AN ELEMENTARY TREATISE

OF

THE CIVIL LAW OF LOUISIANA

VOLUME I

AN INTRODUCTION TO LOUISIANA'S CIVIL LAW TRADITION

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by

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PREFACE

The purpose of this book, in a nutshell, is to introduce the reader to those features of Louisiana's legal system that distinguish it from those of the other American states. How's Louisiana's legal system different?

To understand the answer to that question, we first must understand something about basic legal taxonomy, specifically, the classifications of the different fields of the law. The *summa divisio* – that is, the must fundamental division – is between "public law", which governs relations between the government and its citizens, and "private law", which governs relations between private individuals.[1] Each of these fields is susceptible of further subdivision. Within the field of public law, one finds, among others, constitutional law, administrative law, tax law, and criminal law. As for the field of private law, it is commonly subdivided into commercial law, which governs relations between merchants or between merchants and consumers; industrial law, which governs, among other things, "labor-management relations"; and, finally, "all the rest", which governs all other private relations.

What's distinctive about Louisiana law? Most of its noncommercial, nonindustrial private law – in other words, "the rest" of its private law – and even some of its commercial law, in other words, the bulk of its private law. This distinctive part of Louisiana's law is called the "civil law."

Now, just how's that part of Louisiana's law distinctive? In several respects.

1st: content. Louisiana's private law consists of rules that, in many respects, are different from those of the private law of other states. Here's just one example. Suppose that your mother makes out a will that reads something like this: "I leave my 20 acre plot of land to my daughter *X* for here life and, after that, to my son *Y* in perpetuity." Such a bequest would be valid in Texas, Arkansas, Mississippi, etc. But here it's not. *See* CC art. 1520. Under our law, a bequest of this kind constitutes what's known as "prohibited substitution." So, there are some differences in content. But to tell you the truth, those differences are not as numerous and, all things considered, not as great as most people imagine. And, in any event those differences are not the most important.

2d: history. The unique part of Louisiana's law has a distinctive history. It came to us, ultimately, from Rome, via Spain and France. What corresponds to Louisiana's civil law in other states came ultimately from England. The same is true of the rest of Louisiana's own law, that is, the public law and certain parts of its private law.

3d: legal theory. The tradition from which Louisiana's private law is drawn--the so-called civilian tradition--is built on a distinctive understanding of what "the law" is all about, an understanding that differs from that of the Anglo-American legal tradition. The two traditions have

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[1] There's yet another *summa divisio* of the legal universe, one that cuts across the division between public and private law, namely, the division between "international" and "national" law. This other *summa divisio*, however, is immaterial for present purposes.

rather different conceptions (i) the sources of law, a distinction that, in turn, imply distinctive theories of the proper relationship between legislative and judicial power, (ii) interpretive methodology, that is, the manner in which written law ought to be interpreted, (iii) the effects of laws, (iv) and limitations on the exercise of legal rights. Though the civil law today constitutes only a part of Louisiana law, the legal theory associated with the civil law, at least according to the received wisdom, dominates over the legal theory associated with the English law and, for that reason, affects the way that the Anglo-American parts of Louisiana law are understood, interpreted, and applied.

Though most readers of this treatise will soon figure out what its "subject matter" is, i.e., Louisiana's civil law tradition, many, I fear, may not figure out until they reach the very end of it, if they ever figure it out, what the "content" of this treatise is, i.e., just what kind of "stuff" it is that the treatise is designed to expose them to.

The source of the problem is this: this treatise, inasmuch as it constitutes an "introduction" to the study of the civil law, has a rather different purpose than does the typical law treatise. In such a typical treatise, one is taught the "rules" that govern this or that field of the law, e.g., family law, real estate law, civil rights law, or the law of outer space. That is definitely *not* what the reader of this treatise will be taught. Even if I wanted, in this one treatise, to teach the reader all the rules that make up the civil law, I couldn't possibly do it. The civil law, as we've already learned, comprises the bulk of the private law. That means that it includes (i) the law of torts, (ii) the law of contracts, (iii) the law of property, (iv) family law, (v) sales law, (vi) marital property law, (vii) agency law, (viii) partnership law, (ix) inheritance law, and (x) the law of secured transactions (e.g., mortgages). A field of law that vast could not possibly be covered in a single treatise.

What, then, is this treatise really all about? It's not the rules of the civil law themselves, but the unique *history* and *legal theory* behind those rules. To be sure, we will, during the course of the treatise, look at a number of civil law rules. But that will be only by way of illustration, i.e., to demonstrate how this or that distinctive civilian legal institution evolved and developed over time or to provide an example of this or that distinctive feature of civilian legal theory. Most of the time, however, my focus will not be on the *rules* at all, but rather the *methods* whereby those rules are developed, organized, interpreted, and applied – in a word, on "methodology". This treatise, then, is less a work on "law" itself than it is a work on *legal history, legal methodology, legal philosophy,* and *comparative law.*

PART I
LEGAL HISTORY

CHAPTER 1
THE HISTORY OF THE LARGER CIVIL LAW TRADITION

Like many of the great cultural productions of the West, the civil law can trace its roots to Rome. It would be a mistake, however, to identify the civil law with the law of that civilization. The civil law, in fact, took shape only at the end of a centuries-long process of evolution, one that, though it started at Rome, hardly ended there. In the course of that evolution, what began as Roman law was gradually transformed in ways that the Romans themselves could scarcely have imagined and, at some times and in some instances, was even displaced altogether.

I. The civil law's roman law roots

Though the civil law is not, then, identical to Roman law or even Roman "private" law, one can say, without risk of exaggeration, that much of the future "trajectory" (as well as a great part of the content) of the civil law was already fixed in Rome. The salient features of that trajectory confirm the unique aspects of the civil law tradition emphasized in these materials. First, the Roman law roots of the civil law recognized legislation as the chief source of law with legal analysis focusing on exegesis (the interpretation of texts). Second, beginning early in the development of Roman law, scholars – the *jurisconsults* – played an important role in the elaboration, interpretation, and application of law. Third, Roman law eventually systemized its legal rules into relatively abstract and general concepts.

A. Legislated law

Precisely when and from what sources Roman law originally developed is and will probably remain unknown. What is known, however, is that as early as 450 BC, the Romans had begun to write at least part of that law down. That year saw the enactment and publication, in legislative form, of the "Twelve Tables," a statement of legal principles, collectively referred to as the *ius civile* (literally, the law of the citizen), that purported to govern the most important aspects of the private life of Roman citizens, from family relations (including marriage), to inheritance, to property, to contracts, to delicts (torts).[2]

To be sure, the development of Roman private law did not stop with the Twelve Tables. Not only that, but to the extent that Roman law developed beyond and eventually transcended the primitive *jus civile*, this development was not in the main the product of legislation, properly so

[2] It is important to note that this early Roman law document purported to regulate "private" relations only, that is, relations between citizens, as opposed to "public" relations, that is, relations between the government and citizens. As has been true in nearly all legal systems, that of the common law included, the law that governed private relations came first in time and, for quite some time, was the only law around.

called, but rather grew out of "remedial" innovations (the recognition of what Anglo-American lawyers would call "new 'causes of action'") that were carried out by the Roman high judges (*praetors*) on the advice and with the assistance of Roman legal scholars (*jurisconsults*). This new law, then, was made by the judiciary, not by the legislature. Even so, this judge-made law was rather different from the judge-made law of the English common law tradition. For one thing, it was itself quasi-legislative in form. Unlike the English common law judges, who created new remedies "along the way" of adjudicating legal disputes, setting out those remedies in the very opinions whereby they disposed of those disputes, the *praetor* created his new remedies "in advance" and "up front," before he had adjudicated the first dispute, announcing them in an official written document – the Edict – before his one-year term of office had even begun. For another thing, this judge-made law was (or, at least, was thought to be) an "interpretation" of legislation. In creating new remedies, the *praetor* in most instances understood himself to be enforcing principles that, if not always *expressly* set forth in the Twelve Tables or other, newer Roman private law legislation, were at least *implicit* in that legislation.

