTHERLAND, *supra* note 5, § 28.09, at 480.

102. See *infra* text accompanying notes 132-34.

103. See *supra* text accompanying notes 70-79.

104. See *supra* text accompanying notes 83-87.

105. See *supra* text accompanying notes 53-65.

organizing and publishing statutory law in usable form,<sup>106</sup> and both serve as methods of good statutory housekeeping and maintenance. Because both serve essentially the same purposes, both will naturally have certain features in common. Organizing statutory law into usable form entails organization along subject-matter lines.<sup>107</sup> Good statutory housekeeping and maintenance entails timely revisions of text to reflect amendments and new provisions.<sup>108</sup> Consequently, the form in which both codes and compilations are published inevitably has converged, and they have come to resemble each other in their external appearance—multi-volume publications organized along subject-matter lines and supplemented by later updating volumes or by the lawyer's familiar "pocket parts" to each volume.

Thus to the casual user there may be no obvious differences between a compilation and a code. They are similar in function and form. Certainly, the title on the spine or frontpiece of the book is not controlling, and it may even be misleading, as in the case of the United States Code, parts of which are still a pure compilation.<sup>109</sup>

Moreover, the differences between a code and a compilation are seldom crucial in daily usage or practice. A good compilation is generally reliable, and few lawyers have the time or inclination to verify the language of a compilation by checking the session laws. If they did undertake such a verification, a thorough job would require consulting many volumes of session laws, because it is always possible, for instance, that the compilation has totally omitted any reference to an obscure amendment enacted decades ago. The bar, the bench, and the public rely primarily on whatever publication in usable form is available, whether compilation or code. However, there are more risks involved with reliance on a compilation, as will be discussed below.

### C. Significant Differences Between Codification and Compilation

Similarities in function and form tend to obscure some significant differences of substance between codes and compilations. Compilation by its nature merely takes the multitude of separate "acts" of the legislature, then edits, rearranges, and publishes them in usable form, but this publication is never conclusive of what the statutory law is.<sup>110</sup>

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106. J. SUTHERLAND, *supra* note 5, § 28.01, at 468.

107. *Id.*

108. M. PRICE & H. BITNER, *supra* note 6, at 29.

109. *See supra* note 72 and accompanying text.

110. J. SUTHERLAND, *supra* note 5, at § 28.04.

“The law” remains scattered in a succession of individual “acts.”

A true codification is enacted as law and puts the statutory law itself into the form of the text which is published and used.<sup>111</sup> This difference, although subtle, can be crucial over the long term. With compilation, there is inherently a kind of “gap,” which widens almost every year, between the statutory law as enacted and the published compilation relied upon in daily use. If nothing else, codification can narrow the gap between the form in which statutes are enacted and the form of their publication.

Codification has other advantages attributable to its basic differences from compilation. Once enacted, a code can simplify statutory maintenance and housekeeping. For instance, future amendments should directly amend the code, and new general laws should be enacted as new provisions of the code. This is in stark contrast to the more cumbersome process of compilation. In a compilation, amendments are made to an existing “act,” which often was originally passed decades ago and probably amended several times since. Then, the amending “act” is edited and published as part—usually a “pocket part”—of, or supplement to, the compilation.<sup>112</sup> At a minimum, the extra steps involved in compilation represent extra possibilities for omissions and errors.

Moreover, errors in the editing necessary for compilations can have serious legal consequences. Because a compilation itself is not the law, but, as often described, merely *prima facie* evidence of the law,<sup>113</sup> the session laws prevail over an erroneous compilation.<sup>114</sup> In effect, a compilation is something of a legal time bomb or booby trap. A party or lawyer relying on the text of a compilation may discover, too late, that the compilation is wrong. The odds of someone’s becoming a victim of an error or omission in compilation increase with every passing year and with every act which is edited for publication. Nor does this involve merely a matter of some individual losing or

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111. See J. SUTHERLAND, *supra* note 5, at § 28.02.

112. See generally M. MULLINS, *supra* note 4, at 79-82, 124-26.

113. See, e.g., *Coopersmith v. City and County of Denver*, 156 Colo. 469, 399 P.2d 943 (1965); *Boyd ex rel 2,463 Signatories v. Ford*, 133 Ill. App. 3d 626, 479 N.E.2d 337 (1985); *State v. Gute*, 252 Iowa 294, 106 N.W.2d 417 (1960) (although entitled “codes,” the statutory publications were compilations because not enacted into law); *City of Albuquerque v. Campbell*, 68 N.M. 75, 358 P.2d 698 (1961); *State ex rel. Murphy v. American Surety Co.*, 180 Okla. 565, 71 P.2d 745 (1937); 1 U.S.C. § 204(a) (1982).

114. See, e.g., *Stephan v. United States*, 319 U.S. 423, 426 (1943); *Royer’s Inc. v. United States*, 265 F.2d 615 (3d Cir. 1959); *Peart v. Motor Vessel Bering Explorer*, 373 F. Supp. 927 (D. Alaska 1974); *Bramblett v. Lee*, 162 Ind. App. 654, 320 N.E.2d 778 (1974); *Orton v. Adams*, 21 Utah 2d 245, 444 P.2d 62 (1968).

winning a lawsuit. The interests at stake are larger. There is always the danger that a pivotal provision published in a compilation relied on by a considerable part of the private or public sector in the state will turn out to be erroneous, causing substantial disruption to existing economic, commercial, or other relationships.

Perhaps most importantly, compilations sooner or later reach a kind of saturation point, or point of diminishing returns. There may be limits as to how long a statutory system can be credible if the "law" resides in a series of uncoordinated enactments stretching back for several generations, while those who use the law are forced to rely on a published compilation which does not even purport to be "the law." To say that "the law" is in one source, but you really must rely on another source, which is not the law, comes out sounding a bit weird. It is like being given a road map and being told that this map is just a composite of three or four old maps. Some of those roads may not be there anymore, and there may be some new roads that are not on it. After a century or so of compilations prepared by individuals of differing competence and reliability, the inevitable errors and omissions accumulate. Flaws in organization are compounded with the passage of time, or parts of the original organizational scheme of a compilation become obsolete. A day may come, as one commentator described the Arkansas situation, when "the state's statutory law is in chaos."<sup>115</sup>

At such a stage, there are two basic alternatives—an improved updated compilation or a codification. Arkansas opted for codification, after a long history of compilations and digests.

The remainder of this article will examine several aspects of, and issues related to, that codification. To begin with, some introductory observations will note a few of the ways in which the Arkansas Code of 1987 Annotated (hereinafter, Arkansas Code, or Code) shares the general American heritage of codification discussed in the preceding portions of this article. Next, the special problems involved in a transition from almost 150 years of compilations to a modern codification will be emphasized. Those problems of transition will provide, directly or indirectly, something of a recurring theme underlying much of what follows, although a few pages will be devoted to a slight detour discussing the validity of the Code. Finally, the concluding part of this article stresses the need for a continuing commitment to maintaining and updating the Code, so that the problems which led to its preparation and enactment do not recur.

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115. Arnold, *supra* note 68, at 121.

IV. FROM COMPILATIONS TO CODIFICATION: SOME  
OBSERVATIONS ON THE ARKANSAS CODE  
OF 1987 ANNOTATED

A. Introductory Observations

After nearly 150 years of relying on digests and compilations to provide a usable publication of the state's statutory law,<sup>116</sup> Arkansas was long overdue for a major overhaul. Mr. Henderson's article summarizes the relevant history and mentions some of the problems which had developed with the Arkansas Statutes Annotated.<sup>117</sup> He also indicates that the codification process uncovered more than 200 acts or parts of acts which had been omitted from compilations since 1907.<sup>118</sup> This fact itself speaks several volumes about the condition of Arkansas statutory law on the eve of codification.

