THE LOUISIANA CIVIL CODE

A European Legacy for the United States

Shael Herman

The Louisiana Civil Code:
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Acknowledgments

Readers of this book may recognize its debt to an earlier book, S. Herman, D. Combe, T. Carbonneau, *The Louisiana Civil Code: A Humanistic Appraisal* (1981). That book owed its inspiration to Father David Boileau, Loyola University, New Orleans. Father Boileau, a philosopher by both training and inclination, correctly saw a need for a non-technical book that explained the Louisiana Civil Code to educated laymen, undergraduate students and judges and lawyers unschooled in the civil law. Since the publication of *A Humanistic Appraisal*, the world has moved decisively in the direction of a "global village." The United States and Canada now constitute a single trading bloc. Other great trading blocs include the European Economic Community, the Asian or Pacific Rim nations, and South and Central America. A majority of the nations in these other trading blocs belong generally to the civil law family. Indeed, Quebec's civilian heritage makes even Canada straddle the boundary between the common law and the civil law. When the Berlin Wall fell and the Soviet Union retreated from eastern Europe, former satellites such as Hungary, Poland, Czechoslovakia, East Germany and Rumania unearthed their civil codes and a Romanist tradition that Communism's heavy boot had for forty-five years driven underground. These eastern satellites are now proudly reclaiming their shared civilian heritage, and many are in the process of modernizing their civilian institutions. In view of these changes, the present volume focuses upon the Civil Code as a European artifact. Avowedly European in terms of style and substance, the Louisiana Civil Code provides a natural intellectual bridge to other parts of the world where the civil law tradition is dominant.

The present book was a team effort, and I should like to thank everyone who contributed to its publication. Endowed with a sixth sense about how to make the civilian heritage accessible to both lawyers and non-lawyers, David Combe constantly offered his counsel on this book's design. I am grateful to David Combe and Thomas Carbonneau for their permission to adapt and even to suppress ideas in *A Humanistic Appraisal*. Amy Goldstein (Tulane Law '93) carefully prepared the endnotes. Kevin Hourihan and Kim Koko Glorioso, both of the Tulane Law Library, prepared the bibliography. Nick Marinello designed this book and supervised its publication. Larry Seil contributed the pen-and-ink drawings and the cover illustration. Over the years Professor R.J. Rabalais, Loyola University, has used *A Humanistic*

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Shael Herman
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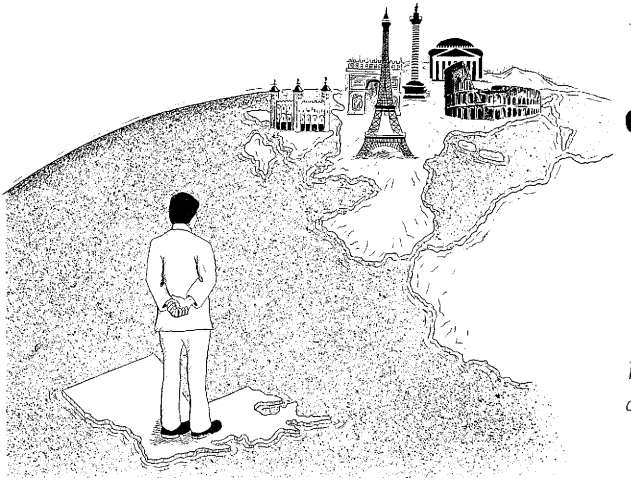
Cover artwork by Larry Seil depicts (clockwise from bottom left): William C.C. Claiborne, Pierre A.C.B. Derbigny, Voltaire, Edward Livingston and Napoleon Bonaparte.

4. Institutions of the Civil Code

1

Vive la Différence[1]



Louisiana's civil law heritage gives the state distinctive perspectives on European law.

The Louisiana Civil Code, a one-volume blueprint for society, is among the most significant landmarks in American legal history. Inspired by the continental Roman tradition rather than by English law, the Civil Code makes Louisiana a unique American jurisdiction. Louisiana law, because it bears the imprint of Roman, Spanish, and French law, forces local lawyers to conceive legal issues differently than their counterparts

elsewhere in the United States. The distinctive policies underlying the Louisiana Civil Code affect business practices and estate planning. Civil juries are less common in Louisiana than in other areas of the country. Unlike their counterparts elsewhere in the United States, notaries are office lawyers, not clerks.

Civilians are proud of their scholarship, their intellectual cultivation, and their ability to read law in foreign languages. The Civil Code is the raison d'être of civilian research. Civilians know French thinkers like Descartes and Rousseau as well as English philosophers like Locke and Hobbes. The doctrinal works of Jean Domat and Robert Pothier are as important for understanding the Civil Code as James Madison's Federalist Papers are for the United States Constitution.

During a formative period in Louisiana's history shortly after the Louisiana Purchase of 1803, local Spanish and French minorities stubbornly resisted attempts of American authorities to replace the social vision of their civil law with common law perspectives that other fledgling states were importing from England. The resistance of these local inhabitants permanently influenced the shape and substance of Louisiana's private law, which today remains almost as different from the rest of American law as the metric system is from the English system of measurement.

Because there is in the United States a national drive to uniformity in law, the worth of the Louisiana Civil Code is constantly questioned; and one is naturally led to wonder if Louisiana's stubborness has a point. While local lawyers, in defense of their code, invoke the slogan "vive la difference," one may legitimately wonder if appreciating "la difference" is worth all the trouble in a society where the intellectual spirit is intensely pragmatic, and law is an already complicated discipline. Partisans of the civil code believe it is. An explanation of this thinking springs from Socrates' injunction, "know thyself." Self-knowledge implies comparisons. In a common law nation where culture is distinctively Anglo-Saxon and the national language is English, the Civil Code offers distinctive perspectives on social and economic organization. Different ways of conceiving issues sharpen thinking about American problems. As sole heirs in the United States to the Romanist tradition, Louisiana lawyers are suited to interpret foreign experience to Americans and American experience to foreigners. The Civil Code, the most important American symbol of the continental

tradition, provides an intellectual bridge across the English Channel, down to Latin America, and to many African and Asian states. As lawyers in a mixed jurisdiction, we share a tradition with our counterparts in jurisdictions like Quebec, Scotland, South Africa and Israel.[2] Students from Latin America and nations of the European Community realize that a lawyer ignorant of the Civil Code's intellectual furniture — forced heirship, usufruct, predial servitudes and a wide range of peculiarly civilian institutions traceable ultimately to Roman law — is not a whole lawyer.

A knowledge of the Civil Code forces us to evaluate our own convictions, and *pace* Shakespeare, to recognize that "there are more things in heaven and earth than are dreamt of in our philosophy." As our colleagues from elsewhere enjoy pointing out, Louisiana is in legal matters the lone holdout, the odd number. In matters of cuisine and music, our oddness is hardly bad. The case for our law is less obvious and therefore harder to make. But we must try. Before we praise the ancient Louisianians as steadfast or condemn them as stubborn, we must understand the social vision they sought to preserve. This book illuminates the Civil Code's role in Louisiana legal experience by reference to its historical and philosophical spirit, its social and economic perspectives, and its institutions and terminology. The book is divided into three interrelated sections: "European Antecedents," a narrative of Louisiana's debt to continental legal evolution; "Louisiana's Experience with Civil Law," an account of the way that the early Louisianians imported the continental tradition and then lodged it in the Louisiana Civil Code; and "Institutions of the Civil Code," a perspective on Louisiana's private law.

2 European Antecedents

The French ancien régime *(King Louis XIV) meets the French Revolution (Napoleon Bonaparte)*

The Idea of a Civil Code

An appreciation of the unique place of the Louisiana Civil Code in American law calls for an explanation of the idea of civil codification in general, or more precisely, the idea of civil codification in the Romanist legal tradition. What historical forces were associated with the conception of a civil code? What were its goals and political assumptions? Answering these questions requires intellectual bifocals: our attention must alternate between the historical setting of the Code Napoleon of 1804 and the immediate context of the Louisiana Civil Code, which dates from 1808, the year in which the Louisiana legislature passed the original *Digest of the Civil Law Now in Force in*

the Territory of Orleans.

The starting point for our inquiry is the term "civil code." Code, from the Latin word *codex,* meant a surface used for writing. By the nineteenth century when the French Civil Code appeared, people had been writing codes for centuries. The Code of Hammurabi was a product of ancient Babylonian civilization; the "Barbarian" codes of western Europe appeared between the sixth and ninth centuries; during the fifteenth and sixteenth centuries, French jurists collected into codifications the customs of France. Modern day California has enacted a "civil code." These codes, unlike the Code Napoleon and the Louisiana Civil Code, collected the law preceding codification without substantially changing or organizing it. By contrast, the French and Louisiana Civil Codes represented revolutionary changes in politics, social perspective, and legal technique.[3] Unlike the other codes we have mentioned, the Code Napoleon and the Louisiana Civil Code were comprehensive, logical organizations of general principles of law to be applied by deduction and extended to new circumstances by analogy.

As Professor Ferdinand Stone has pointed out, a preference for a civil code reflects a particular world view; and in the United States, because it is dominated by common law attitudes, the civilian's world view is distinctive:

> One might say that the world is divided into two manners of men: *the man who says*: "I have in my pocket a blueprint plan of the universe, complete and written down: whenever I meet a new problem or have an old one I have only to consult my plan and by simple logic deduce the appropriate answer." Of such men are good civil law lawyers made: *and the man who says*: "I don't have a preconceived plan for the universe all written down: I can't anticipate all the problems of the world: I'll meet them as they come, one by one bringing to bear upon them my experience and common sense, and I'll not lay down any general rule, but answer only the problem before me." Such men make good common law lawyers. From these different positions certain conclusions seem possible: First, the man who

> lives by the preconceived plan will find his stability, his security in the written word — the code —- the statute —- and will say that the general principles set forth therein survive even erroneous application, while the man who declares that he has no preconceived plan, but only individual solutions to particular problems, is apt to find his stability, his security in the individual instances and their conscientious repetition in experience.[4]

The term "civil code" implies social regulation by means of general propositions.

Deriving from the Latin *civitas* (city), the term "civil" denotes that a civil code's basic focus is the regulation of citizens' daily relations, not their relations with the state, which are the subject of public law. Colonel John H. Tucker, Jr.'s foreword to the newest edition of the Louisiana Civil Code underscores the characterization of the Civil Code as a social blueprint and confirms that its regulation is from cradle to grave. Addressing the legal profession of Louisiana, Colonel John Tucker remarked:

> The Civil Code is your most important book because it ushers you into society as a member of your parents' family and regulates your life until you reach maturity. It then prescribes the rules for the establishment of your own family by marriage and having children, and for the disposition of your estate when you die, either by law or by testament subject to law. It tells how you can acquire, own, use, and dispose of property . . . . It provides the rules for most of the special contracts necessary for the conduct of nearly all of your relations with your fellowman . . . and finally, all of the rights and obligations governing your relations with your neighbor and fellow man generally.[5]

An examination of the code's structure reinforces Colonel Tucker's claim.

Architecture of the Civil Code

Anyone who leafs through the Louisiana Civil Code will be immediately impressed by its format. Unlike a typical American lawbook filled from end to end with judicial decisions, the Civil Code is a collection of organically and logically interrelated articles, written in a terse, staccato style. Like the Code Napoleon of 1804, the Louisiana Civil Code consists of three main books: "Of Persons," "Of Things and the Different Modifications of Ownership," and "Of the Different Modes of Acquiring the Ownership of Things."[6] The code's tripartite structure is generally thought to have a Roman pedigree; according to some historians, the structure is traceable to the Roman jurist Gaius's famous maxim, *omne autem ius quo utimur vel ad personas pertinet, vel ad res, vel ad actiones.*[7] (The whole of the law we observe relates either to persons, things, or actions.) One of the most important compilations of Roman law, the Institutes of the Roman emperor Justinian, followed the format suggested by Gaius's maxim, thereby endorsing it to future generations of civil lawyers. Gaius' divisions, because they expressed a view of social relationships as a civil drama that developed successively the actors (persons), the stage set (things), and the dramatic action (modes of acquiring ownership), naturally appealed to lawyers with a classical turn of mind.

Gaius the jurist viewed social interaction as a civil drama consisting of persons, things and actions.

A review of the table of contents[8] of the Louisiana Civil Code also confirms Colonel Tucker's claim about the generality of the Civil Code's application. Book One, "Of Persons," regulates legal personality, domicile, marriage, separation, divorce, legitimate and illegitimate children, adoption, paternal authority, tutorship, and emancipation. Because Book One regulates matters of personal status (is one married or widowed? a major or a minor?), it implicates property questions covered in succeeding books. Book Two, "Of Things and the Different Modifications of Ownership," covers the general law of movable and immovable property, predial and personal servitudes, usufruct, building restrictions, and boundaries. Book Three, "Of the Different Modes of Acquiring the Ownership of Things," is the longest of the three books. As its title implies, Book Three regulates the ways that citizens acquire and lose property, including successions, testaments, donations, delicts, community property, and many contracts — sale, lease, partnership, loan, deposit, mortgage, mandate, suretyship, compromise, and pledge.

The Vocabulary of the Civil Code: A Clue to Its Roman Lineage

As Bernard Shaw's Pygmalion[9] indicated, origins affect speech patterns. Even the partial list of topics in the preceding section bespeaks the Civil Code's exceptional lineage. A lawyer from elsewhere in the United States could not expect to understand its vocabulary just because he had studied law. This is so because the Louisiana Civil Code, unlike any other lawbook in force in the United States, employs the terminology and conceptions of French and Spanish law, both heavily indebted to Roman law.[10] Thus the Civil Code's conception of property, derived from the Roman idea of *dominium*, is based on three elements — *usus* (use), *fructus* (fruits), and *abusus* (abuse, power to sell). A visiting lawyer, after searching the code in vain for standard common law concepts of property law such as "life estate" and "remainder," would have to content himself with their rough equivalents, usufruct (Latin: *use* and *fruits*) and naked ownership (French: *nu-propriété*). In the sale articles, the visitor would find that a doctrine of *lesion* (Latin: *laesio*), nearly identical to that of the French Civil Code,

regulates the price in a sale. He would discover a number of other Roman law survivors: the Roman *actio redhibitoria*, a warranty claim for hidden defects in an item; mandate, a Roman form of agency agreement; the partnership in *commendam*, a continental form of limited

French philosopher François Marie Arouet (pen name: Voltaire)

partnership derived from medieval commercial law; *mutuum* and *commodatum*, two forms of loans that were well established in classical Roman law[11] long before French and Spanish law borrowed them; and a modern law of community property that descended from the Spanish *sociedad de ganancias*.[12]

As these references to Roman, Spanish, and French sources suggest, the Louisiana Civil Code belongs to a venerable legal tradition much older than the English common law, the dominant legal tradition in

the United States. As direct descendants of the Roman legal tradition, modern civil codes make Roman law the oldest living law in the western world. Conscious of pedigree and lineage, civilians like to point out that the Roman law tradition was already older at the time of the Norman Conquest of England in 1066 than the common law tradition is today. Even if the ancestry of the Louisiana Civil Code were traced no further back than the rebirth of the study of Roman law in medieval Italy about 1100, it would be as old as the earliest artifacts of English common law. Because Roman jurists were lawyers par excellence, their solutions to common problems are often as fresh today as they were when they were formulated. According to source studies, Roman texts supplied the actual wording and conception of some articles of the Louisiana Civil Code.[13] Many doctrines of the present Louisiana Civil Code had already appeared over five hundred years ago in works of great medieval glossators and commentators like Baldus[14], Bartolus,[15] and Accursius.[16] The Civil Code's links to French Romanists like Jean Domat[17] and Robert Pothier[18] are clearer still: Professor Rodolfo Batiza's source studies of the Louisiana Civil Code show that its drafters borrowed almost verbatim directly from these writers or indirectly from them through the Code Napoleon. Whether the sources were direct or indirect, their relevance in Louisiana today is unquestioned: Louisiana lawyers and judges still venerate ancient Roman and civil law sources and doctrinal writers. In quest of a doctrinal gloss on a particular code article, a Louisiana jurist delights in finding support for arguments among the ancient civilians who contributed generously to the style and substance of the present Civil Code.

