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Hidden Law: Taking the Comments More Seriously

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Hidden Law: Taking the Comments More Seriously

Melissa T. Lonegrass*

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* © 2017 Melissa T. Lonegrass. Harriet S. Daggett-Frances Leggio Landry Professor of Law & Bernard Keith Vetter Professor of Civil Law Studies, Paul M. Hebert Law Center, Louisiana State University; Member of the Council of the Louisiana State Law Institute. I would like to thank my friends and colleagues who have reviewed drafts and provided helpful suggestions, as well as invaluable anecdotes and oral histories, without which this Article could not have been completed. Special thanks are due to Jessica Braun, L. David Cromwell, H. Mark Levy, John A. Lovett, Olivier Moréteau, Ronald J. Scalise Jr., Katherine Shaw Spaht, Christopher K. Odiinet, J. Randall Trahan, Dian Tooley-Knoblett, and Mallory Waller. I would like to also thank the organizers and participants of the various conferences at which I have presented my research on legislative comments: the 2016 Annual Meeting of the Law and Society Association, the Fifth Annual American Society of Comparative Law Younger Comparativists Committee Conference, the First Annual Southern University Law Center Law & Society Faculty Forum, the 2015 Conference of the Central States Law Schools Association, and the Fourth Congress of the World Society of Mixed Jurisdiction Jurists. I am grateful to LSU Law Center for its generous research support and my outstanding research assistants Malerie Bulot (class of 2018), Jourdan Curet (class of 2019), and Endya Hash (class of 2018). I am especially grateful to my friend and teacher Thanassi Yiannopoulos, who was both drafter and critic of the comments in Louisiana, for inspiring me to write about the comments.

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I. INTRODUCTION

“The comments are not the law.” This conventional wisdom is well known among Louisiana judges, scholars, practitioners, and law students. Lawyers are instructed during the first days of law school and on countless occasions thereafter that the comments,¹ appearing just below the legislative text in statutory compilations, while useful, are not to be taken too seriously. The familiar maxim resounds from the pages of judicial opinions² and scholarly writing.³ Never mind

1. Throughout this Article, the terms “comments,” “legislative comments,” “revision comments,” “reporter’s comments,” and “official comments” will be used interchangeably, as is the custom of courts and scholars. Although courts refer to comments occasionally as “commentary,” this Article avoids that terminology in reference to the legislative comments given that, in the civil law tradition, the term “commentary” is used to refer broadly to the writings of legal scholars. The author’s observations about, and criticisms of, legislative comments are not intended to be extrapolated to all scholarly writing.

2. See, e.g., *Sims v. Am. Ins. Co.*, 2012-C-0204, p. 6 (La. 10/16/12); 101 So. 3d 1, 5 (“Moreover, comments to Civil Code articles do not constitute law.”); *Broussard v. Hilcorp Energy Co.*, 2009-C-0449, p. 5 n.5 (La. 10/20/09); 24 So. 3d 813, 816 n.5 (“[S]tatements contained in the official comments are not part of the statute and are not binding on courts”); *Ramirez v. Fair Grounds Corp.*, 575 So. 2d 811, 813 (La. 1991) (“[Comments] have no legislative effect on the statute because they are not part of the law.”); *Lakewood Prop. Owners’ Ass’n v. Smith*, 2014-CA-1376, p. 23 (La. App. 4 Cir. 12/23/15); 183 So. 3d 780, 794 (“We note, however, that comments to Civil Code articles do not constitute law.”); see also, e.g., *Cent. Props. v. Fairway Gardenhomes, LLC*, 2016-C-1855, p. 11 (La. 6/27/17); 2017 WL 2837152, at *6 (“Although the Official Revision Comments connected with statutes are not the law, they can be useful in determining legislative intent.”); *Tracie F. v. Francisco D.*, 2015-CJ-1812, p. 8 (La. 3/15/16); 188 So. 3d 231, 238 (“While the Official Revision Comments are not the law, they may be helpful in determining legislative intent.”); *Terrebonne Par. Sch. Bd. v. Castex Energy, Inc.*, 2004-C-0968, p. 11 (La. 1/19/05); 893 So. 2d 789, 797 (“[W]e note that statements contained in the official comments are not part of the statute, and are not binding on this court, although we do not discount them entirely.”).

that the comments are routinely passed before the legislature within the bills that are ultimately enacted into law,⁴ or that courts refer to these annotations as the “official comments” to the legislation.⁵ Do not be distracted by courts’ frequent, detailed discussions of the comments, nor by their slavish dependence upon them.⁶ Legislative comments are mere doctrine,⁷ written by scholars and designed only to provide context for legislative reforms. They are *not law*.

However, while legislative comments are *not law* in an official sense, comments have far more significance and influence than the conventional wisdom dares to admit. Comments add an immense volume of substance to the law. They provide a vast network of rules, policies, and historical cross-references that supports, enhances, and at times even contradicts the legislative text.⁸ Though traditionally regarded as doctrine—the expository writings of legal scholars—this vital infrastructure enjoys an elevated status unknown by other forms of scholarship: they are endorsed by the legislature and directly inform legislative intent.⁹ Further, even while *not law*, comments are cited and recited and parsed by courts and, ultimately, relied upon to reach outcomes in legal disputes.¹⁰ Their authority should not be underestimated.

Judicial reliance on nonbinding authorities is not necessarily objectionable; after all, both doctrine (scholarly writing) and

3. See, e.g., P. RAYMOND LAMONICA & JERRY G. JONES, 20 LOUISIANA CIVIL LAW TREATISE: LEGISLATIVE LAW & PROCEDURE § 7.7 (2d ed. 2016) (noting that in the conduct of statutory interpretation, “[t]he court may also examine text included in statutes and codes such as Official Revision Comments, section headings, and the classification and organization of sections, but must keep in mind that such text is not part of the law”); A.N. YIANNOPOULOS, 2 LOUISIANA CIVIL LAW TREATISE: PROPERTY § 7.40 (5th ed. 2015) (“Indeed, the Revision Comments are not law.”); Katherine Shaw Spaht, *Forced Heirship Changes: The Regrettable “Revolution” Completed*, 57 LA. L. REV. 55, 92-93 (1996) (“Furthermore, comments are not the law.”); Symeon Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 LA. L. REV. 69, 139 n.109 (1983) (“[C]omments are not part of the law.”).

4. See discussion *infra* Part III.A.1. As is discussed *infra*, comments have been included routinely in Law Institute bills since the 1940s.

5. See discussion *infra* Part III.A.2.

6. See discussion *infra* Part III.A.2.

7. A.N. YIANNOPOULOS, CIVIL LAW SYSTEM: LOUISIANA AND COMPARATIVE LAW 165-66 (2d ed. 1999) (“The word doctrine signifies the body of opinions on legal matters expressed in books and articles. The word is also used to designate, collectively, the persons learned in the law who are engaged in analysis, synthesis, and evaluation of legal materials. It thus refers both to legal scholarship and the persons who devote their time to scholarly elaboration on texts.”).

8. See discussion *infra* Part III.B.

9. See discussion *infra* Part III.A.1.

10. See discussion *infra* Part III.A.2.

jurisprudence (judicial decisions) are highly regarded as influential, though secondary, sources of law.¹¹ However, unlike jurisprudence, whose role and status as a source of law in Louisiana is continually discussed and debated,¹² the comments have acquired their force without any meaningful scrutiny of the process of their drafting, their role in the development of legal rules and norms, or their impact on legal disputes. As a result, they have evolved into a source of law¹³ that, while substantial in volume and authority, largely remains hidden from view.

The time has come for the comments to be taken more seriously, and for meaningful inquiry to be made into their role and status as a source of law.¹⁴

11. See LA. CIV. CODE art. 1 cmt. b (2017) (recognizing the secondary status of doctrine and jurisprudence); *Doerr v. Mobil Oil Corp.*, 2000-0947, pp. 13-15 (La. 12/19/00); 774 So. 2d 119, 128-29 (addressing the secondary status of jurisprudence).

12. For examples of the debate about the role jurisprudence in Louisiana, see generally Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937) (concluding that Louisiana is a common law jurisdiction, in part due to reliance on precedent); Harriet Spiller Daggett et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937) (arguing that Louisiana courts rely on precedent no more than other civil law jurisdictions); Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 781 (2005) (concluding that Louisiana courts exercise a "systemic respect for jurisprudence"); Jason Edwin Dunahoe, Note, "*Jurisprudence Désorientée: The Louisiana Supreme Court's Theory of Jurisprudential Valuation*", *Doerr v. Mobil Oil and Louisiana Electorate of Gays and Lesbians v. State*, 64 LA. L. REV. 679 (2004) (calling upon the Louisiana Supreme Court to clarify its theory of judicial precedential valuation); Mary Garvey Algero, *Considering Precedent in Louisiana: Balancing the Value of Predictable and Certain Interpretation with the Tradition of Flexibility and Adaptability*, 58 LOY. L. REV. 113 (2012) (suggesting that Louisiana courts strike an appropriate balance between predictability and flexibility when it comes to jurisprudence); Charles J. Stiegler, *The Precedential Effect of Unpublished Judicial Opinions Under Louisiana Law*, 59 LOY. L. REV. 535 (2013) (exploring weight given to unpublished opinions); FRANK L. MARAIST, *LA LOUISIANA CIVIL LAW TREATISE: CIVIL PROCEDURE-SPECIAL PROCEEDINGS* § 4.1 (2015) (arguing that judicial decisions are the law until overruled by the Louisiana Supreme Court or the legislature).

13. As will be made clear in the pages that follow, this Article does not suggest that the comments are a source of law *de jure*, that is, in the strict dogmatic sense of the phrase. See LA. CIV. CODE art. 1 ("The sources of law are legislation and custom."); *id.* cmt. b ("According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity . . ."). Nevertheless, for the reasons expressed herein, the comments are most certainly a source of law *de facto*, that is, a wellspring of rules and norms that are regarded as highly authoritative, although not binding.

14. As a member of the Council of the Louisiana State Law Institute and the reporter of two Law Institute committees, both of which have produced draft legislation complete with comments, I undertake this inquiry in the spirit of improving the processes for and the product of law reform initiatives. I do not intend to disparage the Law Institute or its members, nor to denigrate that institution's many successes.

This Article explores the process by which comments are made, the manner in which they are employed by courts, and their relationship to the legislative texts.¹⁵ This examination reveals that the comments are indeed a significant source of law—even if *not law* in a formal sense, the comments play an indispensable role in the application and development of law. The historical, doctrinal, and jurisprudential context provided by the comments is essential to the process of law reform in this state, as well as to the ultimate acceptance and understanding of the law. Indeed, most practitioners would find it unthinkable to navigate the law without their guidance. However, the comments come at a cost: the drafting and publication of legislative comments conflicts, at least in some measure, with our commitments to codification in the civilian style, the democratic legitimacy of legislation, and the transparency and accessibility of law.¹⁶ Moreover, while the cost of the comments has long been justified by their practical utility, our neglect of the comments has resulted in errors, inconsistencies, and anachronisms, all of which undermine their efficacy as guideposts for both the bench and the bar.¹⁷ Perhaps worse, we have failed to consider the extent to which our reliance on the comments may impede the clarity and precision of legislation at the time that it is drafted, as well as the organic development of the law through its application by courts.¹⁸

These observations, taken together, make clear that if the comments are not taken more seriously, and soon, the result may be the unwitting degradation of our law. Shining a light on the comments and the manner of their making may reveal some unsightly warts, but it should also motivate a frank discussion about the ways in which comments, and in turn the law, can be improved. What is more, Louisiana is not unique in its use of legislative comments—comments and commentary accompany many legislative texts, uniform laws, and model rules found in civil law and common law jurisdictions alike.¹⁹

15. See discussion *infra* Parts II & III.

16. See discussion *infra* Part IV.A.

17. See discussion *infra* Part IV.B.1.

18. See discussion *infra* Part IV.B.2.

19. See *generally*, e.g., FED. R. CIV. P. (containing “advisory committee notes”); CÓDIGO CIVIL [CÓD. CIVIL] [CIV. CODE] (J. Lajoune & Cia. eds., 1939) (Arg.) (containing “notas”); U.C.C. (AM. LAW INST. & UNIF. LAW COMM’N 2014) (containing “official comments”); U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM’N 2016) (containing “commentary”); UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INT’L SALE OF GOODS (U.N. Comm’n on Int’l Trade Law 2010) (accompanied by an “explanatory note”); PRINCIPLES OF EUROPEAN CONTRACT LAW (COMM’N ON EUR. CONTRACT LAW 2003) (containing “comments”); RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981)

Thus, an examination of Louisiana's experience with comments will serve as an important contribution to the discourse surrounding the drafting, use, and revision of the comments of those various compilations.

This Article proceeds in four parts. Part II describes the drafting, publication, and revision of legislative comments. Part III explores the status of the comments as a source of law and examines the ways in which comments interact with the legislative text. Part IV advances theoretical and functional critiques of the comments. Finally, Part V presents initial suggestions for improving the drafting, publication, and revision of the comments and calls upon all parties involved in the making and study of Louisiana law to continue to debate the role and status of this hidden source of law.

II. THE DRAFTING AND PROMULGATION OF LEGISLATIVE COMMENTS

Although judges and lawyers frequently rely upon the comments for guidance in the resolution of legal disputes, few members of the bench and bar are fully versed in the manner of their making. The following subpart provides an overview of the history and methodology of the comments.

A. *A Brief History of the Legislative Comments*

The drafting and promulgation of legislative comments is a rather new phenomenon in Louisiana—with one exception, the practice dates to the establishment of the Louisiana State Law Institute (Law Institute) in 1938.²⁰ Prior to that time, the only

(containing “comments”); MINISTERE DE LA JUSTICE, COMMENTAIRES DU MINISTRE DE LA JUSTICE: LE CODE CIVIL DU QUEBEC (Publications du Québec ed., 1993) (containing “commentaire”).

20. The Law Institute is Louisiana's official law revision commission, law reform agency, and legal research agency. LA. REV. STAT. § 24:201 (2017) (enacted by Act No. 166, 1938 La. Acts 429); see generally William E. Crawford & Cordell H. Haymon, *Louisiana State Law Institute Recognizes 70-Year Milestone: Origin, History and Accomplishments*, 56 LA. B.J. 85 (2008) (detailing the history and work of the Law Institute); William E. Crawford, *The Louisiana State Law Institute—History and Progress*, 45 LA. L. REV. 1077 (1985) (describing the organization and process of the Law Institute). The Law Institute's legislative mandate is broad; among its principal functions are the responsibilities to “consider needed improvements in both substantive and adjective law and to make recommendations concerning the same to the legislature,” to “examine and study the civil law of Louisiana and the Louisiana jurisprudence and statutes of the state with a view of discovering defects and inequities and of recommending needed reforms,” to “recommend from time to time such changes in the law as it deems necessary to modify or eliminate

occasion on which “comments” were drafted to accompany legislation was the preparation of the Louisiana Civil Code of 1825. Although the drafters of the 1825 Civil Code prepared extensive comments to accompany the projet, or draft, that was submitted to the legislature for its approval, the comments were not promulgated alongside the law once it was enacted.²¹ Since its inception, however, the Law Institute has recommended hundreds of bills to the legislature,²² many of which have contained legislative comments, and those comments have all been published in official compilations of the law.²³ The drafting of comments is thus an integral component of the Law Institute’s law reform work.

Indeed, the Law Institute’s very first reform initiative, the 1942 revision of the Louisiana Criminal Code, involved the preparation of extensive comments designed to explain the proposed changes.²⁴ The

antiquated and inequitable rules of law, and to bring the law of the state, both civil and criminal, into harmony with modern conditions.” LA. REV. STAT. § 24:204(A)(1)-(2), (5). The Law Institute has also been granted “continuous revision” authority, according to which the law revision commission is authorized to “direct and supervise the continuous revision, clarification and co-ordination” of Louisiana law. *Id.* § 24:251. Stated simply, the Law Institute’s principal charge is to study the law, make recommendations for its reform, and oversee its printing and coordination. *See generally id.* § 24:204(A)(1)-(10) (providing a comprehensive list of the Law Institute’s duties).

21. *A Republication of the Projet of the Civil Code of Louisiana of 1825*, in 1 LOUISIANA LEGAL ARCHIVES (1937).

22. *See generally* Crawford & Haymon, *supra* note 20 (cataloging the major legislative proposals of the Law Institute through early 2006); LA. STATE LAW INST., THE THIRTY-NINTH BIENNIAL REPORT OF THE LOUISIANA STATE LAW INSTITUTE (2016) (listing all legislation proposed between 2000 and 2016).

23. For example, among the 163 Law Institute bills described in the Thirty-Ninth Biennial Report of the Law Institute, only fifty-two did not contain commentary. The instances in which legislation was proposed without comments tend to involve targeted revisions of one or more provisions rather than systemic reforms. *See, e.g.*, Act No. 415, 2005 La. Acts 2039 (enacting Louisiana Revised Statutes section 9:2801(C), relative to attorney fees in partitions of community property); Act No. 1295, 2003 La. Acts 3897 (revising Criminal Code provisions dealing with child pornography, obscenity, and video voyeurism); Act No. 509, 2001 La. Acts 1084 (revising Civil Code article 395). One notable exception is the revision of the law of registry, which, although substantial, was made without comments. *See* Act No. 169, 2005 La. Acts 1383; *infra* notes 116-117 and accompanying text. Also, bills that merely repeal or transfer and redesignate law, without enacting new provisions or amending existing ones, do not contain comments. *See, e.g.*, Act No. 503, 1999 La. Acts 1714 (repealing definitional provisions); Act No. 705, 1990 La. Acts 1535 (repealing provisions relating to master and servant); Act No. 126, 1987 La. Acts 418 (repealing and redesignating provisions relating to corporations, unauthorized corporations, and unincorporated associations). Bills updating terminology likewise do not contain comments. *See, e.g.*, Act No. 26, 2004 La. Acts 936 (eliminating “illegitimate children” and related terms).

24. *See* Act No. 43, 1942 La. Acts 137; *see also* Dale E. Bennett, *The Louisiana Criminal Code: A Comparison with Prior Louisiana Criminal Law*, 5 LA. L. REV. 6, 49 (1942) (extolling the virtues of the new Criminal Code in its inclusion of comments).

preparation of the Louisiana Criminal Code was a monumental task that involved the complete codification of a previous hybrid system of partially written and partially jurisprudential criminal rules.²⁵ Although the aim of codification was not a complete overhaul of the law or a break from the past, the Law Institute was charged with synthesizing and modernizing the law in the character of a true “code” in the civilian sense.²⁶ The principal drafters of the Criminal Code viewed the preparation of comments as critical to the acceptance of the projet’s synthesized and modernized rules by the Law Institute and, ultimately, the legislature.²⁷ Specifically, the comments allowed the drafters to explain the relationship between the new legislation and the old and to describe the intended scope and meaning of the text.²⁸

Once complete, the projet, including explanatory comments, was presented to the legislature for consideration and adoption.²⁹ The inclusion of comments proved successful; the projet was ultimately approved by the legislature, and thus Louisiana’s modern Criminal Code was born.³⁰ Indeed, the legislature was so impressed with the quality of the comments and their potential utility for lawyers and judges that it passed a concurrent resolution in the same session directing the publication of the comments alongside the text of the law and declaring that “the information contained in the ‘Comments’ on each proposed article is of inestimable value and will be an important and useful source of information for all persons using [the] Code.”³¹

The publication of the comments was praised by Professor Dale Bennett, one of the three principal drafters of the Criminal Code, for its potential to “greatly facilitate an adjustment to the new law.”³² On

25. See Bennett, *supra* note 24, at 6.

26. See *id.*

27. See Clarence J. Morrow, *The 1942 Louisiana Criminal Code in 1945: A Small Voice from the Past*, 19 TUL. L. REV. 483, 498 (1945).