Nor is Mr. Henderson alone in discovering omissions from prior compilations. As recently as 1987, the Arkansas Court of Appeals called attention to some eleven words which had been omitted from one section of the compilation of an important workers' compensation measure originally enacted in 1939.<sup>119</sup> The court stated: "It appears likely that in compilation the underlined language was inadvertently omitted. Although the meaning of the statute as it is presently worded is clear enough to be applied, the inadvertent omission could cause confusion."<sup>120</sup> This should dispel any notion that compilation errors and omissions in Arkansas were limited to obscure or insignificant acts of no importance to the public or the legal system.

The Arkansas Code of 1987 Annotated therefore falls squarely within the pattern established by our American codification heritage. Typically, the Arkansas Code was developed in response to the need for improved and more accurate publication of the state's statutes.<sup>121</sup>

The Arkansas Code also shares the American codification heritage in other respects. To a minor degree, the general heritage of confusing terminology<sup>122</sup> is reflected in a few provisions of the authorizing and implementing acts, and in one provision of the Code itself. Act 641 of 1983,<sup>123</sup> describing the powers of the Statute Revi-

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116. See Henderson, *supra* note 1, at 22. As Mr. Henderson indicates, the term "digest" denotes, for practical purposes, a publication equivalent to a compilation. *Id.*

117. *Id.* at 23-24.

118. *Id.* at 28-29.

119. *Washington County v. Ford*, 21 Ark. App. 206, 730 S.W.2d 515 (1987).

120. *Id.* at 209, 730 S.W.2d at 517.

121. See *supra* text accompanying notes 42-44.

122. See *supra* text accompanying notes 70-79.

123. Act of Mar. 22, 1983, No. 641, 1983 Ark. Acts 1394.

sion Commission, refers to "the publication of compilations, recombinations, revisions, codifications or recodifications."<sup>124</sup> Act 267 of 1987,<sup>125</sup> the measure which enacted the Code, refers to "compilation, revision, or both" in describing laws enacted prior to the Code.<sup>126</sup> The Code itself states a legislative intent to create "a recodification, revision, modernization, and reenactment."<sup>127</sup> Because the terminology for identifying different varieties of statutory products is confused and far from standardized,<sup>128</sup> there may be contexts, such as those above, where as a matter of self-defense in draftsmanship several terms are used in descriptions or authorizations to help reduce the possibilities of a limiting or narrow judicial interpretation.

Quite commendably, however, the Code's drafters keep such word-strings to a minimum. Overall, the Code's internal references to itself generally use the word "code" or "codification,"<sup>129</sup> in contrast to the muddled drafting in another state's "Revised Statutes" described earlier in this article.<sup>130</sup>

To a more significant extent, the Arkansas Code and its implementing act reflect certain aspects of our American codification heritage in their method of prescribing the effects of the new Code on prior statutory law.<sup>131</sup> Most interestingly, the measure which enacted the Code, Act 267 of 1987,<sup>132</sup> puts Arkansas among those jurisdictions which deal with discrepancies between a new codification and prior statutory law by resolving discrepancies in favor of prior statutory law.<sup>133</sup> Act 267 accomplishes this by exempting from repeal any prior statutory law which was improperly omitted or changed during—at a minimum—the process of codification.<sup>134</sup> However, as discussed later,<sup>135</sup> this exemption from repeal is so broadly phrased that

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124. *Id.* § 2, at 1396.

125. Act of Mar. 17, 1987, No. 267, 1987 Ark. Acts 734 (Adv. Leg. Ser.).

126. *Id.* § 4(b)(2), at 736 (codified in ARK. CODE ANN. § 1-2-103 (1987)).

127. ARK. CODE ANN. § 1-2-101(a) (1987).

128. *See supra* text accompanying notes 70-79.

129. *E.g.*, ARK. CODE ANN. §§ 1-2-102 to -118 (1987).

130. *See supra* text accompanying notes 77-78.

131. *See supra* text accompanying notes 89-100. It also should be noted here that the Code contains provisions dealing with the effect of the Code on various particular categories of prior legislation, such as validating and curative acts, ARK. CODE ANN. § 1-2-104 (1987), and acts dealing with appropriations and compensation, ARK. CODE ANN. § 1-2-105 (1987).

132. Act of Mar. 17, 1987, No. 267, 1987 Ark. Acts 734 (Adv. Leg. Ser.) (reprinted in 1 ARK. CODE ANN. xix-xxi (1987)).

133. *See* J. SUTHERLAND, *supra* note 5, § 28.09, at 480.

134. Act of Mar. 17, 1987, No. 267, § 4(b), (c), 1987 Ark. Acts 734, 736 (Adv. Leg. Ser.) (codified in ARK. CODE ANN. § 1-2-103(a), (b) (1987)).

135. *Infra* text accompanying notes 184-233.

its effects may involve some of the more immediate and confusing issues which could arise under the Code.

## B. Special Aspects of Transition in Arkansas

Arkansas, while not unique in the length of time it had relied on compilations,<sup>136</sup> does have some special problems which flow from enacting a codification after almost 150 years of depending on compilations to provide a usable publication of the state's statutes. The general problems of making the transition from compilation to codification are intensified in a state which has become accustomed to an entrenched series of compilations. For such a state, codification represents an abrupt break from the past, and there is no history or tradition of codification in the state to provide a reassuring cushion of familiarity. Nor are the problems of transition under such circumstances limited to matters of psychological response to the unfamiliar. A state which has no real history of codification has no experience in preparing a true codification. Likewise, there will be only sparse judicial precedents in that state to provide any relevant guidance to lawmakers and drafters.<sup>137</sup> Most crucially, a state in Arkansas' position cannot expect to catch up with almost 150 years of acts and compilations and achieve a perfect codification overnight, or even after several years of careful preparatory work. Codifying 150 years of statutory production is a massive undertaking. The editorial task alone is formidable. Generations of uncoordinated enactments and obsolete terminology must be editorially molded into a coherent, comprehensive whole.<sup>138</sup> Apart from formidable editorial tasks, the codifiers are likely to encounter substantial gaps between the session laws and the law as published in several generations of compilations. Accordingly, a state undertaking its first effective codification in almost 150 years almost inevitably will produce a code which is subject to criticisms and challenges. Before pouncing on particular perceived shortcomings, however, would-be critics should be reminded of the sign above the piano in the old Western saloon: "Don't shoot the piano player. He's doing the best he can." Some discords in the state's first modern codification are foreseeable.

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136. See, e.g., Oddi & Attridge, *supra* note 2; Phillips, *Tennessee Code Annotated*, 23 TENN. L. REV. 268 (1954).

137. See *infra* text accompanying notes 155-56.

138. See Henderson, *supra* note 1, at 36.



### C. The Enacting Legislation

Act 267 of 1987,<sup>139</sup> the measure which enacted the Arkansas Code, is conveniently reprinted in the Code itself.<sup>140</sup> A brief summary of this Act may help in understanding a few of the complexities and problems encountered, and some of the decisions made, in the process of converting from a compilation to a codification.