The Civil Code's Historical Spirit and Values

Appreciating the Louisiana Civil Code's significance requires a short account of the assumptions and goals of its ancestor, the French Civil Code. As we shall detail in later sections, Louisiana drafters, by implanting conceptions of the civil law in Louisiana, affirmed a commitment to a French perspective on law and society. For Frenchmen at the dawn of the nineteenth century, the first goal of civil codification was to render the law accessible by making it clear. To accomplish this goal, a code had to be complete in its field and had to lay down general rules in logical sequence. For France, unification through codification

was a special challenge because there were over three hundred regional customs in force in the *ancien règime*. As Voltaire, the French *philosophe* noted, the law in pre-revolutionary France was neither unified nor clear:

> Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? . . . When you travel in this kingdom you change legal systems as often as you change horses?[19]

Above all else, French legal unification, because it was an expression of French nationalism, entailed territorial, political, and social unification. When unification finally occurred, it rested on an ideological commitment to democracy and economic liberalism. These goals could not have been achieved without intense faith in the power of human reason, unaided by traditional disciplines like theology, to make sense of the universe. This faith in rationalism distinguished the French Civil Code and the Louisiana Civil Code as "modern" legal documents.

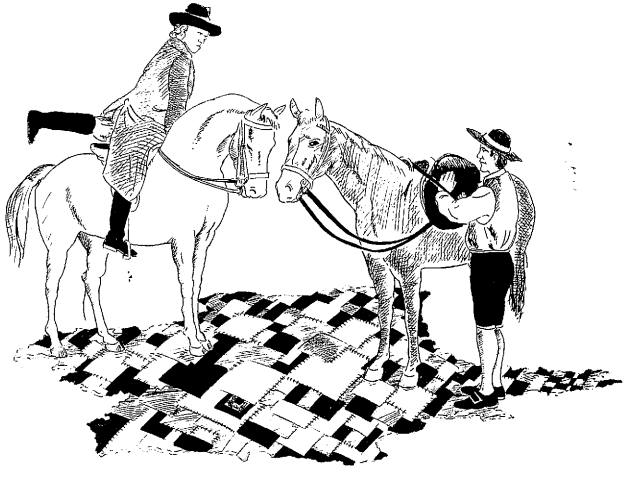
Civil Codification as an Expression of the Enlightenment

The Louisiana Civil Code shares with the French Civil Code the spirit of the Enlightenment, a period after the Renaissance inspired by optimism and faith in the capacity of human reason to guide the course of human affairs. In law as in natural sciences, Enlightenment thinkers directed their minds toward discovering and ordering general ideas as premises from which consequences logically could be deduced. In short, the Enlightenment, from a philosophical perspective, was an era of rationalistic system-building.

This system-building was nurtured by an era of logic in Europe heralded by René Descartes' *Discourse on Method*.[20] "I have been very lucky," Descartes wrote, "for certain paths that I have followed ever since my youth have led me to considerations and maxims out of which I have formed a method; and this, I think, is a means to the gradual increase in my knowledge that will raise it little by little to the highest point allowed by the mediocrity of my mind and the brief duration of my life."[21] Descartes believed nature had engraved on the human mind elementary precepts or rules for the improvement of knowledge.

> The first (rule) was never to accept anything as true unless I knew it was evidently so. The second rule was to divide every problem under examination into enough parts for its best resolution. The third . . . to order my thoughts by starting with the simplest objects most accessible to knowledge and to move by degrees to more complicated ones . . . and the last rule was always to make large enough accumulations and summaries to assure that I had not missed anything.[22]

These are rules of evidence, analysis, synthesis, and formal induction informed by stubborn skepticism. Though these rules were characteristic of mathematics and natural sciences, in a general way they reflected a growing conviction that conclusions for the legal order could be deduced from general propositions that were permanently valid and discoverable by the exercise of human reason alone.[23] This conviction altered the whole mode of discourse of political and social philosophers of the late 1600s. The philosophers Hobbes,[24] Spinoza,[25] and Pufendorf,[26] though their areas of study and purposes differed,



"When you travel in the French kingdom you change legal systems as often as you change horses." — Voltaire

shared a method which derived from central postulates a series of consequences in a descending level of generality, rigorously organized into a system of mathematical forms of logic. At the same time, Hugo Grotius,[27] a founder of the school of modern natural law, ranged widely over most of private law in search of basic postulates for a society governed by human reason alone. The secularization of natural law, which Grotius helped promote, continued under the influence of rationalism in philosophy and new discoveries in mathematics. Just as Galileo had defended the autonomy and systematic integrity of mathematical physics, Grotius, Hobbes, and Pufendorf contended for the autonomy and systematic integrity of the law.

The jurists' commitment to rational ordering of laws was nowhere more evident than in the work of Jean Domat, one of the most creative and original of pre-Revolutionary French jurists. Domat's *Les Lois Civiles dans leur ordre naturel*,[28] still a source of argumentation in modern Louisiana jurisprudence, has been called the preface to the Code Napoleon.[29] It was remarkable for both its philosophical spirit and its unification of Roman sources, French customs, and legislation. In remarkably Cartesian terms, Domat announced his approach and objectives in the preface of his work:

> The design of this book is to put the civil laws in their natural order, to distinguish the subjects of law and to assemble them according to their rank in the body they naturally compose; to divide each subject according to its parts; and to arrange in each part the detail of its definitions, of its principles and rules, advancing nothing either not clear in itself or not preceded by all that is needed to make it understood.[30]

Domat's avowed approach sounds so much like Descartes' analytical method that the reader may wonder whether Domat had Descartes' *Discourse on Method* before him as he wrote. The result of Domat's work was logical rigor uncommon for his time. Like the French codifiers who followed him, Domat viewed himself as a scientist of law; with a scientist's dedication he had sought to bring order out of the chaos of texts that French law had accumulated from the Middle Ages. Domat was also a devout man. For him the law could be summed up in

a few biblical truths: no one should injure another person, each should receive his due, and each must be sincere in his engagements and faithful in their execution. No wonder that Domat is credited with having inspired many articles of the Civil Code having to do with honesty and equity in fulfillment of obligations. Article 1901[31] of the original Louisiana Civil Code, requiring the performance of agreements in good faith, was traceable to Domat. Article 1965 of the original Louisiana Civil Code, concerning the basis of equity, captured the spirit of Domat's work as well as any other article in the code:

> The equity intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others to do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the laws of the land, and that which the parties have made for themselves by their contract are silent, courts must apply these principles to determine what ought to be incidents to a contract which are required by equity.[32]

If, as Enlightenment thinkers believed, men were capable of rational inquiry into nature and society, then eventually men could master their own destinies. As Domat's work implied, there was a natural connection between the discoverability of relatively few immutable laws in science, on one hand, and in politics and human behavior, on the other. These political laws, once discovered and codified, became axioms of self governance. When a civilian claimed that the Civil Code was built on three pillars — private property, freedom of contract, and family solidarity — he believed he was stating axiomatic articles of faith, not arbitrary rules that could be altered by human whim. These axioms, once accepted by citizens, could be sources of postulates applicable to human conduct. If the right to private property were axiomatic, then a servitude grant had to be construed strictly against the grantee. If freedom of contract were axiomatic, then a contract constituted legislation between the parties. Transfer of ownership required only mutual consent on object and price, not delivery of the article into the purchaser's possession.[33] The rationalistic spirit of these deductions pervaded the French and Louisiana Civil Codes and was

captured by the French historian Sagnac in this passage:

> The Civil Code should be simple and clear, like the laws of nature. It must be reduced to a small number of articles that flow logically from general principles of the new democractic society. The individual will know the subleties and infinite complications that chicanery invents at his expense.[34]

Social Unification

When Sagnac wrote of "subtleties and infinite complications" in the law, he probably had in mind invidious social discriminations and church-inspired impediments to social intercourse characteristic of French law during the ancien régime. In pre-Revolutionary France, clergy, commoners, and nobility were subject to different legal rules. For example, the nobility benefitted from feudal law for determination of personal status, inheritance, and the law of goods. In contrast, commoners, to determine such matters, had to refer to local customary law. As the civil code was blind in application to the geographical boundaries that Voltaire had decried, so too was it blind to the social hierarchy that stratified the population. Codification meant both uniformity throughout the territory and equality among citizens without reference to their social status.[35] To foster a degree of equality in the distribution of wealth to heirs, the French Civil Code abolished primogeniture, which had prevailed during the ancien régime. The Louisiana Civil Code followed suit. In succession law, the Louisiana Civil Code likewise abolished the *trebellianic portion*, an institution that discriminated in favor of some heirs against their co-heirs.[36]

Another goal of the French drafters was to reduce the influence of the church in family matters. During the ancien régime, for example, canonical regulation of the church, not secular enactments, specified causes for nullity of marriage. Among the grounds for nullity of marriage were differences between the spouses' religions, a spouse's membership in a religious sect prohibiting marriage, gross discrepancy between the parties' ages, and a close blood relationship between spouses. To curb the church's intrusions into people's lives and to promote secularization of society, the French drafters viewed marriage exclusively as a civil contract dissoluble even upon one spouse's

demand. In an obvious reference to ecclesiastical causes of nullity of a marriage, the drafters of the Louisiana Civil Code, after enumerating all the legal causes for nullification, announced that "the other causes of nullity which existed by the ancient laws [were] abolished."[37]

Centralization of Governmental Authority

Unification of law through codification also implied political centralization with legislation as the chief source of law. Napoleon himself had elevated the legislator to the pinnacle of government. "Who has the place of God on earth?" he asked. "The legislator."[38] Some historians have suggested that Napoleon was referring to himself. A virtual duplication of a provision of the French *Projet du gouvernement* of 1800, Article 1 of the original Louisiana Civil Code announced the doctrine of legislative supremacy: "Law is the solemn expression of the legislative will." In accordance with the separation of powers proposed by Montesquieu in his *Spirit of the Laws*, the legislature made laws, the judiciary interpreted them, and the executive carried them out. We know that many of the French revolutionaries admired the philosophy of Jean Jacques Rousseau.[39] Rousseau's vision of legislation must have figured in Napoleon's assumptions about codification. According to Rousseau's *Social Contract*, the legislator expressed the citizens' general will in positive enactments and transcended the competing demands of particular interests. In Rousseau's scheme, the legislator's laws had to be generally applicable to all citizens; autonomous and independent of socio- economic pressures and official caprice; and publicly known and positive, that is, enacted by a duly constituted body. Like the French *Projet du gouvernement* of 1800, the Louisiana Civil Code, in accordance with the requirement that law be positive and generally applicable to all citizens without distinction, announced: "Law (la loi) orders and permits and forbids, it announces rewards and punishments, its provisions generally relate not to solitary or singular cases but to what passes in the ordinary course of affairs."[40] Article 4 of the original Civil Code itself expressed the requirement that the law be positive: "As laws cannot be obligatory without being known, they must be promulgated." Article 8 expressed the desideratum of generality: "A law can prescribe only for the future . . . . it can have no retrospective operation."

As we have already seen, French law, prior to codification, varied

substantively according to region and social class. Even within a single region, however, sources of law varied. Roman law applied to contracts and obligations, canon law applied to marriage and wills, and a welter of statutes and customs covered all sorts of other legal acts. The Civil Code undid this patchwork of sources by absorbing or abandoning them. More than a mere accumulation of laws, the French codification aimed at unification and secularization of the law.

Comparative Excursus: Methodological Implications of Legislative Supremacy

By definition, a codified standard entailed glorification of the legislator. In a strict separation-of-powers model, an important corollary to legislative supremacy was that judges were inferior to Parliament and did not create law. This statement may puzzle Anglo-American lawyers because judges in the Anglo-American tradition have traditionally been lawmakers *par excellence*, and this role has earned them the sobriquet "oracles of the law."[41] The civilian's view, however, is a logical extension of the separation-of-powers doctrine which England never embraced and the United States finally adopted with important modifications like full scale judicial review. In France, the subordination of judges was rather easy to accomplish for two reasons: first, French judges were less respected than their English counterparts. Second, unlike English judges who had by 1700 acquired independence from the monarch, French judges, even when they were widely trusted, were viewed as agents beholden to the monarch, and unable to create law themselves.

When the Louisiana Civil Code drafters announced that law was a "solemn expression of the legislative will," they were subscribing to the doctrine of legislative supremacy. Consequently, Louisiana law imported a traditional French debate: Are judicial interpretations of the code binding law or merely illustrative rulings effective only for the immediate litigants?[42] To this question there is no definitive answer, but many Louisiana judges readily acknowledge that they rather readily "reverse" their interpretations of the Civil Code even in the face of "precedents."[43] Practically speaking, Louisiana judges are not subordinated to the legislature; they enjoy the same respect and dignity as their counterparts elsewhere in the United States. Judicial decisions, whether or not they are law, are read and cited in Louisiana as much as elsewhere

in the United States. Louisiana lawyers tend to view code provisions through the prism of jurisprudence. Unsure whether to base their arguments on cases or provisions of the Civil Code, many Louisiana lawyers do both. Judicial opinions cite cases, the Civil Code, and civilian doctrine, as if judicial minds oscillated between the attitudes and working methods described in this passage.