28. See Bennett, *supra* note 24, at 49.

29. S. Con. Res. 12, 1942 Leg., 11th Reg. Sess. (La. 1942) (noting that the projet was submitted in bill form).

30. Act No. 43, 1942 La. Acts 137.

31. S. Con. Res. 12 (emphasis omitted). In addition, in Act 7 of 1940, the legislation instructing the Law Institute to prepare a projet of a criminal code, the legislature directed that the projet “together with an explanatory statement and notes shall be printed and [submitted] to the Governor” by April of 1942. Act No. 7, 1940 La. Acts 12. Thus, it appears as though the preparation of commentary was anticipated from the earliest stages of the revision effort.

32. See Bennett, *supra* note 24, at 49. Professor Harriet Daggett also remarked in her writing that it was “particularly worthy of mention that the explanatory notes and comments were included in the official edition for guidance in interpretation of the letter and spirit of the

the other hand, another member of the trio, Professor Clarence Morrow, lamented that the comments were published in their original form rather than refashioned into an *exposé des motifs*, or scholarly narrative expounding upon the motives for and effect of the revised law.³³ In his reflections on the final product of his labors, he mused:

Even where a break with the past was intended, it was necessary to relate the code article to the past for the benefit of countless advisers, committeemen, and Law Institute Council members. Each new article had to be explained in the Comment in terms of the past in order to make the Code acceptable. This in itself was not objectionable, and was undertaken willingly enough, but after the Code was passed, a revision of the Comments should have been undertaken which would have emphasized the intended new meaning of the articles rather than so frequently stressing historical ties with the pre-existing concepts. There was simply no time for this, and it was far better to print the Comments in their present form than not to print them at all. Nevertheless, the Comments, as presently constituted, do not exactly represent the carefully prepared civilian *motifs* contemplated by the writer as a necessary integral part of a modern code system.³⁴

Thus, it appears that Morrow was torn—while he recognized the comments' enormous value, he worried that their publication impeded the objective of preparing a code in the "civilian" style.³⁵

The next law reform initiative of the Law Institute was the comprehensive revision of the Louisiana Code of Civil Procedure, completed in 1960.³⁶ Like the Criminal Code before it, the Code of Civil Procedure was prepared with extensive accompanying comments.³⁷ And, like the drafter's comments of the Criminal Code, the reporter's comments of the Code of Civil Procedure were presented to the legislature in bill form and published alongside the

new code." Harriet S. Daggett, *The Louisiana State Law Institute*, 22 TEX. L. REV. 29, 33 (1944).

33. Morrow, *supra* note 27, at 498.

34. *Id.*

35. *See id.*

36. *See* Crawford & Haymon, *supra* note 20, at 91. Prior to the revision of the Code of Civil Procedure, the Law Institute undertook the enormous task of compiling the Revised Statutes of 1950. While this was an extraordinarily significant project, it did not involve law reform in the sense of substantive revisions of the law; instead, the project involved the compilation, systematization, and clarification of statutes that had been enacted by the legislature since the promulgation of the Civil Code of 1870. *See* Dale E. Bennett, *Louisiana Revised Statutes of 1950*, 11 LA. L. REV. 4, 4-5 (1950); Melissa T. Lonegrass, *The Anomalous Interaction Between Code and Statute—Lessor's Warranty and Statutory Waiver*, 88 TUL. L. REV. 423, 434-40 (2014).

37. Act No. 15, 1960 La. Acts 22.

text of the law once it was enacted.³⁸ In the resolution authorizing the Code's publication, the legislature remarked that it would be "convenient and helpful" if all introductions, preliminary statements, and comments prepared by the Law Institute were printed in the official edition, stating that the comments in particular would "prove invaluable in the future to legislators, judges, state officials, and lawyers in the application of these procedural rules, and the construction and interpretation of the language of the various articles of the proposed code."³⁹ Notably, however, the legislature directed that the comments be printed in a smaller type than that used for the printing of the articles.⁴⁰ As one scholar later surmised, this was likely done in order to signify that the comments were of "lesser importance" than the text.⁴¹

As was the case when the Criminal Code was enacted, the publication of the comments prepared in connection with the Code of Civil Procedure was somewhat controversial. One of the drafters, Professor Henry McMahon, acknowledged the "departure from traditional civilian redaction [drafting] techniques," and commented that the publication of the comments was accomplished "over the objections of a few of the old-school civilians."⁴² McMahon explained that the publication of the comments accompanying the Louisiana Criminal Code had inspired the decision to again deviate from accepted civilian drafting procedures. He noted that the "experiment" had "proved so helpful to the courts and lawyers of the state that there was a strong professional demand for the employment of this technique in the *projet* of the new procedural code."⁴³ Moreover, McMahon explained, the preparation of comments was justified by the importance placed on judicial precedent by Louisiana judges and jurists.⁴⁴ The comments were thus viewed as necessary to

38. H.R. Con. Res. 3, 1960 Leg., 23rd Reg. Sess. (La. 1960).

39. *Id.*

40. *Id.* The legislature also directed that the comments to the Trust Code be printed in "smaller type." H.R. Con. Res. 28, 1964 Leg., 27th Reg. Sess. (La. 1964). The resolution authorizing the publication of the comments to the Criminal Code provided that they should be published "as footnotes." S. Con. Res. 12, 1942 Leg., 11th Reg. Sess. (La. 1942).

41. Fred Zengel, *Civil Code Revision in Louisiana*, 54 TUL. L. REV. 942, 959 (1980).

42. Henry G. McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1, 18 (1960).

43. *Id.* at 18-19.

44. *Id.* at 19.

point out those judicial opinions whose rules were either consistent with or overruled by the new legislation.⁴⁵

The stories of the drafting and publication of the comments to the Criminal Code and the Code of Civil Procedure are revealing. Together, they illustrate that comments have long been viewed by those involved in law reform as indispensable, not only to the legislative process but to the ultimate acceptance and understanding of the revised law. While the drafters perceived that the publication of revision comments diverged from traditional civil law principles of codification, the methodological concerns were ultimately outweighed by the practical. Prior to codification, Louisiana's criminal law and procedural law were heavily jurisprudential; thus, an explanation of the relationship between precedent and codified law was essential. Also, it is noteworthy that in directing the publication of the comments, the legislature never made any reference to the notion that the comments are *not law*.⁴⁶ Presumably, no one thought that such an admonition was necessary in those early days of legislative comments.

Comments were later prepared, presented to the legislature, and published in connection with the 1964 revision of the Trust Code,⁴⁷ the 1966 revision of the Code of Criminal Procedure,⁴⁸ and the 1974 enactment of the Mineral Code.⁴⁹ When the Law Institute commenced its comprehensive revision of the Civil Code in 1976, which began with the revision of the Civil Code title governing usufruct, use, and habitation (personal servitudes),⁵⁰ extensive legislative comments were included in the bill along with the proposed legislation.⁵¹ As had become the custom, the comments were prepared by the reporter and principal draftsman, Professor A.N.

45. *See id.* ("Judicial precedent plays a more important role in Louisiana than in any other civilian jurisdiction, and the consideration of the prior jurisprudence was deemed helpful in all cases. The citation of prior cases was absolutely necessary in those instances where the jurisprudential rule was being reversed legislatively.")

46. *See, e.g.*, Act No. 15, 1960 La. Acts 22; H.R. Con. Res. 3, 1960 Leg., 23rd Reg. Sess. (La. 1960); Act No. 43, 1942 La. Acts 137; S. Con. Res. 12, 1942 Leg., 11th Reg. Sess. (La. 1942); Act No. 7, 1940 La. Acts 12.

47. *See* Act No. 338, 1964 La. Acts 711; H.R. Con. Res. 28, 1964 Leg., 27th Reg. Sess. (La. 1964).

48. *See* Act No. 310, 1966 La. Acts 620; H.R. Con. Res. 10, 1966 Leg., 29th Reg. Sess. (La. 1966).

49. *See* Act No. 50, 1974 La. Acts 237; S. Con. Res. 2, 1974 Leg., 37th Reg. Sess. (La. 1974).

50. *See* Crawford & Haymon, *supra* note 20, at 89.

51. *See* Act No. 103, 1976 La. Acts 321.

Yiannopoulos.⁵² And, as in the past, when the legislation was enacted, the reporter's comments were published alongside the text.⁵³ The printing of comments had become an accepted practice by this time. Although scholars, including Yiannopoulos, later criticized the inclusion of comments in the legislation revising the Civil Code,⁵⁴ there appears to have been no serious controversy surrounding the decision to publish the comments that had been prepared.

The preparation of comments has become, through repetition, one of the chief responsibilities of the Law Institute's many reporters. Since 1976, comments have been drafted to accompany almost every major Law Institute proposal enacting or amending legislation, including the extensive and continuing revisions of the Civil Code,⁵⁵ the reform of the Louisiana Code of Evidence,⁵⁶ the adoption of nearly all of the Uniform Commercial Code,⁵⁷ and the enactment and revision of numerous provisions of the Louisiana Revised Statutes.⁵⁸ While the vast majority of comments penned by the Law Institute accompany legislation that it prepared, the agency is occasionally asked to draft comments for bills that it did not assist in preparing. This was the case, for example, with the Louisiana Children's Code⁵⁹

52. A lengthy introductory *exposé des motifs*, also prepared by Professor Yiannopoulos, was included in the bill as well. *Id.*; see also Crawford & Haymon, *supra* note 20, app. F (documenting that Yiannopoulos was the reporter for the revision of the Civil Code title relating to personal servitudes); Cynthia Ann Samuel, *The 1997 Succession and Donations Revision—A Critique in Honor of A.N. Yiannopoulos*, 73 TUL. L. REV. 1041, 1042 (1999) (noting that “to accompany the submission of the revision to the legislature [Yiannopoulos] wrote an ‘Exposé des Motifs’ carefully documenting the differences between the present and the proposed law”).

53. Compare Act No. 103, 1976 La. Acts 321, with LA. CIV. CODE arts. 533-645 (1977) (demonstrating that the comments were published alongside the articles). Remarkably, this was done although the legislature never directly authorized their publication in the enacting legislation or any accompanying resolution.

54. See, e.g., A.N. Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 TUL. L. REV. 379, 406 (2003); Zengel, *supra* note 41, at 961.

55. See, e.g., Act No. 821, 2004 La. Acts 2556 (revising Book III, Title IX, Lease); Act No. 841, 1993 La. Acts 2239 (revising Book III, Title VII, Of Sale); Act No. 923, 1991 La. Acts 2747 (enacting Book IV, Conflict of Laws); Act No. 886, 1987 La. Acts 2409 (revising Book I, Title IV, Husband and Wife); Act No. 331, 1984 La. Acts 718 (revising Book III, Titles III & IV, Obligations in General and Conventional Obligations or Contracts); Act No. 728, 1978 La. Acts 1900 (revising Book II, Title I, Things). There is one notable exception: the 2005 revision of the law of registry. See Act No. 169, 2005 La. Acts 1383; see also *infra* notes 116-117 and accompanying text (discussing the revision's lack of comments). The reason for this omission has not been documented.

56. See Act No. 515, 1988 La. Acts 1085.

57. See Act No. 128, 2001 La. Acts 206.

58. See, e.g., Act No. 724, 1981 La. Acts 1400 (regarding private works); Act No. 134, 2014 La. Acts 1422 (regarding child support).

59. Act No. 235 § 20, 1991 La. Acts 706, 1059.

and the Louisiana Uniform Electronic Transactions Act,⁶⁰ as well as several other less extensive enactments.⁶¹ Taken together, these many sets of comments represent the Law Institute's most substantial doctrinal contribution to the state's legal system.

The story of the comments' origin and history must include one final detail: on rare occasions, comments have been drafted by groups other than the Law Institute.⁶² In each case, those comments were eventually replaced with others prepared by the state law reform agency. One interesting case involved the comments to the 1984 legislation that recodified Louisiana's banking law.⁶³ That legislation was prepared by the Louisiana Bankers Association, which also presented to the House Commerce Committee various explanatory materials, including an *exposé des motifs*, source provisions, and revision comments.⁶⁴ Apparently several legislators were less than comfortable including in the bill comments and explanatory materials drafted by a body other than the Law Institute, and, as a result, the bill as introduced and enacted omitted all such material.⁶⁵ In the same session, the legislature passed a separate resolution requesting that the Law Institute review the Louisiana Bankers Association's supporting

60. Act No. 244 § 2, 2001 La. Acts 587, 598.

61. See, e.g., Act No. 190 § 2, 2010 La. Acts 1405, 1405 (requesting that the Law Institute draft comments corresponding to the revision of Children's Code article 1243); Act No. 407, 2010 La. Acts. 1787 (requesting that the Law Institute draft comments to the revisions to Code of Civil Procedure provisions regulating divorce proceedings); Act No. 158, 2004 La. Acts 1138 (requesting that the Law Institute draft comments corresponding to the revision of provisions governing the giving of security by usufructuaries); Act No. 1082 § 4, 2001 La. Acts 2264, 2290 (requesting that the Law Institute draft comments for reforms to child support guidelines); Act No. 528, 1988 La. Acts 1367 (requesting that the Law Institute draft comments for revision of law governing security rights).

62. See J. Michael Cutshaw & Walter B. Stewart IV, *Louisiana's Banking Revolution: Recodification and Multibanking*, 59 TUL. L. REV. 602, 606 n.27 (1985). For example, legislation and comments for the Louisiana Banking Law were prepared by the Louisiana Bankers Association, and the comments were later reviewed by the Law Institute prior to publication. Act No. 719, 1984 La. Acts 1732. Similarly, the Law Institute did not prepare the legislation and comments for the Louisiana Assignment of Accounts Receivable Act. Act No. 319, 1983 La. Acts 625. The legislation and comments were later replaced with Law Institute legislation and comments on U.C.C. secured transactions. Act No. 128, 2001 La. Acts 206. Legislation and comments for the Louisiana Code of Juvenile Procedure were not prepared by the Law Institute. Act No. 172, 1978 La. Acts 508. However, the code was replaced with the Louisiana Children's Code, for which the Law Institute drafted comments. Act No. 235, 1991 La. Acts 706, 1059. Finally, the Louisiana State Bar Association prepared the comments for the Louisiana Business Corporation Law. Act No. 105, 1968 La. Acts 266. The comments were later replaced with the Law Institute's legislation and comments on business corporations. Act No. 328, 2014 La. Acts 1911.

63. See Act No. 719, 1984 La. Acts 1732.

64. See Cutshaw & Stewart, *supra* note 62, at 606 n.27.

65. See *id.*; S. Con. Res. 150, 1984 Leg., 10th Reg. Sess. (La. 1984).

materials.⁶⁶ The Law Institute in turn created a committee to conduct this review and ultimately included the comments and explanatory materials in the official printed version of the text.⁶⁷ This anecdote suggests that the legislature regards the Law Institute as the sole body authorized to prepare and promulgate comments, even with respect to legislation that it did not prepare.

B. An Unfamiliar Process Revealed

As the foregoing discussion makes clear, the Law Institute has a long tradition of drafting comments for all manner of legislative enactments. While the bench and bar are familiar with the comments and their utility, the details surrounding the preparation and publication of the comments are not well known. The following materials thus describe the process by which comments are prepared, presented to the legislature, and ultimately published alongside the law.

1. Drafting and Presentation to the Legislature

An understanding of the preparation of legislative comments requires an appreciation of the Law Institute's general procedures for law reform. In short, the Law Institute is responsible for making recommendations to the legislature concerning proposed changes in the law.⁶⁸ In pursuit of this function, the Law Institute charges its numerous committees with conducting studies of the law and, if appropriate, drafting bills for consideration by the legislature.⁶⁹ For each committee, a reporter is appointed—a legal expert drawn from the bar, judiciary, or the faculty of one of the four Louisiana law

66. La. S. Con. Res. 150.

67. Cutshaw & Stewart, *supra* note 62, at 606 n.27.

68. LA. REV. STAT. § 24:204(A)(1) (2017); *By-Laws*, LA. ST. L. INST. § IV(A), <http://www.lsl.org/by-laws> (last visited Sept. 2, 2017). While many of the Law Institute's proposals originate in a specific request from the legislature, others arise from the Law Institute's own independent determinations that an area of the law is in need of reform. *See Crawford & Haymon, supra* note 20, at 87; *see also* LA. REV. STAT. § 24:204(A)(2) (enumerating among the duties of the Law Institute "[t]o examine and study the civil law of Louisiana and the Louisiana jurisprudence and statutes of the state with a view of discovering defects and inequities and of recommending needed reforms").

69. *See Crawford & Haymon, supra* note 20, at 87-88. The reform work of the Law Institute is conducted entirely through its committees, some of which are charged with continuous revision of the law, and others of which are charged with special studies. *See By-Laws, supra* note 68, §§ VIII, IX, X. A complete and up-to-date list of Law Institute committees may be found on the Law Institute's website. *Committees*, LA. ST. L. INST., <http://www.lsl.org/committees> (last visited Sept. 2, 2017).

schools.⁷⁰ Committees, although formally appointed by the Law Institute's President, are nearly always selected by the reporter.⁷¹ The reporter leads the committee in the study of the substantive issue at hand and, once the committee reaches consensus on the basic policy of the proposal, prepares draft legislation for the committee's consideration.⁷² After the committee finalizes its proposed legislation, the reporter makes a presentation of the materials to the Law Institute's Council (the agency's governing body) for approval and recommendation to the legislature.⁷³ If the Council so approves, it is then reviewed by the Coordinating, Semantics, Style and Publications Committee (Coordinating Committee).⁷⁴ The proposed legislation is then presented in the form of a bill to the Louisiana legislature, at which point it enters the usual legislative process for lawmaking.⁷⁵

All of the above procedures are regulated in detail by the Law Institute's By-Laws.⁷⁶ However, that governing document is silent on the topic of legislative comments.⁷⁷ For decades, the Law Institute's procedures for the drafting and review of comments was not formalized; instead, a customary practice emerged. Not surprisingly, this practice parallels the process by which the Law Institute prepares and approves draft legislation.

According to this custom, comments are drafted by the reporter for each committee contemporaneously with or shortly after the preparation of the text of the proposed legislation. The comments are usually discussed and debated by the committee at some length and

70. See Crawford & Haymon, *supra* note 20, at 87-88; see also *By-Laws*, *supra* note 68, § VI(G) (detailing how the reporters and chairpersons of committees are selected).

71. See Crawford & Haymon, *supra* note 20, at 88; see also *By-Laws*, *supra* note 68, § VI(H) (noting that the President of the Law Institute appoints Committee members, subject to the reporter's approval).

72. See Crawford & Haymon, *supra* note 20, at 88.

73. See *id.*; *By-Laws*, *supra* note 68, § IV(C)(3).

74. See *By-Laws*, *supra* note 68, § VIII(D). As the name implies, this committee is charged with reviewing all proposed legislation for semantics and style and coordinating all proposals with existing legislation. *Id.*

75. See Crawford & Haymon, *supra* note 20, at 88. It should be noted that although only members of the legislature may introduce bills, a member of the Law Institute (usually the reporter) frequently testifies in favor of the bill at the legislative hearings and answers questions regarding the substance of the proposed law, as well as the comments thereto. *Id.*

76. See *By-Laws*, *supra* note 68.

77. However, Louisiana Revised Statutes section 24:204 does include as part of the Law Institute duties the following: "To make available translation of civil law materials and commentaries and to provide by studies and other doctrinal writings, materials for the better understanding of the civil law of Louisiana and the philosophy upon which it is based."

undergo numerous revisions in order to reflect the committee's collective understanding of the proposed revisions and their relationship to existing law; however, the extent of committee deliberations regarding comments varies among projects and reporters. Once finalized by the committee, comments are presented to the Council along with the text of the proposed law and may be discussed and revised by the Council during that presentation. Following the Council's approval of legislation and comments, the Coordinating Committee performs a final review of the comments along with the text of the proposed law. When that oversight committee determines that revisions to the comments are needed, it works closely with the reporter to make any required changes. As a final step, comments are incorporated into the draft bills prepared by the Law Institute staff for recommendation to the legislature.⁷⁸

The customary practice remained an informal one until just recently, when the Law Institute's Executive Committee⁷⁹ in 2009 enacted a formal policy for the review of comments.⁸⁰ According to that policy, all comments must be reviewed by the Council prior to submission to the legislature and, if time permits, should also be reviewed by the Coordinating Committee.⁸¹ The policy does not, however, speak to the process by which comments are drafted or whether comments should be approved by committee members prior

78. See generally Crawford & Haymon, *supra* note 20 (discussing the Law Institute's Revision process).

79. According to the Law Institute's by-laws, the Executive Committee has the power to transact all business of the Institute. *By-Laws, supra* note 68, § V(A)(1).