First, there is the title of the Act, which explicitly states that this is "AN ACT TO ADOPT THE ARKANSAS CODE OF 1987 AS THE STATUTE LAW OF THE STATE OF ARKANSAS . . ." <sup>141</sup> Then a fairly long preamble follows. Legalistically, neither a title nor a preamble is part of an act, but both are helpful and can be considered in interpreting it.<sup>142</sup> The preamble to Act 267 essentially recites some of the historical background of the Code, noting, among other things: (1) that the Arkansas Statutes Annotated "have been in use for forty years, twenty-four years longer than any previous digest of Arkansas statutes;" (2) that the General Assembly by Act 641 of 1983 had authorized the preparation of a code, "but *without changing the substance or meaning of any provision of the statutes . . .*;" and (3) that the Code has been prepared for submission to the General Assembly.<sup>143</sup> Section 1 of Act 267 disposes of the easiest part of the legislative task by affirmatively enacting the Code, which was "attached to . . . and expressly made a part of"<sup>144</sup> Act 267 itself. The legislature also specified an effective date of midnight, December 31, 1987, in both section 1 and section 2.

The major problems of dealing with various contingencies relating to transition begin at section 3, which involves a contingency that could arise in any codification—the effect of the codification on other acts passed during the same session at which the Code is enacted. This presents a kind of chicken-and-egg situation. Because a codification ordinarily will have repealing effect on the statutory laws which it replaces,<sup>145</sup> and because the Arkansas Code would not take effect until 1988, acts passed during the same session but before the Code's effective date could have been in something of a conceptual twilight

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139. Act of Mar. 17, 1987, No. 267, 1987 Ark. Acts 734 (Adv. Leg. Ser.).

140. 1 ARK. CODE ANN. xix (1987).

141. *Id.*

142. See MULLINS, *supra* note 4, at 86.

143. Act of Mar. 17, 1987, No. 267, Preamble, 1987 Ark. Acts 734 (Adv. Leg. Ser.) (reprinted in 1 ARK. CODE ANN. xix (1987) (emphasis added)).

144. Act of Mar. 17, 1987, No. 267, § 1, 1987 Ark. Acts 734, 735 (Adv. Leg. Ser.).

145. Act of Mar. 17, 1987, No. 267, § 4(b), 1987 Ark. Acts 734, 736 (Adv. Leg. Ser.). See J. SUTHERLAND, *supra* note 5, § 28.08, at 477.

zone. Those acts were not contained in the measure enacting the Code itself, and most of them already would have taken effect before the Code's 1988 effective date. How could they be made part of the Code? Does the Code's repealing effect apply to those acts which became law prior to the effective date of the Code? Without some explicit statutory provision, their status might be unclear or arguable.

Of course, there are a number of possible strategies for handling the general problem of other legislation passed during the same session that a code is enacted. One possibility might be to avoid the problem entirely by enacting the code after a substantial recess or during a special session, so that the measures passed during the regular session could be included physically in the code. Or, the codification bill might be the very first measure enacted at the start of the session, with no delayed effective date, and with all other measures drafted that session as part of the new code.<sup>146</sup> In other words, provisions such as section 3 of Act 267 must be tailored to conform with the timing and strategy for the enactment of the codification itself. This timing and strategy may depend in turn upon such factors as state constitutional limits on the legislature<sup>147</sup> and political considerations. So, there is no simple, neat, standardized way to draft such a provision. Because the legislature enacted the Code during the regular session, section 3 of Act 267 provided both for insulation against the repealing effect of the Code and for the later incorporation into the Code of other legislation passed during the regular session.

Section 4(a) involves another problem of fitting the Code into the existing legal system. This provision deals with the specialized issue of rules relating to judicial procedures.<sup>148</sup>

With section 4(b) of Act 267, however, the problems become more acute and the issues more delicate. What is to be done with 150 years of prior statutory law? Section 4(b) begins with a broad repeal of all statutes of a general and permanent nature<sup>149</sup> in effect on December 31, 1987, then proceeds to make exceptions. The first exception is fairly routine, a provision exempting from repeal anything which is expressly continued by specific provisions of the Code. This

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146. See Oddi & Attridge, *supra* note 2, at 96-98.

147. See, e.g., *Wells v. Riviere*, 269 Ark. 156, 599 S.W.2d 375 (1980).

148. Other saving provisions and provisions dealing with various contingencies are also contained in the Code itself. See ARK. CODE ANN. §§ 1-2-104 to -112 (1987).

149. The "general and permanent nature" language is something of a term of art designed to exclude such measures as appropriation acts and the scattering of old special and local acts which are still in effect. For a general discussion of special and local acts in Arkansas, see MULLINS, *supra* note 4, at 61-66.

should assure that any Code language preserving particular categories of prior enactments from repeal<sup>150</sup> will override the more general repealing language of section 4(b).

The other two exceptions from repeal in section 4(b) are more complex in language and concept. The repealing effect of Act 267 and the Code does not extend to prior statutory provisions which have been:

(2) Omitted improperly or erroneously as a consequence of compilation, revision, or both, of the laws enacted prior to the Code, including without limitation any omissions that may have occurred during the compilation [,] revision, or both, of the laws comprising the Code; or

(3) Omitted, changed, or modified by the Arkansas Statute Revision Commission, or its predecessors, in a manner not authorized by the laws or the constitutions of Arkansas in effect at the time of the omission, change, or modification.

(c) In the event one of the exceptions in subsection (b) should be applicable, the law as it existed on December 31, 1987, shall continue to be valid, effective, and controlling.<sup>151</sup>

As described by Mr. Henderson, these provisions are a safeguard against unintentional changes which might occur in the substance or meaning of prior law as a consequence of the editorial phase of the codification process, and an effort to prevent editorial changes from having "any legal effect."<sup>152</sup> However, section 4(b) literally could apply to any enactments which have ever been improperly or erroneously omitted—or changed without authority—as a consequence of any prior compilation in the history of Arkansas. A collateral effect of this provision might be, if interpreted too literally, the preservation of an inchoate body of non-code statutory law which prevents the Arkansas Code from being a self-contained, totally comprehensive, and authoritative codification.<sup>153</sup>

The remaining provisions of Act 267 deal with various technical and housekeeping matters. For instance, section 6 provides for correction of typographical errors and kindred clerical mistakes in the Code before actual publication in final form.

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150. See ARK. CODE ANN. § 1-2-104, -105.

151. Act of Mar. 17, 1987, No. 267, § 4(b), (c), 1987 Ark. Acts 734, 736 (Adv. Leg. Ser.) (reprinted in 1 ARK. CODE ANN. xx-xxi (1987) and codified at ARK. CODE ANN. § 1-2-103 (1987) (with comma inserted)).

152. Henderson, *supra* note 1, at 43-44.

153. See *infra* text at 321.

## D. The Validity of the Arkansas Code

### 1. *Validity in General*

The most basic issue concerning the Arkansas Code is its constitutional validity as an exercise of legislative power. Apart from the first collection of statutes enacted after statehood (the 1838 Revised Statutes<sup>154</sup>) and the largely aborted "Chapters of the Digest,"<sup>155</sup> nothing resembling a codification along the lines of the Arkansas Code has ever been enacted in the history of this state. Predictably, Arkansas Supreme Court precedents relating to the validity of a codification are virtually nonexistent. In fact, the only colorably relevant case, *Vinsant v. Knox*,<sup>156</sup> turns out to have very little bearing on the validity of the Arkansas Code.<sup>157</sup>

The basic validity of the Arkansas Code therefore should turn upon general principles and upon any limitations imposed on the General Assembly by the Arkansas Constitution. As far as general principles are concerned (to the extent that there are hornbook principles in an area of the law so dependent upon the variables of particular legislative language used in particular enactments), those principles indicate that the Code was validly enacted by Act 267 of 1987. The power to codify is inherent in a legislature.<sup>158</sup> Likewise, the power to enact provisions such as section 4(b) of Act 267, specifying the effect of a codification on prior law, seems well-established.<sup>159</sup> As far as state constitutional requirements are concerned, Act 267 on its face enacts the Code itself as part of Act 267, which has an enacting clause and was introduced in the form of a bill.<sup>160</sup> Unless there is some latent defect, such as a failure of the Journals to record the ayes and nays,<sup>161</sup> the Code itself seems to be unimpeachably valid.