For written laws to be applied to concrete disputes, they must, of necessity, be interpreted. And so it was that in Rome, where, as we have seen, a good part of the law was in written form, the process of "finding the law" often entailed and, at least as a matter of form, often began with the exegesis – interpretation – of some written text, be it a provision of the Twelve Tables or of the Edict.

B. Legal scholarship

Not longer after the Roman system of *praetorial* justice was established, a new player arrived on the legal scene, one who was to have a profound influence on the future development of the civil law, more profound even than that of the *praetors* themselves. This player was the Roman legal scholar or *jurisconsult*. Over the centuries these scholars produced a tremendous body of writing, some of it in response to questions put to them by the *praetors* regarding how, if at all, the Edict should be modified and how concrete cases should be decided, some of it in the form of scholarly examinations of real or hypothetical cases, some of it in the form of exegetical commentaries on the Twelve Tables or the Edict. In the Roman legal system the public at large and, more importantly, the *praetors* themselves – who, together with their assistants, the *iudexes*, usually had received no legal training to speak of – regarded these scholars, not the *praetors* or *iudexes* – as "the" experts on matters legal.

C. Legal systematization

Though the work product of most Roman *jurisconsults*, as has been suggested, was "disputational," that is, oriented toward the resolution of case-specific legal issues, or exegetical, that is, involved the interpretation of legal texts, some of the *jurisconsults*, in particular, those who took upon themselves the task of training future jurisconsults and lawyers, produced a rather different kind of work product. Designed primarily to facilitate the training of new jurisconsults, this kind of work (sometimes called "Institutes," as was the work of the most famous systematizer, Gaius) consisted of summary restatements of the whole of Roman private law. To develop these

restatements, the authors were required, of necessity, to devise groupings and subgroupings for the myriad particular rules of the Roman law. In the process, they were forced as well to devise new classificatory concepts, at a relatively high level of abstraction, to account for these groupings, together with a corresponding new artificial legal vocabulary. Though this kind of scholarship was not common and, from the standpoint of the *jurisconsults* themselves, not terribly important, it was to have a profound influence on the future development of the civil law.

II. Development of the civil law during the middle ages

A. The early Middle Ages

The early Middle Ages witnessed a new turn in the history of the civil law, namely, codification. This "new turn," of course, had the effect of reinforcing an already-established feature of Roman law, that is, the pre-eminence of legislation as a source of law.

Though the earliest of these codes (the so-called "barbaric" codes), curiously enough, were produced by the Germanic kings who ruled over what had formerly been the Western Empire (modern day Spain, Italy, and southern France), the most important, at least from the standpoint of legal history, were the codes and related works produced in the East under the auspices of the Emperor Justinian. Among these works were the Institutes, a text of private law for law students modeled on Gaius' Institutes, and the Digest, which consisted of a comprehensive synthesis of the disputational and exegetical writings of scores of classical jurisconsults. Though the Digest made few, if any conceptual innovations and displays an arrangement that is anything but scientific, it did, at least, collect the bulk of classical scholarship in a single work. Not only that, but because the Digest had the force of law, its effect was to elevate the status of Roman scholarly legal writings from mere "interpretations" of law to law itself.

B. The late Middle Ages

The year 1100 brought with it the "revival" of Roman law in the West. The movement began when legal scholars in Florence, Italy stumbled upon a long-forgotten manuscript of Justinian's Digest and Institutes. This discovery produced something of a sensation among legal scholars, many of whom immediately abandoned what, up to that point, had been their life's work – the study and teaching of customary law – and took up Roman law studies instead. The "Roman law" that they undertook to study, of course, was not, in fact, classical Roman law, but rather Roman law as reformulated and codified by Justinian.

The first school of new Roman scholars to emerge, known as the Glossators, undertook a thorough study of the Digest and Institutes. Their scholarship was primarily exegetical and, because they assumed (somewhat naively, it turns out) that the texts were free of contradiction, was aimed at eliciting the underlying rational unity of what, at least in some instances, appeared to be contradictory texts.

The Glossators were soon succeeded by a second school of Roman legal scholars, one that came

to known as the Commentators. Two characteristics of their work distinguished it from that of their predecessors. First, the work of the Commentators exhibited a higher degree of abstraction and systematization. Influenced by the synthetic-dialectical method of then-current scholastic philosophy, the Glossators largely gave up the exegetical approach of the Glossators and took up instead the task of finding, through a process of synthesis, generalization, and classification, the principles running throughout the whole of private law. Second, the work of the Commentators exhibited a practical bent. By 1200, Roman law had ceased to be merely the object of academic study. In Italy and a few other jurisdictions, it was fast becoming the law in force. The Commentators, then, had to adapt Roman private law to meet contemporary needs. In so doing, they took note of and incorporated into their work materials aside from the Digest and Institutes and the works of the Glossators, such as customary law and the burgeoning canon law of the Roman Catholic Church[3], thereby effecting a synthesis of these different sources of law, one steeped in Romanist legal terminology.

At the same time at which the Glossators and Commentators churned out scholarly works on the Roman law, they undertook yet another task, namely, legal education. Both schools of scholars aggressively founded law schools across Europe, schools that were attended by literally hundreds of thousands of students. From that point forward, legal education in Europe assumed a much different trajectory than did that in England, with profound consequences for the future of the two legal traditions. Whereas in England the training of future lawyers was handled through a hands-on apprenticeship program run by practicing lawyers and was conducted in the courtroom, in Europe it was confided to legal scholars and was conducted in the classroom.

By the end of the Middle Ages, the synthesis of reformulated Roman law, customary law, and canon law produced by the Glossators and Commentators, which came to be known as the *ius commune* (literally, the "common law"), was "received" (that is, became law), to one degree or another, throughout Western Europe. With rare exceptions, this reception was accomplished by the judges, many of them former students of the Glossators or Commentators. Once again, then, the scholars led and the judges followed.

These judges, it should be noted, found themselves in the midst of a system of judicial

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[3] The assimiliation of canon law precepts into the *ius commune* produced a body of law that differed from classical Roman law at a number of points. Here are some examples.

Law of persons. (i) Parental authority: restriction of father's authority over his children. (ii) Husband and wife: (a) requirement that marriage be celebrated by minister; (b) requirement that marriage be product of free consent of both spouses; (c) imposition of mutual, as opposed to unilateral, spousal duties, in particular, fidelity; (d) prohibition on polygamy; (e) restriction of right to divorce.

Property law. (i) Substantive law: introduction of concept of "foundation," similar to English concept of "trust." (ii) Procedure: creation of possessory action.