80. Memorandum from William E. Crawford & Kerry Triche to the Exec. Comm. of the La. State Law Inst. (Mar. 10, 2009) (on file with the Louisiana State Law Institute).

81. *Id.* The policy affirmatively states:

No comments shall be included in a legislative bill unless the comments were presented to the Council at the time the proposals were adopted or at a subsequent meeting of the Council. If the Council directs the Reporter to add or amend a comment to an Article that is adopted by the Council, it may also waive the requirement that the comment be returned to the Council for approval. In addition, the staff or Reporter may make minor semantic changes without Council approval. However, when time is of the essence or it [is] otherwise impractical, the comments may be sent to the Council by e-mail or other means without the necessity of a formal meeting.

Id. (emphasis omitted). In addition, the policy makes clear that "[i]f the legislature authorizes the Law Institute to prepare comments to a statute or Code Article [that the Law Institute did not assist in preparing], those comments shall be reviewed by the Council and a copy sent to the relevant House or Senate Committee, before being published in the Louisiana Statutes Annotated." *Id.*

to submission to the Council. Those aspects of drafting remain uncodified and flexible.⁸²

2. Legislative Review and Nonintervention

Because comments prepared in connection with a revision are included in the same bill proposing those reforms, they are viewed and actively discussed by the legislators at every step in the legislative process.⁸³ However, according to some accounts, once a bill is filed in one of the houses of the legislature, the comments contained therein enter an intriguing state of limbo. The recent experience of some Law Institute reporters has been that once a bill is filed, the comments contained therein are generally not subject to any modification, either by legislators or the Law Institute, while the bill is under consideration.⁸⁴ Indeed, under this approach, if at any point during a bill's journey from legislative committee to floor any portion of the comments is identified as requiring revision, the task is put on hold until the legislative process is complete. It is only after the law is

82. It should be mentioned that some guidelines for the drafting of comments appear in the Louisiana State Law Institute Style and Drafting Manual, a manuscript drafted by Leonard Martin and last revised in 1984. Leonard Martin, Louisiana State Law Institute Style and Drafting Manual (Sept. 1984) (unpublished manuscript) (on file with the Louisiana State Law Institute). This document is unpublished and was never formally adopted by the Law Institute. For this reason, it is not widely available, nor is it provided to reporters as a matter of course for use in drafting comments or legislation. Likewise, the Coordinating Committee does not enforce the guidelines applicable to comments during its final review prior to submission to the legislature. In fact, this author surmises that very few members of the Law Institute or its Council are even aware of this document's existence.

83. See, e.g., *Hearing on S. 134 Before the H. Comm. on Civil Law and Procedure*, 2015 Leg., 41st Reg. Sess. (La. 2015) (statement of Katherine Shaw Spaht, Member, La. State Law Inst.), http://house.louisiana.gov/H_Video/VideoArchivePlayer.aspx?v=house/2015/may/0526_15_CL; *Hearing on H.R. 439 Before the S. Comm. on Judiciary A*, 2015 Leg., 41st Reg. Sess. (La. 2015) (statement of Ronald J. Scalise, Member, La. State Law Inst.), http://senate.la.gov/video/videoarchive.asp?v=senate/2015/05/051915JUDA_0; *Hearing on H.R. 388 Before the H. Comm. on Civil Law and Procedure*, 2008 Leg., 34th Reg. Sess. (La. 2008) (statement of William E. Crawford & David Cromwell, Members, La. State Law Inst.), http://house.louisiana.gov/H_Video/VideoArchivePlayer.aspx?v=house/2008/apr/0421_08_CL (featuring committee discussion of comments associated with revision of the law of usufruct).

84. This was the experience of the author of this Article when serving as the reporter for the Mineral Rights—Unsolicited Offers Committee in 2016. When the Sale of Mineral Rights by Mail Solicitation Act was introduced in the legislature, concerns were raised regarding the effect of a potential rescission of a sale of mineral rights on third persons. While the bill was under consideration, the Law Institute agreed to revise a comment to clarify the issue and was instructed by the legislative staff to defer the change until the printing of the enacted law. See Minutes of the Meeting of the Council, La. State Law Inst. (Aug. 12-13, 2016).

enacted in final form that revisions, whether technical or substantive, may be made.

The rationale for prohibiting revision of the comments while the bill is under consideration by the legislature stems from the official stance that comments "shall not be enactments of the Legislature . . . and shall not be law."⁸⁵ While early pronouncements of the legislature concerning comments did not contain this admonition, beginning with the 1964 Trust Code and continuing through the first revisions to the Civil Code, the legislature made a point to expressly discount the legal status of the comments.⁸⁶ And, although at first this was done on an enactment-by-enactment basis, in 1978 the legislature enacted a standing rule (now Joint Rule 10) designed to address in a comprehensive manner all comments prepared by the Law Institute.⁸⁷ This rule provides that any bill submitted on recommendation of the Law Institute may include revision comments and further states definitively that "[c]omments included in the bill *shall not be enactments of the Legislature . . . and shall not be law.*"⁸⁸ In addition, the rule provides the Law Institute with standing authority to publish comments in the official version of the pertinent law.⁸⁹ According to the rule, publication may be accomplished "with such changes to be

85. H.R. Con. Res. 58, 1978 Leg., 4th Reg. Sess. (La. 1978).

86. The negation of the comments' status as legislation first appeared in connection with the enactment of the Trust Code in 1964. *See* H.R. Con. Res. 28, 1964 Leg., 27th Reg. Sess. (La. 1964) ("[T]he printed House Bill No. 417 prepared by the Louisiana State Law Institute is accepted in lieu of any other printed copy, except that the source notes and comments therein shall not be considered to be a part of the proposed law nor acted upon as such . . ."). A similar statement was later made in connection with the Code of Criminal Procedure in 1966. Article 10 of that enactment provides that "[t]he headings of the articles of this Code, and the source notes and comments thereunder do not constitute parts of the law." Act No. 310, 1966 La. Acts 5; *see also* H.R. Con. Res. 10, 1966 Leg., 29th Reg. Sess. (La. 1966) (directing publication of comments and stating that comments shall not be enactments of law). The enactment of the Mineral Code in 1974 came with a similar admonition. *See* S. Con. Res. 2, 1974 Leg., 37th Reg. Sess. (La. 1974) ("The comments under the various articles of the mineral code shall be printed in said Senate Bill No. 66, which proposes the adoption of the mineral code, but the comments shall not be considered as part of the proposed law."). Later, the 1976 revision of the law of personal servitudes contained a similar pronouncement. *See* Act No. 103, 1976 La. Acts 321, 430 ("The article headnotes, the Exposé des Motifs and the Comments in this Act are not intended to be considered as part of the law and are not enacted into law by virtue of their inclusion in this Act.").

87. La. H.R. Con. Res. 58. The resolution was prepared at the request of Representative Frank Simoneaux, with the apparent purpose of relieving Law Institute staff from the necessity of preparing resolutions for each legislative session relative to the introduction and consideration of Law Institute comments. *Id.*

88. *Id.* (emphasis added).

89. *Id.*

made . . . as [the Law Institute] may deem necessary to accurately reflect the sections or articles as enacted” or subsequently amended.⁹⁰ Joint Rule 10 thus explicitly recognizes that the Law Institute may revise comments after the law’s enactment so that they may best conform with the final enactment.

It is important to note that the legislature does not uniformly disallow the amendment of comments during the legislative process. Indeed, there have been occasions on which comments contained within a bill have been revised contemporaneously with amendments to the legislative text of a bill. For example, when the law of filiation was revised in 2006, the comments to article 186 were removed entirely from the bill following extensive amendments to the text of the law while it was under committee consideration in the House.⁹¹ Thus, despite the fact that comments feature prominently in legislative debates regarding the text, there appears to be no clear legislative policy regarding whether they are subject to amendment or modification during the legislative process.

3. Publication and Post-Enactment Revision

Once the law is enacted, comments are published alongside the law at the Law Institute’s direction.⁹² As part of its “continuous revision” authority, the Law Institute is responsible for coordinating the printing of all legislation enacted, amended, or repealed each year.⁹³ In fulfillment of this duty, at the close of each legislative session the Law Institute prepares a “printer’s copy” of those portions of the various codes, Revised Statutes, and Louisiana Constitution that were affected by legislation or constitutional amendment.⁹⁴ Each

90. *Id.* Even before 1978, the legislature often granted this authority on an act-by-act basis. Indeed, even the very first legislative enactment concerning the comments—the resolution directing publication of the comments to the Criminal Code—bestowed on the Law Institute the power to make “such changes . . . as may be necessary because of amendments to the . . . Code adopted by this Legislature.” S. Con. Res. 12, 1942 Leg., 11th Reg. Sess. (La. 1942).

91. Compare H.R. 91, 2005 Leg., 31st Reg. Sess. (La. 2005) (original draft) (including revision comments), with Act No. 192, 2005 La. Acts 1444 (lacking revision comments). For more discussion of these comments and their revision, see *infra* notes 107-112 and accompanying text.

92. Notably, comments are neither enacted nor promulgated so much that they are published—that is, produced in print alongside the text of the law to which they appertain. See LAMONICA & JONES, *supra* note 3, § 5.1 (discussing the distinction between promulgation and publication of law).

93. LA. REV. STAT. §§ 24:251-:256 (2017).

94. *Id.* § 24:252.

printer's copy includes any comments that accompanied proposed legislation. The law and comments are then published by the official printer of Louisiana's laws.⁹⁵ Comments also appear in some, but not all, of the other commercially available publications of the law.⁹⁶ And intriguingly, while the comments appear in the official publications, they are not prominently featured alongside the law on the Louisiana Legislature's own website.⁹⁷

As might be expected, comments are revised with some frequency after the legislation that they accompany is enacted,⁹⁸ sometimes extensively so, usually prior to the law's publication.⁹⁹ As the legislative process unfolds, comments may require revision for

95. Like many states, Louisiana has designated an "official" printer for its legislative enactments—a private publisher tasked with the printing, publication, sale and distribution of Louisiana laws. *See id.* § 24:256. Currently, Thomson Reuters (formerly known as West Publishing Company) is designated as the official printer. LAMONICA & JONES, *supra* note 3, § 5.3. As is discussed *infra* at notes 99 through 113, the Law Institute has wide latitude to revise the comments following enactment. The printer's copy thus includes all post-enactment revisions made prior to publication of the law. Notably, the printer's copy may also contain changes to the *legislative text*; again, the Law Institute has wide latitude to make editorial changes to the law, provided they remain of a purely formal or clerical nature "in keeping with the purpose of the revision." LA. REV. STAT. § 24:253. Thus, for example, when the law of conflicts of law was enacted in 1991, the printer's copy differed from the enacting statute with respect to the content of the comments (which were substantially revised post-revision). In addition, a profound structural change was made: the provisions, which were designated as Civil Code articles 14-49 in the enacting legislation, were redesignated as a new Book IV of the Civil Code in the printer's copy. *Compare* Act No. 923 arts. 14-49, 1991 La. Acts, 2747, *with* LA. CIV. CODE arts. 14, 3515-3549 (2017).

96. *Compare* LOUISIANA CIVIL CODE (A.N. Yiannopoulos ed., Thomson Reuters 2017) (containing comments), *and* LOUISIANA CIVIL CODE (Melissa T. Lonegrass ed., 2017) (containing comments), *with* LOUISIANA POCKET CIVIL CODE (Alain Levasseur ed., 2017) (omitting comments).

97. At the same time the printer's copy is disseminated to commercial publishers, it is also disseminated to state officials, including the secretary of the Senate and the clerk of the House of Representatives. LA. REV. STAT. § 24:253.2; *see* LAMONICA & JONES, *supra* note 3, § 5.3. These final, published revisions are then input into the House of Representatives database, which in turn populates the "laws" database on the Louisiana Legislature's website, although without the accompanying comments.

98. *See, e.g.*, Louisiana State Law Institute Printer's Copy 2014, LA. CIV. CODE arts. 3155 cmt. c, 3163 cmt. d (reflecting minor revisions); Louisiana State Law Institute Printer's Copy 2015, LA. CIV. CODE arts. 230 cmts. a, c, 232 cmt. b (reflecting more extensive revisions).

99. For example, the comments to article 14 were revised heavily following enactment of the conflicts of law rules in 1991, owing largely to the fact that the Law Institute determined post-enactment to relegate conflicts of law to a fourth book of the Civil Code. *Compare* Act No. 923, 1991 La. Acts 2747 (comments enacted), *with* LA. CIV. CODE arts. 14, 3515-3549 (1992) (comments published). In addition, the comments accompanying a number of articles included within the 1995 revision of the Civil Code title on sales were amended following enactment. *Compare* Act. No. 841, 1993 La. Acts 2239 (comments enacted), *with* LA. CIV. CODE arts. 2439-59 (2017) (current comments).

any number of reasons. For one thing, despite the fact that comments are carefully crafted by reporters and subject to several levels of review prior to their submission to the legislature, they sometimes contain typographical errors and substantive inaccuracies that are identified during the legislative process. Moreover, if any portion of the text of a bill is amended prior to the bill's final passage, then the comments may require a corresponding modification. Finally, as a bill works its way through legislative committees and onto the floor of each house, legislators and lobbyists may identify comments that are imprecise or confusing, or which raise worrisome concerns about the policies underlying proposed revisions. The revision of comments thus may be required to better reflect the true intent of the drafters, as well as that of the legislature.

Within the Law Institute, it is the reporter of the committee who prepared the projet who is principally responsible for revising comments.¹⁰⁰ Whether the reporter solicits the assistance of the committee is a matter of discretion, as the reporter is given great leeway in determining whether the required changes merit committee input. Significant freedom is also given to the reporter to make semantic changes to comments or correct minor errors without soliciting the approval of the Council. Major revisions, on the other hand, have historically required Council approval prior to printing.

For most of the Law Institute's history, the revision of comments, much like their drafting, was left to informal rather than formal procedures. In recent years, however, the Law Institute has formalized the process by which comments are revised prior to publication. In the same 2009 policy formalizing the presentation of the comments to the Council prior to submission to the legislature, the Law Institute clarified that reporters may revise published comments "to conform the comments to a legislative amendment, to correct an inaccuracy, or to respond to a need for clarification."¹⁰¹ Significantly, the reporter does not have unfettered freedom in this regard; the policy requires that "[a]ll substantive changes" be submitted to the Council for review prior to publication.¹⁰² The sticking point, of

100. The legislature specifically directed that revisions to the Criminal Code be undertaken by the reporters. See La. S. Con. Res. 12.

101. Memorandum from William E. Crawford & Kerry Triche, *supra* note 80. The policy also states that "[a]fter a bill is enacted, the staff may make changes to the comments (and the law) in accordance with R.S. 24:253," the Law Institute's continuous revision authority. *Id.*

102. *Id.*

course, is the distinction between “substantive” changes (which require Council approval) and non-substantive changes (which do not).

As expected, even after the formalization of the Law Institute’s procedures, there has occasionally been controversy concerning whether post-enactment revisions of comments are appropriate. One example involved revisions to the law of usufruct in 2010. Following the law’s enactment, the reporter revised the comments extensively.¹⁰³ The comments were submitted to the Council for approval and ultimately approved prior to the official printing of the law.¹⁰⁴ While the official compilation of the law contains the revised comments, this is not true for all commercial publications of the Civil Code. Indeed, Professor Yiannopoulos, the former editor of a widely available version of the Civil Code, believed that the reporters’ revisions exceeded the Law Institute’s authority and refused to print the revised comments alongside the law.¹⁰⁵ In an introductory note preceding the articles on usufruct, Yiannopoulos wrote:

In November 2010, months after Acts 2010, No. 881, acquired the force of law, the Louisiana State Law Institute prepared a new set of comments for the amended texts. Because those Comments have not been part of the legislative process and are merely doctrinal materials containing *ex post facto* explanations they are not reproduced in this edition.¹⁰⁶

While this was certainly not the first time that a Law Institute reporter had revised comments following a bill’s enactment, this seems to be the only occasion on which Yiannopoulos refused to print revised comments in his publication. Yiannopoulos’ concern may have been based less on the fact that comments were *revised* and more on the fact that many of the articles for which comments were drafted after enactment were included in the bill with *no* accompanying comments.

103. Compare Act No. 881, 2010 La. Acts 3037 (lacking extensive comments), with LA. CIV. CODE arts. 538, 549, 553, 558, 567-569, 573-575, 577, 580-581, 583-584, 586-594, 601, 603-604, 608, 613, 615-616, 618-620, 623-625 (2011) (containing additional, heavily revised 2010 revision comments).

104. Minutes of the Meeting of the Council, La. State Law Inst. (Sept. 10-11, 2010); Minutes of the Meeting of the Council, La. State Law Inst. (Oct. 15-16, 2010); Email from Gloria Girouard to Members of the Council of the La. State Law Inst. (Oct. 4, 2010, 10:35 AM) (on file with the Louisiana State Law Institute).

105. See *Introductory Note* to LOUISIANA CIVIL CODE 135, 135 (A.N. Yiannopoulos ed., 2011); see also 2 LOUISIANA CIVIL CODE 569-76 (A.N. Yiannopoulos ed., West 2011) (relegating the comments to an appendix).

106. *Introductory Note*, *supra* note 105, at 135.

For those articles, the comments were not merely revised, they were drafted anew.

While revisions usually occur in the months following a bill's enactment—that is, just prior to the first publication of the revised law—on some occasions comment revisions have been postponed, even for several years. One instance involves the 2005 revision of the law of filiation—specifically, the comments to Civil Code article 186.¹⁰⁷ While comments were initially drafted to accompany the article, the provision underwent major amendments prior to enactment.¹⁰⁸ The comments, rendered inapposite, were dropped from the amended bill prior to its approval.¹⁰⁹ Despite the Law Institute's undisputed authority to draft and print a revised comment immediately upon the article's enactment, the article was published in 2006 without any accompanying comments.¹¹⁰ Indeed, the article remained without comments for four years. It was not until the printing of the Civil Code in 2010 that a revised comment to article 186 appeared.¹¹¹ And, although presumably the Law Institute's authority to draft and print an appropriate comment to article 186 had not somehow expired, the comment was not simply prepared and printed but instead was included within proposed legislation seeking

107. That article sets forth the presumption of paternity when a child is born within 300 days of the termination of a marriage, and the mother has married again before the child's birth. LA. CIV. CODE art. 186 (2017).

108. The original proposal of the Law Institute was for the legislation to state that if the previous marriage was terminated by judgment of divorce, declaration of nullity, or declaration of death under article 54, then the second husband is presumed to be the father of the child. H.R. 91, 2005 Leg., 31st Reg. Sess. (La. 2005) (original draft). If, on the other hand, the previous marriage was terminated by the husband's death, then the first husband is presumed to be the father of the child. *Id.* Members of the Senate Committee were presumably concerned that any presumption that the second husband was the father of the child was, in effect, a presumption that the mother had violated her marital obligations through adultery. The article was thus entirely rewritten to provide that regardless of the cause of the termination of the marriage, the first husband is presumed to be the father of the child. Act No. 192, 2005 La. Acts 1444.