### 2. *Two Specters: Vinsant and the Indiana Code of 1971*

At this juncture, however, it is advisable to make a slight detour related to the validity of the Code. The first leg of this detour involves the Arkansas case *Vinsant v. Knox*,<sup>162</sup> and the second involves the demise of the Indiana Code of 1971.

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154. Arnold, *supra* note 68, at 121; Henderson, *supra* note 1, at 21-22.

155. Henderson, *supra* note 1, at 22-23.

156. 27 Ark. 266 (1871).

157. See *infra* text accompanying notes 164-79.

158. J. SUTHERLAND, *supra* note 5, at § 28.05.

159. *Id.* at § 28.09.

160. See ARK. CONST. art. V, §§ 19, 21.

161. *E.g.*, Niven v. Road Improvement Dist. No. 14, 132 Ark. 240, 200 S.W. 997 (1918).

162. 27 Ark. 266 (1871).

*Vinsant* appears to be the only Arkansas Supreme Court case dealing with an attempt to enact a codification, or at least the equivalent of a codification. Some question regarding *Vinsant's* possible effect on the validity of the Arkansas Code arises because *Vinsant* sometimes is cited to support the contention that a code may be invalid if the drafters who prepare the codification exceed their authority by adding new laws or omitting laws which had not been repealed.<sup>163</sup> *Vinsant* does not support such a contention. In order to dispel any lingering doubts about the effect of this case on the Arkansas Code, a brief discussion of *Vinsant* is appropriate.

*Vinsant* was a post-Civil War case involving a claim against an estate.<sup>164</sup> After addressing the interesting but (for our purposes) irrelevant issue of the validity of governmental actions taken while Arkansas had been in a state of secession,<sup>165</sup> the court confronted the issue of a direct and definite conflict between the statutory law as reflected in Gould's Digest and the more recent "Chapters of the Digest," purportedly enacted in 1869.<sup>166</sup> If validly enacted, the Chapters of the Digest would control the outcome of the case.<sup>167</sup> The Chapters of the Digest had been prepared, under the authority of the state constitution then in force, by individuals appointed by the Constitutional Convention itself; the appointees were to be individuals who were "learned in the law, [and] whose duty it shall be, to revise and rearrange the statute laws of this State . . . ."<sup>168</sup> The court gave a narrowing interpretation to "revise" and concluded that the appointees had exceeded their authority to "revise" because the Chapters of the Digest contained some entirely new laws.<sup>169</sup>

However, *Vinsant* did not invalidate the Chapters of the Digest on grounds that the revisors exceeded their authority. The only consequence of exceeding their authority was that the constitutional authority for revision could not serve to validate the Chapters of the Digest. The point is somewhat subtle, but simple. In other words, the Chapters of the Digest could not be held validly enacted on the basis of the constitutional provision authorizing a statutory revision, because they went beyond a mere "revision."<sup>170</sup> Instead, their validity

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163. J. SUTHERLAND, *supra* note 5, at § 28.05.

164. 27 Ark. at 267-69.

165. *Id.* at 269-71.

166. *Id.* at 271.

167. *Id.*

168. *Id.* at 271-72 (quoting ARK. CONST. of 1868, art. XV, § 11) (emphasis added).

169. *Id.* at 272-76.

170. *Id.* at 276-77.

would depend on whether they had been properly enacted. "If valid, [the Chapters of the Digest] must derive their validity from having been legally enacted by the General Assembly, as other original statutes."<sup>171</sup> *Vinsant* in no way supports any contention that a properly enacted codification will be invalid if the drafters exceed their authority by making unauthorized additions or changes to, or omissions from, prior statutory law.

Indeed, *Vinsant* continues for a goodly number of pages after addressing the effect of the revisors' exceeding their authority. Under the State constitution then in force, there was a "single subject" requirement for legislation: "no act shall embrace more than one subject, which shall be embraced in its title."<sup>172</sup> Consequently, "the work of the revisors . . . in order to be valid as laws, should have been regularly and by titles separately enacted, by the General Assembly, as original statute laws."<sup>173</sup> Still, this "single subject" requirement did not prove fatal to the Chapters of the Digest. The legislature had made some colorable effort to comply with this constitutional requirement by attempting to enact the Chapters separately, and substantial compliance was found to be sufficient.<sup>174</sup> However, the *Vinsant* court continued measuring the Chapters of the Digest against several other constitutional provisions,<sup>175</sup> until it found flaws which invalidated most of them.

One fatal flaw for many, if not most, of the Chapters of the Digest was their failure to have a constitutionally required "enacting clause." The state constitution at that time provided for an enacting clause: "the style of the laws of the State shall be, 'Be it enacted by the General Assembly of the State of Arkansas.'"<sup>176</sup> The *Vinsant* court concluded that an enacting clause was mandatory, and in strong dicta it stated that all Chapters of the Digest which lacked an enacting clause would be void. Only a handful of the Chapters of the Digest had the required enacting clause.<sup>177</sup>

*Vinsant* is relevant to the validity of the 1987 Arkansas Code only in the limited sense that *Vinsant* embodies the hornbook princi-

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171. *Id.* at 277.

172. *Id.* at 276 (quoting ARK. CONST. of 1868, art. V, § 22).

173. *Id.*

174. *Id.* at 276-77, 281-82.

175. *Id.* at 280-82.

176. *Id.* at 282 (quoting ARK. CONST. of 1868, art. V, § 27).

177. *Id.* at 282-86. The opinion also indicates that several of the Chapters of the Digest also were fatally flawed because there was no constitutionally required Journal entry showing the ayes and nays on final passage. *Id.* at 279-280.

ple that a codification can have the force of law only if it is enacted in compliance with constitutionally mandated requirements for passage of legislation generally.<sup>178</sup> *Vinsant* itself did not invalidate the Chapters of the Digest because of changes, omissions, or additions made by the revisors, so *Vinsant* is irrelevant to any challenges which might be based on purportedly unauthorized changes made in prior law by the 1987 Code. *Vinsant's* discussion of separate enactment of the various Chapters of the Digest likewise is irrelevant to the Code because, under our present Arkansas Constitution, there is no "single subject" requirement for general legislation.<sup>179</sup> Unlike most of the Chapters of the Digest, Act 267 has an enacting clause. *Vinsant* therefore seems marginally relevant, at best, to the validity of the Arkansas Code.