> A civilian system differs from a common law system much as rationalism differs from empricism or deduction from induction. The civilian naturally reasons from principles to instances, common lawyers from instances to principles. The civilian puts his faith in syllogism, the common lawyer in precedents; the latter silently asking himself as each new problem arises, "What did we do last time?" . . . The instinct of the civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*.[44]

The Style of the Civil Code and Its Political Implications

At their best, civil code articles are epigrammatic. Their style was consciously wrought; the Code Napoleon owed its clarity to the fact that its draftsmen had constantly to ask themselves whether their chosen words would withstand the criticisms of a highly intelligent layman like Napoleon, who grew impatient with technical aspects of the law though he readily foresaw its social implications. When they began their work, the Louisiana drafters must have had in mind the French legislative style. In addition to the articles we have already quoted, we shall cite a few more: Article 491: "Perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner provided it is not used in any way prohibited by laws or ordinances." Article 179: "Legitimate children are those who are born during the marriage." Article 184: "The law considers the husband of the mother as the father of all children born or conceived during the marriage." Article 215: "A child, whatever be his age, owes honor and respect to his father and mother." Article 2315: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

From the point of view of style and language, the French Civil Code

For Portalis, a principal drafter of the Code Napoleon, a sound law should be fertile in its implications, and not get bogged down in imponderable details.

was a masterpiece. Jurists and literary figures praised its clear, memorable phrases, and the absence of cross references and jargon. These features contributed significantly to its popularity. The great French novelist Stendhal is said to have read the Civil Code every day to refine his feeling for the French language. The French poet, Paul Valéry, described the French Civil Code as the greatest book of French literature.

At its best, the Louisiana Civil Code shows the influence of the epigrammatic French drafting style. On the whole, however, the Louisiana Civil Code is much more verbose than the French Civil Code; it is nearly one-third longer than its older cousin chiefly because its drafters, in addition to copying many of the best French articles, sought to make of the Civil Code a pedagogical tool by incorporating long passages from venerable French treatises. As against the

2281 articles of the Code Napoleon, the Louisiana Civil Code has over 3500. But the Louisiana Civil Code's bulk is understandable: Working in the new world with relatively few doctrinal works, the Louisiana drafters realized that their product had to be a code, a law school, and an elementary doctrinal treatise all wrapped up in one package.[45]

We have so far focused on the literary quality of the Civil Code. But important technical and ideological reasons also compelled the choice of this drafting style. As Professor C.J. Morrow said, generalization was the soul of civilian codification. Even the most brilliant legislators could not have foreseen all the possible problems that might arise; code articles had to be flexible enough to be accommodated by judges to unforeseen individual cases. According to Portalis, a main drafter of the Code Napoleon, the ideal code expressed general principles *féconds en consequences* (fertile in implications). In a celebrated discourse, Portalis argued:

> The task of legislation is to determine the general maxims of law, taking a large view of the matter. It must establish principles rich in implications rather than descend into the details of every question that might possibly arise.[46]

From a political standpoint, a legislator's skill was "to discover principles in each area most conducive to the common welfare;" the skill of the magistrate was to "put these principles into action, and to extend them to particular circumstances by wise and reasoned application."[47] Portalis knew that history would always outstrip the imagination. The courts were assigned the task of sifting varied "details" with which the legislator had no time to deal. Theoretically, this division of labor between judge and legislator fully conformed with the doctrine of separation of powers laid down by Montesquieu and Rousseau. Practically, the relative generality and terseness of the Civil Code's style contributed to its longevity. Many articles of both the Code Napoleon and the Louisiana Civil Code were never amended because their terms were supple enough for judges to mold to new circumstances.

Among the best examples of the lapidary style of the French Civil

Code are five terse paragraphs concerning delicts, that is, the law of civil wrongs. To Louisiana lawyers, the evolution of case law under these articles is instructive because the Louisiana Civil Code practically duplicated all of them and added a few more. Now over 180 years old, many of these liability rules are still in force, almost unaltered despite the economic and technological changes that have taken place since their enactment. In both Louisiana and France, these few paragraphs have been the basis for practically the whole law on accidents and negligence. As criteria for civil liability these provisions are remarkable, for when they were enacted, the impact of the Industrial Revolution was hardly imaginable.

The average lawyer from elsewhere in the United States may find it bewildering that a single book of a few thousand sentences can constitute the entire private law of a single state or nation. To him, the very idea of lawmaking by means of compressed generalizations seems curious; the private law of a typical state fills whole libraries. Justice Holmes' dictum that "general propositions do not solve concrete cases"[48] had always exercised a powerful influence over American lawyers' minds. The sentiment expressed in Holmes' dictum was antithetical to the fundamental concept of civilian codification. Not surprisingly, opponents of codification in the United States have fortified their positions by consciously or unconsciously inverting Portalis' formulation for an ideal code.

In 1826, William Sampson, a distinguished nineteenth century American jurist, reiterated traditional American anti-codification arguments to A.M.J.J. Dupin, an influential legal figure of nineteenth century France.

> . . . The French Codes have had but the life of a day. . . . the Civil Code, the model of all the others, is already almost buried by the multiplicity of laws, decrees, and commentaries with which it is loaded. . . in a short time, the law will be sought for, not in the code, but in the solutions of its difficulties, and in the questions to which it has given rise.[49]

"The assertion is not true," replied Dupin, "that the jurisdrudence of decided cases had prevailed in any way against the text of our codes."[50]

> Nor are we in any way threatened, even at a distance, with the danger of seeing the letter of our laws disappear under the load of interpretations. In every discussion, the text of the law is first looked into, and if the law has spoken, *non exemplis sed legibus judicandum est*. If the law has not clearly decided the point in question, its silence or its error is endeavoured to be supplied. But what country is there where decisions have not thus been used to supply the defects of legislation?[51]

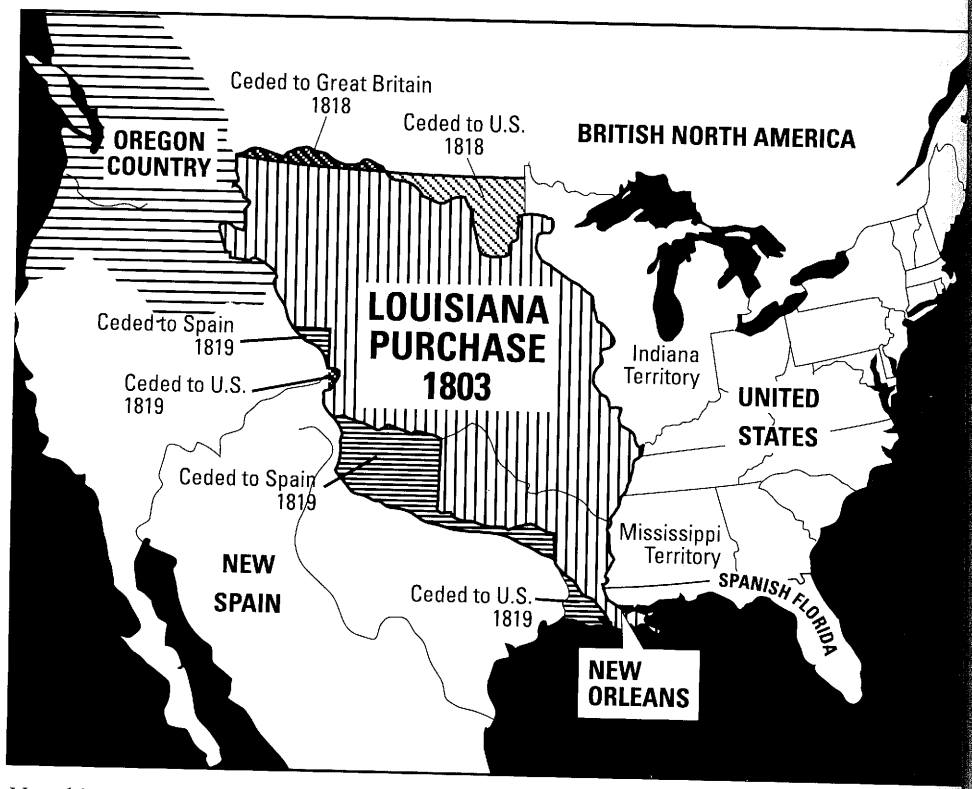
Reflecting the conviction of a common lawyer, Sampson's statement indicated his comfort with individual cases produced by an independent and coordinate judicial branch. Dupin, by contrast, showed the civilian's traditional attachment to written principles and relatively less esteem for the judiciary. Alexis de Tocqueville's *Journey to America* supplied a clear explanation of the American debate on codification:

> Generally, American men of law emphatically sing the praises of the common law. They oppose codification with all their powers, which is to be explained in this way. 1st. If a code of laws was made, they would have to begin their studies again. 2nd. The law becoming accessible to the common herd, they would lose a part of their importance. They would no longer be like the Egyptian Priests, the sole interpreters of an occult science. Some distinguished men in America, even outside the bar, are opposed to codification, among others Mr. Ponsett; Mr. E. Livingston on the contrary is very much in favour of it. He told me straight out today that the lawyers who were of an opposite opinion had an interest in the matter. The fact is that unwritten constitutions often give rise to less argument than those that are written down. It is easier to prove an antecedent fact than to discern the intention of a legislator and the spirit of the written law.[52]

Tocqueville's observations about American lawyers are equally relevant today. In the mid-twentieth century, an American antipathy toward codification continued to percolate through scholarly works. Around 1950, Judge Jerome Frank, as if to echo Sampson's views, wrote:

> The plan (to codify) has never succeeded. No codification can anticipate every possible set of facts. Moreover when social conditions change and social attitudes alter, many portions of the code act as an intolerable strait-jacket.[53]

The civilians' debate with common lawyers about the best way to make law reflects their antithetical assumptions about the power of generalized rules over men's lives. These assumptions, in turn, are linked to the civilian's preference for deduction and the common lawyer's attachment to induction as ways of reasoning about legal issues. The civilian, unless he assumed that the code stated generally valid standards, could not deduce a result by manipulating its provisions. By contrast, a common lawyer would not bother with close analysis of individual precedents if he thought their meaning could be captured for all time in a terse code provision. The differing assumptions about the power of inductive and deductive reasoning are linked to contrasting assumptions about the unfolding of history. As we have noted already, a civilian must believe that history is orderly enough to permit terse generalization. A common lawyer is much less confident than his civilian counterpart about the predictability of history. Years ago, Professor Ferdinand Stone summarized these contrasting attitudes toward historical process in the memorable passage quoted earlier in the section entitled "The Idea of a Civil Code." From Professor Stone's contrast of a common lawyer with his civilian counterpart, he arrived at important conclusions. First, a judge in a system of codified law is apt to be thought of as a mere technical expert and a good public servant, while the judge in the case-by-case system is apt to have his position regarded as one of relatively greater power and importance, for he actually finds the law. Second, in a system of preconceived or codified law, an ordinary citizen might be said to have a better chance to know the law by which the judge performs his craft. Third, a system of codified law is best suited for preserving the reforms made after periods of revolution or for keeping pace with drastic social change (e.g., the French and Soviet Revolutions, the emergence of Japan from isolation, and the unification of Germany); by contrast, a case system is most appropriate in societies of relatively stable evolutionary growth and change, such as England after the twelfth century and Rome in the classical period.[54]



United States, 1803-19, showing the boundaries of the Louisiana Purchase

3 Louisiana Experience with Civil Law

Civil Law in Louisiana Before Codification

Louisiana's civil law tradition dates from 1712, the year in which France granted Antoine Crozat a monopoly on commerce throughout the Louisiana territory. The royal charter that established Crozat's monopoly permitted him to confiscate all goods traded in Louisiana without his authority and declared that French royal proclamations and the Custom of Paris were the law of the territory. Despite the financial advantages afforded by Crozat's monopoly, his venture failed, and France revoked his charter in 1717. By then, however, the inhabitants of Louisiana were already used to the idea that they lived under French law.

The Custom of Paris was among the most celebrated laws of feudal France. As its name indi-

cates, it was unwritten customary law and it regulated human relations for centuries before its provisions were reduced to writing in 1580. Unlike the Code Napoleon, whose social perspective was decidedly bourgeois, the Custom of Paris applied to a stratified society of barons, vassals, and peasants. Allowing for this important difference in social visions, however, the Custom of Paris regulated a number of institutions that survived in the French Civil Code and the Louisiana Civil Code.

In August, 1769, Don Alejandro O'Reilly took possession of Louisiana for Spain. For the rest of the eighteenth century Louisiana was subject to the same laws as Spain's other possessions in the New World. In 1800, Spain ceded Louisiana to France by the Treaty of San Ildefonso. The formal transfer of the territory occurred in November 30, 1803, when Don Juan Manuel de Salcedo and the Marquis de Casa Calvo, both temporary governors of Louisiana, ceded the territory to the French colonial prefect, Laussat. The French flag flew over Louisiana only twenty days. On December 20, 1803, by virtue of the Louisiana Purchase, France transferred Louisiana to the United States. There is a disagreement over the extent to which Laussat, during his twenty days in power, replaced Spanish law with French law. According to Begnaud and Dethloff's popular Louisiana history text, Laussat "proceeded to organize the government and laws of Louisiana along French lines. He abolished the Spanish Cabildo; and in its place he appointed a mayor, two adjutants and a municipal court for New Orleans."[55] Laussat made no basic changes in the laws then in force, but his short repossession legally caused a restoration of French civil law to the extent that it was compatible with Spanish law. Confusion about the return of French law during Laussat's short reign is a main source of lively scholarly debate over the true sources of the provisions of the Louisiana Civil Code.

Civil Law Versus Common Law in the Louisiana Territory[56]

When the United States acquired Louisiana in 1803, lawyers and public officials trained in the Anglo-American legal tradition streamed in from the rest of the United States and urged local inhabitants to adopt to the common law. President Jefferson himself favored the assimilation of Louisiana into the general legal culture of the United States. Jefferson and his representatives, however, underestimated the resistance of local citizens. It must be remembered that these people,

who considered themselves French or Spanish, never sought the Louisiana Purchase, the young republic's first imperial acquisition. Their antipathy toward American rule took the form of a "clash of legal traditions."[57]

Partly in response to local objections to American rule, the United States Congress, by an act of March 26, 1804, split the Louisiana territory into two smaller territories: the District of Louisiana and the Territory of Orleans. The latter became the State of Louisiana, and W. C. C. Claiborne was named its civil governor. In 1806, the first legislature of the Territory of Orleans met and resolved to give the civil law a firm foundation. An act was passed providing that Louisiana was to be governed by Roman and Spanish laws in effect at the time of the Louisiana Purchase. When Governor Claiborne vetoed the act on May 26, the local legislature adjourned in protest.

A few days later, a local journal, *Le Telegraphe*, published a manifesto signed by Sauvé, president of the legislative council, and twelve other legislators. A product of people who, but for historical accident, would have maintained allegiance to France or Spain, the manifesto eloquently expressed the commitment to civil law and implored United States authorities not to tamper with a law that embodied their cultural heritage and assured the stability of social and economic relations.