Obligations law. (i) Theory: first account of the reason why contractual obligations are binding, namely, to breach is to lie. (ii) Substance: (a) introduction of notion of "vices of consent," i.e., that consent is vitiated, and the contract therefore invalid, if it's the product of duress, fraud, or error; (b) introduction of notion of lesion, i.e., that seller can upset sale if he fails to receive a "just price," defined as at least 1/2 the fair market value of the thing.

administration that differed markedly from that which was developing in England. Unlike England, with its unitary court system at the "top" of which stood a single court of last resort, the civil law jurisdictions of the Continent had a multiplicity of court systems, each with its own "jurisdiction" (for example, "private law," "penal law," "commercial law") and its own independent hierarchy. Rules of procedure, which had never been (and never would be) the focus of serious scholarly attention, were fairly informal and, in any event, few and far between. Not only that, but courts tended to be both numerous and large and, for much of the late Middle Ages, did not "motivate," that is, did not provide written reasons for, their decisions. This system, obviously enough, further diminished the importance of judges in the overall law-elaboration process and, by default, enhanced the importance of legal scholars.

III. Development of the civil law during the modern era

During the 16th and 17th centuries, the civil law was reformulated yet again, this time under the influence of new philosophical and cultural movements, including humanism, Cartesian rationalism, natural rights theory, and nationalism. The scholars who conducted this reformulation, much more so than any of their predecessors, tended to conceptualize the law in terms of "rights" rather than remedies and, further, felt free to devise original legal concepts and systematization schemes whereby to express and to re-present the law.

By the end of the 18th century, several of the emergent nation-states of Western Europe took the momentous step of codifying their laws. This codification movement, unlike that of the early Middle Ages, was not aimed at merely compiling and perhaps re-systematizing the law that was then in place. To be sure, the new codes drew their inspiration and the bulk of their content from the theretofore-existing law, that is, the national variants of the *ius commune*. But these codes were intended to and did in fact make a "break" with that law, at least in the sense of replacing it. Though these codes varied from one jurisdiction to another in terms of style, organization, and content, in all of them the rules of law (called articles) were couched in terms of the technical legal vocabulary that had been developed by legal scholars since the revival of Roman law; for the most part, were general in scope, with only a minimum of detail; and were structured according to one or more of the various "scientific," logically-ordered organizational schemes that had been devised by ancient or modern civil law scholars. By the early twentieth century, codes of this kind had been enacted in nearly every jurisdiction within the "civilian" sphere of influence, that is, not only the jurisdictions of Europe, but also those of Latin America, a good part of Africa, and parts of Asia and North America.

The enactment of these codes proved to be a momentous development. Because the codes broke with prior law and were supposed, at least in principle, to be comprehensive, their enactment reinforced the civil law's already-established tendency to regard legislation as the primary, if not the sole, source of law and spurred a revival of exegetical legal analysis. In addition, the enactment of the codes had the effect of encouraging, indeed, requiring what has been called a "deductive" method of legal reasoning, one in which the reasoning process begins, if only formally, by treating this or that code provision as the "major premise" of a larger syllogistic argument. This effect of codification was attributable not only to the "break" that the codes made with prior law (much of

which had contained useful material for analogical or inductive reasoning), but also to the generality of the codes' provisions. This deductive method has since become a hallmark of "civilian methodology."

While civil law jurisdictions overhauled their law through the vehicle of codification, they did little, if anything, to alter the system for administering justice within which that law was to be applied. Though, by this time, courts in most jurisdictions were expected to and did "motivate" their decisions, the courts remained numerous and large and, further, were divided into multiple units, each with its own hierarchy. Furthermore, because the written reasons for judgment are often collaborative efforts and are issued in the name of the court as a whole rather than that of this or that judge, judges have continued to remain anonymous if not invisible players in the legal process. This system, it should be noted, has remained largely unchanged to the present day.

During the twentieth century, the course of the civil law has, in the main, followed the trajectory that had been set for it in the past. Some important changes have nonetheless occurred. In the vast majority of jurisdictions, the civil law has been recodified (sometimes more than once) in response to the various important socio-cultural movements, so as to bring that law more closely into line with contemporary values. One important example is the revision of the law of marriage and of marital property in such a way as to take account of the "equal rights" of women. Alongside this substantive change there has been an important, if subtle and sometimes overlooked, change in methodology. In most jurisdictions courts, once again following the lead of legal scholars, have moved away from a strictly exegetical, text-bound approach to the resolution of legal issues and have, instead, adopted approaches (including the so-called "teleological" and "evolutive" methods) that accord them greater flexibility, in particular, make it easier for them to "adjust" the law to what, at least in the minds of the judges, are the needs of their jurisdiction's contemporary economic, social, and political system.

PART I
LEGAL HISTORY

CHAPTER II
HISTORY OF THE CIVIL LAW IN LOUISIANA

I. The Colonial Period (1699 - 1803)

The history of Louisiana's civil law dates back to time of the European colonization of Louisiana. During that period, Louisiana was owned, first, by France, then, by Spain, and finally, by France again. That Louisiana took its civil law from the civil law of both of those nations is undisputed. But what is disputed is just how much and precisely what Louisiana took from each.

A. The 1st French Period (1699 - 1762)

Though the French began to colonize Louisiana as early as 1699, the French king made no provision for the administration of justice here until 1712. In that year, he issued "Letters Patent" to Sieur Crozat, his Secretary, directing him to assume the administration of the territory. That document made the royal edicts, ordinances, customs, and usages then in force in France applicable to the colony. Five years later the king issued another set of "Letters Patent," which not only reiterated that directive, but also forbade the colonists to introduce "any other Custom" into the colony.

What were these "royal edicts, ordinances, customs"? Coutume de Paris. Did they have a lasting influence? See chart.

B. The Spanish Period (1763 - 1800)

In a treaty signed in 1762, France ceded Louisiana to Spain. For a variety of reasons related to the political situation in Europe, the cession was kept secret for several months and was not fully implemented for nearly four years. The first Spanish governor, Don Antonio de Ulloa, assumed power, formally at least, in 1766. Because of stiff opposition from the leaders of the French population, he was not, however, able to put a Spanish stamp on the administration of justice. The civil law, for the time being, remained French. By 1768, the opposition to Ulloa exploded into an open rebellion. The Spanish, with the backing of the French government, then ordered a contingent of troops, headed by General Alexander O'Reilly into the colony to restore order. O'Reilly swiftly subdued the rebels, then undertook a thorough reform of the military, administrative, financial, and judicial systems of the colony, according to the instructions given to him by the Spanish Crown.

This brings us to what may be termed the first mystery of the history of Louisiana law: Whether O'Reilly, in the course of carrying out those reforms, put Spanish law into effect in the colony, thereby displacing French law? The controversy has centered around two distinct questions: (i) whether O'Reilly's mandate from the king of Spain included the power to effect such a change and

(ii) if so, whether he exercised that power? Let's consider the questions in that order.

Today no one seriously disputes that the answer to the first question--whether O'Reilly had the power to change the law--is "yes." Several documents from the Spanish period, which were not available to those who raised this question, make this clear. The first is the "Royal Schedule" issued to O'Reilly on April 16, 1769. That decree empowered O'Reilly to

> establish in military, as well as political matters, administration of justice and management of my royal treasury, the form of government, dependence, and subordination which, according to you present instructions and further directions, shall be advisable. In order that you may carry out the aforesaid, I grant you as full a power and jurisdiction as the nature of affairs, events, and incidents may require . . . .