The second leg of the present detour involves the Indiana Code of 1971. However, the fate of the Indiana Code of 1971<sup>180</sup> does not provide much ammunition for challenges to the validity of the Arkansas Code. The Indiana Supreme Court decision demoting the Indiana Code to the status of an official compilation is irrelevant, because the decision hinged solely on that state's constitutional "single subject" rule.<sup>181</sup> Again, Arkansas has no such constitutional provision applicable to general legislation.<sup>182</sup>

Neither *Vinsant* nor the fate of the Indiana Code seem to jeopardize the validity of the Arkansas Code. The Indiana case is irrelevant. *Vinsant*, correctly read, actually supports the Code, so long as the General Assembly followed constitutionally required procedures for its enactment.

#### E. The Effect of the Arkansas Code on Prior Statutory Law

One could write a great deal about the possible effects of the Code. Any time that a major statutory overhaul occurs, there will be an abundance of issues—foreseen, unforeseen, and unforeseeable. However, this article will confine itself to considering the possible effects of section 4(b) of Act 267.

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178. See J. SUTHERLAND, *supra* note 5, at § 28.07.

179. *Ewing v. McGehee*, 169 Ark. 448, 453, 275 S.W. 766, 768 (1925). There is, however, a constitutional provision relating to a "single subject" requirement for special appropriation measures, which obviously is irrelevant here. See ARK. CONST. art. V, § 30.

180. See *supra* text accompanying notes 79-83.

181. *State ex rel. Percy v. Criminal Court of Marion County*, 257 Ind. 178, 274 N.E.2d 519 (1971).

182. See *supra* text accompanying note 179.

1. *Section 4(b) of Act 267*

As mentioned earlier, this provision opens by declaring “[a]ll acts, codes, and statutes, and all parts of them and all amendments to them of a general and permanent nature . . . repealed *unless . . .*”<sup>183</sup> Two of the clauses which follow the “unless” may raise some interesting issues of statutory construction and therefore bear repeating:

unless:

. . . .

(2) Omitted improperly or erroneously as a consequence of compilation, revision, or both, of the laws enacted prior to the Code, including without limitation any omissions that may have occurred during the compilation [,] revision, or both, of the laws comprising this Code; or

(3) Omitted, changed, or modified by the Arkansas Statute Revision Commission, or its predecessors, in a manner not authorized by the laws or the constitutions of Arkansas in effect at the time of the omission, change, or modification.<sup>184</sup>

If one of these exceptions occurs, the law prior to December 31, 1987, i.e., prior to the effective date of the Code, will be “valid, effective, and controlling.”<sup>185</sup>

At first blush, and if considered without any knowledge or appreciation of the problems involved with a transition from compilation to codification, section 4(b) might appear to be odd, inconsistent with the purposes of codification, and inconsistent with the rest of the Act. To a certain extent, it may be all of the foregoing. Literally, section 4(b) may have created an anomalous situation. The Code is enacted affirmatively into law by the first section of Act 267, but, as a consequence of section 4(b), any provision of past statutory law preserved by section 4(b) trumps the Code.

On its face, section 4(b) seems to be a classic example of trying to “keep your cake and eat it too.” Everything is repealed except for those provisions of prior law which should not be repealed.

A casual reader might react by concluding that the legislature cannot have it both ways. The Code either should repeal all general and permanent statutory measures which are not in the Code, or it should identify with greater precision those prior statutes which are to

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183. Act of Mar. 17, 1987, No. 267, § 4(b), 1987 Ark. Acts 734, 736 (Adv. Leg. Ser.) (reprinted in 1 ARK. CODE ANN. xix, xx-xxi and codified at ARK. CODE ANN. § 1-2-103 (1987) (emphasis added)).

184. *Id.*

185. *Id.*, § 4(c) (codified at ARK. CODE ANN. § 1-2-103(b) (1987)).



be insulated from repeal by section 4(b). After all, one purpose of statutory codification should be to clarify the law. Section 4(b) detracts from this purpose by at least appearing literally to exempt from repeal an indeterminate assortment of prior laws and parts of laws which have only a vague, dual common denominator: their improper omission as a consequence of prior compilation or revision, or their unauthorized omission or change by predecessors of the Statute Revision Commission, during the entire statutory history of Arkansas. If this is a correct reading of section 4(b), then the scope of the statutory exemption from repeal wrought by section 4(b) is hardly precise.

Foreseeably, the broad literal scope of these exemptions from repeal will send astute legal counsel scurrying to dredge up acts and statutory provisions from the past which will be offered as "the law" under sections 4(b) and 4(c) because at some point in Arkansas' statutory history they were omitted from, or changed in, a compilation. Even if section 4(b) does not spawn excessive litigation of borderline merit, some testing of its outer limits is quite predictable.

However, uninformed criticism of section 4(b) could easily descend into second-guessing and armchair quarterbacking. Perspective is necessary for a balanced view of section 4(b) and its effects. In perspective, and in the larger scheme of things, section 4(b) is far from being unprecedented, unique, or unjustified.

To begin with, a legislature has the power to provide for what happens if a codification omits or changes the language of prior statutory law.<sup>186</sup> Section 4(b) thus falls within a broader category of provisions common in codifications, but far from standardized in scope and articulation. As a leading treatise puts it: "There is considerable variety among statutory provisions dealing with this question. *The effect of any code to which such a provision applies can be ascertained only by examining the wording of the pertinent provision.*"<sup>187</sup> Moreover, legislatures sometimes give

controlling effect to the text of the prior law . . . . With respect to the United States Code, *for example*, an act of Congress provides that 'in case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.'<sup>188</sup>

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186. See J. SUTHERLAND, *supra* note 5, at § 28.09.

187. *Id.* at 479 (emphasis added).

188. *Id.* at 480 (citing at 481, n.8, "Act of July 30, 1926, chap 712, 1 U.S.C. p. lxiii.") (emphasis added).

Arguably, the treatise-writer quoted above chose a poor example, because the statutory provision he cites did not pertain originally to a true codification. Rather, the provision was part of the measure promulgating the first publication of the United States Code,<sup>189</sup> which at that time was entirely a compilation and only *prima facie* evidence of the law.<sup>190</sup> The present effect of the quoted provision on those titles of the U.S. Code which subsequently have been enacted into positive law could make for an interesting academic exercise, but one which would be outside the scope of this article.

However, even for those titles of the U.S. Code which have been enacted into positive law, Congress has not explicitly or unambiguously stated that all prior statutory law is categorically repealed: “[W]henver titles of such Code shall have been enacted into positive law the text thereof shall be *legal evidence* of the laws *therein contained* . . . .”<sup>191</sup> The extent to which the term “legal evidence” operates to preempt prior law in case of inconsistency between enacted code and prior law is certainly not self-explanatory. Indeed, the Statutes at Large (the term used to denominate the federal session laws) have the same status—“legal evidence of laws”<sup>192</sup>—as the positively enacted titles of the U.S. Code.

Insofar as can be gathered by examining a few of the Congressional measures enacting particular titles of the U.S. Code into positive law, Congress seems inclined against broad repealing language. Rather, the pattern seems to be one of including a detailed list of particular prior acts and statutes which are repealed explicitly.<sup>193</sup> The measure enacting title 1 of the U.S. Code contains an interesting variation of this theme: “The sections or parts thereof of the Statutes at Large or the Revised Statutes covering provisions codified in this Act are hereby repealed *insofar as such provisions appeared in title 1, United States Code, 1940 edition, as shown by the appended table* . . . .”<sup>194</sup>

Fortunately, this is neither the time nor the article to attempt a definitive explication addressing the intricacies of U.S. Code draftsmanship. Sufficient to say, Arkansas certainly is not alone in drafting,

189. Act of June 30, 1926, ch. 712, 44 Stat. 1 (1926) (reprinted in 1 U.S.C. LXXIX (1982)).

190. *Id.*

191. 1 U.S.C. § 204(a) (1982) (emphasis added).