> Now, since we have the power to keep our old laws insofar as they do not conflict with the Constitution of the United States and the special acts passed for our provisional government, no one can deny the advantage to us of remaining under a system to which we are accustomed and which has nothing contrary to the affection which we owe to our Government.
>
> We certainly do not attempt to draw any parallel between the civil law and the common law; but, in short, the wisdom of the civil law is recognized by all Europe; and this law is the one which nineteen-twentieths of the population of Louisiana know and are accustomed to from childhood, of which they would not see themselves deprived without falling into despair. If the inhabitants of this Territory had never

known any laws, if they had lived down to the present time without making agreements or contracts, it would perhaps be a matter of indifference to them whether to adopt one system or another system, and it is even probable that their attachment to their new mother country would cause them to prefer that sytem which would bring them nearest to their new fellow-citizens. But it is a question here of overthrowing received and generally known usages, and the uncertainty with which they would be replaced would be as unjust as disheartening. Every one knows today and from long experience how successions are transferred; what is the power of parents over their children and the amount of property of which they can dispose to their prejudice; what are the rights which result from marriages effected with or without contract; the manner in which one can dispose by will; the manner of selling or exchanging or alienating one's properties with sureness; and the remedies which the law accords in the case of default of payment. Each of the inhabitants dispersed over the vast expanse of this Territory, however little educated he may be, has a tincture of this general and familiar jurisprudence, necessary to the conduct of the smallest affairs, which assures the tranquility of families; he has sucked this knowledge at his mother's breast; he has received it by the tradition of his forefathers and he has perfected it by the experience of a long and laborious life. Overthrow this system all at once! Substitute new laws for the old laws; what a tremendous upset you cause! What becomes of the experience of an old man and what becomes of the facility and the sureness of transfers? Who will dare to sign a contract under a new regime the effects of which will not be known to him? What will be the lot of the inhabitant who is so unfortunate as not to have received sufficient education to learn these new laws at least by reading them, even supposing that his understanding of them is facilitated by transmitting the new laws to him in his own language? Will he not

> shudder every time that he wishes to dispose of his properties? Will he not then be afraid lest he be throwing himself into a bottomless pit without outlet and of bringing about his total ruin? Or must he always have recourse to the knowledge of a jurist regarding the most ordinary transactions of civil law?[58]

Addressed to American authorities, this manifesto hit its mark.

On June 7, 1806, the Legislative Council authorized James Brown and Louis Moreau-Lislet to make a code with "the civil law by which this territory is now governed" as its groundwork. This time Governor Claiborne capitulated. On March 31, 1808 the legislature enacted *A Digest of the Civil Laws now in Force in the Territory of Orleans with Alterations and Amendments Adapted to its Present System of Government.* A basis for all later versions of the Louisiana Civil Code, the Louisiana Digest inspired many rules of modern Louisiana law. After the enactment of the Digest of 1808, Claiborne reflected upon the reasons for survival of civil law in Louisiana:

> We ought to recollect . . . the peculiar circumstances in which Louisiana is placed, nor ought we to be unmindful of the respect due the sentiments and wishes of the ancient Louisianians who compose so great a proportion of the population. Educated in a belief in the excellencies of the civil law, the Louisianians have hitherto been unwilling to part with them, and while we feel ourselves the force of habit and prejudice, we should not be surprised at the attachment which the old inhabitants manifest for many of their former customs and local institutions.[59]

Sources of the Louisiana Digest of 1808

For some years, there has been intense scholarly debate over the sources utilized by Brown and Moreau-Lislet in drafting their Digest. Without careful investigation, many observers had assumed that the drafters had copied the Code Napoleon of 1804. (Indeed, lawyers from elsewhere commonly assume that the Louisiana Civil Code today *is* the Code Napoleon.) To assess the Code Napoleon's impact on the Louisiana drafters, Professor Rodolfo Batiza of Tulane Law School

undertook an exhaustive analysis of all provisions of the Digest of 1808.[60] Professor Batiza, after carefully comparing the provisions with a number of other legal texts available to the drafters, concluded that the drafters had been far more eclectic in their source selection than was earlier thought. He concluded that about eighty-five percent of the Louisiana Digest of 1808 derived from French sources, seventy percent of the total originating in a *projet*, or draft, of the French Civil Code and the Code Napoleon of 1804. The rest of the provisions came from Spanish, Roman, and English sources. After the publication of this research, Professor Robert Pascal of Louisiana State University challenged Professor Batiza's conclusions. According to Professor Pascal, the drafters' work was even more eclectic and imaginative than Professor Batiza had suggested. In Pascal's view, the drafters of the Digest used the French Civil Code and one or more of its *projets* as models for the form of the Digest and even copied the provisions of the Civil Code or its *projets* when these expressed the principles and rules of the Spanish and Roman laws then in force in the territory. However, when the substantive French rules were incompatible with Spanish and Roman law, the drafters translated or rephrased the Spanish and Roman texts themselves to reflect the content of the Spanish Roman law.[61]

Although the debate between Professor Batiza and Professor Pascal has spawned more research and raised more questions, it also settled important issues: the institutions of the Civil Code, whether French, Spanish, or Roman in origin, were essentially civilian in character and the original Louisiana Digest was not a copy of the Code Napoleon or any other single text. Despite national campaigns at the highest political levels, the local Louisiana inhabitants had achieved their goal of tailoring a code for Louisiana.

From the Louisiana Digest of 1808 to the Civil Code of 1825

With the enactment of the Louisiana Digest of 1808, Louisiana inhabitants reaffirmed their preference for civil law over common law. The Digest was a first step in the consolidation of their position. Fifteen years later, the legislature enacted the Louisiana Civil Code and replaced the Digest with it. In terms of scope and size, the Civil Code of 1825 was larger than the Digest of 1808. The Digest had 2,160 provisions; the Civil Code had 3,522 articles. A comparison of their contents reveals that the Civil Code addressed a number of topics on

which the Digest was silent. Among the reasons for enactment of the Civil Code of 1825 was serious concern among lawyers and judges about the comprehensiveness and proper interpretation of the Digest. Early judicial interpretations of the Digest reflected uncertainty about the continuing significance of Spanish, French, and Roman laws that predated its enactment. Assuming the Digest enacted French, Spanish, and Roman laws then in force, what was the fate of laws not addressed explicitly by the Digest? Did they survive? Or did the Digest, by failing to refer to them, overrule them by implication? These questions had percolated through a number of early supreme court rulings, and they crystallized in 1817 in the case of *Cottin v. Cottin*.[62] The case was notable for both the law it announced and the jurists who argued and decided it. It would have been difficult to assemble a more distinguished group of local jurists. Edward Livingston and Etienne Mazureau represented the plaintiff; Louis Moreau-Lislet the defendants. Justice Pierre Derbigny delivered the opinion. According to the case report, the plaintiff's son had died and was survived by his pregnant wife. The wife gave birth to a child, who lived only a few hours. The plaintiff, father of the deceased husband, contended that the deceased child, because it was incapable of living outside its mother's womb, could not inherit from its father. Thus, went the argument, the plaintiff, as parent of the deceased husband, was his forced heir. Justice Derbigny acknowledged that the Digest of 1808 did not resolve the dispute. Although the Digest of 1808 did not expressly authorize reference to earlier Spanish laws, Derbigny justified such judicial reference in these terms:

> It must not be lost sight of that our civil code is a digest of the civil laws which were in force in this country when it was adopted; that those laws must be considered as untouched wherever the alterations and amendments, introduced in the Digest, do not reach them and that such parts of those laws only are repealed as are either contrary to, or incompatible with the provisions of the code.[63]

Applying to the facts of *Cottin v. Cottin* the *Recopilación de Castilla*, an ancient body of Spanish laws first published by Philip II in 1567, Justice Derbigny sided with the plaintiff as parent of the deceased hus-

band. The child could not inherit from his father because under Spanish law he was incapable of living on his own. *Cottin v. Cottin* and a number of other decisions attested to the continuing vitality of Spanish law in Louisiana despite the enactment of the Digest of 1808.[64]

On March 14, 1822, the Louisiana legislature resolved to revise the Digest of 1808. It charged Edward Livingston, Pierre Derbigny, and Louis Moreau-Lislet with the drafting task. They submitted their *projet* in February 1823. It was passed and went into force in 1825. Predictably, the enactment of the Civil Code did not put to rest questions of interpretation that had crystallized in *Cottin v. Cottin*. It was still unclear whether the Civil Code's enactment signalled the repeal of prior laws.[65] To complicate matters, the category of "prior laws" had expanded. This category included the Digest of 1808 as well as prior Spanish, French, and Roman laws. Hoping to settle this serious dispute over legislative interpretation, the legislature spelled out its intention in article 3521 of the Civil Code of 1825:

> From and after the promulgation of this code, the Spanish, Roman, and French laws which were in force in this state, when Louisiana was added to the United States and the acts of the Legislative Council, of the legislature of the Territory of Orleans, and of the legislature of the State of Louisiana, be and they are hereby repealed in every case for which it has been especially provided in this code, and that they shall not be contrary or repugnant to those of this code.[66]

In the teeth of this express repeal, the course of Louisiana jurisprudence after enactment of the Civil Code attested to the vitality of ancient civil laws. Louisiana's experience with these ancient laws resembled the experience of other states that had tried in vain to repeal certain English common law doctrines only to discover that colonial judges invoked them anyway whenever gaps in their fledgling American law appeared. For example, in *Flower et. al. v. Griffith*,[67] decided in 1827, the Louisiana Supreme Court held that certain parts of the Digest of 1808 were still in force. In *LaCroix v. Coquet*,[68] also decided in 1827, the Supreme Court held that certain provisions of *Las Siete Partidas* were effective, despite their legislative repeal:

"Subsequent laws [did] not repeal former ones by containing different provisions; they [had to be] contrary."[69] The Louisiana judge's sentiment toward ancient civil laws was perhaps an amusing twist of the traditional common law notion that statutes in derogation of common law had to be strictly construed. Louisiana courts seemed often to accord codes in derogation of earlier codes the same treatment that common law judges meted out to statutes in derogation of judicial precedents. In 1828, the legislature sought to change this judicial attitude by means of other repealing acts. Yet, Louisiana's ancient laws proved as hardy as weeds in a flower bed, and counsel and courts still routinely referred to repealed provisions.

In 1839, the Louisiana Supreme Court, in *Reynolds v. Swain*,[70] acknowledged the validity of repealing legislation passed ten years earlier. The *Reynolds* decision held that the laws of Rome, Spain, and France had been abrogated in Louisiana unless the principles they embodied had already been confirmed by judicial decisions. By 1839, the number of judicial decisions that had recognized these ancient principles assured routine judicial recourse to venerable civilian texts.[71]

4 Institutions of the Civil Code

Individual ownership of property is an ideological pillar of the Civil Code.

Ideological Pillars of the Civil Code

The Code Napoleon was the lawbook of the third estate, the bourgeoisie that, during the French Revolution, had defeated the feudal groups dominant in the *ancien régime* and then, during the restoration after Napoleon's fall, had consolidated its position with growing self confidence and political influence. Both the Code Napoleon and the Louisiana Civil Code addressed men of property,

not day laborers. In both codes, the ideal man was the responsible *paterfamilias* endowed with sound judgment and knowledge of business affairs and law.[72] The bourgeoisie's success depended on guarantees of private property and personal freedom, especially the freedom to engage in economic activities. As each of the Civil Codes had three books, they also had three ideological pillars: freedom of contract, private ownership of property, and family solidarity. The rest of this book briefly shows doctrinal interrelationships among these pillars and then discusses how each pillar has supported specific institutions of the Civil Code.

Freedom of contract and private property were considered necessary to overthrow the complex restraints of feudalism. To master their destiny, so went the argument of the bourgeoisie, men had to be free to exploit the wealth of the land. Absolute enjoyment of land formerly subjected to the hierarchical bonds of lord and vassal was seen as indispensable to the development of agriculture. Unrestricted freedom to contract for the fruits of human labor was equally important.[73] Consistent with these ideas was the conclusion in the general formula of Louisiana Civil Code article 2315 (a reproduction of French Civil Code article 1382) that one had to pay for harm he carelessly caused another. This articulation of negligence liability represented an accommodation of individual responsibility with a broad range of free activity needed to further the bourgeoisie's goals.

Family solidarity was the third ideological pillar of the Civil Code. The family, in the view of the code drafters, was the primary building block of society. Napoleon himself probably contributed the idea of a strong patriarchal family; a French scholar once suggested that the code had sanctified "a strong family in an omnipotent state with Napoleon at the top."[74] Many rules of the civil code suggest this commitment to a family structure with a *bonus paterfamilias* at the top. For the *bonus paterfamilias*, ideas like private property and freedom of contract facilitated advancement in the workplace. Familial bonds, the focus of one's private activity, gave meaning and direction to work.

Conventional Obligations[75]

Both the French and Louisiana Civil Codes, in their treatments of conventional obligations (or contracts), express a commitment to human autonomy. Opposed to the feudal view that social status dictated men's fortunes, the code drafters enshrined in their work the doc-

trine of freedom of contract: Men were the best judges of their own interests and could freely contract to realize their goals so long as the goals were not prohibited. According to article 1901 of the Louisiana Civil Code of 1870, a contract constituted the law between the parties; when parties agreed on a course of action, they made law for themselves.

> Agreements legally entered into have the effect of laws on those who have formed them. They cannot be revoked unless by mutual consent of the parties, or for causes acknowledged by law. They must be performed with good faith.[76]

By means of article 1901, which corresponded to French Civil Code article 1134, the drafters acknowledged that people, having escaped from feudal bondage, could live under a government responsive to basic ideas of freedom.[77] Provisions like this one affirmed men's sense of faith in themselves. According to article 1761 of the Louisiana Civil Code of 1870, a contract was "an agreement, by which one person obligate[d] himself to another."[78] Mutual obligations were created by the parties, not the state or the church.[79] In contractual matters, the state was subordinated to the parties' will. The state could interfere in the parties' relationship only if they requested the interference. According to article 1799 of the Louisiana Civil Code of 1870,

> it is a presumption of law that in every contract each party has agreed to confer on the other the right of judicially enforcing the performance of the agreement, unless the contrary be expressed or may be implied.[80]

In addition to eighteenth century rationalism, the Civil Codes embodied the view of natural law philosophers that human beings were inherently moral and that there was a correspondence between universal morality and legal institutions. The Civil Codes balanced a fundamental sense of right and wrong against contractual freedom, thereby preventing freedom from degenerating into license.

To Anglo-American lawyers, a striking feature of a civil code is its moralizing self-righteousness. Let us consider, for example, the differing views of the Civil Code and the common law toward the maxim

Contractual freedom flows from the Civil Code's commitment to good faith and fair dealing.

caveat emptor (let the buyer beware).[81] At common law, this doctrine promoted party autonomy by imposing on the buyer a duty to verify the qualities of an item before he bought it. The Civil Code tempered the doctrine of *caveat emptor* with ideas of good faith and fair dealing. According to both the French and Louisiana Civil Codes, a buyer's honest mistake as to the quality of his purchase justified avoidance of his contract. By means of the redhibitory action, the buyer could "avoid a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."[82] Though today there is a warranty remedy similar to a redhibitory action everywhere else in the United States, it is a product of relatively recent statutory inroads on the doctrine of *caveat emptor*.[83] By contrast, Louisiana citizens, thanks to their Civil Code, have availed themselves of a similar warranty action since the time that Louisiana joined the Union.