This "full power and jurisdiction" undoubtedly included the power to reform the law. Even clearer evidence of O'Reilly's power to change the law appears in an exchange of letters between O'Reilly and the Spanish king between late 1769 and early 1770. On October 17, 1769, O'Reilly advised the king that, in his view, "it [was] necessary that this Province be governed by the same laws as those in force in the other dominions of His Majesty in America." In a letter to O'Reilly dated January 27, 1770, the king unequivocally expressed his assent to that proposal:

> In a letter of October 17 of last year Your Excellency stated that you deem it necessary that the Province of Louisiana be governed by the same laws as those in force in the other dominions of His Majesty in America . . . .
>
> . . .
>
> Your Excellency's opinions as well as the solid reasons on which they are based having received the King's approval, His Majesty has decided that everything be executed as proposed by Your Excellency. . . .

O'Reilly, then, clearly had the power to subject Louisiana to Spanish law.

The answer to the second question--whether O'Reilly ever exercised that power--, though perhaps not as clear as the answer to the first, likewise seems to be "yes." The trouble is that no one has yet been able to locate a copy of the gubernatorial decree whereby O'Reilly supposedly put Spanish law into force. There are, nevertheless, good reason to believe that such a decree was in fact issued. First, Professor Levasseur has located among the private papers of Clément Laussat, governor of Louisiana during the second French period (1800-1803), a document that specifically refers to such a decree. That document, which purports to be an inventory of documents that Laussat received from the last Spanish governor upon his arrival in Louisiana, speaks of "a decree abolishing the French council and proclaiming the putting into force of the Spanish law and of a new council in New Orleans, dated December 21, 1769." Since Laussat had no reason to lie, one must assume that there was such a decree. Second, several documents from the period clearly manifest O'Reilly's intention to put Spanish law into effect in Louisiana. In addition to the documents mentioned earlier,

one can also point to his proclamation of November 25, 1769, which read in part as follows:

> [I]t is indispensable to abolish the [French] council and to establish in their stead that form of political Government and administration of justice prescribed by our wise laws, and by which all the states of His Majesty in America have been maintained . . . . And as the want of advocates in this country, and the little knowledge which his new subjects possess of the Spanish laws might render a strict observance of them difficult . . ., we have thought it useful, and even necessary, to form an abstract or regulation drawn from the said laws, which may serve for instruction . . . ."

That one so determined to put Spanish law into effect, having received the permission to do so, would not have realized his objective seems most unlikely. Third, in his correspondence with the French government and in his directives to his inferiors in Louisiana, Laussat consistently assumed that Spanish law, not French law, was in effect here at the end of the Spanish era. Who was in a better position to know? Finally, the leaders of the Louisiana bar who worked in the courts during the Spanish period, the second French period, and into the American period all took the position, when the question was raised in the early 1800s, that Spanish law, not French law, was in force in Louisiana when Laussat took the helm. Again, who was in a better position to know. For all these reasons, one can be confident that O'Reilly did, in fact, exert his power to replace French law with Spanish law.

It should be noted, however, that O'Reilly's attempt to extirpate French law from the colony was not entirely successful. The French population, particularly outside in New Orleans, remained strongly attached to their own laws and customs. Instead of resorting to the new Spanish judicial system, which applied only Spanish law, they frequently settled affairs among themselves extrajudicially on the basis of French customs and usages, for example, those relating to marital property.

C. The 2d French Period (1800 - 1803)

By treaty signed on October 1, 1800, Spain retroceded Louisiana to France. The Spanish king and Napoleon agreed, however, that the treaty should remain secret as long as Britain and France remained at war. Napoleon feared that the British, upon learning of the deal, would use its superior sea power to seize control of the colony. The treaty did not, however, remain a secret for long: the Americans, after receiving word of it, leaked the news. And so the two countries went forward with the transfer of power. The French governor, Laussat, assumed his post on March 26, 1803.

We now come to the second mystery of the history of Louisiana's civil law: Whether Laussat reinstituted French law during his brief tenure as governor? The affirmative case is built on two documents. The first is a decree, issued by Laussat on November 30, 1803, which dissolved the Spanish courts and set up new courts, staffed by French judges, in their place. Though the decree does not say so in so many terms, it is reasonable to assume, some scholars have argued, that the new judges did what would have come naturally, i.e., applied French law. The second is the contention of Barbé Marbois, the French Minister of Finance in 1803 and one of the signatories to the treaty

whereby France ceded Louisiana to the United States, that after Laussat took office "the laws and royal ordinances were maintained in Louisiana on a provisional basis, but only for a very short time."

But most historians of Louisiana law dispute that contention. Their argument is pitched on three grounds. First, there is no record of a decree whereby Laussat ordered that French law be put into effect. Second, the proposition that Laussat issued such a decree is fundamentally inconsistent with the record of the correspondence between Laussat and his government. In late 1802, before Laussat took office, the Minister of the Colonies, at Laussat's request, sent the French Commissioner of Justice to Louisiana to develop proposals for the administration of justice there. In his report, the Commissioner proposed, among other things, that "justice be dispensed, in both civil and criminal cases, in accordance with the forms of action, the regulations, and the tariffs observed in 1789 in those colonies handed over to France . . . ." The Minister, however, disagreed. In his reply to the Commissioner, the Minister noted that "[t]he intention of the government is not to decide, at this time, what concerns courts and the forms of action in Louisiana" and, after giving the Commissioner a few instructions for the interim, expressed his hope that "[t]h[e]se explanations [w]ould dispel any objection which you may have to the temporary preservation of the Spanish system of law." The following year Laussat, after having worked in Louisiana for a time, begged the Minister to reconsider. This time the Minister's response consisted of a copy of the recently-executed Treaty of Paris, the treaty whereby France ceded Louisiana to the United States. Article 4 of that treaty required the French colonial officials to maintain the status quo pending the transition to American rule and, further, restricted them to taking only those measures necessary to facilitate the transition. This correspondence simply makes no sense if one assumes that Laussat put French law into effect. Third, there is the testimony, once again, of those lawyers whose legal practice transcended the transition from Spanish rule to French rule and from French rule to American rule, all of whom maintained, when the question arose, that the second French colonial government did not disturb the Spanish law theretofore in force. For these reasons, the better view is that French law was not reintroduced into Louisiana during the second French period.

II. The Territorial Period (1803 - 1812)

A. Louisiana's Civil Law Before the Digest

In the Treaty of Paris, executed on March 22, 1803, France ceded Louisiana to the United States. The transition of power occurred on December 20, 1803, the date on which the new American governor, William Claiborne, assumed his post.

One of Claiborne's first acts as governor, an act that he no doubt later came to regret, was to issue a proclamation concerning the administration of justice. In that proclamation, Claiborne declared that "all Laws and municipal regulations which were in existance [*sic*] at the Cession of the late Government remain in force."

That decree was later ratified by two successive acts of Congress --Act of March 26, 1804 and Act of March 2, 1805. Both provided that "[t]he laws in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force,

until altered, modified, or repealed by the legislature."

The effect of Claiborne's decree, however, was intended to be merely provisional. Claiborne, who had been trained in the common law tradition and had served on the Tennessee Supreme Court, hoped eventually to establish the Anglo-American common law as the law of the new territory. That the new territorial government had the power to effect that change cannot be denied. The same Congressional acts that ratified Claiborne's decision to preserve the laws them in force also provided that the legislature "shall have the power to alter, modify, or repeal the laws which may be in force at the commencement of this act."