192. 1 U.S.C. § 112 (1982).

193. *See, e.g.*, Act of Sept. 2, 1958, Pub. L. No. 85-857, § 14, 72 Stat. 1105, 1268-74 (1958); Act of June 25, 1948, ch. 645, § 21, 62 Stat. 683, 862-68 (1948).

194. Act of July 30, 1947, ch. 388, Pub. L. No. 278, § 2, 61 Stat. 633, 640 (emphasis added).

with something less than crystal clarity, provisions dealing with the relationship between a codification and prior statutory law.

Even more directly in point, sections 4(b) and (c) have a very close counterpart in the current Delaware Code.

All codes . . . and all other statutes, and parts thereof, of a general and permanent nature in effect on December 31, 1974, are repealed unless . . . (2) *omitted improperly or erroneously as a consequence of compilation, revision, or both, of laws enacted subsequent to the enactment of the Code [of 1953], including, without limitation, any such omissions that may have occurred during the compilation, revision, or both, of the laws comprising this Code, or* (3) *omitted, changed or modified by the Revisors, or their predecessors, in a manner not authorized by § 211 of this title. In the event 1 [sic] of the above exceptions should be applicable, the law as it existed prior to May 13, 1975, shall continue to be valid, effective and controlling.*<sup>195</sup>

There are some differences from section 4(b), of course. For instance, the Delaware exemption from repeal cannot be read as stretching back into the nineteenth century. (In Delaware, there was an earlier codification in 1953 which had been held to completely repeal most prior statutory law<sup>196</sup> under a very different and more absolute repealing provision.<sup>197</sup>) However, much of the current Delaware provision's operative language is almost identical to that of sections 4(b) and (c). Arkansas, therefore, is not totally unique or unprecedented in its approach to dealing with discrepancies between the text of prior law and the text of a codification which makes unauthorized changes or omissions from prior law.

Nor is section 4(b) completely unjustified in its approach when the choices confronting the General Assembly are carefully considered in proper context.

To begin with, even if sections 4(b) and (c) mean that errors, omissions, and changes as a consequence of any compilations, during the entire history of Arkansas statehood, may affect or nullify provisions contained in the Code today, it still must be recalled that the Arkansas codifiers were dealing with 150 years of compilations and enactments. As Mr. Henderson informs us, the research and editorial process of preparing the Code disclosed some 200 omissions of acts or parts of acts from compilations since 1907.<sup>198</sup> This factor alone is

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195. DEL. CODE ANN. tit. 1, § 103 (1985) (emphasis added).

196. *Monacelli v. Grimes*, 48 Del. 122, 99 A.2d 255 (1953).

197. See *infra* text accompanying note 203.

198. Henderson, *supra* note 1, at 28-29.

cause for genuine concern and reflects the problems of enacting a codification after more than a century of compilations. Mr. Henderson's article also describes the extensive editorial changes and revisions which were made in the present codification,<sup>199</sup> and it is reasonable to assume that past compilers and digesters, subject to less supervision, might have taken substantial liberties with text in the name of editorial license.

In brief, the transition to a codification after almost 150 years of compilations required a choice in some form between: (1) preserving still-valid but uncompiled or improperly changed statutory provisions which the codification process still might not have uncovered,<sup>200</sup> and (2) a codification which preempted all such provisions. The General Assembly in effect already had given a rather firm mandate governing this choice. The General Assembly only authorized the Statute Revision Commission to make changes "for the purpose of orderly and logical codification of acts, and not [to make] any changes in the meaning or substance of any portion of the Statutes of Arkansas or *any other act*."<sup>201</sup> A repeal certainly qualifies as a change to prior statutory law, so the repeal of otherwise-valid statutory law omitted from, or changed by, past or present compilations would have conflicted with this purpose.

Moreover, it is difficult under the circumstances to conceive of some compromise position between: (1) saving from repeal prior laws which had been improperly or erroneously omitted from the Code (or changed), and (2) repealing such laws. One hundred fifty years of acts with no intervening effective codification represent a continuum of legislation which might not be susceptible, for instance, to an arbitrary cut-off date, such as "all laws enacted after 1907 which have been improperly or erroneously omitted . . . ."

Although the bolder approach of a more complete and unqualified repeal of prior laws not contained in the Code would have had its advantages, this approach also has its disadvantages and complications. The experience of one state which opted for the bolder course of a more absolute repeal of anything not specifically preserved in or

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199. *Id.* at 27-37.

200. As Mr. Henderson's article indicates, those provisions of prior law which were discovered to have been omitted were included in the Code during the codification process. Henderson, *supra* note 1, at 28-29. However, discovery of those omissions could well have generated concern that there remained yet-undiscovered omissions and changes.

201. Act of Mar. 22, 1983, No. 641, § 2, 1983 Ark. Acts 1394, 1400 (emphasis added). See also Act of Mar. 17, 1987, No. 267, Preamble, 1987 Ark. Acts 734 (reprinted in 1 ARK. CODE ANN. xix (1987)).

by its code might be instructive. Interestingly enough, Delaware provides the example. Prior to its current Code, which has a repealer provision similar to section 4(b),<sup>202</sup> Delaware had enacted a codification in 1953 which contained the following language:

The following laws, unless expressly continued by specific provisions of this Code, are hereby repealed—

1. All prior codes, and parts thereof, and all laws amendatory thereof.
2. All other prior statutes, and parts thereof, of a general and permanent nature.<sup>203</sup>

The Delaware courts took the Delaware legislature at its word. Consequently, in *Monacelli v. Grimes*<sup>204</sup> editorial changes in language made by the Delaware codifiers in the 1953 Delaware Code were held to have altered the statutory provisions for service of process on non-resident motorists, because those changes had been enacted into law by the state legislature. *Monacelli* did not end all litigation and reported cases, however. In *Dooley v. Rhodes*<sup>205</sup> the Delaware Supreme Court four years later ruled that the omission from the 1953 Code of a provision limiting the authority of justices of the peace repealed that provision, leaving justices of the peace free from prior restrictions on the length of time they could incarcerate individuals who did not pay their fines. Said the court: "The situation is an anomalous one, but it is the logical result, as we view the matter, of the error in repealing § 4461 of the 1935 Code. Remedial legislation is obviously called for, but the courts cannot supply it."<sup>206</sup> Several other reported Delaware cases likewise dealt with or touched upon the consequences of the absolute, clean repeal of prior statutory law.<sup>207</sup>

While the changes wrought by the repealer provision of the 1953 Delaware Code did not throw the Delaware legal system into chaos or result in an avalanche of litigation, it cannot be said that the near-absolute repealer created a situation free from problems of statutory interpretation or litigation. Moreover, the 1974 Delaware Code, with

202. See *supra* text accompanying note 195.

203. DEL. CODE ANN. tit. 1, § 103 (1953) (amended, 60 Del. Laws, ch. 56, § 3 (1975)) (codified, as amended, in DEL. CODE ANN. tit. 1, § 103 (1985) (the 1975 amendment effectively repealed and replaced the 1953 provision)).

204. 48 Del. 122, 99 A.2d 255 (1953).

205. 50 Del. 479, 135 A.2d 114 (1957).

206. *Id.* at 486, 135 A.2d at 118.