109. In this regard, this bill involved an instance in which the legislature was willing to revise the comments during the legislative process. *Compare* La. H.R. 91 (articulating a presumption for filiation), *with* Act No. 192, 2005 La. Acts 1444 (revising the original presumption). *See also supra* notes 83-92 and accompanying text for discussion of the legislature's unwillingness to revise comments prior to the enactment of the law.

110. LA. CIV. CODE art. 186 (2006).

111. *Compare* LA. CIV. CODE art. 186 (2010) (including revision comments), *with* LA. CIV. CODE art. 186 (2009) (lacking revision comments), LA. CIV. CODE art. 186 (2008) (same), LA. CIV. CODE art. 186 (2007) (same), *and* LA. CIV. CODE art. 186 (2006) (same).

to revise the law of filiation and adoption.¹¹² It appears as though the Law Institute thought it necessary, or at least advisable, to present the comment to the legislature for review, if not implicit approval.

4. Post-Publication Revision

Once published, comments are rarely revised. Instead, they generally remain in the state in which they were first printed, in perpetuity. This is true even if the provision to which they appertain is later amended and new comments are drafted to explain the change. Instead of replacing previously drafted comments, the new comments are printed above the old. Fastidious reporters take care to point out in the new comments those portions of the old comments that are no longer accurate.¹¹³ Otherwise, no updates to the comments are made.

The general rule against revision admits just a few isolated exceptions. One example involves the 2014 revision of the law of security rights, during which the comments to several provisions governing the inscription of mortgages were updated without corresponding revision to the text of the law.¹¹⁴ This unusual case was precipitated by the precise circumstances surrounding previous reforms of the same rules. First, when law governing mortgages was comprehensively revised in 1992, comments were drafted to accompany the updated articles, and those comments were subsequently printed alongside the text.¹¹⁵ Later, in 2005, when the law of registry was comprehensively revised, the articles on mortgage inscription were redesignated (that is, moved and renumbered), largely without amendment and, inexplicably, the 1992 comments were neither included in the 2005 legislation¹¹⁶ nor reprinted alongside the redesignated articles (that is, they simply vanished).¹¹⁷ The 2014 security devices revision presented an opportunity for the Law Institute to restore the lost comments and, in the process, to revise them as necessary to reflect the current state of the law.¹¹⁸

112. Act No. 3, 2009 La. Acts 4. The comments to article 186 were not the only material relevant to filiation. The Act also enacted article 178 (defining filiation) and article 179 (establishing the methods by which filiation occurs). *Id.*

113. *See, e.g.*, LA. CIV. CODE art. 1849 cmt. a (2017) (“In light of this Article, comment (c) to Article 1848 [enacted in 1984] should no longer be considered in the context of proving the existence of simulations.”).

114. *See* Act No. 281, 2014 La. Acts 1765.

115. *See* Act No. 1132, 1992 La. Acts 3123.

116. *See* Act No. 169, 2005 La. Acts 1383.

117. *See* LA. CIV. CODE arts. 3354-3368 (2007).

118. *See* Act No. 281, 2014 La. Acts 1765.

Though the revision of comments following their publication is unusual, it has occurred with sufficient frequency that the Law Institute thought it advisable to address the possibility of post-publication revision in a formal policy. In 2005, the Law Institute's Executive Committee adopted a policy permitting "[p]ublished comments [to] be revised by the Reporter and the committee with jurisdiction over the subject matter."¹¹⁹ However, such revision occurs only "subject to approval by the Council and the Coordinating Committee."¹²⁰ Although the policy does not require the revisions to be passed before the legislature prior to printing, the practice has been to include comment revisions in legislation revising related provisions.¹²¹

Only once has the legislature specifically directed the Law Institute to revise previously published comments.¹²² This well-known instance involves the comments accompanying Civil Code article 1493, the contentious provision defining "forced heirs."¹²³ When the law of forced heirship was comprehensively revised in 1996, the definition of forced heirship was substantially modified so that forced heirs no longer included all descendants of the decedent but only two categories of descendants: (1) those "twenty-three years of age or younger" at the time of the decedent's death and (2) those "permanently incapable of taking care of their persons or administering their estates" at the time of the decedent's death.¹²⁴ The latter category was not proposed by the Law Institute but was instead borne of a legislative amendment. Thus, a post-enactment comment was required to expound upon the change.¹²⁵ Once the comment was printed, the legislature objected, finding that the comment suggested a requirement for forced heirship that was unsupported by the text of the law.¹²⁶ It therefore passed a resolution in 1998 requiring the Law Institute to amend the comment to conform with the legislative

119. Email from William E. Crawford to the Exec. Comm. of the La. State Law Inst. (May 23, 2005, 2:12 PM) (on file with the Louisiana State Law Institute).

120. *Id.*

121. *See, e.g.*, Act No. 281, 2014 La. Acts 1765 (including comments for provisions on mortgage records in the security devices revision); Act No. 3, 2009 La. Acts 4 (including comments for Civil Code article 186 in the revision of filiation and adoption provisions).

122. *See* H.R. Con. Res. 1, 1998 Leg., 29th Extra. Sess. (La. 1998).

123. LA. CIV. CODE art. 1493 cmts. a-e (2017).

124. Act No. 77, 1996 La. Acts 1015; *see generally* Spaht, *supra* note 3 (discussing the revisions to forced heirship).

125. *See* Spaht, *supra* note 3, at 77 n.100.

126. *See* La. H.R. Con. Res. 1.

intent.¹²⁷ Indeed, the legislature not only directed that the comment be revised, it provided specific instructions as to what the comment should say.¹²⁸

III. COMMENTS AS A HIDDEN SOURCE OF LAW

Officially, the conventional wisdom surrounding comments—that they are not the law—is correct. According to the Civil Code, the sources of law in Louisiana are, exclusively, “legislation and custom.”¹²⁹ Legislative comments, of course, are neither.¹³⁰ Instead, the comments—drafted by the scholars of the Law Institute and included in proposed bills for the legislators’ edification—constitute doctrine.¹³¹ Moreover, numerous legislative enactments state broadly and incontrovertibly that comments are *not law*. The Louisiana Code of Criminal Procedure¹³² and the Louisiana Children’s Code¹³³ contain general statements negating the legislative force of comments, as do countless individual legislative acts amending and reenacting various provisions of the Civil Code,¹³⁴ the Code of Civil Procedure,¹³⁵ and

127. *Id.* Notably, a resolution was introduced in the House by Representative Riddle (the same author of Resolution No. 1 of 1998) during the 1997 Regular session. See H.R. Con. Res. 23, 1997 Leg., 23rd Reg. Sess. (La. 1997). The resolution was scheduled to be heard by the House Committee on Civil Law and Procedure but did not progress further in the legislative process that session. HCR23, LA. ST. LEGISLATURE, <http://www.legis.la.gov/legis/BillInfo.aspx?s=97RS&b=HCR23&sbi=y> (last visited Sept. 2, 2017).

128. See La. H.R. Con. Res. 1; see also *infra* notes 140-145 and accompanying text (discussing the legislature’s instructions to the Law Institute to revise the comments to clearly reflect legislative intent).

129. LA. CIV. CODE art. 1 (2017).

130. See *id.* art. 2 (“Legislation is a solemn expression of legislative will.”); *id.* art. 3 (“Custom results from practice repeated for a long time and generally accepted as having acquired the force of law.”).

131. See Panel Discussion, *The Great Debate Over the Louisiana Civil Code’s Revision*, 5 TUL. CIV. L.F. 49, 75, 79 (1990) (Professor David Gruning equating comments with doctrine); Kimberly D. Higginbotham, Comment, *Reimbursement for Satisfaction of Community Obligations with Separate Property: Getting What’s Yours*, 68 LA. L. REV. 181, 200 (2007) (“Though not a formal source of law, the doctrine contained in comments is still persuasive authority in Louisiana.”).

132. LA. CODE CRIM. PROC. art. 10 (2017) (“The headings of the articles of this Code, and the source notes and comments thereunder do not constitute parts of the law.”).

133. LA. CHILD. CODE art. 111 (2017) (“The headings of the Articles of this Code and any comments thereto are for convenient reference and do not constitute parts of the law.”).

134. See, e.g., Act No. 187 § 6, 1982 La. Acts, No. 518, 569 (“The Expose de motif [sic], the article headnotes, and the comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act.”); Act No. 77 § 4, 1996 La. Acts 1015, 1044 (“The introductory note, headings, source lines, and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act.”); Act No. 1078 § 7, 1997 La. Acts 1885, 1897 (“The headings, source lines, and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act.”).

the Louisiana Revised Statutes.¹³⁶ Indeed, since 1978 the general law governing Louisiana's legislative process has been completely clear that comments accompanying *any* bill submitted to the legislature "shall not be law."¹³⁷

Despite the fact that they do not have the force of law, the comments enjoy an authority and significance that is unlike that of any other form of doctrine. The following subpart describes the ways in which comments approximate law, both through their preparation and through their use.

A. *Quasi-Legislation and De Facto Law*

First, comments enjoy an authority that may be viewed as inherent; irrespective of the manner in which they are employed, they are imbued with legal force by virtue of the processes by which they are made and published. Even while the comments are expressly distinguished from legislation, they undeniably have some legislative character that is not shared by other doctrinal writing. Moreover, courts regularly rely on comments to discern legislative intent, determine the proper interpretation of the law, and resolve actual conflicts. Thus, as described below, the comments have a quasi-legislative status and, in practice, constitute a source of law.

1. Comments as Quasi-Legislation

Despite the legislature's repeated pronouncements denying the legislative force of the comments, the comments bear a "stamp of

135. See, e.g., Act No. 173 § 2, 1989 La. Acts 673, 675 ("The headings, source lines and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act.").

136. See, e.g., Act No. 989 § 9, 1990 La. Acts 2417, 2454 ("The Expose [sic] des Motifs, headings, source lines, and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act.").

137. *Louisiana Senate Rules of Order, Joint Rule of Order of the Senate and House of Representatives No. 10*, LA. ST. LEGISLATURES, <https://legis.la.gov/Legis/Law.aspx?d=113406> (last visited Sept. 10, 2017) ("A bill submitted on the recommendation of the Louisiana State Law Institute may be introduced and considered by the Senate and House of Representatives in pamphlet form and, whether in pamphlet form or not, may include introductory comments and explanatory comments following proposed sections or articles. Comments included in the bill shall not be enactments of the Legislature, and shall be included only as explanatory language, and shall not be law, but may be printed in the official edition of the pertinent law with such changes to be made therein by the Louisiana State Law Institute as it may deem necessary to accurately reflect the sections or articles as enacted, or subsequently amended.").

legislative approval” that is difficult to ignore.¹³⁸ This stamp of approval is first a formal one: the very inclusion of the comments in the bills and the resulting acts incorporates those comments into the legislative process in the same manner as the text of the law. However, the approval of the legislature is not merely a matter of physical proximity and timing. Because the legislature actively considers the text of the law and the comments in tandem during debates, the text is necessarily approved in light of the accompanying comments. The comments are thus assimilated into the legislative intent: the law that is enacted is the law as it is justified, explained, and interpreted by the comments.

Professor Yiannopoulos once characterized the notion that the comments reflect the legislative intent as an “illusion,” remarking that, “[i]n reality, the Reporter’s comments merely reflect the Reporter’s own intent and explanations.”¹³⁹ While it is certainly true that comments are authored by Law Institute reporters, the same can be said for the legislative text. It is not the identity of the drafter that gives the law its force, but the process of legislative approval. When the text and comments are reviewed and approved as one interconnected package, it is difficult to distinguish between the legislature’s express approval of the text and its implicit approval of the comments. It is presumably the thinness of this line that has prompted the legislature to repeatedly and unambiguously denounce the comments’ status as *law*. And while those many legislative decrees cannot be ignored, it must also be recognized that the comments, though *not law*, are quite authoritative.

It may be more accurate to consider the gradations of authority bestowed upon particular types of legislative comments. At the center of the spectrum lies the bulk of legislative comments—the variety that is included within a bill for the legislature’s consideration but that is free of legislative direction or interference. These comments, though *not law*, are quasi-legislative by virtue of their role in the lawmakers’ approval of the text.

Now consider the spectrum’s poles. At one end of the spectrum, some comments enjoy heightened authority as a result of the legislature’s involvement in their drafting. Recall that from time to time, the legislature specifically instructs the Law Institute to craft comments to reflect a particular iteration of legislative intent. Those

138. Zengel, *supra* note 41, at 960.

139. Yiannopoulos, *supra* note 54, at 406.

comments, rare though they may be, enjoy a special legislative imprimatur that makes them practically incontrovertible. Consider, for instance, the post-enactment revision of the comments to Civil Code article 1493. In its original form, comment (c) to that article provided as follows:

More important, the Legislature added the word “permanently” before the word “incapable” for the express purpose of emphasizing that a temporary disability, even if severe, should not apply. The legislature thereby expressly manifested its intent that the rule making disabled children of any age forced heirs should only apply to “seriously handicapped” individuals. The Legislature requested specifically that these Comments be written to explain that it is the purpose of adding the word “permanently” to more effectively express the public policy intended, namely, to protect children who are over the age of 23 as forced heirs if, and only if, they are severely disabled.¹⁴⁰

As described above in Part II.B.4, the legislature took issue with this comment following its publication and expressly directed that it be revised to more accurately reflect the legislative intent regarding the meaning of “permanently incapable.”¹⁴¹ Rather than leaving the determination of that intent to the reporter, the legislature gave explicit instructions. Reacting to the comment’s statement that the permanent incapacity be “severe,” the legislature retorted: “[T]he language of the Civil Code Article 1493 does not require that the child prove that he is either ‘severely disabled’ or ‘seriously handicapped’ but instead provides protection for a child who is ‘*permanently* incapable of caring for his person or administering his property.’”¹⁴² The legislature further instructed that “the terms ‘disabled’ and ‘handicapped’ are terms not adopted by the legislature and not necessarily coextensive with the standard ‘incapable of caring for his person or administering his property.’”¹⁴³ Indeed, the resolution went so far as to direct the Law Institute to “*delet[e]* all references describing such incapable children in terms other than those used in the article, to wit: children who are ‘permanently incapable of caring for their persons or administering their estates.’”¹⁴⁴ The Law Institute of course complied with the legislature’s directive. The relevant language of the comment now provides simply that the word

140. LA. CIV. CODE art. 1493 cmt. c (1997).

141. See *supra* notes 122-128 and accompanying text.

142. H.R. Con. Res. 1, 1998 Leg., 26th Extra. Sess. (La. 1998).

143. *Id.*

144. *Id.* (emphasis added).

“permanently” was included before the word “incapable” “for the express purpose of emphasizing that a temporary incapacity or infirmity, even if severe, should not apply.”¹⁴⁵

A similarly precise directive was given on another occasion, this one involving 2001 reforms to the law governing the guidelines for the calculation of child support.¹⁴⁶ While the Law Institute did not prepare the bill introducing those reforms, the enacting legislation directed the Law Institute to prepare comments to the revised statutes and Civil Code articles that had been affected.¹⁴⁷ In addition to this general request, the legislature in a separate resolution set forth specific instructions regarding the substance of the comments to one of the many provisions that had been revised: Louisiana Revised Statutes section 9:315.9, a provision regulating the calculation of child support obligations in shared custody arrangements.¹⁴⁸ Rather than leave the explanation of this rule to the reporter’s judgment, the legislature pointedly directed the Law Institute to:

[C]larify that in the calculation of a support obligation in a shared custodial arrangement, each parent’s share of the basic support obligation shall be cross-multiplied by fifty percent or the actual percentage of time the child spends with the other parent and the parent owing the greater amount pays the difference to the other parent as support, after deducting each parent’s proportionate share of direct payments ordered to be made to a third party on behalf of the child.¹⁴⁹

The Law Institute faithfully executed this mandate, drafting a comment that substantially tracks the legislature’s own language.¹⁵⁰

145. LA. CIV. CODE art. 1493 cmt. c; see *In re Succession of Carroll*, 48,436-CA, p. 3 n.1 (La. App. 2 Cir. 9/25/13); 125 So. 3d 505, 507 n.1. Notably, despite the legislature’s directive, the comment expounding upon the nature of disability required for a *grandchild* of the decedent to qualify as a forced heir was not revised. Thus, comment (e) continues to state that to qualify, “the grandchild must be *severely* disabled.” LA. CIV. CODE art. 1493 cmt. e (emphasis added). The comment then refers the reader back to comment (c) for additional discussion of the severity requirement. *Id.* In light of the 1999 legislative directive, this comment is unquestionably inconsistent with legislative intent. What force, if any, should it be afforded?

146. H.R. Con. Res. 2, 2001 Leg., 30th Extra. Sess. (La. 2001).

147. Act No. 1082 § 4, 2001 La. Acts 2264, 2290.

148. La. H.R. Con. Res. 2.

149. *Id.*

150. The comment provides in part:

Secondly, each parent’s share of the basic support obligation shall be cross-multiplied by fifty percent or the actual percentage of time the child spends with the other parent and the parent owing the greater amount pays the difference to the other parent as support, after deducting each parent’s proportionate share of direct payments ordered to be made to a third party on behalf of the child. This

In both of the cases described above, the legislature all but wrote the comments itself, memorializing its intent regarding their substance in the form of resolutions. Thus, the legislature has produced comments—or at least portions thereof—which are essentially legislation: “[A] solemn expression of legislative will.”¹⁵¹

At the other end of the spectrum are comments that are drafted or extensively revised *after* the legislation to which they appertain is enacted. While post-enactment comments may be unquestionably helpful, they are not as interconnected with the text as those considered contemporaneously with the law at the time of enactment or those drafted according to a specific direction of the legislature. These post-enactment comments are more of the nature of traditional scholarly doctrine, which, although not integral in the *formation* of legislative intent, routinely engages in educated guessing about the legislative will. This is not to say that post-enactment comments carry no influence; when comments are drafted by respected experts who were instrumental in the preparation of the law and its approval by the legislature, they should be afforded appropriate intellectual weight even if they are lacking in legislative sanction. The comments drafted to accompany the Children’s Code in 1991 are a prime example of post-enactment comments that, due to the timing of their drafting, are only indirectly indicative of legislative intent. Although drafted by many of the same scholars and practitioners who prepared and presented the text of the Children’s Code to the legislature, these comments were prepared only after the law was enacted and were thus not considered by the legislature contemporaneously with the legislative text.

If the quasi-legislative force of comments drafted entirely after a law’s enactment is attenuated, so too is that of comments that, though initially passed before the legislature alongside proposed legislation, are subsequently revised. Even when they are made in order to align the comments with the law as ultimately enacted, post-enactment revisions, though perhaps quite reliable, reflect the intent and understanding of the drafter alone. Nevertheless, even while

calculation reflects the fact that each parent has physical custody of the child for approximately one-half of the year.

LA. REV. STAT. § 9:315.9 cmt. b (2017). As a belt-and-suspenders initiative, the legislature later enacted legislation to clarify the calculation of child support for shared custody. *See* Act No. 62, 2002 La. Acts 1258; Katherine Shaw Spaht, *The Two “Ics” of the 2001 Louisiana Child Support Guidelines: Economics and Politics*, 62 LA. L. REV. 709, 725 n.64 (2002).

151. *See* LA. CIV. CODE art. 2 (2017).

lessening the comments' legislative force, post-enactment revision is designed to, and hopefully does, enhance their accuracy and utility, and thereby, their intellectual influence.