When Claiborne's plan to "commonize" Louisiana law became public, it aroused intense opposition. Just why the Louisianians opposed the plan is not entirely clear. The principal reason, it seems, was cultural. At that time, most Louisianians were of French descent, most spoke only French, and most thought of themselves as French Creoles, not as Americans. Though the law then in force was Spanish, not French, Louisianians did not find it utterly alien. It came from a culture similar to their own and, more important, was but a variant of the same body of law of which French law was a variant--the Romanist *ius commune*. The common law, on the other hand, seemed altogether alien to them. It came from an entirely different culture, one with different customs and institutions, was written in an entirely different language, and reflected a legal tradition altogether different from those of France and Spain. For the Louisianians, then, Claiborne's effort to put the common law into effect seemed to be a direct assault on their culture. But there were no doubt other reasons for the intense opposition to the plan. One should not, for example, discount the personal interests of Louisiana's legal elites, who had a stake in the maintenance of the legal *status quo*. Had the law been changed, they would have been put to the Hobson's choice of (i) learning an entirely new legal system or (ii) giving up legal practice altogether and, with it, their power, prestige, and livelihoods. Nor should one ignore the influence of the existing economic system. At that time, Louisiana' principal trading partners were the French and Spanish colonies scattered around the Caribbean Basin, countries governed, respectively, by the French and Spanish variants of the *ius commune*. Claiborne's proposal to change the law therefore threatened the stability of the existing commercial order.

When Claiborne attempted to convene the first Legislative Council for the purpose of establishing a new legal system for the territory, Claiborne's opponents, led by Edward Livingston, prepared a memorial to Congress urging it to grant Louisiana statehood immediately so that it might be governed by elected representatives. The opponents were confident that an elected legislature, unlike Claiborne's hand-picked appointed Legislative Council, would not stand for the displacement of Louisiana's civil law. Though the memorial was not a complete success--Congress refused to grant Louisiana immediate statehood--, it was not a complete failure either. In response to the memorial, Congress passed an act that, among other things, reconstituted the territorial legislature. The new legislature was to include, in addition to an appointed upper chamber, an elected lower chamber. The new legislature took office in early 1806.

One of the new legislature's first acts was to pass an act "declaring the laws which continue to be in force in the Territory." Those laws, according to the act, consisted of

1. The roman Civil code, as being the foundation of the spanish law, by which this country was governed before its cession to France and to the United States, which is composed of the institutes, digest and code of the emperor Justinian, aided by the commentators of the civil law, and particularly of Domat . . .; the whole so far as it has not been derogated from by the spanish law; 2. The Spanish law, consisting of the books of the *recopilation de Castilla* . . ., the [*siete*] *partidas* . . ., the *fueroreal*, the *recopiliation de indias* . . ., the laws *de Toro*, and finally the ordinances and royal orders and decrees, which have been formally applied to the colony of Louisiana . . . ."

[Question: Do these authorities appear in any particular order? If so, what is it? If not, which authorities trump which? Answer: Ascending order. The royal ordinances and decrees trump the *Toro*, the *Toro* trumps the *recopiliation de las indias*, and so on. Domat is at the bottom of the heap, just below Justinian's *Institutes*.]

The purpose of the act was two-fold. The first, reflected in the act itself, was simply to clarify what law was then in force. The second, not reflected in the act, was to head off Claiborne's legal commonization effort. It was not, however, the legislature's purpose to posit new law.

Claiborne vetoed the act. Why he did so is unclear. Some scholars believe that he did so for political reasons, in particular, to thwart the efforts of his opponents to stop his drive to commonize Louisiana law. Others maintain that his reason was more benign, namely, that in the act's contents were self-evident and, therefore, that the act was unnecessary.

Whatever may have been his reasons, his decision evoked a firestorm of controversy. The legislature responded, first, with a "Manifesto," complaining that Claiborne had repeatedly rejected its "most essential and salutary measures" and, consequently, calling for the legislature's immediate dissolution. The Manifesto is of interest to us for two reasons: (i) its description of the law then in force in Louisiana and (ii) its statement of the rationale for retaining that law.

In describing the law then in force in Louisiana, the Manifesto, interestingly enough, refers not to the law of Spain or the law of France, but to the Roman law:

> those old laws are nothing but the civil or Roman law modified by the laws of the government under which this region existed before the latter's cession to the United States. . . . In any case it is no less true that the Roman law which formed the basis of the civil and political laws of all the civilized nations of Europe presents an ensemble of greatness and prudence which is above all criticism.

The Manifesto, then, reflects the view that the law then in force in Louisiana was, at bottom, the Romanist *ius commune*.

The rationale for preserving those laws, according to the Manifesto, was two-fold. First there were cultural considerations:

> the civil law . . . is the one which 19/20 of the population of Louisiana know and are accustomed to from childhood . . . . [I]t is a question here of overthrowing received and generally known usages . . . . 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 . . . . [H]e has sucked this knowledge at his mother's breast, he has received it by the tradition of his forefathers . . . .

Second, there were commercial considerations. The precipitous introduction of the common law system into Louisiana, the authors of the Manifesto argued, would throw into uncertainty the law governing "contracts and agreements between private persons." Telling in this regard is the authors' rhetorical question: "Who will dare to sign a contract under a new regime the effects of which will not be known to him?"

The legislature's second response to Claiborne's veto was to adopt a resolution calling for the preparation of a "Civil Code" for the territory. By codifying the law then in force, the legislature hoped to address several of the criticisms that Claiborne and his partisans had directed against it: (i) that it was scattered here and yon in a variety of different Spanish and Roman digests and codes, the ranking among which was not at all clear (not unlike the law of the early middle ages, before the barbaric codifications), and (ii) that it was written in languages--Spanish and Latin--that few could understand. The point of legislature's call for codification, then, was to render the existing law less confusing and more accessible.

This brings us to what might be termed the third mystery of Louisiana's civil law: whether the legislature intended to make or at least to allow for a few innovations--changes in the law--in the codification process. The question, to put it in technical terms, is whether the legislature wanted a "digest" pure and simple, that is, a convenient compilation or restatement of the laws then in force, or a "code" properly so called, that is, a written law that, though based on the existing law, would displace it once it was put into effect. We've encountered this distinction before. The barbarian "codes" were not, in fact, codes at all, but mere digests, for they merely summarized, but did not replace, the prevailing customary laws; the French code, on the other hand, was a true code, for it took the place of the customary laws from which it was drawn; and the Justinian Digest, which purported at the same time to compile the existing law but also to replace it, was a confused mixture of the two.

The vast majority of scholars take the view that the "code" which the legislature had in mind was really intended to be a digest. To support their conclusion, they point to the following evidence. First, the act authorizing the preparation of the "code" directs the draftsmen to "make the civil law by which this territory is now governed the ground work of said code." Second, the act whereby the legislature later put the code into effect (i) referred to the new code as a "digest of the civil laws now in force," (ii) indicated that the code's sole purpose was to give order and clarity to the existing laws, and (iii) by ordering the repeal of all existing laws inconsistent with the code, implicitly maintained in effect all existing laws not inconsistent with the code.

Impressive though this evidentiary edifice may be, I think there are a few cracks in it. Notice,

first, that the act authorizing the preparation of the code requires only that the existing civil law be made the "ground work" of the code. This choice of words suggests the code might, in some minor respects, depart from the existing laws. Notice also the repealing clause of the act that put the new code into effect. If the code had been a pure digest, then this clause would have been unnecessary. A document that merely restates, but does not change, rules *A*, *B*, and *C* cannot possibly be inconsistent with rule *A*, *B*, or *C*. In my view, then, what the legislature wanted was a "hybrid" document, somewhat on the order of Justinian's *Digest*.