207. *State v. Botluck*, 57 Del. 362, 200 A.2d 424 (1964); *Application of X-Chequer Inn, Inc.*, 229 A.2d 22 (Del. Super. Ct. 1967); *Delaware Compensation Rating Bureau v. Gordy*, 42 Del. Ch. 446, 213 A.2d 706 (1965).

its provision similar to that of Arkansas,<sup>208</sup> seems to have generated only one arguably relevant reported case, and that case did not even cite the repealer provision of the 1974 Code. There, the omission of a prior enactment was held to have no effect; the enactment, despite being omitted from the 1974 Code, was still the law.<sup>209</sup> For whatever reason, and contrary to what might have been expected, the more complex Delaware provision, which is quite similar to Arkansas' section 4(b), apparently has not resulted in a single reported case which cites that provision, much less engages in interpreting it.

Any lessons to be drawn from the Delaware experience may be arguable, but the Delaware cases certainly indicate that questionable omissions and changes may be unavoidable in a comprehensive codification, even though they may not have been intended.<sup>210</sup> When such omissions and changes occur, they may be given legal effect by the judiciary if the measure enacting the code contains a repealing provision which is complete and absolute on its face. Whether or not the present Delaware Code repealer was a legislative response to the case law arising under the more absolute repealer of the 1953 Code, the fact remains that the present Delaware Code took a different approach to the problem.

In all likelihood, therefore, neither a complete repealer, nor a complex repealer provision such as that contained in section 4(b), can avoid interpretive problems and litigation. Some questions, problems, or litigation are probably unavoidable, regardless of how the transition and repealer provisions are drafted.

## 2. *Interpretative Problems Stemming from Section 4(b)*

Although sections 4(b) and (c), viewed in proper perspective, are neither unprecedented nor unjustified, they nevertheless create serious doubt regarding whether the text of the Code contains all of the general and permanent statutory law of Arkansas. The net effect probably is that Arkansas has two bodies of general statutory law: the tangible published Code, and the unidentified *corpus* of unrepealed law waiting to crystallize after litigation. This inchoate body of non-Code statutory law could prove troublesome. At the very least, those who use the Code, relying on its status as affirmatively enacted law, could find themselves ambushed as a consequence of section 4(b).

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208. See *supra* text accompanying note 195.

209. *Elliott v. Blue Cross and Blue Shield of Delaware, Inc.*, 407 A.2d 524 (Del. 1979).

210. For an interesting and fairly exhaustive discussion, see *Monacelli v. Grimes*, 48 Del. 122, 99 A.2d 255 (1953).

Moreover, section 4(b) could generate some interesting problems of statutory construction and create a fertile field for confusion. For example, under what circumstances can it be said that an act or a provision has been "[o]mitted improperly or erroneously"?<sup>211</sup> To take only one facet of this one possible example, there are situations where compilations have omitted, quite properly, the text of a prior act or provision which has never been explicitly repealed. These situations arise because a legislature does not always repeal explicitly those provisions of prior law which it intends to supplant with subsequent legislation.<sup>212</sup> To create a simplified example, assume that a legislature in 1897 enacts a comprehensive measure regulating pool halls. A decade later a new comprehensive measure is enacted covering the same subject. Some provisions in the act of 1897 do not appear in the new act. It is possible that a repeal by implication of the omitted provisions has resulted.<sup>213</sup> If so, the compiler properly omitted them. However, repeals by implication are not favored; the judicial presumption is against repeals by implication.<sup>214</sup> Whether an omission from the Code is "improper" or "erroneous" therefore might hinge upon the good or bad judgment of some digester or compiler of a bygone era in assessing the rather tangled issues of repeal by implication.

Fortunately, there are indications in Arkansas case law that the Arkansas Supreme Court historically has been sensitive to the special context of repeal by implication which exists when compilers have omitted prior laws or parts of laws. In *Pulaski County v. Downer*,<sup>215</sup> one of the earliest Arkansas cases concerning the effects of subsequent legislation on a prior statute, the Arkansas Supreme Court indicated in strong dicta that Arkansas courts would pay considerable deference to the digest or compilation in effect at the time: "The *Digest* . . . prepared by E.H. English . . . were [sic], as such, published by the authority of the State . . . . This, at the very least, was a legislative declaration that there were no other such statutes then in force."<sup>216</sup> Still, in *Downer*, the later act "covered the entire ground [of the earlier statute] and was evidently a complete substitute for that stat-

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211. Act of Mar. 17, 1987, No. 267, § 4(b)(2), 1987 Ark. Acts 734, 736 (Adv. Leg. Ser.) (codified in ARK. CODE ANN. § 1-2-103(a)(2) (1987)).

212. See J. SUTHERLAND, *supra* note 5, at §§ 23.09, 23.10, 23.13, 23.14.

213. See, e.g., *City of Little Rock v. Arkansas Corp. Comm'n*, 209 Ark. 18, 189 S.W.2d 382 (1945). See also J. SUTHERLAND, *supra* note 5, at §§ 23.09, 23.10.

214. E.g., *Davis v. Cox*, 268 Ark. 78, 593 S.W.2d 180 (1980). See also J. SUTHERLAND, *supra* note 5, at § 23.10.

215. 10 Ark. 588 (1850).

216. *Id.* at 590.

ute.”<sup>217</sup> Therefore, when that later act omitted a provision which the earlier act had contained, the later act had the effect of repealing the omitted provision. “[W]here the legislature take up a whole subject anew and cover the entire ground of the subject matter of a former statute, and evidently intend it as a substitute . . . the prior act will be repealed thereby, although there may be no express words to that effect and there may be in the old act provisions not embraced in the new.”<sup>218</sup> About a hundred years after *Pulaski County v. Downer*, the Arkansas Supreme Court said much the same thing in another case, with much the same result, although paying lip-service to the disfavor in which repeals by implication are held.<sup>219</sup> “We attach significance to the fact that the compilers of ‘Arkansas Statutes 1947 Annotated’ did not include [section] 3381 . . . as a part of our criminal procedure . . . .”<sup>220</sup> Thus, challenges involving omissions by prior compilers, in the context of possible repeals by implication, have generated at least some signals from the Arkansas Supreme Court that the challengers must shoulder a relatively heavy burden of persuasion before the court will be satisfied that a compiler’s omission of a prior law was improper or erroneous.

It should be emphasized that the foregoing discussion involves merely one possible type of omission which, if made in the Code, could turn out to be proper, rather than “improper” or “erroneous.” However, omissions made because of the repealing effect of subsequent enactments still might be the subject of litigation which generates confusion if the courts are not alert.

Other interpretive issues regarding section 4(b) could be raised. For example, when has an omission been a “consequence of compilation, revision, or both”?<sup>221</sup> If not a “consequence” of compilation or revision, the omission literally does not seem to come within the statutory exception. When has something in prior statutory law been “changed, or modified . . . in a manner not authorized by the laws . . . in effect at the time of the . . . change”?<sup>222</sup> It may be all well and good to prevent an inadvertently omitted act from being repealed, but to prevent the Code from having a repealing effect on some prior act

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217. *Id.*

218. *Id.* at 591.

219. *Forby v. Fulk*, 214 Ark. 175, 214 S.W.2d 920 (1948).

220. *Id.* at 181, 214 S.W.2d at 923.

221. Act of Mar. 17, 1987, No. 267, § 4(b)(2), 1987 Ark. Acts 734, 736 (Adv. Leg. Ser.) (codified in ARK. CODE ANN. § 1-2-103(a)(2) (1987)).