The Civil Code's moralism, though somewhat toned down in recent revisions, was already apparent in its highly original classification of obligations. According to article 1779 of the Louisiana Civil Code of 1870, "obligation" was synonymous with "duty," and duty had both legal and moral connotations. The Civil Code of 1870 then divided the range of obligations into three subcategories: imperfect, natural, and civil. A civil obligation was the most common and familiar, for it

consisted of "a legal tie which gave the party with whom it [was] contracted the right of enforcing its performance by law." Natural and imperfect obligations testified to the Civil Code's moral substratum and its natural law content. An imperfect obligation arose when "the duty created by the obligation operate[d] only on the moral sense, without being enforced by any positive laws." The obligation of giving charity was imperfect. Although such an obligation created no legal right of action, its presence in the code suggested that the human spirit operated in both legal and moral spheres.[84]

Appropriately, the merger of morality and justice advocated by natural law theory was most pronounced in natural obligations. Article 1760, illustrating this merger of morality and justice, provides: "A natural obligation arises from circumstances in which the law implies a particular moral duty to render a performance." Article 1762 provides concrete examples of circumstances giving rise to natural obligations:

> (1) When a civil obligation has been extinguished by prescription or discharged in bankruptcy
>
> (2) When an obligation has been incurred by a person who, although endowed with discernment, lacks legal capacity.
>
> (3) When the universal successors are not bound by a civil obligation to execute the donations and other dispositions made by a deceased person that are null for want of form.

Although a natural obligation does not give rise to a legal claim, it produces certain effects. For example, once payment has been made in satisfaction of a natural obligation, the paying party cannot recover it on the ground that it was not owed. Under article 1762, if a debtor has paid a debt whose enforcement is barred by prescription, he cannot recover it from his creditor. A natural obligation also constitutes sufficient basis for a new contract; in other words, a natural obligation, although itself unenforceable, may be the basis for a new binding obligation.[85]

Every student of the Civil Code will agree that good faith is essential to its contractual scheme. Long before the French Revolution, the

great French jurist, Robert Pothier, stressed the moral dimension of good faith:

> Good faith obliges the seller not only to refrain from suppressing the intrinsic faults of what he sells, but universally from concealing anything concerning it, which might possibly induce the buyer not to buy at all, or not to buy at so high a price.[86]

Lawyers in both Europe and America studied and appreciated Pothier's writings. Both the French and Louisiana Civil Codes eventually incorporated many of his views. Soon after Louisiana joined the Union, it became clear that Pothier's view of good faith was perhaps loftier than that of the ordinary man in the street. In *Laidlaw v. Organ*,[87] the United States Supreme Court directly confronted Pothier's views. Organ sought delivery of a quantity of tobacco that he had bought from Laidlaw. Laidlaw denied Organ's right to the tobacco on the ground that Organ, when he was asked by Laidlaw if there was any information calculated to enhance the tobacco's value, remained silent. In fact, as Organ well knew, the tobacco's value had risen dramatically as a result of the signing of the Treaty of Ghent that ended the War of 1812. Had Organ, by remaining silent, committed fraud on Laidlaw? Yes, according to the followers of Pothier's view, which was reproduced in the Louisiana Civil Code. No, according to Justice Marshall, who wrote that the buyer's actions, although they might have been immoral, did not constitute fraud, especially when the "means of intelligence were equally accessible to both parties."[88] Other jurists came to share Justice Marshall's view that the Civil Code's stress on good faith, although praiseworthy, was impractical. At Marshall's time, most Americans did not seem to want so much morality in their law.[89]

The doctrine of lesion beyond moiety, like the civilian treatment of fraud, reflects the code drafters' attitudes toward fair dealing. A claim of lesion,[90] derived from a Roman law doctrine that protected the poor from the rich and powerful, refers to the harm suffered by one who does not receive a full equivalent for what he gives in a contract. An anomalous qualification on unbridled personal freedom, the doctrine of lesion permits a seller to rescind a sale of a parcel of real estate if he has received less than half its value. Reflecting a bias in favor of land-

holders, the doctrine of lesion almost never applies to anything but land. The doctrine is also an anomaly in another sense: while a seller can get relief for selling property too cheap, a buyer may not obtain relief for buying too dear.

The Civil Code's moralistic attitude is apparent in its regulation of the Good Samaritan, one who comes to another's aid without being invited to do so. The common law has traditionally disdained such rescuers, usually labeling them as busybodies and "officious intermeddlers."[91] By contrast, the Louisiana Civil Code, by means of the ancient civilian institution of *negotiorum gestio*, rewards Good Samaritans by compensating them for reasonable though unauthorized management of their neighbors' affairs. According to article 2295:

> when a man undertakes, of his own accord, to manage the affairs of another, whether the owner be acquainted with the undertaking or ignorant of it, the person assuming the agency contracts the tacit engagement to continue it and to complete it, until the owner shall be in a condition to attend to it himself; he assumes also the payment of the expenses attending the business. He incurs all the obligations which would result from an express agency with which he might have been invested by the proprietors.

Although *negotiorum gestio* does not create a contractual bond, the Civil Code outlines situations in which a Good Samaritan's voluntary conduct may obligate the beneficiary to reimburse his expenses. According to Professor Robert Pascal, the institution of *negotiorum gestio* reflects an unusual commitment to social solidarity.

> It permits an observation concerning the general philosophical orientation of the Civil Code . . . . The encouragement of unsolicited and unobliged cooperation implies a recognition of a human society that is essentially ontological rather than conventional, one in which each person is a part of the whole rather than an individual in voluntary association with the others . . . . Law and contract themselves are to be understood as modes of specifying the form of ontolog-

> ically demanded cooperation rather than as parts for enlightened self-interest.[92]

Finally, the Civil Code's scheme for compensation of damages, like its treatment of good neighbors, emphasizes the integrity of the individual. To the code drafters, being human meant more than being an economic unit for capitalist production. Article 1934 of the Louisiana Civil Code of 1870 allowed recovery for both economic and moral damage.

> Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.[93]

Under this rule, which recognizes both financial and spiritual harms, a young bride has recovered damages from a store for the annoyance and embarrassment resulting from an imperfectly tailored trousseau.[94] A mother has recovered damages for mental suffering due to delayed delivery of a telegram announcing the serious illness and impending death of her son.[95]

Property[96]

The Civil Code's regulation of property must be understood in light of historical developments that eventually led to the transformation of French ideas about the exploitation of wealth. Before the French Revolution, property was commonly divided into long term interests of landlords and tenants. Feudal practice usually defined property holding relationships between landlords and tenants by reference to their hier-

In the Civil Code's social vision, people must be free to exploit the wealth of the land.

archical personal ties. A landlord, whose family commonly held an estate for centuries, granted his tenants limited rights of enjoyment in return for the tenants' personal commitment to till the soil. Though the landlord had dominant rights in the land, he generally lacked possession. By contrast, a tenant, while he might physically hold the land, lacked important incidents of control over it. Consequently, even in the eighteenth century, land tenure in France was split conceptually into two: The lord had direct domain (*dominium directum*) over the estate, permitting him to withdraw its fruits and revenues as feudal dues, while the tenant had physical control of the land, the *dominium utile*. The tenant, although he actually lived on and cultivated the soil, lacked long-term control over it. He ordinarily could not sell the estate or devise it to his children.

For the drafters of the French Civil Code, the emergence of the third estate and the rise of a middle class implied the abolition of feu-

dal restraints on exploitation of property and their replacement by a system in which everyone could bargain freely for control and exploitation of land. In general, the code drafters replaced the rights and duties that flowed from lord-vassal relationships, status, and heredity with rights and duties based upon freedom of contract and private property. To achieve a major change in patterns of wealth distribution, the drafters sought to unite in the same hands both the control of assets and the benefits they yielded. Accordingly, they elaborated a highly stylized, streamlined system of ownership free of the privileges enjoyed by church and nobility under the ancien régime and devoid of feudal burdens upon land.

Inspired by their French counterparts, the Louisiana drafters adopted as their cardinal principle the inviolability of private property. Rejecting the feudal system under which a hierarchy of personal ties dictated landholding patterns, the Louisiana lawmakers declared all citizens equal in terms of the way they held property. In Book II of the Civil Code, "Of Things and the Different Modifications of Ownership," the lawmakers gathered rules on immovable and movable property, adopting a series of civilian legal categories into which they sought to pour virtually every aspect of the physical universe. Book Two begins by stating that all things are either common, public, or private; corporeal or incorporeal; movable or immovable. In typically civilian style, the articles move deductively from general to particular, stating that:

> *Article 449*. Common things may not be owned by anyone. They are such as the air and the high seas that may be used by everyone conformable with the use for which nature intended them.
>
> *Article 450*. Public things are owned by the state or its political subdivisions in their capacity as public persons.
>
> *Article 453*. Private things are owned by individuals, other private persons, and by the state or its political subdivisions in their capacity as private persons.

Ownership

In contrast with the heavily restricted idea of ownership associated with feudalism, the Civil Code's concept of ownership is a nearly absolute right akin to the individualistic Roman conception of *dominium*. The absolute character of the right of ownership is qualified only by the rule that an owner must not abuse his rights or allow his property to create a nuisance for the rest of the community. According to article 477,

> ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.

Within the civilian's universe, the owner has absolute title, and his ownership attaches to the asset itself. Limited ownership is practically no ownership at all. No other jurisdiction in the United States envisages individual property rights more uncompromisingly. Louisiana's Romanist conception of property has sometimes prompted Louisiana judges to remark ethnocentrically that Anglo-American property law consisted of "intricate, and except to the uninitiated, unintelligible modes and distinctions."[97] Unlike the common law, the Civil Code establishes no estates in land of various durations: civilian ownership may be divided conceptually into *usus* (use), *fructus* (fruits), and *abusus* (the right to sell or otherwise dispose of property). The nearest equivalent of a common law life estate is the usufruct which, according to article 535, is "a real right of limited duration on the property of another." Under the property scheme of the Civil Code, an asset always has an absolute owner; limited rights of enjoyment such as usufruct, habitation, and servitude are mere encumbrances or burdens on absolute ownership. According to article 478, "the right of ownership . . . may be burdened with a real right in favor of another person . . . . The ownership of a thing burdened with a usufruct is designated as naked ownership."

The civil law of property sharply distinguishes ownership from possession. According to traditional learning, possession is a matter of fact; ownership is a matter of law. A possessor enjoys material control and use of a thing as if he were its owner, but he is not the legal owner.

In the language of article 481, "the ownership and the possession of a thing are distinct. Ownership exists independently of any exercise of it and may not be lost by nonuse. . ."

To illustrate the distinction between ownership and possession as well as the typical division between naked ownership and usufruct, assume A dies survived by his wife and two sons. The only asset in A's estate is the family farm. Under A's will, his wife becomes usufructuary of the farm and their sons the naked owners. In other words, absolute ownership is divided into the wife's *usus* and *fructus*, on one hand, and the sons' *abusus*, or power to alienate the property, on the other hand. Upon A's death, title to the farm vests immediately in the sons, although their mother is in possession and may remain there until she dies or remarries. As usufructuary, she may enjoy the property as if she were owner so long as she preserves its substance.

The mother may harvest and sell crops, live in the house, and operate the farm machinery. But as usufructuary, she only possesses the farm; she cannot sell it without her sons' consent because they have the *abusus* or power to alienate it. For their part, the sons must not interfere with their mother's right of enjoyment, and she cannot dissipate the property through neglect or abuse.

Perpetuities

According to French legal historians, the drafters of the French Civil Code shared a profound distrust of legal devices that diminished the productive use of an asset by keeping it out of commerce. Their attitude was founded upon historical experience. Before the French revolution, substantial portions of land could not be given away, either inter vivos or by will. By means of a "fideicommissary substitution,"[98] a grantor could transfer property to his grantee with a string attached in the form of a stipulation that the grantee would transfer it to a third party on the happening of a special condition. If the grantor controlled the direction of an asset in the first grantee's hands, he could control its movement to a second, third, and fourth grantee as well. Anglo-American lawyers would recognize this restriction on property transfers as a problem of mortmain or "dead hand" control, and the common law sought to regulate it by means of the Rule Against Perpetuities.

Fideicommissary substitutions were not the only clogs on the free use of assets. Under the prerevolutionary doctrine of *retrait lignager*, families often enjoyed power to frustrate the efficient use of an estate

by taking it back long after it had been sold to a third party. Sometimes a grantor of land, instead of selling it outright for a lump sum, transferred it under a perpetual lease for a perpetual rent, rather like a "fee farm" in England.[99] Louisiana drafters, like their French counterparts, took a number of steps to overcome the perpetual removal of property from commerce. They provided that leases were contracts, not interests in land; leases had to be established for certain periods, not in perpetuity. Like the French Civil Code, the Louisiana Civil Code outlawed both the *retrait lignager* and fideicommissary substitutions.

Servitudes

To modern ears, the word "servitude" has ugly connotations. Derived from the Latin *servus* (slave), it originally denoted a relationship of master and serf in which the latter was bound to do the former's bidding. For a feudal tenant, servitudes implied slavishness toward his lord who commonly exacted from his vassals all sorts of personal services. According to historians, feudal servitudes blocked efficient agricultural production and drained away valuable revenues in tolls and taxes. During the French Revolution, there was strong sentiment in favor of the abolition of servitudes. After the French Revolution, the French drafters realized that servitudes, if they were properly circumscribed, could facilitate the efficient working of a community. They maintained servitudes in the Civil Code and reduced their harshest effects by providing that a servitude ran between estates, not persons. As the French jurisconsult, Treilhard,[100] suggested in a debate preceding the enactment of the French Civil Code, post-Revolutionary servitudes had nothing in common with feudal ones:

> Servitudes cannot be established but for the use and utility of an estate, do not entail any affirmative duties of the person, and have nothing in common with feudal tenures which are destroyed forever.[101]

Under the Civil Code, a servitude limits the ownership of one parcel of land for the benefit of another, usually adjacent parcel of land. Typically, a servitude, such as one's right of passage upon his neighbor's land, involves a benefit for the dominant estate and a charge upon the servient estate. Servitudes are classified according to their characteristics; they are natural, legal, or conventional. A natural servitude arises

by necessity from the relative positions of the dominant and servient estates. For example, article 655 of the Civil Code provides:

> An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow.