To execute this confusing mandate, the legislature selected two prominent Louisiana lawyers, James Brown and Louis Moreau-Lislet. To judge from their backgrounds, were an unlikely pair. Brown, a native of Virginia, had been trained in the common law; Moreau-Lislet, a native of Santo Domingo, then a French dependency, had been trained in the civil law in France. But both were fluent in French and Spanish and, more importantly, both were partisans of Louisiana's civil law tradition.

Claiborne, to everyone's surprise, approved the resolution, notwithstanding that it meant the end of his plan to commonize Louisiana law. It appears that the intensity and breadth of the reaction to his veto had convinced him that the public would never submit willingly to the common law. In the interest of preserving peace, he bowed to the public will.

B. Louisiana's Civil Law After the Digest

The new civil code, which Brown and Moreau-Lislet entitled "Digest of the Civil Laws now in force in the territory of Orleans," was formally adopted by the territorial legislature on March 31, 1808. Claiborne approved it a few weeks later. It was then published in two official versions, one in French and the other in English. The French, of course, was the "working text" of the drafters and the English, just a translation, though both were considered to be "official."

We come at last to the fourth and undoubtedly the most puzzling mystery of the history of Louisiana's civil law: Did Brown and Moreau-Lislet, in drafting the Digest, faithfully execute their mandate, that is, did they make the "civil law by which this territory is now governed" the "groundwork" of the Digest? Stated more technically, the question is whether the "sources" were primarily Spanish, as the legislature had directed, or something else?

Given that the commissioners had been instructed to make Spanish civil law the groundwork for the Digest, the "form" that they adopted is, perhaps, a bit surprising, for in that regard the Digest was heavily indebted to the *French* civil-law tradition. Consider, first, the Digest's structure. Just like the French Code civil, but unlike the various Spanish law and Roman law compilations, the Digest opens with a preliminary title, followed by three books, entitled, respectively, "Of Persons," "Of Things," and "Of the Modes of Acquiring Things." Next, consider the phraseology of the Digest. As has been shown by Professor Batiza of Tulane,

> the French Projet and Code, combined, account for . . . 70 percent of the [Digest] . . . . Domat contributed . . . 8 percent, Pothier, . . . 5 percent. The custom of Paris and the

> Ordinance of 1667 on civil procedure add to the French sources that account for about 85 percent of the [Digest].

Thus, nearly 85% of the articles of the Digest are verbatim copies or at least extremely close paraphrases of articles or statements found in the *Code Civil*, the Projet, the Custom of Paris, and the treatises of the French scholars Domat and Pothier. As for the other 15% of the articles in the Digest, most were taken from various Spanish sources, such as the *Siete Partidas*, the *Recopilacion de Castilla*, and the *Fuero Real*, and the writings of Spanish commentators José Febrero and Hevis Bolaños

Given that the Digest, at least in terms of its "formal" sources, was 85% French and 15% Spanish, some observers – chief among them Professor Rudolfo Batiza of Tulane – have suggested that the Digest drafters effectively changed the *substance* of law of Louisiana from Spanish law to a mixed law that was predominantly French and, in so doing, deliberately violated their mandate to make the "existing law" the "groundwork" of the code.

Other scholars, led by Professors Pascal and Levasseur of LSU, dispute that conclusion. Though they acknowledge the close parallels between the Digest, on the one hand, and the French *Code Civil* and its Projet, on the other, they nevertheless maintain that Brown and Moreu-Lislet drew the Digest from Spanish law sources. How? First, they draw a sharp distinction between "form" and "substance." It is possible, they observe, to draw the substance of a law from one source, yet express that substance in a form supplied by another source. Second, they point to evidence suggesting that Brown and Moreau-Lislet did precisely that, specifically, drew the substance of the Digest from Spanish law sources, but cast it in the form of various French law sources. That evidence consists, in part, of the numerous variations between the French sources and the Digest. Where the rule set out in the *Code Civil* or the Projet was inconsistent with Spanish law, the draftsmen, it seems, modified the language of the *Code Civil* or Projet article to reflect the Spanish rule. Other evidence appears in the *De la Vergne Manuscript*, a Moreau-Lislet's own copy of the Digest. *See* Symeonides at 78-81. This manuscript contains handwritten notes, one set of which purports to identify the "titles of the Roman and Spanish laws that are related to the matters treated" under each title and the other of which lists the particular Roman and Spanish laws to which each article is related. These notes suggest that the draftsmen, before "adopting" each of the articles that they took over from the *Code Civil* or Projet, first checked it against Spanish law sources for consistency. Pascal and Levasseur add that it was reasonable and, indeed, even necessary for Brown and Moreau-Lislet to choose French forms to express the substance of Spanish law: *Reasonable* because the French materials were thought to be expressions of the *ius commune*, the modernized Roman law recognized in Spain and France, and *necessary*, because the Spanish language materials, the *Siete Partidas*, for example, were not in modern codified form, that is, did not reflect a high degree of systematization. For Pascal and Levasseur, then, the draftsmen, while admittedly taking the form of the Digest from French law, nevertheless remained true to their mandate.

Still other scholars, including Professors Yiannopolous, have taken up a position somewhere in between. In Professor Yiannopolous view, the debate regarding the sources of the Digest rests on at least two mistaken assumptions and one misunderstanding. The first mistaken assumption:

that the "civil laws now in force" in Louisiana were purely Spanish. As Yiannopolous correctly points out, the term "civil law" didn't mean then what it means now. The term "civil law," as used in the 18th century, meant the *ius commune*, the body of modernized Roman law common to the states of Western Europe, including both France and Spain. Civil law was not, at that time, thought of in nationalistic terms. And so, when the legislature spoke of the "civil laws now in force," what it presumably had in mind was not so much Spanish law as Roman law. Further, the term "civil law" included *custom* as well as *legislation*. Indeed, civilian thinkers of that day recognized the possibility of a legally-binding custom that contradicted legislation, so-called custom *contra legem*. That is significant here, for many of the French Louisianians, as we noted earlier, continued to order juridical relationships according to French customary law throughout the Spanish period. The truth is, then, that the "civil laws now in force" in at least some regions of Louisiana included French customary law. The second mistaken assumption: that the mandate of the draftsmen was limited to that of codifying the "civil laws now in force," in other words, that the draftsmen were charged with preparing a pure "digest." We made this point earlier, noting that certain provisions of the acts that authorized the preparation and the promulgation of the digest seem to allow for the possibility that the draftsmen might change the law in some respects. Now for the misunderstanding: the antagonists in the debate do not use the term "sources of law" in the same sense. As Yiannopolous correctly points out, the expression "sources of law" has two fundamentally different meanings: (i) *material* sources, that is, the actual corporeal documents on which the statement of a legal rule is based and (ii) *formal* sources, that is, those authorities from which the matter, or substance, of legal rule is derived. Batiza uses the expression "sources of law" in the former sense; Pascal and Levasseur, in the latter. For all these reasons, Yiannopolous concludes that even if the draftsmen did draw most of the Digest from French law sources, they did not necessarily violate their mandate.

Let's see, then, if we can't summarize the common findings of these legal scholars. First, all agree the Digest, in terms of form and style, was mainly French. Second, all agree that the Digest, in terms of substance, was Roman, not French or Spanish, with modifications that reflected Spanish legislation or custom.