222. Act of Mar. 17, 1987, No. 267, § 4(b)(3), 1987 Ark. Acts. 734, 736 (Adv. Leg. Ser.) (codified in ARK. CODE ANN. § 1-2-103(a)(3) (1987)).



simply because there has been at some time in the past an unauthorized change—no matter how minor and immaterial—seems, literally at least, to be a bit extreme. And what is a “predecessor” of the Arkansas Statute Revision Commission?<sup>223</sup>

In short, there are likely to be some interesting, although not monumental, issues of statutory interpretation arising from section 4(b) of Act 267. The ultimate results cannot be predicted with any assurance because there are too many variables and imponderables. To some extent, the effect of section 4(b) depends upon the thoroughness with which the codifiers identified and included prior enactments omitted from the compilations. To some extent, much depends on the degree to which attorneys in this state will be able to discover bona fide past omissions and “changes” made by compilers. Ultimately, a great deal depends on the posture and attitude of the Arkansas Supreme Court, which has, in the past, displayed some willingness to presume, in effect, that past compilations published under legislative authority embody, *prima facie*, a legislative determination that prior enactments have been superseded.<sup>224</sup>

Arkansas courts might further simplify any statutory interpretation problems raised in connection with sections 4(b) and (c) by adhering to a few general principles of statutory construction. To begin with, the clauses of section 4(b) which preserve from repeal improperly or erroneously omitted statutory provisions, or provisions changed in an unauthorized manner, are exceptions from a more general statutory rule. They are very close to “provisos” in their scope and nature, and courts should strictly construe provisos.<sup>225</sup> Even if not regarded as provisos, they are definitely exceptions. The burden of persuasion in establishing an exception is on the party claiming that the exception applies.<sup>226</sup> Moreover, there should be a reasonably strict interpretation of these exceptions.<sup>227</sup> As a matter of common sense, the courts should not allow exceptions to erode the more general rule which would prevail in the absence of the exception.

In addition, there are strong policy considerations favoring a narrow application of these exceptions. The bar, the bench, and the pub-

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223. *Id.*

224. *Forby v. Fulk*, 214 Ark. 175, 181, 214 S.W.2d 920, 923 (1948) (“attach[ing] significance to the fact that the compilers of ‘Arkansas Statutes 1947 Annotated’ did not include” a provision of prior law and listed earlier decisions as “Decisions Under Prior Law”).

225. *See* J. SUTHERLAND, *supra* note 5, at §§ 47.08 to .10.

226. *Id.* at § 47.11.

227. *See id.*

lic need to be able to rely on the Code as published.<sup>228</sup> An expansive judicial reading of the exceptions created by section 4(b) would not only encourage litigation, but also undermine the value of having a codification at all.

Finally, the courts should be sensitive to the legislative intent and purpose underlying section 4(b). Despite the possible literal readings that the courts might render, the legislative intent and purpose seem clear enough. As Mr. Henderson's article suggests, section 4(b) is a "safeguard,"<sup>229</sup> rather than a trap for those relying on the Code, or a windfall for those who discover some obscure omission or change. The purpose of the exception was "to prevent any accidental or unintentional changes in the substance or meaning" of pre-Code law.<sup>230</sup> The legislative intention in this respect seems clear enough, based on legislation authorizing the preparation of the Code<sup>231</sup> and the Preamble to Act 267.<sup>232</sup> Thus, courts should read section 4(b) as reflecting a sensible precaution against significant omissions and changes during the codification process itself, and not as reflecting an invitation to delve back into the statutory history of Arkansas in a quest for obscure, long-forgotten statutory provisions which arguably supersede provisions of the Code. As the Arkansas Supreme Court has stated, "[i]t is the duty of this Court to give effect to the intent of the General Assembly, even though the true intention, though obvious, has not been expressed by the language employed when given its literal meaning."<sup>233</sup> In any event, Arkansas courts should give a narrow interpretation to section 4(b), because it is unlikely that the General Assembly intended for the tail (section 4(b)) to wag the dog.

## V. THE FUTURE

Although the Arkansas Code is an important landmark, what the General Assembly accomplished in the 1987 codification does not even begin to approach the importance of what happens to the Code in the future. Arkansas must not allow shortcomings or imperfections, if any, in the current Code to obscure its significance or deter continued commitment to codification of the state's statutory laws. Imperfections may be inevitable when codification occurs after almost

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228. See *supra* text at 303-04.

229. Henderson, *supra* note 1, at 43.

230. *Id.*

231. Act of Mar. 22, 1983, No. 641, § 2, 1983 Ark. Acts 1394, 1400.

232. Act of Mar. 17, 1987, No. 267, Preamble, 1987 Ark. Acts. 734 (Adv. Leg. Ser.) (reprinted in 1 ARK. CODE ANN. xix (1987)).

233. Steele v. Murphy, 279 Ark. 235, 238, 650 S.W.2d 573, 575 (1983).

150 years of relative neglect and reliance on compilations and digests. Imperfections can be identified and corrected. Lessons can be learned from experience. But there is no substitute for commitment. Without adequate maintenance and upkeep, the Code could become obsolete, and the far-sighted investment of time and resources made during this decade could be a pure waste of money.

The enactment of a codification is only a first step. The experience of Georgia shows that a state can too-easily backslide. Georgia was one of the earliest states to codify, and for many years it apparently continued to update and recodify its statutory law. Then one year it stopped. In 1980, a commentator wrote: "For roughly the last 45 years, the Georgia statutory scene has featured both codification species—a statutorily sanctioned code of 1933, and a supplemented and 'annotated' code of private publication."<sup>234</sup> Actually, the "code of private publication" probably should have been characterized as a "compilation," but the more important point is that a state can wind up with possibly the worst of both worlds—an outdated, obsolete codification and reliance on private publishers.

The Arkansas Code contemplates, and itself contains the machinery for achieving, the goal of timely and systematic maintenance:

(a) All acts enacted after December 31, 1987, of a general and permanent nature *shall be enacted as amendments to this Code . . . .* If the subject matter of any law is already generally embodied in one of the titles of this Code or can be appropriately classified therein, *that new law shall be enacted as an amendment to that title.* If it is not possible to classify the subject matter of a new law in an existing title, a new title shall be enacted containing the new law . . . .<sup>235</sup>

. . . .

(f) *In the enactment of new laws, the plan, scheme, style, format, arrangement, and classification of this Code shall be followed as closely as possible with the result that the Code and all amendments to it will comprise a harmonious entity containing all the laws of the State of Arkansas of a general and permanent nature.*<sup>236</sup>

Failure to make a modest continuing investment in updating and maintaining a codification would be a classic case of penny-wise and dollar-foolish. The costs of insecurity and uncertainty flowing from

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234. Sentell, *supra* note 66, at 737.

235. ARK. CODE ANN. § 1-2-116(a) (1987) (emphasis added).

236. *Id.* at § 1-2-116(f) (emphasis added).

diminished confidence in the reliability of the basic usable publication of state statutory law are, of course, difficult to calculate because they are intangibles. However, the dollar cost of eventual but sporadic comprehensive revision or recodification can be estimated by conventional methods and has been described as "enormous."<sup>237</sup>

Prompt and timely upkeep of the Code, whatever the form and mechanics of the process, should save money in the long run. It certainly would save wear and tear on the legal system and enhance public confidence that the books purportedly publishing the statutory law of the state for day-to-day use come as close as humanly possible to a faithful publication of that law.

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237. J. SUTHERLAND, *supra* note 5, at § 28.15.