Legal servitudes are limitations on ownership established by law for the benefit of the general public or for the use of particular persons. An owner of a building must keep his property in repair to prevent injuries to his neighbors and passers-by. Conventional servitudes are created by contract. A landowner may grant another the right to drive livestock across his estate, to draw water from his well, and to bury refuse in his dump. By means of such agreements, the landowner does not transfer ownership of his property. Instead, he imposes a charge on his estate for the benefit of his neighbor's estate.

To preserve the sanctity of private ownership, the drafters of the Civil Code provided that the grant of a servitude had to be interpreted in favor of the freest use of the burdened property. Although a man, under certain circumstances, might pass over his neighbor's property, the law required him to take the shortest route to minimize disturbance of his neighbor's own enjoyment. A building owner had to keep his property in good repair to prevent injury to his neighbors, and he had to repair the roof so that rainwater did not fall on his neighbor's ground. Such limited restrictions of use were consistent with the code's highly individualistic conception of ownership.

Delictual Liability

According to Professor Ferdinand F. Stone, "tort is a civil wrong for which reparation is sought, normally in the form of an award of money damages. The word comes from the French word *tort* or wrong, and from the Latin *tortus*, meaning conduct twisted from the norm. Formerly, the French used the term 'tort' but now they have discarded it in favor of the word *délit*, derived from the Latin term *delictum*."[102] Some years ago, Professor Stone remarked that Louisiana's civilian concept of delictual liability hinged on individual responsibility. Louisiana Civil Code article 2315 provides that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Emphasis on fault, like the stress on private ownership, reflects a particularly civilian way of envisioning human beings in their social relationships and of defining the notion of social responsibility. As the preceding discussion of the civil law of property suggested, an essential assumption of the French drafters and their Louisiana counterparts was that the bourgeoisie's success required an emphasis upon individual responsibility and a wide freedom to engage in all sorts of economic activities. The delict articles in both civil codes accommodated a broad range of free activity desired by the bourgeoisie to the concept of individual responsibility.

Professor Stone elaborated on this accommodation in the following passage:

> The philosophy underlying the concept of liability based on fault is that each individual is responsible for the consequences of his acts. The freedom of the individual from the legal obligation to pay damages depends upon his compliance with the generally accepted standards of the society in which he lives. The good citizen is rewarded: the erring citizen is penalized. The individual is free to act and as long as he acts as a good citizen, then, even though damage to someone results from his acts, he is not obliged by law to compensate for that damage since he was not at fault. The aim of such a system may be said to be the development of responsible individuals who act according to the generally accepted standards of conduct of their society and are thereby protected by law against the obligation to make good any damage caused by their acts. Only if the individual steps beyond or abuses these standards does society hold him by law obliged to make repair.
>
> The philosophy of the fault concept of delictual liability is carried one step further by the proposition that every person is responsible for damage caused not only by his act but also by his negligence, imprudence or want of skill. The individual as a member of society may be required under certain circumstances to act in a definite manner. Thus he may be required to pay damages because he has not acted at a time and in a

> manner required by society of its prudent members. Hence liability may result not only from acts but also from omissions to act. Again, the aim of this thought is to bring the individual citizen up to a minimum standard of conduct, which minimum will vary with the circumstances, or, as we say, with the "reasonable man under the circumstances."[103]

As the drafters of both civil codes realized, no one could foresee all the possible types of civil injuries and accidents that might befall people. Accordingly, they treated delictual liability lapidarily; the civil codes contain only a handful of articles on the topic. In both France and Louisiana, the paucity and suppleness of relevant legal provisions enabled courts to discover their meanings in a wide range of unforeseen circumstances.

The Louisiana tort articles have a number of distinctive features. Derived from French[105] and Roman sources,[106] articles 2321[104] and 2322 impose strict liability upon owners for damage done by their animals and their ruinous buildings. Under article 2318,[107] the father or the tutor of an unemancipated child is liable for all damages occasioned by the child. By contrast, common law jurisdictions take a more restrictive view of parental liability: according to the usual rule, a parent is liable for his child's intentional torts, but not for his negligent acts.[108]

The doctrine of comparative negligence — only recently developed in common law jurisdictions — has been a feature of the Louisiana Civil Code since the early 1800s. Under traditional common law principles, an injured plaintiff whose own negligence, however slight, contributed to his injury was barred from any recovery whatsoever. Some common law courts devised the comparative negligence doctrine to remedy evident inequities that flowed from the application of this absolute rule. Article 2323 of the original Civil Code contained the seeds of comparative negligence principle although Louisiana lawyers for a long while did not exploit its potential. That article provided:

> The damage caused is not always estimated at the exact value of the thing destroyed or injured. It may be reduced according to the circumstances, if the owner of the thing has exposed it imprudently.

As Professor Stone pointed out, article 2323 was not taken from the French Civil Code, which was silent on the subject of comparative negligence; in fact, the exact origins of the article remain in doubt. In 1859, article 2323 was applied in *Fortunich v. City of New Orleans*[109], but it soon fell into disuse. In 1979, the principle of article 2323 inspired enactment of detailed comparative negligence provisions.[110]

Any exposition of Louisiana tort doctrine would be incomplete without a consideration of article 2317.[111] A cognate of article 1384 of the French Code Civil, this article imposed a presumption of liability for damages caused by things in one's custody. The notion of things under this form of strict "custodial" liability is broad and includes items such as cars, animals, trees, and even skis. In common law jurisdictions, tort actions involving damage caused by things in the custody of another would be decided by the usual reference to fault-based negligence liability: the plaintiff would have to prove that the defendant, because he failed to exercise reasonable care, was liable for the injuries. Article 2317 imposes liability on a custodian irrespective of his fault on the theory that he either benefits from the item in his care or is best situated to protect others from the item's harmful effects.

The Family

The drafters of the Civil Code considered the family the basic cell of society and the protector of the future of society. The Civil Code provisions were influenced by middle class values and specifically by a sense that the family was a closely knit group under the authority of a strong parents. These values are reflected particularly in provisions concerning the economic rights of a family to the wealth accumulated by a family member. When one considers the financial shakiness of the public institutions designed to keep the family afloat (welfare, social security, etc.), it is heartening to find a private law concerned with the material well-being of the family. If the Civil Code rules we describe appear anachronistic, perhaps it is because we no longer share the code drafters' assumptions about the centrality of the family's role in society.

In the disposition of property, the Civil Code promotes family solidarity. Although in other states familial financial responsibilities do not routinely go beyond what is necessary for periodic support of dependent children and spouses, Louisiana law has traditionally imposed support obligations on a parent and has generally insured that a spouse will receive family capital in the form of community property

The basic cell of society, the family also guarantees the future of society.

and that minor and incompetent children will receive fixed shares.[112] Although responsibility to a person's family restricts his autonomy, the code's restrictions permit considerable latitude to dispose of property outside the family circle, to favor one minor child over another, and even to alter the share of capital to which a spouse is entitled. These features of code regulation permit the conclusion that the Civil Code stresses family responsibility over individual autonomy to a greater extent than the law of other states in which the balance tips towards autonomy.

Community Property[113]

Another index of the Civil Code's approach to family financial solidarity is its regulation of community property. Unless the spouses agree otherwise in a solemn contract, the civil code subjects them to a system of community property. Under this system, married people share the ownership of all property acquired during the marriage through the

labor or earnings of either spouse. Even if one spouse devotes himself or herself completely to homemaking and childrearing, that spouse will end up owning half of the property acquired with the other spouse's earnings. Moreover, the spouses share income produced from property owned by a spouse before marriage or inherited during marriage even though the spouses do not share the ownership itself of this income-producing property. In the United States, the notion of shared ownership in income and earnings during marriage has been largely unknown in states other than the eight community property states. Upon dissolution of the marriage by either death or divorce, each spouse (or a spouse's heirs) receives half of the shared property.

The Future of Codification

The goal of this book has been to demonstrate the Louisiana Civil Code's debt to the continental Romanist tradition and the code's operation in the only mixed jurisdiction in the United States. On the American legal landscape, the Civil Code is a unique monument worthy of appreciation and preservation. If we do not stress its virtues and the need to preserve it, we always run the risk of losing it. Implicit in the Civil Code's structure and technique is a faith in human reason. At a time when the other forty-nine states are producing thousands of cases monthly — far more than any one can ever hope to read — the Civil Code stands for the proposition that the basic private law rules of self-governance can be organized in a single book for the benefit of all citizens. Critics of the Civil Code may characterize this proposition as unrealistic. For resolving disputes critics of codification may prefer *ad hoc* techniques over general rules. Proponents of civil codification, by contrast, choose to believe that social patterns are knowable enough to permit generalization about them.

Preservation of the Civil Code is a complicated matter. In the current age of relevance, it is hard to maintain any tradition, let alone a civilion tradition that requires intimate knowledge of foreign languages, philosophy, and continental history. Coupled with the special demands of the tradition is the momentum of the common law drive toward uniformity exerted by forty-nine other jurisdictions and by a federal system operating both above and within Louisiana. In 1948, the Louisiana legislature authorized the Louisiana State Law Institute to modernize the Civil Code. The work of revision began in earnest in the mid-1960s. At this writing, all of Book II, as well as chapters on

such topics as matrimonial regimes, partnerships, obligations, prescription, and suretyship have been revised. The Louisiana legislature has deviated from the classical tripartite scheme by adding to the Code a new Book IV, Conflicts of Law. Newly renovated titles on sales will probably be enacted in 1993, and revisions of successions and lease are now under consideration.

The legislative revision has not been the orderly process its early advocates envisioned. This is so partly because of the routine extrusion of piecemeal statutes by state lawmakers insensitive to civilian drafting techniques. The disorder is also due to the basic nature and function of the Civil Code as well as the stresses and tensions produced by rival common law states. Despite the Civil Code's transformation in response to social changes, the idea of civil codification as a social blueprint will survive. Rapidly burgeoning transnational commerce, the dissolution of east-west trade barriers, and the emergence of great multinational markets have already impelled lawmakers to unify and to generalize regulation of many typical transactions such as sales and loans. In these unifying efforts, commercial lawyers, seeing the folly of depending upon a haphazard case law development, have routinely relied upon civilian drafting methods.[194] In our view, the idea of a Civil Code, because it stresses the power of legal generalization, will enjoy an important role in a society far more complex than that of the early Louisianians who fought to preserve their civilian heritage nearly two hundred years ago.

Appendix A

Chronology of Significant Events in Louisiana's Early History

1699	Pierre le Moyne, Sieur d'Iberville explores the Mississippi and establishes a royal colony at Ocean Springs, Mississippi
1712	By royal charter, France grants Crozat a monopoly on Louisiana commerce
1717	Crozat surrenders his charter
1718	Jean Baptiste le Moyne, Sieur de Bienville establishes New Orleans
1762	France secretly cedes Louisiana to Spain
1768	Local French inhabitants revolt against Spanish rule
1769	Don Alejandro O'Reilly takes possession of Louisiana for Spain
1800	Spain cedes Louisiana to France by the Treaty of San Ildefonso
1803	November 30, Spain formally transfers Louisiana to France
1803	December 20, Laussat, a French colonial prefect, transfers Louisiana to the United States
1804	Congress divides the Louisiana Territory into the Territory of Orleans and the District of Louisiana
1804	French assembly enacts *French Civil Code (or Code Napoleon)*
1808	Louisiana Legislature enacts *Digest of the Civil Law Now in Force in the Territory of Orleans*
1823	Louisiana Legislature passes projet of Civil Code
1825	Promulgation of Civil Code

Appendix B

Biographical Sketches of Key Shapers of the Louisiana Civil Code

William C.C. Claiborne

William Charles Coles Claiborne was born in Sussex County, Virginia in 1775. He studied briefly at William and Mary, and read law before moving to Tennessee to practice law. Before his appointment as supreme court justice in the state, he served as a member of the Tennessee Constitutional Convention.

Claiborne emerged onto the national scene in 1794 when he was elected to Congress to fill Andrew Jackson's term. He was appointed Governor of the Mississippi territory and arrived there in November 1801. Along with General Wilkinson, Claiborne was an American Commissioner for the formal transfer of the Louisiana territory from France. He remained as governor of an antagonistic people who were mollified by his subsequent marriage to Clarisse Durald, daughter of a local Creole family. After serving as governor of Louisiana during the initial period of transition to statehood, he was elected to the United States Senate on January 13, 1817. He died on November 23,1817, before he could take office.

James Brown

James Brown was born near Staunton, Virginia, and graduated from William and Mary College. He read law and was admitted to practice in Kentucky. In 1792 he became Secretary of State of Kentucky, and moved to Louisiana shortly after the Louisiana Purchase. He became successful in the practice of law in New Orleans. After his appointment as secretary of the Territory of Orleans on October 1, 1804, he became district attorney. In 1806 he was designated (with Moreau-Lislet) to prepare the *Digest of the Civil Laws now in Force in the Territory of Orleans.*

In 1812, Brown became a representative to the first Constitutional Convention for the State of Louisiana, and in 1813 he was elected to the United States Senate. He served there until 1817 when he failed to win reelection. He again served in the senate from 1819 until December 10, 1823, when James Monroe appointed him minister to France. Brown served through Monroe's second term and under John Quincy Adams. He died April 7, 1835.

Louis Moreau-Lislet

Louis Moreau-Lislet was born in 1767 in Cap Francois, Santo Domingo (Haiti). His formal and legal education was in France, and he came to New Orleans because of the Revolution in his birthplace. An excellent lawyer, he served as a parish judge, attorney-general, and state senator. Along with James Brown, Moreau-Lislet prepared the Digest of 1808, and with Henry Carleton he later translated *The Laws of Las Siete Partidas Which Are Still in Force in the State of Louisiana.* The Civil Code of 1825 was prepared jointly by Derbigny, Livingston, and Moreau-Lislet. Moreau-Lislet died in 1832, at the age of sixty-five.

Edward Livingston

Edward Livingston was born in Clermont, New York, on May 28, 1754. In 1782 he began the study of law in the office of John Lansing. Among his fellow students were Aaron Burr and Alexander Hamilton. Livingston was elected to Congress in 1794, and was reelected in 1796 and 1798. In 1800 he was appointed United States Attorney for the District of New York and then Mayor of New York.

A strange twist of fate brought Livingston to New Orleans. In 1803, a large amount of custom house bonds under his control disappeared. Livingston voluntarily confessed liability in the matter, and left for New Orleans in 1804. Livingston represented Gravier in the famous Batture Controversy, and in 1820 was elected to the Louisiana legislature. His reforms of the criminal law (though Louisiana never adopted them) brought him international fame. The Civil Code of 1825 was the joint creation of Livingston, Derbigny and Moreau-Lislet. According to tradition, the chapters on obligations were the sole work of Livingston.

On January 16, 1832, the Governor of Louisiana was authorized to present Livingston with a medal honoring his work in the reforms of the civil and criminal law. He died on May 23, 1836. A distinguished English scholar, Sir Henry Maine, called Livingston "the first legal genius of modern times."