To assess properly the impact that the enactment of the Digest had upon Louisiana's theretofore existing civil law, one must take into account the "repealer clause" that was included in the enactment. Unlike the "repealer clause" that had accompanied the enactment of the *Code civil* in France, which purported to abrogate all theretofore existing civil laws, the Digest's repeal clause provided for the repeal of only those theretofore existing laws that were "inconsistent" with its provisions. Consequently, the Digest left intact all Spanish private law rules for which it did not provide a contrary rule.

III. The Statehood Period (1812 to date)

A. Up to the Code of 1825

During the period immediately following the enactment of the Digest, the influence of Spanish law stood at its full height. Courts interpreted the repealer clause narrowly, so as to leave much of the pre-existing Spanish law in place. And, in the interpretation of the Digest, the courts much more

often than not followed Spanish rather than French authorities. That they did so in interpreting the 15 % of the articles that were definitely of Spanish origin is hardly surprising. What is surprising, at least if one believes that the other 85% of the articles were truly French in origin, is that the courts did the same with respect to even those articles.

The courts' predilection during this era for Spanish over French doctrinal authorities is reflected in a number of judicial decisions, excerpts from two of which are reproduced below. These cases, to use a good "common law" expression, are still "good law," that is, the interpretations reflected in them are still "correct" even today.

In early 1822, the Louisiana Legislature appointed a commission to "revise the Civil Code (of 1808) by amending the same in such manner as they will deem it advisable." The team consisted of Moreau-Lislet, whom we have already met; Edward Livingston, a New-York lawyer who had immigrated to Louisiana in 1803 and had helped spearhead opposition to Claiborne's attempts to commonize Louisiana's private law; and Pierre Derbigny, a political refugee from Revolutionary France who had earlier served as Claiborne's "civil law" advisor and had later served as a Justice of the Louisiana Supreme Court.

Why the legislature called for the new code is reflected in the commissioners' preliminary report, dated Feb. 13, 1823. According to the commissioners, the legislature's objective was

> to provide a remedy for the existing evil, of being obliged in many Cases to seek for our Laws in an undigested mass of ancient edicts and Statutes, decisions imperfectly recorded, and the contradictory opinions of Jurists; the whole rendered more obscure, by the heavy attempts of commentators to explain them; an evil magnified by the circumstance, that may of these Laws must be studied in Languages not generally understood by the people . . . .

The "law" to which the commissioners were referring, of course, was not the civil law set forth in the Digest, but the supplementary civil law--the Spanish law that the Digest had left intact. That law was scattered here and yon in several different statutes and codes, the pecking order among which was often uncertain and all of which were written in Spanish. It appears, then, that what the legislature wanted this time around was a true code, something that would wipe the slate clean.

The report also tells us something about the sources from which the commissioners planned to and on which they presumably did base their work. The commissioners pledged to keep a "reverent eye" on (i) the *Siete Partidas*, (ii) the French *Code Civil*, (iii) the English common law, and (iv) *above all* the works of the Roman jurisconsults. The commissioners pointed out, however, that they would not follow those sources slavishly. As they candidly admitted, they planned to innovate, cautiously to be sure, to eliminate what they perceived to be "great inconveniences" and "inconsistencies" in the existing law.

The commissioners presented their Projet to the legislature in late 1823. This Projet, unlike the typical projet, was not complete in itself. It set forth only those articles of the Digest that the commissioners proposed to amend or suppress (repeal), together with comments explaining their

proposals. *See* Symeonides at 96-97. The articles of the Digest not addressed in the Projet were to remain in force without modification. True to their word, the commissioners drew upon a variety of sources in preparing the Projet, in particular, commentaries on the French *Code Civil*, especially that of Toullier, the President of the Cour de Cassation (the supreme court) of France. On the whole, then, the Projet was even more French than the Digest.

Look at the chart, in particular, at the entries for Pothier & Toullier. Did the importation of these authorities into our Civil Code have a lasting effect? Clearly so.

The legislature, which had only a few months to review the Projet, largely rubber-stamped the commissioners' work. The new code, a "merger" of the 1808 Digest and the Projet of 1823, was published in parallel versions, one in French and one in English, in 1825. Once again, the French was the "working version" and the English, just a translation. Though both versions were supposed to be "official," the courts, which soon realized that the English translation was stunningly bad, ruled that, in the event of a conflict between the two, the French would control.

B. Between the Codes (1825-1870)

Throughout the period between the enactment of the Code of 1825 and its revision in 1870, Louisiana's courts not uncommonly turned to Spanish and French authorities, be it for assistance in interpreting that code or for ideas for resolving cases for which that code did not seem to provide. Though Spanish authorities continued to dominate at first, the courts made a marked "turn" toward French and away from Spanish authorities in the early 1840s.

What lay behind this "French turn" is not entirely clear. It was almost certainly attributable, if only in part, to the Repealing Acts of 1828, the effect of which was to abrogate all theretofore existing civil law, which, as we have already seen, was Spanish private law. But that explains only why the courts stopped treating Spanish authorities as sources of *supplementary law*; it does not explain why the courts stopped drawing *interpretive guidance* from them. Perhaps the explanation for this latter development is simply loss of access: it could be that by this relatively late date there were few lawyers and judges left in Louisiana who could read Spanish. Then again, perhaps the explanation is to be found in the courts' recognition that the framers of the Projet of 1823, by virtue of the innovations that they have made in the theretofore existing law, had effectively rendered Louisiana's private law relatively more French and less Spanish.. Finally, it could be that this development had something to do with then-current perceptions of French legal culture: at the time French civil law was widely perceived to be more "modern" than Spanish civil law, in particular, to be more compatible with "democratic" political values.

C. The Code of 1870

In the wake of the Civil War, the legislature decided it was time to revise the Civil Code. It evidently struck the legislators that the articles in the Code of 1825 regarding "master and slave" were somehow incompatible with the new national order.

The new code, which was entitled "The Revised Civil Code of the State of Louisiana," was adopted in 1870. It was substantially the same as the Code of 1825, except that it (i) eliminated the articles relating to slavery, (ii) eliminated other articles that the legislature had suppressed since 1825, and (iii) incorporated all of the new articles that the legislature had added by amendment since 1825. Unlike the Code of 1825 and the Digest before it, the Code of 1870 was published only in English rather than in both English and French. The new Code, in fact, appears on its face to be a verbatim reproduction of the English version of the old Code (with the modifications noted above). The act promulgating the new code contained no repealer clause.

D. Between the Code of 1870 & the "Civil Law Renaissance": the Era of "Civil Law Decadence" (1870 - 1940)

If one were to confine one's attention to the "law on the books" (as opposed to the "law in practice"), then one could justly assert that the seventy (70) or so years following the enactment of the Civil Code of 1870 witnessed few substantial changes in Louisiana's private law. To be sure, that Code was amended on a number of occasions, but the amendments were, all things considered, few and far between and largely *de minimis*. Though there was at attempt to revise the Code in the early 20th century, that attempt eventually failed. Thus, it would be fair to say that during this period no significant dilution of the Spanish and French content of Louisiana's *official* private law took place.

But if one turns one's attention from the law on the books to the law in practice during this period, then one confronts a quite different picture. In terms of day-to-day use of the official private law by lawyers advising clients and judges deciding litigation, this was a period of steady decline. Now it is true that the courts, especially in opinions written in the early part of this period, did on occasion cite the Code or related legislation and, in some instances, even relied upon French authorities as interpretive aids. But much more commonly, especially in opinions written in the latter part of this period, the courts ignored the Code altogether, instead drawing their rules of decision from Anglo-American authorities or sometimes, in a manner not unlike that of the devotees of the *Freirecht* movement in Germany sometime later, creating their own autochthonic rules of decision. As Professor Yiannopoulos has aptly observed, "[r]eading the decisions of the 1920's and the 1930's, one has the feeling that the civil law was dead."