The placement of comments on a continuum of quasi-legislative authority is not an attempt to calculate precisely the weight of authority to be attributed to any particular comment. Rather, the exercise is intended to demonstrate only that the comments are not *equally* authoritative, and that their relationship to the text is affected by many factors: the legislature's input into their content, the timing of their drafting and presentation to the legislature, and the extent to which they are subsequently revised.

2. Comments as De Facto Law

Aside from the process by which comments are made, the authoritative nature of comments stems also from the jurisprudence. An examination of cases construing comments reveals that the courts consider the comments to be highly authoritative, even sometimes as authoritative as the text itself.

First, it must be observed that Louisiana courts have in numerous cases perfunctorily recited the conventional wisdom that "the comments are not law" just before relying upon the comments to determine the proper interpretation of legislative text.¹⁵² So common is this seeming turnabout that the refrain against the comment's legal force has been converted from a rule into an introductory phrase for its exception.¹⁵³ Thus, the comments are expressly denied the force of law, *but* they are nonetheless used to determine outcomes.

The fact that courts use comments to interpret legislative text is not surprising, nor is it necessarily a cause for concern. Courts rightly point out that there is good reason to trust and rely upon the

152. See, e.g., *Cent. Props. v. Fairway Gardenhomes, LLC*, 2016-C-1855, pp. 14-15 (La. 6/27/17); 2017 WL 2837152, at *8 (citing comment to Louisiana Revised Statutes section 47:2156 as revealing the legislative intent); *Tracie F. v. Francisco D.*, 2015-CJ-1812, pp. 8-9 (La. 3/15/16); 188 So. 3d 231, 238-39 (finding the comments to Civil Code article 131 to be "greatly instructive"); *In re Siverd*, 2008 CA 2383, p. 5 n.3 (La. App. 1 Cir. 9/11/09); 24 So. 3d 228, 231 n.3 (relying on comment to Article 1577 as "an extrinsic aid that assists in statutory interpretation"); *Robinson v. N. Am. Royalties, Inc.*, 463 So. 2d 1384, 1388 (La. App. 3 Cir. 1985) (maintaining that Article 128 of the Mineral Code "must be considered in connection with the official reporter's comment").

153. See, e.g., *Arabie v. CITGO Petroleum Corp.*, 2010-C-2605, p. 4 (La. 3/13/12); 89 So. 3d 307, 312 ("While the Official Revision Comments are not the law, they may be helpful in determining legislative intent."); *Thigpen v. Boswell*, 465 So. 2d 865, 867 (La. App. 2 Cir. 1985) ("The comments of the reporter are not law, *but* they show the intent of the drafter of the articles." (emphasis added)).

comments. In some cases, courts unconsciously call upon their quasi-legislative force, referring to the comments as the “official comments” or “official revision comments.”¹⁵⁴ In other cases, courts more deliberately tie the comments’ weight to their role in the legislative process. As the Louisiana Supreme Court has observed, “While the revision comments do not form part of the law, they were presented together with the proposed legislation and illuminate the understanding and intent of the legislators.”¹⁵⁵ The Supreme Court has described comments as having “legislative sanction.”¹⁵⁶ Indeed, many state¹⁵⁷ and federal court¹⁵⁸ opinions describe the comments as indicative of the legislative intent.¹⁵⁹ Thus, courts tend to recognize

154. See, e.g., *Cent. Props.*, 2016-C-1855 at p. 11; 2017 WL 2837152, at *6; *L.J.D. v. M.V.S.*, 2016 CA 0008, p. 5 n.5 (La. App. 1 Cir. 1/25/17); 212 So. 3d 581, 585 n. 5; *Tracie F.*, 2015-CJ-1812 at p. 8; 188 So. 3d at 238; *Terrebonne Par. Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, p. 11 (La. 1/19/05); 893 So. 2d 789, 797; *State v. Bennett*, 610 So. 2d 120, 124 (La. 1992); *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1068 n.31 (La. 1992); see also *Yiannopoulos*, *supra* note 54, at 406 (noting that the comments are termed “official comments” and concluding that for that reason, “undue weight is attributed to them in the process of interpretation of the law”).

155. *Wartelle v. Women’s & Children’s Hosp., Inc.*, 97-0744, p. 9 (La. 12/2/97); 704 So. 2d 778, 783.

156. *State v. Daniels*, 109 So. 2d 896, 898 n.3 (La. 1958) (“It is appropriate to take into consideration these reporters’ comments to the Criminal Code, which have legislative sanction, in the interpretation and construction of the articles therein.”); see also *State v. Broadnax*, 45 So. 2d 604, 609 (La. 1950); *State v. Davis*, 23 So. 2d 801, 808 (La. 1945) (looking to the comments of the Criminal Code).

157. See, e.g., *In re Succession of James*, 2007-2509, p. 9 (La. App. 1 Cir. 8/21/08); 994 So. 2d 120, 125-26 (“The legislature did not clearly and unequivocally express, in either the act, the new law, or revision comments, an intent to have new article LSA-C.C. art. 197 apply retroactively to revive the right, claim, or cause of action at issue here.”); *In re Succession of Martinez*, 98-962, p. 4 (La. App. 5 Cir. 2/10/99); 729 So. 2d 22, 24 (“The comments indicate that the intent of the legislature was to provide this remedy only for ‘severely handicapped’ persons.”); see also, e.g., *Cent. Props.*, 2016-C-1855 at p. 11; 2017 WL 2837152, at *6 (“Although the Official Revision Comments connected with statutes are not the law, they can be useful in determining legislative intent.”); *Tracie F.*, 2015-CJ-1812 at p. 8; 188 So. 3d at 238 (“While the Official Revision Comments are not the law, they may be helpful in determining the legislative intent.”).

158. See, e.g., *Chalos & Co. v. Marine Managers, Ltd.*, No. 14-2441, 2015 WL 6442558, at *7 n.65 (E.D. La. Oct. 23, 2015) (quoting *Wartelle*, 97-0744 at p. 9; 704 So. 2d at 783).

159. In some cases, the courts recognize that the comments are indicative of the intent of scholars rather than legislators; nevertheless, the comments are heeded. See, e.g., *Royal v. Cook*, 2007-CA-1465, p. 7 n.7 (La. App. 4 Cir. 4/23/08); 984 So. 2d 156, 162 n.7 (“The ‘revision comments’ . . . are not intended to be considered as part of the law Rather, [they] merely express the *commentator’s* interpretation of how the codal provisions and/or statutes are to be applied, and are meant to be used as guiding tools for the court.” (emphasis added)); see also *Oxley v. Sabine River Auth.*, 94-1284, p. 19 (La. App. 3 Cir. 10/19/95); 663 So. 2d 497, 509 (referring to the “commentator’s caution” provided in comment (b) to Louisiana Civil Code article 1806).

that it is the comments' role in the legislative process that provides them with their weight: while they may not have the force of enacted law, they are especially helpful as interpretative aids given their relationship to the legislative text.¹⁶⁰

When characterized as interpretative aids, comments are often considered alongside other indicia of the law's proper application, including the legislation's plain meaning, jurisprudence interpreting and applying the legislative text, and scholarly writing.¹⁶¹ As a tool in the arsenal of implements of statutory interpretation, comments are frequently used to bolster the prevailing interpretation of the law.¹⁶² In other cases, comments are found to fall short and are rejected as erroneous, incomplete, or shortsighted. For example, in *Terrebonne Parish Schoolboard v. Castex Energy, Inc.*, the Louisiana Supreme Court rejected the supposition in the comments to Mineral Code article 122 that mineral lessees owe an implied duty to restore the surface of the leased premises, finding the comments at odds both with the legislative text and its interpretative jurisprudence.¹⁶³ Likewise, in *Savoy v. State Farm Fire & Casualty Co.*, the Louisiana Fourth Circuit Court of Appeal rejected a statement in Civil Code article 3461 comment (c) suggesting that peremption may be suspended by filing of suit or service of process, finding "the non-

160. See, e.g., *Broussard v. Hilcorp Energy Co.*, 2009-0449, p. 5 n.5 (La. 10/20/09); 24 So. 3d 813, 817 n.5 ("While statements contained in the official comments are not part of the statute and are not binding on courts, they are not discounted entirely, and we find that they provide some aid in interpreting legislative intent."); *Terrebonne Par. Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, p. 11 (La. 1/19/05); 893 So. 2d 789, 797 ("[W]e note that statements contained in the official comments are not part of the statute, and are not binding on this court, although we do not discount them entirely."); see also *Anding v. Anding*, 37,778-CA, p. 8 n.8 (La. App. 2 Cir. 10/29/03); 859 So. 2d 901, 905-06 n.8 ("Although the comments to the code cannot supersede the clear language of a code article, they are often used for guidance. The lack of a statement [regarding whether revised Civil Code article 938 "changes the law" or "does not change the law"] by the reporter regarding this new article implies that the question of whether the article changes existing law is an open question.")

161. See, e.g., *Curole v. Curole*, 2015-CA-0126, 2015 WL 4761420, at *6 (La. App. 4 Cir. Aug. 12, 2015) (considering the comments to Civil Code articles 2358 and 2365 while construing those articles *in pari materia* to determine proper construction of article 2365); *Wede v. Niche Mktg. USA, LLC*, 2010-0243, pp. 10-11 (La. 11/30/10); 52 So. 3d 60, 66 (citing and quoting from the 1992 revision comments to Civil Code article 3320 to support a plain meaning interpretation of the article's text); *Ogea v. Ogea*, 378 So. 2d 984, 989-90 (La. App. 3 Cir. 1979) (considering the comments to article 187 while also comparing the text to a prior version of the law to determine legislative intent underlying the same provision).

162. See, e.g., *Rebel Distributions Corp. v. LUBA Workers' Comp.*, 2013-0749, pp. 20-22 (La. 10/15/13); 144 So. 3d 825, 839-40 (citing and quoting from the comments to Civil Code article 1881, along with jurisprudence and other sources of legal doctrine, while expounding on the proper application of the article).

163. 2004-0968 at p. 11; 893 So. 2d at 797.

authoritative revision comment” to be contrary to the plain language of article 3461, which states emphatically that “peremption may not be renounced, interrupted, or suspended.”¹⁶⁴ In a different case, the same court noted the limitations of comment (d) to Civil Code article 2541, which may be read to require that a buyer, to prevail in a redhibitory action against the seller, prove that a defect renders the property structurally “unsound.”¹⁶⁵ These cases and others like them employ sound methods of statutory construction, according to which the plain language of the text must be given effect without resort to external interpretative aids when the law, as written, is clear.¹⁶⁶ Some of the courts employing this plain meaning approach emphasize that because the comments are the work of the Law Institute, not the legislature, they must yield to the statutory text.¹⁶⁷

Despite the moderate rhetoric that usually surrounds the comments in judicial opinions, courts occasionally regard comments with far more import, at times either equating, or conflating, the comments with the text. In one such case, the Middle District of Louisiana parsed the text and the comments to Civil Code article 1977 while considering the mechanics of the *promesse de porte-fort*.¹⁶⁸ After acknowledging that “[t]he object of a contract may be that a third person will incur an obligation or render a performance,” the article provides only that “[t]he party who promised that obligation or performance is liable for damages if the third person does not bind himself or does not perform.”¹⁶⁹ The comments go further, explaining that when the third person expresses consent, the

164. 2008-CA-0182, pp. 6-7 (La. App. 4 Cir. 10/1/08); 993 So. 2d 349, 353 (citing LA. CIV. CODE art. 3461).

165. *Royal v. Cook*, 2007-CA-1465, pp. 6-7 (La. App. 4 Cir. 4/23/08); 984 So. 2d 156, 162-63.

166. See LA. CIV. CODE art. 9 (2017) (“When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”); *Mills v. Davis Oil Co.*, 11 F.3d 1298, 1302 (5th Cir. 1994) (refusing to give effect to comment declaring that a statute “does not change the substance of the law” where “the plain language of the statute is clear”); *Hinchey v. Hinchey*, 203 So. 2d 409, 416 (La. App. 2 Cir. 1967) (“When an article is unambiguous, complete in meaning and without need for interpretation, as is LSA-R.S. 9:301, the comments thereunder are of no legal significance.”).

167. See *Savoy*, 2008-CA-0182 at pp. 6-7; 993 So. 2d at 353-54 (“It is well-settled that revision comments to codal articles are not the law but are merely interpretations by the Louisiana State Law Institute as to how the codal provisions should be applied.” (citing *Royal*, 2007-CA-1465 at p. 7 n.7; 984 So. 2d at 162 n.7)).

168. *Keybank Nat’l Ass’n v. Perkins Rowe Assocs.*, No. 09-497-JJB-SCR, 2010 WL 2838373, at *3 (M.D. La. July 19, 2010). The precise question before the court was whether the plaintiff’s claims could withstand a motion to dismiss. *Id.*

169. LA. CIV. CODE art. 1977.

promisor is “released”¹⁷⁰ through “substitution.”¹⁷¹ Ignoring the distinction between comment and text, the court phrased the applicable legal rule thusly: “Until the third party ‘*substitutes himself*’ into the original contracting party’s shoes by either ‘bind[ing] himself or . . . perform[ing],’ the original contracting party is liable for any damages.”¹⁷² The court then declared that “the *plain text* of the civil code indicates performance alone can be enough to *release* the original contracting party from liability and *substitute* the third party into that role.”¹⁷³ In support of this contention, the court again quoted from the comments.¹⁷⁴

The court’s use of the comments to explain the law is not objectionable; they are, after all, indicative of legislative intent and are ostensibly grounded both in doctrine and common sense. However, the court’s failure to distinguish between code and comment is disturbing, as is its reference to the comment as the “plain text” of the law. Nowhere does the text state that when a person whose performance has been promised binds himself to the obligee, the original obligor is released.¹⁷⁵ Thus, to equate this statement with “plain text” is to imbue it with a weight that it does not deserve.¹⁷⁶

In one incredible case, the Louisiana First Circuit Court of Appeal went to great lengths to explain why a comment was “law” equal in force to the text of the Louisiana Code of Civil Procedure.¹⁷⁷ Inquiring into the question of whether peremption is properly pled as an affirmative defense or peremptory exception, the court looked to

170. *Id.* cmt. b (“For as long as the third person does not bind himself, the promisor remains the sole obligor, and as soon as the third person binds himself the promisor is released.”).

171. *Id.* cmt. c (“The *promesse de porte-fort* must be distinguished from the *stipulation pour autrui*. . . . In the former, a third person, by expressing his consent, initially substitutes himself for an intended party to a contract and therefore binds himself.”).

172. *Keybank*, 2010 WL 2838373, at *3 (emphasis added) (quoting LA. CIV. CODE art. 1977).

173. *Id.* (emphasis added).

174. *Id.* (“[A]s soon as the third person binds himself the promisor is released.” (quoting LA. CIV. CODE art. 1977 cmt. b)).

175. *See* LA. CIV. CODE art. 1977.

176. This is especially so in light of the fact that the statement in the comment that the original obligor is “released” when the third person binds himself is directly at odds with the general law of assumption of obligation. According to the *plain text* of Civil Code article 1821, when a third person agrees to assume the obligation of another, the original obligor is not released. *Id.* art. 1821. The court accepted the comment at face value without exploring this apparent conflict. The author submits that the development and understanding of these legal institutions would have been better served if the court had done so.

177. *Wooley v. Lucksinger*, 2006-1140, pp. 201-02 (La. App. 1 Cir. 12/30/08); 14 So. 3d 311, 451-52, *aff’d in part, rev’d in part*, 2009-0571 (La. 4/1/11); 61 So. 3d 507.

comment (b) of article 1005 of the Code and determined that, according to that comment, peremption is not an affirmative defense.¹⁷⁸ To determine the weight of the comment's authority, the court looked to the enacting legislation and observed that "La. C.C.P. art. 1005 and Comment (b) are provided for in Section 1 of the Act and, thus, both are law, unless otherwise provided for in the act in which it is contained or by some other law."¹⁷⁹ To bolster its conclusion, the court went on to explore the effect of Code of Civil Procedure article 5057, which provides that headings, source notes, and cross references found in the Code "do not constitute parts of the procedural law."¹⁸⁰ Remarkably, the court found the omission of "comments" from this article to be determinative: "The clear and unambiguous language of Article 5057 does not exclude the comments in the Louisiana Code of Civil Procedure from being parts of the procedural law."¹⁸¹

Another jurisprudential phenomenon worth noting is that of courts applying methods of statutory construction—usually reserved for exposition of the legislative text—to the comments.¹⁸² For example, in *Tracie F. v. Francisco D.*, the Louisiana Supreme Court utilized the maxim *expressio unis est exclusio alterius* (the expression of one thing implies the exclusion of another thing) to determine the proper construction of Civil Code article 131.¹⁸³ And, in *Ogea v. Ogea*, the Louisiana Third Circuit Court of Appeal utilized an argument *ejusdem generis* (of the same kind or nature) to determine the proper construction of the comment accompanying former Civil Code article 187.¹⁸⁴ Here, the court stated explicitly, "We feel that the rules on statutory interpretation are also applicable to the interpretation of Official Revision Comments when the Comments

178. *Id.*

179. *Id.* at p. 202; 14 So. 3d at 452. (emphasis omitted).

180. *Id.* (quoting LA. CODE CIV. PROC. art. 5057 (2017)).

181. *Id.* (emphasis added).

182. *Tracie F. v. Francisco D.*, 2015-CJ-1812, p. 18 (La. 3/15/16); 188 So. 3d 231, 244; *Ogea v. Ogea*, 378 So. 2d 984, 989 n. 3 (La. App. 3 Cir. 1979).

183. *Tracie F.*, 2015-CJ-1812 at p. 18; 188 So. 3d at 244 ("Although we are parsing a legislative comment, rather than a statute itself, by analogy, this principle supports our interpretation: 'the mention of one thing in a statute implies the exclusion of another thing.'" (quoting *State v. La. Riverboat Gaming Comm'n*, 94-1872, p. 17 (La. 5/22/95); 644 So. 2d 292, 302)).

184. 378 So. 2d at 989 ("It is a fundamental rule of interpretation that the meaning of a word or phrase may be ascertained by the meanings of other words or phrases with which it is associated. Also, when general and specific words are associated with and take color from one another, the general words are restricted to a sense analogous to the less general.").

are used to aid the Court in determining the proper legislative intent.”¹⁸⁵

Cases expressly equating comments with legislation in so blatant a manner as those described above are relatively unusual. Far more frequent are cases that implicitly regard the comments as authoritative, without explicitly addressing the source or scope of their influence. Sometimes, the court’s failure to question (or even carefully read) the comments results in grievous error. Thus, in *In re Succession of Martinez*, the Louisiana Fifth Circuit Court of Appeal accepted without question the statement made in comment (c) to Civil Code article 1493 (the pre-revised version) that, to qualify as a forced heir, a child must be “severely disabled” at the time of the decedent’s death.¹⁸⁶ This case is remarkable because, at the time it was decided, the comment had already been amended at the legislature’s direction to remove language indicating that a child must be “severely” handicapped to qualify as a forced heir. Apparently, the court was unaware that the change had been made.¹⁸⁷ More often, a court’s reliance on the comments is innocuous, even beneficial. Regardless of the outcomes of these cases, they show that even without consciously exploring the comments’ legal status, courts habitually rely upon them to elucidate the law.

Through their frequent use in the determination of outcomes, the comments have become nearly as important as the language of the statutory text. This phenomenon is especially pronounced when the applicable legislation is terse or the interpretative jurisprudence scant. In cases such as these, courts out of necessity look to the comments for guidance that cannot otherwise be readily found. Take, for example, the jurisprudence interpreting Civil Code article 1479—a provision recognizing undue influence as a vice of consent whose presence will result in the nullity of a donation. The article itself provides only the barest description of the type of influence that leads to nullity, stating:

A donation inter vivos or mortis causa shall be declared null upon proof that it is the product of influence by the donee or another person that so

185. *Id.* at 989 n.3.