Pierre A.C.B. Derbigny

Pierre Auguste Charles Bourguignon Derbigny was born in Laon, France, in 1767. In 1793, Derbigny's family fled the French Revolution and arrived in Santo Domingo. After moving to Pennsylvania, and

then to Missouri and Florida, Pierre Derbigny settled in New Orleans around 1800, and became secretary of the municipality of New Orleans. He became the official interpreter for the American administration of Governor Claiborne, and later was a member of the first Louisiana legislature and secretary of the legislative council. In 1813 he was made an associate justice of Louisiana's first Supreme Court.

Derbigny served as Secretary of State of Louisiana from 1820 to 1827. Along with Livingston and Moreau-Lislet, he was charged with the drafting of the Civil code of 1825. He became governor of Louisiana in 1828. He died accidentally on October 1, 1829. Derbigny dedicated much of his life to alleviating the frictions between the French—the "Ancient Louisianians"—and the newly arrived American settlers.

Appendix C

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Notes

[1] The foundation for this book was S. Herman, D. Combe and T. Carbonneau, THE LOUISIANA CIVIL CODE: A HUMANISTIC APPRAISAL (1981), and reliance upon it has been greater than our footnotes indicate. I am grateful to my original coauthors for allowing me to update and elaborate views that, even with the passage of time, we still share.

[2] For the shared characteristics of mixed jurisdictions and their startling variety, see generally, DAINOW, THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS (1974) (hereinafter cited as DAINOW). For discussion of judicial decisions and doctrine in several mixed jurisdictions, see Baudouin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec*, in DAINOW, at 1; Walker, *Judicial Decisions and Doctrine in Scots Law*, in DAINOW, at 202; Kahn, *The Role of Doctrine and Judicial Decisions in South African Law*, in DAINOW, at 224; and Tedeschi & Zemach, *Codification and Case Law in Israel*, in DAINOW, at 272.

[3] But the political wellsprings for the two codes were strikingly different. Unlike the Code Napoleon, the Louisiana Civil Code was a transplant to the new world, not the product of violent political upheaval. Indeed, many Frenchmen who fled revolutionary France found refuge in Louisiana. As founders of a slaveholding, plantation economy many of the French refugees in Louisiana were less committed to ideas of "liberté, fraternité, egalité" than the French revolutionaries who remained in France. For these reasons alone, one cannot view the Louisiana Civil Code as an identical twin of its French counterpart. For a discussion of the economic and social background of the early Louisianians, *see* G. DARGO, JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS 129-53 (1975) (hereinafter cited as DARGO). Though Louisiana's private law derived from the civil law tradition, Louisiana's political structure and her public, administrative, and criminal law descended directly from the Anglo-American tradition. This influence was inevitable because the state's laws are subject to judicial scrutiny in accordance with constitutional standards enunciated since the founding of the Republic by the United States Supreme Court. Herman, *The Influence of Roman Law Upon the Jurisprudence of Antebellum Louisiana*, 1992 STELLENBOSCH L. REV. 198 n.8 [hereinafter cited as *Antebellum Louisiana*]. *Antebellum Louisiana* abbreviates a long study of the same title, forthcoming in AUFSTIEG UND NIEDERGANG DER RÖMISCHEN WELT.

[4] Stone, *To Codify or Not to Codify; Derivation of Louisiana Law*, 9 A.B.A. INT'L AND COMP. L. BULL. 16 (1965) [hereinafter cited as Stone].

[5] J. Tucker, *Foreword*, The Louisiana Civil Code, at xix (A.N. Yiannopoulos, 4th ed. 1992).

[6] Although a short fourth book, "Conflict of Laws," was added in 1992, the traditional private law topics of the original civil code remained in the original three books mentioned above. For the arrangement and contents of the new fourth book, see Appendix C.

[7] Herman and Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats and Policy Considerations*, 54 TUL. L. REV. 987, 992 (1980) [hereinafter cited as Herman & Hoskins].

[8] See Appendix C for contents of the current Louisiana Civil Code.

[9] In George Bernard Shaw's *Pygmalion*, and its musical transformation, *My Fair Lady*, Henry Higgins prided himself on his ability to discover in a speaker's dialect clues to her place of birth and upbringing.

[10] For an assessment of the French code drafters' reliance upon Roman law in their codification efforts, see Herman, *The Uses and Abuses of Roman Law Texts*, 29 AM. J. COMP. L. 671 (1981) [hereinafter cited as *Uses and Abuses*]. For an investigation of the early Louisiana judges' knowledge and use of Roman law, see generally *Antebellum Louisiana*, *supra* note 3.

[11] For background on the Roman contracts of mutuum and commodatum, see R. ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION, 188 (1990) [hereinafter cited as ZIMMERMANN].

[12] Until 1990, the Louisiana Civil Code, like nearly all other civil codes, also provided a reserve portion for forced heirs. Under typical civil codes, this institution consists of a set of guarantees that ensure that an owner's children will inherit a predetermined share of his estate. For almost two centuries, Louisiana law followed this pattern. By recent amendment, however, the Louisiana legislature narrowed the definition of "forced heir" to include only children under age 23 and incapables of any age. See La. Civ. Code art. 1493, as amended. The constitutionality of the amendment has been attacked, but at this writing there has been no final adjudication of the amendment's validity. Only the Quebec Civil Code allows free testation without provision for a reserve or legitime. Quebec's atypical policy probably results from English influence.

[13] Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 13-14 (1971).

[14] For helpful background on Baldus, see J. SMITH, MEDIEVAL LAW TEACHERS & WRITERS, CIVILIAN & CANONIST 83 (1975) (hereinafter cited as SMITH).

[15] For background on Bartolus, *see id.*, at 81.

[16] For a brief biographical sketch of Accursius and his contribution as a glossator, see J.P. DAWSON, THE ORACLES OF THE LAW 127, 139 (1968) (hereinafted cited as ORACLES.) and SMITH, *supra* note 14, at 42-43.

[17] A sketch of Domat's intellectual contribution to the French codification enterprise appears in Herman & Hoskins, *supra* note 7, at 1007-1009.

[18] *See* Herman & Hoskins, *supra* note 7, at 1016-1018, for a discussion of Pothier's contribution to French law.

[19] Voltaire, *7 Oeuvres de Voltaire*, DIALOGUES 5 (1838), quoted in K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 73-74 (1st ed. 1977) and Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1129 (1982).

[20] R. DESCARTES, *Discourse on Method*, DESCARTES' PHILOSOPHICAL WRITINGS 8 (1st ed. E. Anscombe & P. Geach trans. 1971).

[21] *Id.*

[22] *Id.*

[23] For further background on this point, *see* Herman & Hoskins, *supra* note 7, at 998.

[24] For a brief summary of Thomas Hobbes' philosophical contribution, *see* THE GREAT LEGAL PHILOSOPHERS 109-33 (C. Morris ed. 1976).

[25] For a summary of Spinoza's philosophical contribution, *see* F. BEROLZHEIMER, THE WORLD'S LEGAL PHILOSOPHIES 127-32 (1929).

[26] For a survey of Pufendorf's views on subjective rights and duties of individuals, *see* Herman & Hoskins, *supra* note 7, at 1004-06.

[27] For a discussion of Grotius' contribution to the philosophy of modern natural law, *see* Herman & Hoskins, *supra* note 7, at 1003-1004.

[28] J. Domat, *Les Lois Civiles Dans Leur Ordre Naturel*, in 1 OEUVRES COMPLÉTES DE DOMAT (J. Rémy ed. 1835).

[29] A GENERAL SURVEY OF CONTINENTAL LEGAL HISTORY 269 (1912) (quoted in Herman &Hoskins, *supra* note 7, at 1007).

[30] J. Remy, *Préface de l'editeur*, 1 OEUVRES COMPLÉTES DE DOMAT, at vi (J. Rémy ed. Paris 1835) (quoting Domat but not identifying source of quotation) (author's trans.) (quoted in Herman & Hoskins, *supra* note 7, at 1008).

[31] In 1985, the Louisiana legislature repealed La. Civ. Code art. 1901 and replaced it with a new article 1983, which provides:

> Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith.

[32] In 1985, La. Civ. Code art. 1965 was repealed, but the quoted maxims, derived from Roman law, are firmly embedded in Louisiana law. On the role of unjust enrichment in early Louisiana cases, see generally *Antebellum Louisiana*, *supra* note 3.

[33] *Uses and Abuses*, *supra* note 10, at 682; Herman, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 U. ILL. L. REV. 612 (1984) (hereinafter cited as *Secular Scripture*).

[34] P. SAGNAC, LA LÉGISLATION CIVILE DE LA REVOLUTION FRANÇAISE (1789-1804) 385 (1898).

[35] Herman & Hoskins, *supra* note 7, at 1000, n.44.

[36] La. Civ. Code art. 1520 originally banned the trebellianic portion and fideicommissary substitutions. In this century, the Louisiana legislature has enacted a trust code for private trusts. That code substantially follows the lines of the Anglo-American trust, except that the entrusted property interests, e.g., legitime and usufruct, are typically Romanist dismemberments. Accordingly the Louisiana legislature amended Article 1520, which now provides: "Substitutions are and remain prohibited, except as permitted by the laws relating to trusts. Every disposition not in trust by which the donee, the heir or the legatee is charged to preserve for and to return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee. La. Civ. Code art. 1520 (1965). For studies on Louisiana's reception of the trust, *see* Gruning, *Reception of the Trust in Louisiana: The Case of Reynolds v. Reynolds*, 57 TUL. L. REV. 89 (1982); Lorio, *Louisiana Trusts: The Experience of a Civil Law Jurisdiction with the Trust*,

42 LA. L. REV. 1721 (1982).

[37] La. Civ. Code art. 115.

[38] J. RAY, ESSAI SUR LA STRUCTURE LOGIQUE DU CODE CIVIL FRANÇAIS 129 (Author's trans. 1926).

[39] *Secular Scripture*, *supra* note 33, at 598 n. 8. For a discussion of Rousseau's influence on the thinking of French revolutionary lawmakers, *see* GROETHUYSEN, PHILOSOPHIE DE LA REVOLUTION FRANÇAISE 171-210, 251-79 (1956).

[40] Although Article 2 was recently repealed, the principle of the article is firmly embedded in Louisiana law.

[41] W. BLACKSTONE, I COMMENTARIES ON THE LAW OF ENGLAND 69

[42] For a discussion of this question in French law, see J. Carbonnier, *Authorities in Civil Law: France*, in DAINOW, *supra* note 2, at 91; and R. David, *Supereminent Principles in French Law*, in DAINOW, *supra* note 2, at 119.

[43] For a narrative of this point by a distinguished Louisiana judge, see A. Tate, Jr. *The Role of the Judge in Mixed Jurisdiction: The Louisiana Experience*, in Dainow, *supra* note 2, at 23; A. Tate, Jr., *The 'New' Judicial Solution: Occasions for and Limits to Judicial Creativity*, 54 TUL. L. REV. 877 (1980).

[44] Cooper, *The Common Law and the Civil Law — A Scot's View*, 63 HARV. L. REV. 468, 470 (1950) (quoted in Herman & Hoskins, *supra* note 7, at 1047).

[45] M. Franklin, *Some Observations on the Influence of French Law on the Early Civil Codes of Louisiana*, LE DROIT CIVIL FRANÇAIS-LIVRE-SOUVENIR DES JOURNÉES DU DROIT CIVIL FRANÇAIS 841 (Barreau de Montréal 1936). "The draught of the year VIII met colonial demands better than the Code Civil Francais itself because the draught of the Year VIII was more pedagogic... The difference in the length of the two codes was a difference ... between a code that was a code and a code that was a code, a law school and doctrine all at once." *Id.*

[46] J.E.M. Portalis, *Discours Preliminaire*, in P. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 470 (Paris; 1827) (hereinafter cited as FENET) (quoted in Herman & Hoskins, *supra* note 7, at 1048).

[47] FENET, *supra* note 46, at 475. For a translation of the discourse, see Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 772 (1969).

[48] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Echoes of Holmes' dictum in *Lochner* can be heard in a number of scholarly pieces opposing codification. *See* J. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION (1907) and Carter, *The Province of the Written and the Unwritten Law*, 24 AM. L. REV. 1, 9-10 (1890): "[I]t is impossible to write down the law applicable to any future transaction, because it is impossible to know the law applicable to any future transaction" (emphasis in original). Joseph Story's opposition to codification practically inverts Portalis' view. "We ought not to permit ourselves to indulge in theoretical extravagances of some well meaning philosophical jurists who believe that all human concern for the future can be provided for in a code, speaking a definite language." J. STORY, PROGRESS OF JURISPRUDENCE (1821).

[49] THE JURIST 55 (1828).

[50] *Id.*, at 58.

[51] *Id.* The Latin maxim means "judgments should be rendered in accordance with legislation, not cases." For a discussion of the implications of the maxim for judicial method, see ORACLES, *supra* note 16, at 123, 324. Perpetuated by civilian codifiers, a common misinterpretation of the maxim was that classical Roman law had no important case law development. Misled by this fallacy, modern Romanists, and particularly civil code readers of the exegetical school, argued that they should devote their energies exclusively to parsing out the meanings of legislative texts. On this theme, *see* generally ORACLES, 392-96.

[52] A. TOCQUEVILLE, JOURNEY TO AMERICA, 301-02 (1835). Livingston played a capital role in the preparation of the Louisiana Civil Code of 1825, and his distrust of judicial lawmaking was well known. See generally, E. LIVINGSTON ET AL., REPORT OF THE JURISTS (1823).

[53] J. FRANK, COURTS ON TRIAL 290 (1949).

[54] Stone, *supra* note 4, at 16.

[55] A. BEGNAUD AND H. DETHLOFF, OUR LOUISIANA LEGACY 94 (1968).

[56] For further background on this theme, *see* DARGO, *supra* note 3.

[57] Prof. Dargo coined this phrase. For background on the tense political climate summarized here, *see* generally DARGO, *supra* note 3, at 3-49.

[58] The manifesto appears in IX THE TERRITORIAL PAPERS OF THE UNITED STATES 643-57 (ed. C.E. Carter; 1934-1962) and portions of the manifesto are quoted in DARGO, *supra* note 3, at 138-40.

[59] Governor Claiborne to Judge J. White, IV OFFICIAL LETTER BOOKS OF W.C.C. CLAIBORNE Oct. 11, 1808.

[60] Batiza, *The Influence of Spanish Law in Louisiana*, 50 TUL. L. REV. 474 (1976); Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971); Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972); Batiza, *The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey*, 47 TUL. L. REV. 1 (1972).

[61] Pascal, *A Recent Discovery; A Copy of the 'Digest of the Civil Laws' of 1808 with Marginal Source References in Moreau Lislet's Hand*, 26 LA. L. REV. 25 (1965); Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972). For a summary of the Pascal-Batiza debate on the sources of the Louisiana Digest, see Dargo, *supra* note 3, at 160-64. Spanish and French laws were not the only sources of the Louisiana Digest. T.W. Tucker has argued that Blackstone's influence on the Digest of 1808 was "pervasive." Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes*, 44 TUL. L. REV. 264-95 (1970).