E. The "Civil Law Renaissance" (1940-1980)

1. The Challenge of Professor Ireland

By the end of the 1930s, some observers of Louisiana's private law took the position that Louisiana's civil law tradition had, in fact, fallen into desuetude. Chief among these observers was Gordon Ireland, a young professor at the Louisiana State University Law School. In a now famous (or infamous) law review article, Ireland asserted, among other things, that "the Civil Code . . . is now after all only a legislative statute to be construed and applied when there is no local decision in point." For these and other reasons, he insisted, it was time to stop "pretending" that Louisiana's private law was still civilian and to acknowledge forthrightly that "Louisiana is today a common law

state."

Whatever may have been the merits of Ireland's position – it was immediately and hotly contested –, his article provided a much needed "wake-up call" to partisans of Louisiana's civil law tradition. Now awakened to the reality and the dimensions of the problem, these partisans, in different times and in various ways, undertook a number of initiatives that they hoped would, at the very least, arrest the decline of that tradition and, beyond that, perhaps even reverse it.

The earliest of these initiatives came from the state's law schools. Professors of civil law prevailed upon their colleagues to revamp law school curricula so as to give greater emphasis to instruction in the civil law. In addition, these professors, having dedicated themselves anew to the production of civil law scholarship, began to publish periodical articles and monographs on civil law topics. The culmination of this renewal of civil law scholarship was the founding of the Louisiana Civil Law Treatise series, the first installment of which, entitled "The Civil Law of Property," appeared in 1966. As of today this series, which covers such basic private law fields as property, obligations, matrimonial regimes, and successions, comprises seventeen (17) volumes and more are still on the way.

Other initiatives came from the Louisiana Legislature. In 1938 the legislature set up the Louisiana State Law Institute, a law reform agency whose purpose, according to its founding charter, was in part to develop materials to promote "the better understanding of the Civil Law of Louisiana and the philosophy upon which it is based." Ten (10) years later, the legislature charged the Institute with the task of revising the Civil Code of 1870. In 1960 the Institute formed a "Civil Law Section," the purpose of which was to promote civil law studies and to conduct the mandated civil code revision. Not long thereafter the Institute, in fulfillment of its charter, began to publish English translations of major doctrinal works in the French civil law tradition, including Aubry & Rau's *Course of French Civil Law*, Planiol's *Elementary Civil Law Treatise*, and Gény's *Method of Interpretation*.

Eventually even the state courts joined the civil law partisans' cause. In 1967, Chief Justice Sanders, in an article published in the Louisiana Bar Journal, gently chided Louisiana attorneys for their "failure . . . to include pertinent code articles in their briefs" and "use of common law doctrinal materials, instead of available civil law authority." And before long first the Louisiana Supreme Court and later the state's intermediate appellate courts began, once again, to resort to French and Spanish authorities for assistance in interpreting the Civil Code of 1870 and related legislation.

F. From the Late 20th Century to Today

One of the principal developments of the Civil Law Renaissance, as I noted earlier, was the legislature's charge to the Louisiana State Law Institute to revise the Civil Code of 1870. Before the revision could begin, the Institute, of course, had to decide on both the goal and the method of revision. As for the *goal* of revision, two possibilities presented themselves. The first was the relatively modest one of "bringing the text of the Code up to date in the light of judicial precedents and special legislation on civil law matters" with "no major changes in organization and policies."

The second was a much more ambitious "substantial revision" of the Code "with regard to structure, determination of policies, and drafting of new provisions." As between these alternatives, the Institute chose the latter. With respect to the *method* of revision, there were, once again, two possibilities. The first was that of redrafting the Code "as a whole" in one fell swoop, something that presumably would have required the appointment of a commission like that which the French set up in the 1950s to revise the *Code civil*. The second was that of a part-by-part revision (or, as its detractors prefer to call it, "piecemeal revision"), that is, one in which first this set of Civil Code titles, then another, and then another would be independently revised as it might seem desirable and convenient. Judging that the former alternative was far too ambitious, the Institute opted for the latter.

The revision process, which finally got underway in the mid-1970s, is today nearly complete. Though there is considerable disagreement among scholars regarding the technical quality and political wisdom of the resulting product, all would agree, I think, that the revision has had the effect of diluting the Spanish and French content of Louisiana's private law.

The cause of this dilution is that, in the course of the revision, the revisers have ended up introducing into the Civil Code scores of new legal rules and even a few new legal institutions that were of neither Spanish nor French origin. The sources of these new non-Spanish and non-French rules and institutions are varied. Some can justly be called autochtonic, that is, they are original Louisiana creations. Others have been drawn from Anglo-American law, be it "case law" or legislation, such as the so-called "Uniform Laws" that have been developed in the United States. The rest have been taken from the civil law of jurisdictions other than Spain and France, in particular, Italy, Greece, Germany, Quebec, Argentina, and, most exotic of all, Ethiopia.

Though the revision of the Civil Code has, then, diluted the Spanish and French content of Louisiana's private law, one must not exaggerate the extent of that dilution. The truth is that the revision process, innovative though it has been, has nevertheless left intact the bulk of the theretofore existing private law, which was, as we have seen, almost completely Spanish and French in origin. Not only that, but the revision process has at points actually "added back" French and, to a lesser extent, Spanish content to that law. In addition to the new rules and institutions mentioned earlier (those that are not of Spanish or French origin), the revisers have added a number of others that owe their origin to French civil law, in particular, to the French Civil Code or French civil law doctrine.

The same can fairly be said, I think, of Louisiana's private law "in practice." As the revision process has ground on, Louisiana courts have continued to use French and to a lesser extent Spanish authorities to assist them in interpreting the revised civil Code articles.

It must be acknowledged, however, that judicial citations to French and Spanish authorities have been on the wane during the last decade or so. But if one views this development in context, it does not, in fact, point to a decline in the influence of French and Spanish law within Louisiana's "law in practice." At the same time at which judicial citations to those authorities have been dropping, judicial citations to "domestic" civil law authorities (that is, the works of Louisiana's own civil law scholars) have been climbing. And there is reason to believe that these two phenomena are causally

connected, specifically, that the courts are now resorting to the domestic works in situations in which they would formerly have resorted to the foreign works (in other words, the former are seen as and are being used as substitutes for the latter). Now, the Louisiana scholars who are responsible for these new works, to the very last one, are themselves students of the French or Spanish civil law tradition (or, in many instances, of both traditions). Further, most of these works are shot through with citations to French and, in some instances, even Spanish civil code articles and doctrinal works. Thus, to the extent that the Louisiana courts are now citing these works, those courts are still "feeling" the influence (albeit now in a less direct fashion) of the French and Spanish civil law traditions.

So, how do things stand in Louisiana's private law at the present moment? At its core, the private law remains largely "civilian." Civil law predominates in a number of subfields, e.g., successions and property. But other subfields consist of a more or less equal "blending" of rules of Anglo-American and civil law derivation, e.g., security devices, partnership, and delicts (torts). And many subfields are governed entirely by law of Anglo-American derivation, e.g., commercial paper and corporations.