186. 98-962, pp. 3-5 (La. App. 5 Cir. 2/10/99); 729 So. 2d 22, 23-24.

187. *See In re Succession of Ardoin*, 2007-43, p. 8 (La. App. 3 Cir. 5/30/07); 957 So. 2d 937, 942-43 (“Although we recognize the complexities raised by the changing commentary, we conclude that the trial court erred in applying *Martinez* and the standard expressed therein.”).

impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.¹⁸⁸

As the article's comment (a) points out, the doctrine of undue influence is "new" to Louisiana law.¹⁸⁹ Prior to its introduction in 1991, the Civil Code had expressly prohibited the admission of any proof that a donation had been made "through hatred, anger, suggestion or capitation"—all rough analogues to modern undue influence.¹⁹⁰ Indeed, undue influence is foreign to the civil law and comes to Louisiana as a legal transplant—an institution borrowed from the common law tradition.¹⁹¹ This borrowing and abrupt reversal in approach were precipitated by the significant erosion of the law of forced heirship in the early 1990s: as all descendants were no longer guaranteed a forced share of their ancestors' estates, undue influence was seen as a means of preventing the disinherison of capable, adult children who would no longer be entitled to a forced share of their ancestor's estate.¹⁹²

Finding little substance to undue influence in the text of the law and having no historical cases or foreign civil law doctrine on which to rely, courts faced with determining whether a donor was unduly influenced have found it necessary to depend heavily—at times almost exclusively—upon the comments to provide undue influence with content.¹⁹³ Courts most typically recite comment (b) to article

188. LA. CIV. CODE art. 1479 (2017).

189. *Id.* cmt. a.

190. *Id.*; see Laurie Dearman Clark, Comment, *Louisiana's New Law on Capacity To Make and Receive Donations: "Unduly Influenced" by the Common Law?*, 67 TUL. L. REV. 183, 221-22 (1992); see generally KATHRYN VENTURATOS LORIO, 10 LOUISIANA CIVIL LAW TREATISE: SUCCESSIONS AND DONATIONS § 9.5 (2d ed. 2009) (discussing history of undue influence in Louisiana).

191. This latter point is revealed by comment (b), which refers to the "common-law rules" of undue influence. LA. CIV. CODE art. 1479 cmt. b; see generally Ronald J. Scalise Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41 (2008) (discussing the approach of the civil law, and in particular of France and Germany, to interference with freedom of testation).

192. See John A. Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 LA. L. REV. 923, 985 (2012); Scalise, *supra* note 191, at 82.

193. Comment (b) notes that the "rules" of undue influence are largely derived from common law case law and then goes on to provide a summary of those rules occupying nearly half a page of the "official" printed version of the Code. LA. CIV. CODE art. 1479 cmt. b. Comments (c), (d), and (e) further expound on the parameters of the doctrine, discussing the requisite intent of the influencer, the time at which undue influence must be operative, and the distinction between undue influence and error. *Id.* cmts. c-e. Presumably these guidelines are, like those in comment (b), based on the common law doctrine of undue

1479, whether in part or in full, for the proposition that “the objective aspects of undue influence are generally veiled in secrecy, and the proof of undue influence is either largely or entirely circumstantial,” the admonition that “everyone is more or less swayed by associations with other persons . . . [t]he more subtle influences, such as creating resentment toward a natural object of a testator’s bounty by false statements, may constitute the kind of influence that is reprobated by this Article,” and the statement that “[m]ere advice, or persuasion, or kindness and assistance, should not constitute influence that would destroy the free agency of a donor and substitute someone else’s volition for his own.”¹⁹⁴ These oft-cited statements have over time become the de facto law of undue influence, far more determinative of legal outcomes than the text of the law.

B. *Comments as Sources of Legal Rules and Norms*

Full appreciation of the comments’ significance begins with an exploration of the way that they are employed by courts, as well as the rhetoric surrounding their use. It does not, however, end there. Equally essential is an examination of the ways in which comments interact with the legislative text. While all comments supplement the text of the law in some way, they vary in the way that they augment, or detract from, legislative statements. Appreciating the variety of comments assists in determining whether comments enrich the law or lead to its impoverishment.

1. Exposition of the Text

From the beginning, the principal aim of the Law Institute in preparing legislative comments has been to contextualize the law.¹⁹⁵ Whereas statutory text is crafted as succinctly as possible, comments allow drafters to provide detailed, narrative explanations for the

influence. However, whether this is the case is not made clear in the comments themselves. *Id.*

194. See, e.g., *id.* cmt. b; *In re Succession of Davisson*, 50,830, p. 12 (La. App. 2 Cir. 12/22/16); 211 So. 3d 597, 606, *writ denied*, 2017-0307 (La. 4/7/17); 218 So. 3d 111 (quoting from comment (b) to articulate the type of conduct constituting undue influence); *In re Succession of Cook*, 50,111, p. 17 (La. App. 2 Cir. 12/16/15); 189 So. 3d 409, 418; *In re Succession of Himel v. Todd*, No. 2011 CA 1638, 2012 WL 2921495, at * 4 (La. App. 1 Cir. 7/17/2012) (discussing comments (b), (c), (d), and (e) in depth); *In re Succession of Foret*, No. 2010-CA-1038, 2010 WL 5465229, at *4 (La. App. 1 Cir. 12/22/2010); see also *Petrie v. Michetti*, 10-122, pp. 10-11 (La. App. 5 Cir. 1/11/11); 59 So. 3d 430, 436 (relying upon comment (b) to differentiate undue influence and duress).

195. See *supra* note 20 and accompanying text.

revisions they propose. Underlying policies and legislative objectives may be expounded upon at great length.¹⁹⁶ Definitions, often purposefully omitted from the legislative text, find comfortable homes in the comments,¹⁹⁷ as do specific examples illustrating the application of rules stated in general terms.¹⁹⁸

Perhaps most helpfully, comments serve as legal compasses, assisting the reader in navigating space and time to understand the history of the law and its relationship to other provisions and institutions within the law. In this regard, cross-references are important navigational tools. They assist in the interpretative task of reading legislation *in pari materia* by pointing to provisions that are closely connected to the statute to which they appertain.¹⁹⁹ In addition, comments provide a means of explaining the relationship between the new legislation and the prior law—both the legislation and its interpretative jurisprudence.²⁰⁰ Comments indicate when prior cases have been codified²⁰¹ or overruled.²⁰² They point out whether an

196. Some discussions of legislative purpose are lengthier than others. *See, e.g.*, LA. CIV. CODE art. 3515 cmt. b (discussing “[t]he objective” of the choice of law process as a whole).

197. *See, e.g., id.* art. 1804 cmt. b (defining the term “virile portion” with reference to French doctrine). The approach of avoiding definitions in code drafting is summarized by Portalis thusly: “All that is definition, teaching, doctrine, belongs to the domain of science. All that is order, rule—properly so called—belongs to the domain of laws.” Alain Levasseur, *On the Structure of a Civil Code*, 44 TUL. L. REV. 693, 698 (1970) (quoting 6 P.A. FENET, RECUEIL COMPLET DES TRAVAUX PREPARATOIRES DU CODE CIVIL 42 (Paris, Marchand du Breuil 1827) (author’s translation)).

198. *See, e.g.*, LA. CIV. CODE art. 366 cmt. d (providing an example for the general rule stated in the text that “[l]imited judicial emancipation confers the effects of majority specified in the judgment of limited emancipation”).

199. *See, e.g., id.* art. 2028 cmt. b 2012 (directing the reader to the definition of “third person” found in the law of registry to assist in interpreting the text, which states that simulations may have effects against “third persons”); *see also id.* art. 13 (requiring laws “be interpreted in reference to each other”).

200. Professor Vernon Palmer has written previously about the methods by which “the comments attempt to bond the jurisprudence to the new Code.” *See Vernon V. Palmer, The Death of a Code—the Birth of a Digest*, 63 TUL. L. REV. 221, 260 n.108 (1988). Palmer identifies six such methods:

- (1) to illustrate the scope of a concept or rule; (2) to show the continuity between the old source article and the new provision; (3) to indicate that a jurisprudential ruling is the source for a new article; (4) to reject or overrule a line of cases; (5) to establish an interpretative gloss on the new text; and (6) to establish a counterrule or exception at variance with the text.

Id. (citations omitted).

201. *See, e.g.*, LA. CIV. CODE art. 2030 cmt. (“[The article] codifies the jurisprudential rule that a contract which contravenes the public order is absolutely null.”).

202. *See, e.g., id.* art. 1607 cmt. (“To the extent that the rationale of *Succession of Melancon*, 330 So. 2d 679 (La. App. 3rd Cir. 1976), would deny that a revocation would

article is “new”²⁰³ or merely restates past legislation.²⁰⁴ They also purport to distinguish an article that “does not change the law”²⁰⁵ from one that effects a substantive change²⁰⁶ as well as from one that merely “clarifies” the law.²⁰⁷ A declaration of a revision’s relationship to prior legislation and jurisprudence in the comments has become so commonplace that courts now read significance into the absence of such a statement.²⁰⁸

The comments’ role in relating legislation to jurisprudence should not be understated. As was emphasized by the drafters of the earliest comments, Louisiana’s regard for judicial decisions as an extremely significant, although not binding, source of law nearly requires that those engaged in substantial law reform explain to the legislator and the judge how the new law will relate not only to the text of prior legislation but its prevailing interpretations. Moreover, given the discursive style of opinions authored by Louisiana judges, cases themselves often serve as a source of instruction about the law. It is therefore quite helpful when the comments point to cases whose discussions may enlighten the lawyer as to the proper meaning of a

occur by a signed and handwritten notation to that effect that did not have a date, that decision is overruled.”).

203. *See, e.g., id.* art. 2990 cmt. a (“This provision is new.”).

204. *See, e.g., id.* art. 2531 cmt. a (“This Article reproduces the substance of Article 2531 of the Louisiana Civil Code of 1870. It does not change the law.”). The distinction between “new” and “old” provisions is not stark, but graded. According to the comments, some articles are entirely new, *see, e.g., id.* art. 2601 cmt. a (noting that the article is “new,” “changes the law,” and departs from prior law, which “require[d] the acceptance to conform to the terms of the offer”), and others, though new, are based on principles found across multiple past provisions, *see, e.g., id.* art. 2019 cmt. a (noting that the article, though new, restates a principle contained in articles 1899 and 2696 of the Civil Code of 1870). Still others, though new, reproduce the substance of a single provision, *see, e.g., id.* art. 2028 cmt. a (noting that the article, though new, reproduces the substance of article 2239 of the Civil Code of 1870), and still others do not purport to be new at all, *see, e.g., id.* art. 2037 (noting that the article reproduces the substance of articles 1971 and 1985 of the Civil Code of 1870, and making no reference to the revised article as “new”).

205. *See, e.g., id.* art. 2567 cmt. a (“This Article reproduces the substance of Article 2567 of the Louisiana Civil Code of 1870. It does not change the law.”).

206. *See, e.g., id.* art. 3416 cmt. b (“According to Article 3417 of the Louisiana Civil Code of 1870, ‘peacocks and pigeons are considered as wild fowls, though after every flight it is their custom to return.’ Article 3416 suppresses this rule and thereby changes the law. There is no reason why peacocks and pigeons should be considered as wild fowl as long as they have the habit of returning.”).

207. *See, e.g., id.* art. 469 cmt. a (“This provision is new. It clarifies the law.”); *id.* art. 3296 cmt. a (“This Article is new. It clarifies the law.”).

208. *See, e.g., Anding v. Anding*, 37,778-CA, p. 8 n.8 (La. App. 2 Cir. 10/29/03); 859 So. 2d 901, 905-06 n.8 (“The lack of a statement in this regard by the reporter regarding this new article implies that the question of whether the article changes existing law is an open question.”).

revised provision. Even when the comments do not reference cases explicitly, statements that the revision “changes the law” or “does not change the law” are particularly useful for determining whether cases that predate the revision are still relevant or should be disregarded.²⁰⁹

Comments perform still another orienting function by providing information about the origin of legal rules. For example, the comments to Louisiana Civil Code article 477 state that the definition of ownership provided in that article “follows closely the definition in the treatise of Planiol.”²¹⁰ In addition, the reader is informed of “corresponding provisions in modern civil codes,” including the codes of Italy, Greece, Germany, Switzerland, and Québec.²¹¹ Armed with this information, the comparativist (and presumably the judge) can now identify foreign historical, doctrinal, and jurisprudential materials that may aid in her understanding of the revised law.

Comments not only provide roadmaps to civil law institutions, they also quite frequently address the relationship between the Louisiana law and its common law analogues. A rule may be attributed to the common law, signaling that borrowing has occurred.²¹² Or the comments may note that a Louisiana rule, while derived from the civil law, is consistent with the common law approach.²¹³ In other cases the comments serve a distinguishing function, making clear that Louisiana law, in its terminology or approach, quite intentionally departs from the common law.²¹⁴ In the latter case, the comments implicitly signal that common law

209. See, e.g., *Videocipher, Div. of Cable/Home Commc'n Corp. v. Satellite Earth Stations Sese, Inc.*, No. CV88-2815, 1992 WL 208037, at *3 (W.D. La. July 30, 1992) (relying on pre-revision jurisprudence to interpret the meaning of “prompt and easy liquidation” as used in Civil Code article 1902 and noting the article was intended to restate and clarify the law, not change it); *Ward v. Blache*, 466 So. 2d 723, 725 n.1 (La. App. 4 Cir. 1985) (noting, while relying on pre-revision jurisprudence, that “the new statute does not change the law and the Official Comments state that jurisprudence remains relevant”).

210. LA. CIV. CODE art. 477 cmt. b.

211. *Id.* cmt. d.

212. See *id.* art. 1477 cmt. b (noting that Louisiana’s formulation of donative capacity, “[a]lthough new for Louisiana . . . did not spring *ex nihil*. In many respects it is derived from the common-law test for testamentary (donative) capacity.”).

213. See, e.g., *id.* art. 1937 cmt. (noting that the rule that a revocable offer is effective when received is derived from French law but consistent with the common law approach); *id.* art. 2502 cmts. b-c (noting that the transfer of rights without warranty is akin to the common law “quitclaim” deed).

214. See, e.g., *id.* art. 2524 cmt. c (“The seller’s obligation under this Article is not the common law warranty of fitness. At common law the remedies arising from the warranty of fitness offer quasi-delictual overtones entirely absent from this Article.”) (citations omitted).

authorities are not appropriate tools for the application and development of the law.²¹⁵

Moreover, all of this is done in a didactic manner. Comments, after all, are drafted not by legislators, but scholars, and aside from being indicative of the legislature's intent, they are revelatory of the historical trajectory and conceptual organization of the legal institutions they describe. They serve two aims in this regard. First, they are designed to convince the legislator of the wisdom of proposed reforms, which may involve explaining the pressing need for a substantive change or reassuring that despite revision there is nothing new under the sun. And second, they seek to guide lawyers and judges following the law's enactment. This is done not merely to benefit the user; legal scholars, and most of all Law Institute reporters, have a keen interest in directing the law's future development, whether to achieve desirable policy objectives or simply to ensure clarity and methodological integrity in the law.

One particularly representative example of the expository function of the comments are those accompanying the 2008 revisions of Civil Code article 466.²¹⁶ The article sets forth the definition of "component parts of a building or other construction"—a matter of fundamental importance in Louisiana property law and a subject that has been in a state of flux for several decades, having been first enacted in 1978, amended in 2005 and 2006, and again revised in 2008.²¹⁷ The 2008 revision comments accompanying the reforms are lengthy, consisting of nearly two pages of printed text.²¹⁸ First, comment (a) appropriately orients the law in time, explaining its relation to past law with extensive and helpful references to both jurisprudence and doctrine:

This Article represents a fresh start in an area of law that has been the focus of extensive academic and jurisprudential debate. Cf. *Willis-Knighton Medical Center v. Caddo-Shreveport Sales and Use Tax*

215. See, e.g., *id.* art. 797 cmt. c (noting that "[o]wnership in indivision is the only type of co-ownership" and stating affirmatively that "[j]oint tenures and the common law doctrine of estates are not recognized in Louisiana").

216. LA. CIV. CODE art. 466 cmts. (2008).

217. See Act No. 632, 2008 La. Acts 2573; Act No. 765, 2006 La. Acts 2693; Act No. 301, 2005 La. Acts 1772; Act No. 728, 1978 La. Acts 1900; see generally John A. Lovett, *Another Great Debate?: The Ambiguous Relationship Between the Revised Civil Code and Pre-Revision Jurisprudence as Seen Through the Prytania Park Controversy*, 48 LOY. L. REV. 615 (2002) (providing an excellent discussion of the historical trajectory of the law of component parts).

218. LA. CIV. CODE art. 466 cmts. a-i 2008.

Commission, 903 So. 2d 1071 (La. 2005) and *Prytania Park Hotel Ltd. v. General Star Indemnity Co.*, 179 F.3d 169 (5th Cir. 1999) with *Equibank v. United States Internal Revenue Service*, 749 F. 2d 1176 (5th Cir. 1985) and *LaFleur v. Foret*, 213 So. 2d 141 (La. App. 3 Cir. 1968). See John A. Lovett, Another Great Debate?: The Ambiguous Relationship Between the Revised Civil Code and Pre-Revision Jurisprudence as Seen Through the Prytania Park Controversy, 48 Loy. L. J. 615 (2002); A. N. Yiannopoulos, Of Immovables, Component Parts, Societal Expectations and the Forehead of Zeus, 60 La. L. Rev. 1379 (2000); A. N. Yiannopoulos, Property § 142.5, 2 La. Civil Law Treatise (4th Ed. 2001). Prior jurisprudence remains relevant only to the extent that it employs principles consistent with those provided under this Article.²¹⁹

The remaining comments—(b) through (i)—all seek to elucidate the law, with frequent references to past legislation, doctrine, and jurisprudence. Comment (b) discusses the “substantial damage” test, noting that it is “carried forward from the prior Article without change in the law.”²²⁰ Comment (c) makes the case that civil law doctrine supports the notion that loosely attached things may serve as component parts of a building “even though substantial damage would not result from their removal.”²²¹ Comment (d) provides a cross-reference to Civil Code article 4, which refers to “prevailing usages,” a concept upon which the societal expectations test is built.²²² Examples of the proper application of the rules are provided in comments (e) and (g).²²³ Comment (f) provides detailed analysis of the prior cases,²²⁴ while comment (h) discusses the meaning of “physical attachment.”²²⁵ A final comment (i) addresses the scope of the article as it pertains to immovables only, with several cross-references to guide the reader.²²⁶ These comments do not provide an exhaustive discourse on the institution of component parts.²²⁷ However, they do provide numerous references with which the lawyer, judge, or aspiring scholar may chart a course through this challenging area of the law.

219. *Id.* cmt. a.

220. *Id.* cmt. b.

221. *Id.* cmt. c.

222. *Id.* cmt. d.

223. *Id.* cmts. e, g.

224. *Id.* cmt. f.

225. *Id.* cmt. h.

226. *Id.* cmt. i.

227. Indeed, no revision comments could ever accomplish such a herculean task, given the complexity of this area of the law.

2. Extension of the Text

While the majority of legislative comments are committed to exposition, many comments do much more than simply contextualize the law. Comments may also extend or complement the law by grafting on substantive content that is not found in the text. Comments of this sort act as gap-fillers, suggesting solutions to legal problems that did not make their way into the text and making explicit various connections to which the text points only implicitly, if at all.