[62] 5 Mart. O.S. 93 (1817).

[63] *Id.* at 94.

[64] At the time of the *Cottin* decision, the Court's reliance on Spanish law was rather

commonplace. The legislature in 1819 authorized the translation of *Las Siete Partidas*. Louis Moreau-Lislet, an attorney in *Cottin v. Cottin*, collaborated with Henry Carleton in translating *Las Siete Partidas* and they entitled their translation THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA. According to Moreau-Lislet and Carleton, the *Partidas* were the most perfect system of Spanish laws, "comparable to any code published in the most enlightened ages of the world." The title chosen for the Louisiana translation confirmed that ancient Spanish law had taken root in Louisiana. For further background on the role of Spanish law in Louisiana, *see* also J. McCaffery, *"Las Siete Partidas" en la Jurisprudencia del Estado Norteamericano de Luisiana*, REVISTA DE DERECHO PRIVADO 938-44 (Noviembre, 1989).

[65] This issue is linked with the distinction between a code, i.e., a fresh legislative start that displaces prior laws and a digest, a compilation of extant laws. The distinction is a surprisingly enduring feature in Louisiana scholarship. For a modern assessment, see Palmer, *The Death of a Code: the Birth of a Digest*, 63 TUL. L. REV. 221 (1988); Cueto-Rua, *The Civil Code of Louisiana is Alive and Well*, 64 TUL. L. REV. 147 (1988); Dennis et al., *The Great Debate Over the Louisiana Civil Code's Revision*, 5 TUL. CIVIL LAW FORUM 49-100 (1990); Palmer, *Revision of the Code or Regression to a Digest: A Rejoinder to Prof. Cueto-Rua*, 64 TUL. L. REV. 117 (1988).

[66] COMPILED EDITIONS OF THE CIVIL CODES OF LOUISIANA, 798-799 (J. Dainow ed. 1972).

[67] 6 Mart N.S. 89 (1827).

[68] 5 Mart N.S. 527 (1827).

[69] 5 Mart. N.S. 528 (1827).

[70] 13 La. 193 (1839).

[71] For modern examples of such judicial recourse, *see* Covert v. Liggett Group, Inc., 750 F.Supp. 1303 (M.D. La. 1990) (Polozola, J.). [In a federal claim by survivor of a lung cancer victim against a tobacco manufacturer, the personal or heritable quality of the action analyzed in light of *Lex Aquilia*, D. 47.1.1 and *Las Siete Partidas* 7.15.2; extensive discussion of Louisiana's Spanish-Roman heritage). Young v. Ford Motor Co., Inc., 595 So.2d 1123 (1992). [In redhibitory action, reviews the action in Roman law.]; Tidewater Marine Towing, Inc. v. Curran-Houston, Inc. and Dow Chemical v. Vicknair, 784 F.2d 1317, 1320 (1986). [Nonrecognition of common law marriage in the Code considered in light of the origin of Louisiana domestic relations law which, as the court notes, is not the Code Napoleon, but the Spanish law through Las Siete Partidas.]; Barbry v. Dauzat, 576 So.2d 1013, 1022 (1991). [In deciding whether a minor child of a Caucasian mother and an Indian father was to be considered a Caucasian child for jurisdictional purposes, the court analyzed the status of children under Roman law.]

[72] For further background on the ideas in Section IV, *see Secular Scripture*, *supra* note 33.

[73] *Id.* at 604-12.

[74] This description is consistent with Lynn Hunt's argument that the authoritarian character of the new republic was mirrored in the authoritarian French family. See L. Hunt, THE FAMILY ROMANCE OF THE FRENCH REVOLUTION (1992). The link between family and state updated a theme announced in a royal edict of 1639: "The natural reverence of children for their parents is linked to the legitimate obedience of subjects to their sovereign." M. GARAUD & R. SZRAMKIEWICZ, LA RÉVOLUTION FRANÇAISE ET LA FAMILLE 135 (1978).

[75] A detailed, up-to-date treatment of Louisiana's new law of obligations appears in S. LITVINOFF, 5 LA. CIVIL LAW TREATISE: LAW OF OBLIGATIONS (1992). For analysis of the law of obligations before the 1985 revision, *see* generally S. LITVINOFF, 6 LA. CIVIL LAW TREATISE: OBLIGATIONS (1969); S. LITVINOFF, 7 LA. CIVIL LAW TREATISE: OBLIGATIONS (1975).

[76] In 1985, La. Civ. Code art. 1901 was repealed, but its guiding principle is now codified in article 1983 of the present code, *supra* note 31.

[77] On this point *see* generally, *Secular Scripture*, *supra* note 33, at 610-15.

[78] This principle is now codified in more technical language in La. Civ. Code art. 1906: "A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished."

[79] For brief background on the revolutionaries' program of uprooting canon law and subordinating the church to the state, *see Secular Scripture*, *supra* note 33, at 615-16.

[80] This principle is now enshrined in article 1983, *supra* note 31.

[81] On the doctrine of *caveat emptor* in early Louisiana jurisprudence, see *Antebellum Louisiana*, *supra* note 3, at 202-07.

[82] La. Civ. Code art. 2520; The Louisiana provision follows French Civ. Code art. 1641. Links between the Roman *actio redhibitoria* and the Louisiana redhibition action are illuminated in *Antebellum Louisiana*,*supra* note 3, at 202-07.

[83] For standard warranty provisions now applicable to sales in the United States, see U.S. Uniform Commercial Code §§ 2-313–2-316.

[84] In recognition of the difficulty of enforcing purely moral duties, the recently enacted obligations provisions eliminated the category of imperfect obligations. But as shown in the text, this elimination did not do away with the moral ingredient in both civil and natural obligations.

[85] La. Civ. Code art. 1761 provides: "A contract made for the performance of a natural obligation is onerous."

[86] R. Pothier, *Traité du Contrat de Vente*, 2 OEUVRES DE POTHIER 106 (M. Dupin, ed. 1823). For a thumbnail sketch of Pothier's intellectual legacy to both Louisiana law and U.S. law generally, *see* Herman & Hoskins, *supra* note 7, at 1016-18; Stein, *The Attraction of the Civil Law in Post Revolutionary America*, 52 VA. L. REV. 403, 412, 422 (1966). Pothier's intellectual achievement is questioned in ORACLES, *supra* note 16, at 350 and DAWSON, UNJUST ENRICHMENT 95-96 (1951).

[87] 15 U.S. (2 Wheat) 178 (1817). About Pothier's distinction between the civil forum and the *foro conscientiae*, and the duty of Mr. Organ in each forum, the case report observes: "On principle, he [Organ] was not bound to disclose. Even admitting that his conduct was unlawful in *foro conscientiae* does not prove that it was so in the civil

forum? Human laws are imperfect in this respect, and the sphere of morality is more extensive than the limits of civil jurisdiction. The maxim of *caveat emptor* could never have crept into the law, if the province of ethics had been coextensive with it." 15 U.S. (2 Wheat) 178 (1817). A contemporary analysis of the *Laidlaw* decision appears in G. VERPLANCK, ESSAY ON THE DOCTRINE OF CONTRACTS (1826).

[88] 15 U.S. (2 Wheat.) 178, 179 (1817).

[89] But the warranty regime of the U.S. Uniform Commercial Code has in our time injected into daily life a dose of morality and has tempered the harshest features of *caveat emptor*. *See generally* U.C.C. §§ 2-313 - 2-316.

[90] On the Roman law of *laesio enormis*, see generally ZIMMERMANN, *supra* note 11, 259-70. For a summary of the Louisiana law on lesion, see generally Herman, *The Anomalous Institution of Lesion in Louisiana*, 10 REV. GEN. DE DROIT (Ottawa) 192 (1979) and *Antebellum Louisiana*, *supra* note 3, at 210- 14.

[91] DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION 24 (1977). For a discussion of early Louisiana cases on *negotiorum gestio*, see *Antebellum Louisiana*, *supra* note 3, at 214-18.

[92] Pascal, *The Sources of Civil Order According to the Louisiana Civil Code*, 54 TUL. L. REV. 916, 938-39 (1980).

[93] In 1985, La. Civ. Code art. 1934 was repealed. The principles of former article 1934 were redistributed among new code articles 1995-2003.

[94] Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903). Today such recoveries are often based upon the doctrine of moral damages. See generally Litvinoff, *Moral Damages*, 38 LA. L. REV. 1 (1977). New La. Civ. Code art. 1998 has codified the principle of moral damages: "Damages for nonpecuniary loss may be recovered when the contract, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss. Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee."

[95] Graham v. Western Union Tel. Co., 109 La. 1069, 34 So. 91 (1903).

[96] For an extensive, up-to-date analysis of Louisiana property law, *see generally*, A. YIANNOPOULOS, PROPERTY: THE LAW OF THINGS, REAL RIGHTS AND REAL ACTIONS (3d ed., 1991); A. YIANNOPOULOS, PERSONAL SERVITUDES: USUFRUCT, HABITATION, RIGHTS OF USE (3d ed., 1989); A. YIANNOPOULOS, CIVIL LAW PROPERTY COURSEBOOK: LOUISIANA LEGISLATION, JURISPRUDENCE AND DOCTRINE (3d ed., 1983); A. YIANNOPOULOS, PREDIAL SERVITUDES (1983).

[97] *Succession of Franklin*, 7 La. Ann. 395, 418-19 (1852). In a subsequent opinion this judge also declared that the Roman form of perfect ownership in force in Louisiana, qualified by a fixed number of subordinate interests such as usufruct and servitude, was "abundantly sufficient to meet all the wants of civilization . . . there is no warrant of law, no reason of policy for introduction of any other." *State of Louisiana, State of Maryland v. The Executors of John McDonough and the City of New Orleans* 8 La. Ann. 171, 251 (1853). On the Roman character of the original Louisiana property legislation, see Snyder, *Possession: A Brief for Louisiana's Rights of Succession to the Legacy of Roman Law*, 66 TUL. L. REV. 1853 (1992).

[98] The drafters of the Louisiana Civil Code explicitly rejected the fideicommissary substitution. *Secular Scripture*, *supra* note 33, at 610. On the relationship between the fideicommissary substitition and the trust, see Tucker, *Substitutions, Fideicommissa, and Trusts in Louisiana: A Semantic Reappraisal*, 24 LA. L. REV. 439 (1964); Pascal, *The Trust Concept and Substitution*, 19 LA. L. REV. 273 (1959).

[99] There is apparently a close historical link between the perpetual lease and "fee farm." The English term "fee farm" derives from the French *fiefferme*, a contraction of *firma feodalis*. GÉNESTAL, LE ROLE DES MONASTÉRES COMME ÉTABLISSEMENTS DE CRÉDIT ETUDIÉ EN NORMANDIE DU XI à LA FIN DU XIII SIÉCLE (Paris, 1901).

[100] For Treilhard's views, see P. FENET, 11 RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 247, 257 (Paris 1827); Watson, *The Transformation of American Property Law: A Comparative Approach*, 24 GA. L. REV. 163, 185 n.192 (1990) and A. VON MEHREN and J. GORDLEY, THE CIVIL LAW SYSTEM, 594-98 (2d ed. 1977). For translations of excerpts of Treilhard's views, see Tomlinson, *Tort Liability in France for the Acts of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299, 1329 n. 112 (1988).

[101] See *Secular Scripture*, *supra* note 33, at 611 n.71.

[102] Stone, *Tort Doctrine in Louisiana: The Materials for the Decision of a Case*, 17 TUL. L. REV. 159, 161 (1942).

[103] Stone, *Tort Doctrine in Louisiana: The Concept of Fault*, 27 TUL. L. REV. 1-2 (1952).

[104] La. Civ. Code art. 2321 provides: "The owner of an animal is answerable for the damage he has caused; but if the animal had been lost, or had strayed for more than one day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal, for then he must pay for all the harm done, without being allowed to make the abandonment."

[105] La. Civ. Code art. 2322 provides: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

[106] French Civ. Code articles 1385-1386 are the sources of La. Civ. Code articles 2321-2322. French Civil Code article 1385 and Louisiana Civil Code article 2321 derived from the concept of "noxal surrender," which required surrender to the victim or to his kin of the instrument causing accidental damage or death. H. JOLOWICZ & B. NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW, (3d ed. 1972). For additional discussion of this concept, see Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235, 275, 284 (1986).

[107] La. Civ. Code art. 2318 provides: "The father and the mother and, after the decease of either, the surviving parent, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons. The same responsibility attaches to the tutors of minors."

[108] Some states have enacted statutes to reaffirm the common law rule of parental lia-

bility for a child's intentional tort. *See* e.g., Hyman v. Davies, 453 N.E.2d 336 (Ind. App. 1983). These state statutes follow the traditional common law view that paternity does not result automatically in liability for a child's action. *See* e.g., Winfrey v. Austin, 260 Ala. 439, 71 So.2d 15 (1954).

[109] 14 La. Ann. 115 (1859).

[110] In 1980, the original text of La. Civ. Code art. 2323 quoted above was replaced by the following: "When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss."

[111] La. Civ. Code art. 2317 provides: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody." Under article 2317, the Louisiana Supreme Court has elaborated a rich jurisprudence. *See*, e.g., Green v. Industrial Helicopters, Inc., 593 So.2d 634 (1992); Landry v. The State of Louisiana and the Board of Levee Commissioners of the Orleans Levee District, 495 So.2d 1284 (1986); Entrevia v. Hood, 427 So.2d 1146 (1983).

[112] Until recently, Louisiana's version of forced heirship guaranteed a share to all children, both minors and majors; legislation has scaled back this guarantee to children without means to care for themselves. The new legislation appears in La. Civ. Code article 1493. For a discussion of forced heirship, see McCaffery, *La Controversia Candente en Louisiana Sobre La Herencia Forzosa*, REVISTA DE DERECHO PRIVADO, 414-23 (Mayo 1985).

[113] For a comprehensive account of Louisiana law of community property, see generally K. SPAHT & L. HARGRAVE, 16 LOUISIANA CIVIL LAW TREATISE: MATRIMONIAL REGIMES (1989). See also McCaffery, *Febrero y la Comunidad de Gananciales en Luisiana*, REVISTA DE DERECHO PRIVADO, 332-38 (Abril 1987).

[114] This claim is expanded in Herman, *Apologia for a Footnote*, 6-7 TUL. CIV. L. FORUM 187 (1991-92); reprinted with modifications as *Apologia for a Footnote: On Reading* in Pari Materia *the United Nations Convention on the International Sale of Goods, the Civil Code, and the Uniform Commercial Code* in ESSAYS IN HONOR OF PROFESSOR FERDINAND F. STONE: A FESTSCHRIFT 187 (1993).