Opening the Civil Code to the first articles of the Preliminary Title reveals comments of this type. Article 1 announces that, in Louisiana, “[t]he sources of law are legislation and custom.”²²⁸ Articles 2 through 4 go on to define legislation and custom and provide that, in the event of a gap in the law, the court must “proceed according to equity.”²²⁹ Nowhere in the text are secondary, nonbinding sources of law addressed. Also not discussed are sources of law superior to legislation. Instead, this more comprehensive treatment of the theory of sources of law is relegated to the comments, which address the relationship of the enumerated sources to jurisprudence and doctrine, as well as the state constitution, federal law, and international treaties.²³⁰

The comments accompanying Civil Code article 1479’s recognition of undue influence also readily exemplify the expansive power of comments. As discussed above, the text of the article is scant, consisting only of a single sentence recognizing the nullity of a donation procured through influence “that so impaired the volition of the donor as to substitute the volition of the donee . . . for the volition of the donor.”²³¹ The article reveals none of the complexity surrounding the doctrine of undue influence nor of the legislative intent behind its introduction into the law. Moreover, it is the comments, not the legislative text, that perform the labor of incorporating the common law doctrine (and common law terminology) of undue influence into Louisiana law.²³²

Yet another example of a comment extending the law is found in the law of Obligations in General. Civil Code article 1803 addresses

228. LA. CIV. CODE art. 1.

229. *Id.* arts. 2-4.

230. *Id.* art. 1 cmts. b, d.

231. *Id.* art. 1479.

232. *See id.* cmt. b (summarizing the subjective elements of undue influence found in common law cases and instructions to juries and using the phrase “natural object of a testator’s bounty,” which is not found in the Civil Code).

the effect of remission of debt by an obligee in favor of one of several solidary obligors.²³³ According to the article, a remission “benefits the other solidary obligors in the amount of the portion of that obligor.”²³⁴ The comment goes on to provide a rule that the article does not: “In case of insolvency of a solidary obligor after the obligee has remitted the debt in favor of another, the loss must be borne by the obligee.”²³⁵ Thus, again, the comment supplies a rule that is neither expressly provided by nor readily apparent from the legislative text.

3. Subversion of the Text

A third variety of comments, like those that expand the legislation, provides rules and distinctions that are not stated in the legislative text. However, unlike the comments described above, this third type of comment subverts the legislation, espousing counter-rules and exceptions that are directly contrary to the legislative text.

Quite often, the uncodified counter-rule is sourced in jurisprudence. For example, comment (b) to Civil Code article 1837 provides a rule in direct contravention of the text of the law. Found within the chapter on Proof of Obligations, article 1837 defines the act under private signature.²³⁶ The text provides that “[a]n act under private signature need not be written by the parties, but must be signed by *them*.”²³⁷ The plural form of the last word of the provision clearly suggests that if the act is multilateral, then *all* parties must affix their signatures to the act. Nevertheless, comment (b) provides quite the opposite, stating:

This Article is not intended to change the jurisprudential rule that an act under private signature is valid even though signed by one party alone, when the party who signed it asserts the validity of a commutative contract contained in the writing against a party who did not sign it but whose conduct reveals that he has availed himself of the contract.²³⁸

The comment goes on to cite six cases supporting this counter-textual position.²³⁹

233. *Id.* art. 1803.

234. *Id.*

235. *Id.* cmt. d. This rule may be viewed as counter-textual rather than merely an extension of the law when contrasted with the affirmative statement found in Civil Code article 1806 that the loss “must be borne by the other solidary obligors in proportion to their portion.” *Id.* art. 1806.

236. *Id.* art. 1837.

237. *Id.* (emphasis added).

238. *Id.* cmt. b.

239. *Id.*

Another example of comments contradicting text appears in the comments addressing the law of error. Civil Code article 1949 sets forth a single framework for determining whether error vitiates consent.²⁴⁰ According to that article, consent is vitiated only when two criteria are met: "Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party."²⁴¹ The comments, on the other hand, do not approach error as a unitary entity but instead distinguish between bilateral and unilateral error. In the case of the former, comment (d) instructs:

The granting of relief for error presents no problem when both parties are in error, that is, when the error is *bilateral*. When that is the case the contract may be rescinded, as when the parties misunderstood each other at the time of contracting or when they were misinformed because of the error of a third party. As an alternative, the instrument that contains the contract may be reformed in order to reflect the true intent of the parties.²⁴²

The comment goes on to explain that it is only when the error is *unilateral* that courts resist granting relief because "granting relief to the party in error will unjustly injure the interest of the other party if he is innocent of the error."²⁴³ The comment continues, quoting from a pre-revision case: "The jurisprudence . . . establishes that a contract may be invalidated for unilateral error as to a fact which was a principal cause for making the contract, where the other party knew or should have known it was the principal cause."²⁴⁴ The comment thus suggests, albeit indirectly, that the criteria for relief articulated by the text of article 1949 are applicable in cases of *unilateral* error only, even though this distinction, seemingly fundamental, is never made in the text.

Language in the comments addressing the effects of error also contain counter-textual rules. According to the legislative text, when error vitiates consent, the contract is considered relatively null—a designation that usually leads to rescission of the contract upon the request of the party in error.²⁴⁵ There are, however, several recognized exceptions to this general rule of rescission. First, "[a] party may not

240. *Id.* art 1949.

241. *Id.*

242. *Id.* cmt. d (emphasis added) (internal citations omitted).

243. *Id.* (emphasis added).

244. *Id.* (quoting *Nugent v. Stanley*, 336 So. 2d 1058, 1063 (La. App. 3 Cir. 1976)).

245. *See id.* arts. 2031, 2033.

avail himself of his error if the other party is willing to perform the contract as intended by the party in error.”²⁴⁶ Second, “[t]he court may refuse rescission when the effective protection of the other party’s interest requires that the contract be upheld.”²⁴⁷ A third exception appears not in the text of the law but in the comments to article 1952. Comment (d) provides that, “[i]n determining whether to grant rescission or, when rescission is granted, whether to allow any recovery to the party not in error, the court may consider whether the error was excusable or inexcusable.”²⁴⁸ Comment (d) goes on to state that the doctrine of inexcusable error enjoys ample support in continental civilian doctrine and in Louisiana jurisprudence.²⁴⁹ There is no question that a limitation on rescission for inexcusable errors is both sensible and well-established; however, despite its firm hold within the broader doctrine of error, “inexcusable” error did not make its way into the text of the law.²⁵⁰

Before leaving this topic of the comments’ relationship to the text, it must be admitted that the line between an expository comment and one that extends the law is a thin one, as is that between an extending comment and one that subverts the text. It is not a goal of this Article to identify with precision the contours of these three categories of comments. Rather, fluidity between exposition, extension, and subversion illustrates that comments, that appear to provide innocuous explanation of the law may easily introduce into the statutory compilation a layer of rules and counter-rules that must be harmonized with the text in the same manner as other statutory enactments.

IV. THEORETICAL AND PRACTICAL CRITIQUES OF THE COMMENTS

It can no longer be denied that comments are an authoritative source of legal rules and norms, one that is carefully cultivated by the

246. *Id.* art. 1951.

247. *Id.* art. 1952.

248. *Id.* cmt. d.

249. *Id.* (citing *Watson v. Planter’s Bank of Tenn.*, 22 La. Ann. 14 (1870); JACQUES GHESTIN, *LA NOTION D’ERREUR DANS LE DROIT POSITIF ACTUEL* 146-65 (1963); Saúl Litvinoff, “*Error*” in *the Civil Law*, in *ESSAYS ON THE CIVIL LAW OF OBLIGATIONS* 222, 226-69 (Joseph Dainow ed., 1969); 6 MARCEL PLANIOL & GEORGES RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 227-29 (Paul Esmein ed., 2d ed. 1952)).

250. *Id.* This is so despite the fact that the remainder of the same comment is dedicated to addressing an exception that was clearly codified: the court’s discretion to consider whether the party not in error suffered a detrimental change in position that militates against rescission of the contract. *Id.*

Law Institute and legislature and which courts rely upon and implicitly trust. Moreover, it is clear that comments, though *not law*, provide a vast infrastructural system for legislation. Comments contextualize legislation, ease its integration into the existing legal fabric, and guide its application and development. They fill gaps and make connections between legislated rules. They preserve uncodified exceptions to and variations on statutory rules when the text is not sufficiently nuanced.

Astonishingly, this has come to be the state of affairs without any serious debate regarding the propriety of this outcome. Historically, Louisiana scholars envisioned a cost-benefit analysis for the comments, whereby their perceived departure from traditional civilian code methodology was outweighed by their practical use. However, to date this cost-benefit analysis has been lacking. In truth, neither the theoretical nor practical shortcomings of the comments have ever been fully recognized. For the widespread and pervasive reliance upon comments to be defensible, this calculus must be complete.

A. *Theoretical Considerations*

Louisiana jurists tend to view comments as benign, even beneficial addenda to the text of the law. However, an examination of the shortcomings of the comments reveals that the drafting and publication of comments comes at a cost of some measure to our ideals: codification in the civilian style, the democratic legitimacy of legislation, and the transparency and accessibility of law. While these costs are not insurmountable, they must be recognized and examined.

1. Ideal Codification

Since the publication of the comments to the Louisiana Criminal Code, Louisiana scholars have lamented that the publication of comments alongside the law deviates significantly from accepted civilian drafting techniques.²⁵¹ In civil law jurisdictions, legislation is typically drafted and promulgated without accompanying comments.²⁵² This is not to say that commentaries are not prepared during the revision process; rather, quite often the principal drafter of the projet prepares an extensive *exposé des motifs* to explain and

251. See Morrow, *supra* note 27, at 498; see also *supra* notes 42-43 and accompanying text (discussing the perceived deviation from civilian drafting techniques).

252. See Yiannopoulos, *supra* note 54, at 406; see also Zengel, *supra* note 41, at 959 (noting “the use of comments in a civilian code is extraordinary”).

contextualize proposed reforms for legislators and, if the projet is adopted, the bench and bar.²⁵³ However, these works, though presented to the legislature, are published in treatises and monographs, not in official compilations of the law.²⁵⁴ This seemingly narrow distinction has been viewed as substantial by critics of Louisiana's practice.²⁵⁵

The civil law tradition's separation of law and commentary is deliberate; it furthers the goals of codification as a legal methodology. Fundamentally, a civil code should consist of clear, concise statements of law.²⁵⁶ The aim is not to legislate individual cases within the code itself, but to lay down general principles that may be later employed by the judge and the jurist to find solutions to specific disputes.²⁵⁷ In part, brevity of expression ensures the simplicity and elegance of the code, which should in theory be accessible by all members of a society and not merely the trained legal elite.²⁵⁸

Even before considering the problems posed by the contents of comments, recognition must be given to the fact that their very volume stands in the way of ideal codification. The practice in Louisiana of printing revision comments in official compilations of law adds considerably to the length and complexity of the text—"outrageously" so, according to one scholar, who observed, "The revised code should not be a textbook."²⁵⁹ And, while experienced attorneys and scholars may find the comments instructive, their detailed references to jurisprudence, prior legislation, doctrinal theories, and other legal institutions do little to elucidate the law for the layperson or inexperienced lawyer. More concerning, many comments contain so many oblique references to prior law and outmoded legal institutions that even seasoned legal experts find them difficult to decipher.

Generality of expression not only ensures the code's aesthetic appeal, it serves functional aims as well. Excessive detail undermines

253. See Morrow, *supra* note 27, at 498.

254. Yiannopoulos, *supra* note 54, at 406; see also Zengel, *supra* note 41, at 961 (stating comments "should be published separately as doctrinal writings").

255. See Morrow, *supra* note 27, at 498; Yiannopoulos, *supra* note 54, at 406; Zengel, *supra* note 41, at 961.

256. Levasseur, *supra* note 197, at 697-98.

257. Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1082 (1988).

258. See Ferdinand Fairfax Stone, *A Primer on Codification*, 29 TUL. L. REV. 303, 307 (1955). It should be mentioned that although this may be viewed as a recognizable aim of codification in the French tradition, it is not universal in the civil law world.

259. Zengel, *supra* note 41, at 960.

the code by anchoring it to particular social circumstances; as a society evolves, detailed provisions may become outdated and eventually obsolete. Moreover, law that prescribes outcomes hamstring judicial creativity, preventing the judge from adapting the law to circumstances that were unforeseen at the time the law was drafted.²⁶⁰ Generality also must be understood in relation to another hallmark of a civil code's design: systematization.²⁶¹ While individual provisions may be sparse, they are not designed to be read in isolation. Instead, the judge is to read the civil code as a single statutory enactment, assembling solutions to legal disputes by pulling principles from across the whole of the law.²⁶²

When comments are appended to the text in official publications, they anchor the law in a way that undermines these functional aims of generality. Comments frequently provide specific examples of the law's proper application. Given that judges are so heavily influenced by the comments, these examples pose nearly the same risk of rendering the law obsolete as if they were written into the text. And, as comments are generally retrospective, focusing on *past* legislation, *past* jurisprudence, and *past* doctrinal exposition, they may discourage judicial innovation as social needs evolve.

Moreover, the provision of solutions in the comments disincentives the vital civil law technique of solving problems by reasoning across the whole of the law. Terse cross-references to other provisions of law contribute to this problem. While they may provide a good starting point for textual analysis, these references are necessarily incomplete; even lengthy comments cannot effectively reveal the interrelationship between a single provision and all other related articles. As a result, lawyers and judges relying on the comments may be less inclined to explore for, or have confidence in, more creative, more nuanced, and perhaps even more accurate solutions to the problems before them.

According to some Louisiana civil law scholars, the most salient feature of an ideal civil code is its comprehensive nature. As articulated by Yiannopoulos, "Civil codes are conceived as comprehensive enactments, designed to be complete within their area of application, and intended to break with the past."²⁶³ The inclusion

260. See Bergel, *supra* note 257, at 1082-83.

261. See *id.* at 1083.

262. See *id.*

263. A.N. Yiannopoulos, *The Civil Codes of Louisiana*, in LOUISIANA CIVIL CODE, *supra* note 96, at LI, LVI.

of revision comments in the Louisiana Civil Code undeniably prevents it from attaining this ideal. Lawyers and judges are all but compelled to consult the comments given their physical proximity to the text. The comments then point the reader to other subsidiary sources of law: repealed or suppressed legislation, legal doctrine, and jurisprudence.²⁶⁴ Indeed, as Professor Vernon Palmer has aptly observed, “[O]ne cannot know the ‘Code’ without reading the comments, and then one must read the sources that the comments say to read.”²⁶⁵

However, while the use of comments may seem at odds with the archetypal code, the ideals of codification should not be overstated, nor should the conflict between comments and codification be unduly problematized.²⁶⁶ Although the practice of publishing comments thwarts perfect clarity, generality, systematization, and comprehensiveness, no civil code lives up entirely to these ideals.²⁶⁷ Indeed, despite the rhetoric of codification, the modern civil law recognizes that codes are not designed to exist in legal vacuums in which prior legislation and subsidiary sources of law are entirely ignored, or a world in which legal problems are solved with the code and logic alone.²⁶⁸ The persistence of legal norms arising from uncodified statutes, jurisprudence, and legal doctrine is inevitable, if not also desirable.²⁶⁹

Louisiana’s status as a mixed jurisdiction provides additional justification for departing from puritan civilian drafting principles to allow the inclusion of the comments. As the drafters of the Louisiana codes have long understood, judicial reliance on jurisprudence necessitates explanations of the relationship between the prior jurisprudence and the new law. While reliance on the comments may be somewhat incongruous with Louisiana’s theory of sources of law, if suddenly the comments were no longer included alongside revisions of the law, this omission would do little to curb courts’ overreliance on

264. See Palmer, *supra* note 200, at 253-55.

265. *Id.* at 255.

266. See, e.g., Julio C. Cueto-Rua, *The Civil Code of Louisiana Is Alive and Well*, 64 TUL. L. REV. 147, 166-67 (1989) (refuting Professor Palmer’s theory that reliance on jurisprudence and revision comments has produced two codes).

267. Moreover, these ideals of codification do not apply equally to every code. For example, the German Civil Code is far less general and abstract than the French Code civil. See Hein Kötz, *Taking Civil Codes Less Seriously*, 50 MOD. L. REV. 1, 7-9 (1987).

268. See *id.* at 11; Cueto-Rua, *supra* note 266, at 166-67.

269. See Kötz, *supra* note 267, at 11 (“Indeed all codes, partly from age, partly from the intention of their draftsmen, partly from mere oversight, leave wide gaps which cannot be filled by the available statutory rules.”).

case law. Indeed, such a change of course may even increase reliance on jurisprudence because, without comments, the judge would often have *no* explanation of the proper interpretation of the law.

Moreover, while the official publication of comments is not the norm in the civil law tradition, Louisiana is not entirely alone in this practice. For example, the Argentinian Código Civil, which became effective in 1871, contained extensive comments—referred to as “notes”—authored by its principal drafter, Dalmacio Vélez Sarsfield.²⁷⁰ These notes provide information regarding the sources from which the provisions of the Civil Code were drawn,²⁷¹ as well as expository discussions of the Roman law and its various interpretations.²⁷² As early as the beginning of the twentieth century, Sarsfield’s notes were reportedly regarded as “the most abundant source of help to judges, and practitioners for the study of the code.”²⁷³ While Argentina’s tradition of comments promulgated alongside the text of the law endured for nearly 150 years, it has recently come to an end; in 2015, Argentina enacted a new civil and commercial code, the Código Civil y Commercial de la Nación, which is devoid of explanatory notes.²⁷⁴

More recently, the 1993 revision of the Civil Code of Québec was accompanied by official comments prepared and published by the Ministère de la Justice.²⁷⁵ As in Louisiana, pressure from the legal community in Québec prompted the publication of an “official” commentary to accompany the Code.²⁷⁶ The official status of the commentaries in Québec is similar to that of Louisiana’s legislative comments—not law, but merely interpretative aids.²⁷⁷ However, as to

270. See generally CÓDIGO CIVIL [CÓD. CIVIL] [CIV. CODE] (J. Lajoune & Cía. eds., 1939) (Arg.); Phanor James Eder, *The Argentine Civil Code*, 1 A.B.A. J. 91, 94-96 (1915) (describing the Sarsfield’s work).

271. See, e.g., CÓD. CIVIL art. 1 note.

272. See, e.g., *id.* art. 3 note.

273. Eder, *supra* note 270, at 101.

274. CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. CIV. Y COM.] [CIVIL AND COMMERCE CODE] (2015) (Arg.).

275. See MINISTÈRE DE LA JUSTICE, COMMENTAIRES DU MINISTRE DE LA JUSTICE: LE CODE CIVIL DU QUÉBEC (Publications du Québec ed., 1993).

276. See Pierre Legrand, *Codification and the Politics of Exclusion: A Challenge for Comparativists*, 31 U.C. DAVIS L. REV. 799, 802 (1998).

277. As articulated by a 1997 decision of the Supreme Court of Canada:

Of course, the interpretation of the *Civil Code* must be based first and foremost on the wording of its provisions. That said, however, and as noted by Baudouin J.A. in the judgment under appeal, there is no reason to systematically disregard the Minister’s commentaries, since they can sometimes be helpful in determining the legislature’s intention, especially where the wording of the article is open to

be expected, the unofficial story may be more complex: as is the case in Louisiana, some scholars are critical of the comments.²⁷⁸

Although beyond the scope of this Article, detailed comparative analysis of the Argentinian and Québécois experiences with legislative comments is vital to an understanding of the relationship between comments and civil codes, as is further study of comments and other scholarly writings, official or otherwise, in other civil law jurisdictions. One would expect to observe variety among the ways that comments, *exposés des motifs*, and other scholarly commentaries on legal enactments are made and published. An examination of this variety may enable the development of drafting and publication techniques that safeguard against the deterioration of codes. Moreover, comparative study should focus on the use of comments and similar materials by courts, lawyers, and scholars, as well as the deference they are afforded vis-à-vis other sources of law. Observation of the law in action should provide further insight into the extent to which the ideals of codification are honored or breached in their application. This insight in turn can inform a realistic assessment of whether the threats posed by comments to civilian methodology are more imagined than real.

For the present, it is sufficient to observe that even while the archetypal code may be out of reach—for any civil law jurisdiction, and even more so for Louisiana—the ideals of codification remain sound drafting principles that should generally be honored.²⁷⁹ And while neither the publication of the comments nor their use by courts constitutes a crisis—methodological or otherwise—if this supplemental source of law and its relationship to codified law is not well understood and carefully managed, then its proliferation may have unintended consequences for the Civil Code. As stewards of the civil law tradition, Louisiana lawyers, judges, and scholars have a responsibility not only to appreciate legislative comments but to

differing interpretations. However, the commentaries are not an absolute authority. They are not binding on the courts, and their weight can vary, *inter alia* in light of other factors that may assist in interpreting the *Civil Code*'s provisions.

Doré v. Verdun (City), [1997] 2 S.C.R. 862, 873 (Can.) (citation omitted); see Stéphane Beaulac, *Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?*, 43 MCGILL L.J. 287, 308 (1998).

278. See, e.g., John E.C. Brierley, *Preface*, 39 MCGILL L.J. 743, 745 (1994) (discussing the “ambiguous status” attaching to the “official” comments, which “render the distinction between existing law and innovation often obscure”).

279. See Zengel, *supra* note 41, at 960 n.81.

carefully curate them, so that those consequences may be anticipated and minimized.

2. Legislative Integrity and Democratic Legitimacy

While Louisiana scholars have long recognized the threats posed by comments to the Civil Code, less attention has been given to a more fundamental concern: the comments' capacity to undermine the very ideal of legislative integrity. While this concern is related to the comments' effect on codified law, it is conceptually distinct and should be independently explored.

First, comments pose a threat to Louisiana's source-ranking system. Louisiana, like other civil law jurisdictions, articulates a theory of sources of law according to which the designation of binding "law" is restricted to the constitution, legislation, and custom.²⁸⁰ Other legal sources—jurisprudence, doctrine, usages, and equity—are relegated to the status of secondary, nonbinding authorities.²⁸¹ In a conflict between the sources, it is legislation, not doctrine, that should prevail. Our experience with the comments reveals that on occasion Louisiana courts improperly elevate the comments to the level of the legislative text. While explicit disregard for the source hierarchy is rare, the existence of counter-textual comments is not, and each instance of counter-textualism appears to violate the theory of sources.

More generally, when considering the relationship between comments and legislation, it becomes clear that as a practical matter, the comments occupy undefined territory, an interstice in our source-ranking regime. Officially, comments are a form of legal doctrine—expositions drafted by legal scholars. They are expressly *not law*, as the legislature has repeatedly denied their force as legislation. And yet, their making and promulgation suggest that they do carry some legislative authority. Perhaps more troubling is the fact that, unlike members of the legislature or even the judiciary, members of

280. LA. CIV. CODE art. 1 cmt. b (2017) ("According to civilian doctrine, legislation and custom are authoritative or primary sources of law."). Comment (d) acknowledges that while article 1 references only "legislation" and "custom," making no reference to constitutional law, federal legislation, executive orders, international treaties, and the Louisiana Constitution, those sources of law are "the prius of all Louisiana legislation and need not be mentioned in Article 1 of the Civil Code."). *Id.* cmt. d.

281. *Id.* cmt. b (contrasting primary sources with "persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom").

the Law Institute are not elected and thus not democratically accountable to the people governed by the laws (and comments) that they draft.

Thus far, legitimacy concerns have largely been ignored by Louisiana scholars, who have focused exclusively on the threat of the comments to Louisiana's codified system of law. Nevertheless, the threat posed by comments to the legislative process should not be understated. Comments accompany many statutory enactments that exist outside of the Civil Code. Are these comments exempt from criticism because they do not concern a "code" in the civilian sense? Regardless of the form that legislation takes, if comments obscure, expand, or contradict the law, the will of a small group of Louisiana's legal elite is allowed to obscure that of the elected legislature.

The authenticity of this concern is confirmed through comparative analysis focused on the common law. In the United States, comments accompany many sources of legislation, including the Uniform Commercial Code, the Federal Rules of Civil Procedure, and the Federal Sentencing Guidelines. Addressing these forms of commentary, American scholars have expressed concern that the comments are formed outside of the democratic processes established for legislation and routinely expand on or restrict the meaning of the text.²⁸² Of particular concern is the fact that comments lack the constitutional safeguards that exist to ensure the legitimacy of law.²⁸³ Without democratic accountability, it is feared that drafters will fall victim to political pressures and personal biases.²⁸⁴

Like concerns surrounding the ideals of codification, doubts regarding the legitimacy of comments should not be inflated. It may be that Louisiana's practice of passing comments before the legislature within the bills to which they appertain lessens any concern that they are drafted by a small group of unelected citizens rather than by the legislature. After all, the legislature not only reviews the comments, it has on at least a few occasions shown that it is willing to exercise some oversight of their content. Moreover, the Law Institute is an official state agency, tasked with authority to oversee the coordination of the law. While its membership may be appointed rather than elected, legitimacy concerns here are arguably less than are regularly tolerated with respect to state and federal

282. See, e.g., Nigel Stark, Note, *Unofficial Official Comments*, 11 TEX. REV. L. & POL. 479, 480-81 (2007).

283. See *id.* at 488-89.

284. See *id.* at 493.

agency rulemaking. On the other hand, it must be remembered that in most cases, the legislature does not permit revision of the comments during the legislative process and affords wide latitude to the Law Institute to revise comments following the law's enactment. Within this reality, apprehension that the writings of a few elite scholars may undercut the legislative will should not be discounted as formalism.

One final solace is the recognition that law, at least in the living, applied sense, is never made by the legislature alone but is instead fashioned through interaction between legislators, the judiciary, scholars, and private actors.²⁸⁵ And while legislative text may trump subsidiary sources in a contest of rank, one can never predict how the law will be applied without familiarity with secondary texts and historical context.²⁸⁶ Said another way, doctrine always has been and will continue to be vital to the understanding and sensible application of law—and to a large extent, whether that doctrine takes the form of legislative comments is immaterial.

3. Accessibility and Transparency

Comments suffer yet another problem of legitimacy distinct from the identity of their drafters: neither the process of their making nor their publication is entirely transparent. Few practitioners and judges are fully aware of the process by which comments are made, published, and revised. And, with rare exceptions, the identity of the drafters of comments is not well known, as the comments are not attributed to individuals, but to the Law Institute as a whole.²⁸⁷

Moreover, although comments are printed in both official and unofficial publications of the law, they are not readily available for public viewing on the legislature's website. A search using the Louisiana legislature's "Louisiana Law Search" page yields only the text of the law, not the comments.²⁸⁸ Comments do appear in acts of the legislature, available on the legislature's "Bills Search" page.²⁸⁹ However, reading entire bills to find the comments to a single

285. See Jan Smits & Caroline Colomme, *The Reform of the French Law of Obligations*, 23 MAASTRICHT J. EUR. COMP. L. 1040, 1049 (2016).

286. *Id.*

287. This is not without exception: in 1942, the legislature requested that the drafters of the Criminal Code be recognized for their preparation of the comments. See S. Con. Res. 12, 1942 Leg., 11th Reg. Sess. (La. 1942).

288. See *Search Louisiana Laws*, LA. ST. LEGISLATURE, <http://www.legis.la.gov/legis/LawSearch.aspx> (last visited Sept. 2, 2017).

289. See *Bill Search*, LA. ST. LEGISLATURE, <http://www.legis.la.gov/legis/BillSearch.aspx> (last visited Sept. 2, 2017).

provision is not only time consuming and difficult, it is also futile given the Law Institute's authority to revise comments after enactment and the frequency with which it does so.²⁹⁰ The practical consequence of this state of affairs is that the public, to access comments, must rely on sources of legislation prepared by commercial publishers.

Nevertheless, the issue of accessibility is perhaps the least worrying drawback of the comments. For one thing, while the Law Institute's procedures may not be well known in the legal community or by the public, they are hardly secret. The Law Institute is, after all, a public body which is subject to both the Louisiana Open Meetings Law and the Public Records Law.²⁹¹ As a result, all meetings of the Law Institute (both committee meetings and meetings of the Council) are noticed and open to the public. In addition, all Law Institute materials and records may be accessed through the making of public records requests. While the identities of reporters are not given in official publications of the law, they are readily ascertainable through inquiry to the Law Institute and are even listed on the Law Institute's own website, as are the identities of all committee members and members of the Council.²⁹² Moreover, given the Law Institute's institutional review and endorsement of draft legislation and comments, the association of comments with individual reporters is arguably unnecessary, if not misleading.

However, while transparency concerns about the comments may be minimal, the importance of comments in the day-to-day practice of law and the resolution of legal disputes warrants consideration of whether comments should be more prominently recognized and promoted as a source of law and, if so, how that might be accomplished. The Law Institute, the legislature, and even legal publishers have a role to play in ensuring the comments and the process of their making is as accessible as any other source of written law.

290. As is discussed herein, comments are often revised extensively prior to publication. See discussion *supra* Part. II.B.3.

291. LA. REV. STAT. § 24:202(G) (2017).

292. See *Council Members*, LA. ST. L. INST., <http://www.lsl.org/council-members> (last visited Sept. 2, 2017); *Committees*, *supra* note 69.

B. Practical Shortcomings

Throughout their history, the comments have been justified by their practical advantages. Revision comments have great potential to assist practitioners and judges in their understanding and application of law, particularly when revisions are extensive. Students, too, may benefit from their guidance. However, this promise of the comments is not always achieved. No formal standards govern the drafting of comments, and as a result comments are inconsistent in their style and quality. Once they are published, comments are usually not revised, and as a result many comments have become stale or even inaccurate over time. Our occasional neglect of the comments has resulted in errors, inconsistencies, and historical anachronisms, all of which both undermine the purpose of the comments and prevent their practical utility from counterbalancing their philosophical costs. Lamentably, our reliance on the comments at times even impedes the quality of the law—both the legislative text as it is drafted and the development of the law through its application by the courts.

1. Imperfections in the Comments

The principal purpose of the legislative comments is to elucidate the law—explain the relationship between past and present, point to jurisprudential examples of codified rules, and provide examples of the proper application of the text. While many comments perform these functions flawlessly, many others fall short of these objectives. Distressingly, comments are too often incorrect in an objective sense, citing cases for principles they do not contain, misstating the historical course of the law, or wrongly stating that a revision does or does not change the law. Inaccurate comments such as these muddy the legal waters and create interpretative problems where the text, standing alone, would not. While comprehensive itemization of erroneous comments is beyond the scope of this work, a sampling of inaccuracies illustrates the variety of the flaws.

First, some comments are facially inaccurate, articulating principles without support in the law and citing cases to support propositions for which they do not stand. Take for example comment (b) to Civil Code article 2628. This comment states that “[a] right of first refusal or an option to buy for a perpetual or indefinite term is null” and cites several cases in support of this proposition.²⁹³ The

293. LA. CIV. CODE art. 2628 cmt. b (2017).

cases support the nullity of a perpetual or indefinite *option*; however, none of the cited cases supports the application of that rule to *rights of first refusal*.²⁹⁴ While an argument may be made that both legal certainty and the policy against keeping property out of commerce militate in favor of extending the rule beyond options to other agreements preparatory to a sale, the fact remains that despite the dogmatic statement in the comments, neither the text of the Civil Code nor its interpretative jurisprudence requires this result.²⁹⁵

Other comments, although accurate when first written by a project's reporter, become inaccurate or misleading if they are not carefully updated when the text of the law is revised during the legislative process. These comments faithfully expound upon legal rules that never became law. Comment (b) to Civil Code article 2545 is of this type. The article, which addresses the seller's liability for redhibitory defects, provides that "[a] seller is deemed to know that the thing he sells has a redhibitory defect when he is a manufacturer of that thing."²⁹⁶ The comment, however, provides that a manufacturer is merely "presumed to know" of defects.²⁹⁷ While this may seem like a semantic trifle, the difference in language reflects an indefensible mistake. Although early Law Institute drafts of the text of article 2545 provided that manufacturers were merely "presumed" to know of redhibitory defects, the final version presented to the legislature provided that the manufacturer's knowledge is "deemed." It thus becomes clear that the comment's language, though deliberately chosen, was never revised to reflect the text as enacted. Moreover, the

294. Happily, Louisiana courts have recognized this error. See *Gorum v. Optimist Club of Glenmora*, 99-1963, p. 6 (La. App. 3 Cir. 8/30/00); 771 So. 2d 690, 694.

295. This is not the only instance of an entirely erroneous comment. Another error that has been detected by the courts appears in the comments to Civil Code article 2534, which provides the prescriptive periods applicable to actions for redhibition. LA. CIV. CODE art. 2534. Comment (b) sets forth a contra-textual cap on the prescriptive period, citing Civil Code article 3499 for the proposition that "an action in redhibition prescribes ten years from the time of perfection of the contract regardless of whether the seller was in good or bad faith." *Id.* art. 2534 cmt. b. This legal proposition is incorrect, as article 3499 states that the prescriptive period for personal actions is ten years "[u]nless otherwise provided by legislation." *Id.* art. 3499. Recent decisions have indicated an unwillingness to follow the comment's directive. See, e.g., *Mouton v. Generac Power Sys., Inc.*, 2014-350, p. 6 (La. App. 3 Cir. 11/5/14); 152 So. 3d 985, 989-90 (determining that a buyer's reliance on comment (b) to provide a prescriptive period for an action in redhibition was "misplaced"). Other decisions have evidenced some confusion over the issue. See, e.g., *Tiger Bend, L.L.C. v. Temple-Inland, Inc.*, 56 F. Supp. 2d 686, 690 (M.D. La. 1999) (discussing the comment and finding it to be "superfluous and unnecessary").

296. LA. CIV. CODE art. 2545.

297. *Id.* art. 2545 cmt. b.

distinction is not one without a difference: while a presumption may be rebutted, a fact that is deemed is not susceptible of refutation.

Although not entirely inaccurate, some comments may contain vague or misleading information about the source of a new provision of law. These obfuscations make it difficult for courts to draw upon doctrinal materials relevant to the source provision for guidance in interpretation. One noteworthy example is drawn from the law of sales. Articles 2601 and 2602 of the Civil Code are well known as the Louisiana analogues of UCC section 2-207.²⁹⁸ Indeed, the structure and language of the articles is quite similar, though not identical, to the UCC text.²⁹⁹ Although the comments to the new articles are extensive, they reveal nothing of the undeniable influence of the common law on the Louisiana provisions.³⁰⁰ The omission must have been intentional and was presumably designed to prevent courts from relying upon common law cases and doctrine analyzing the proper application of the uniform law.

Another example of the comments obscuring the common law origins of a revision, again drawn from the law of sales, is the revision comment accompanying Civil Code article 2466. This comment provides that the article, which sets forth a price gap-filing mechanism for certain sales of movables, “gives legislative formulation” to a rule established by a Louisiana case.³⁰¹ A brief examination of the case and text exposes that the comment’s revelation is only half-true. In *Benglis Sash & Door Co. v. Leonards*, the Louisiana Supreme Court upheld a sale of windows despite the parties’ failure to expressly specify a price.³⁰² According to the court, in the absence of an express agreement, “the parties can consent to buy and to sell a certain thing for a reasonable price, and when they do, the contract of sale has been perfected.”³⁰³ With respect to the facts at hand, the court noted that “[t]he parties had a history of dealings in which [the buyer] ordered materials and paid the price

298. N. Stephan Kinsella, *Smashing the Broken Mirror: The Battle of the Forms, UCC 2-207, and Louisiana’s Improvements*, 53 LA. L. REV. 1555, 1556 (1993) (noting that the Louisiana articles present a “‘new and improved’ version of section 2-207”).

299. Compare LA. CIV. CODE arts. 2601-2602, with U.C.C. § 2-207 (AM. LAW INST. & UNIF. LAW COMM’N 2014).

300. See LA. CIV. CODE arts. 2601 cmts. a-i, 2602 cmts. a-b.

301. *Id.* art. 2466 cmt. (“[This article] gives legislative formulation to a rule established by the Louisiana jurisprudence through an interpretation of [the source article] in the light of the principles that govern consent in general.”).

302. 387 So. 2d 1171, 1173 (La. 1980).

303. *Id.* at 1172-73.

stated on the delivery invoice.”³⁰⁴ Also, the buyer’s specific conduct suggested an implied understanding that a “reasonable price” would be owed.³⁰⁵ The codified rule, which supposedly finds its roots in this case, provides a narrower and far less contextual exception to the general rule. The general rule is that a price must be “fixed by the parties in a sum either certain or determinable through a method agreed by them.”³⁰⁶ The exception provided by the text of article 2466 reads as follows:

When the thing sold is a movable of the kind that the seller habitually sells and the parties said nothing about the price, or left it to be agreed later and they fail to agree, the price is a reasonable price at the time and place of delivery. If there is an exchange or a market for such things, the quotations or price lists of the place of delivery or, in their absence, those of the nearest market, are a basis for the determination of a reasonable price.³⁰⁷

At first glance, the dissimilarity between case and text may be dismissed as immaterial; after all, *Benglis Sash* stands for the general proposition that the parties’ consent to a price may be implied from the circumstances.³⁰⁸ However, a quick comparison to the common law’s approach to this problem reveals that it is not *Benglis Sash*, but rather the Uniform Commercial Code, that inspired the precise language of the text. According to the relevant portions of the uniform law:

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time of delivery if (a) nothing is said as to price; or (b) the price is left to be agreed by the parties and they fail to agree³⁰⁹

Thus, while it may be true that article 2466 is consistent with Louisiana’s jurisprudence, the text quite clearly parallels the common law’s formulation of this approach. Remarkably, the comment makes no mention of the common law provision, which was undoubtedly a source of the new law.

304. *Id.* at 1173.

305. *Id.* (“In the present transaction, moreover, [the buyer’s] authorized agent ordered a specific item which had to be specially ordered from the manufacturer. Although an exact price was not immediately ascertainable, [the buyer] did not object to the price which was eventually charged. Under these circumstances one could reasonably infer that [the buyer] and plaintiff intended to buy and sell these particular windows at a reasonable price.”).

306. See LA. CIV. CODE art. 2464.

307. *Id.* art. 2466.

308. 387 So. 2d at 1173.

309. U.C.C. § 2-305 (2016).

Whereas the comment accompanying Civil Code article 2466 obscures the law's relationship to *foreign* provisions, other comments blur the relationship between a revised provision and *prior* law. Consider, for example, the comment accompanying revised Civil Code article 2012 and its description of the text. The article itself addresses the court's power to modify stipulated damages, providing that "[s]tipulated damages may not be modified by the court unless they are so manifestly unreasonable as to be *contrary to public policy*."³¹⁰ The comment provides that the article "is new, but it does not change the law."³¹¹ For this proposition, the comment cites a case: *Pennington v. Drews*.³¹² However, in *Pennington*, the court refused to enforce a stipulated damages clause, not because the damages were manifestly unreasonable, but because the court interpreted Louisiana law as requiring, like the common law, that proof of actual damage is a prerequisite to recovery of stipulated damages.³¹³ A careful analysis of the jurisprudential history of stipulated damages reveals that the text of article 2012 likely repudiates, rather than codifies, the result in *Pennington*.³¹⁴ That same analysis reveals also that pre-revision jurisprudence was inconsistent in its approach to judicial modification of the parties' agreement.³¹⁵ In its inexplicable endorsement of *Pennington*, the revision comment represents both an error and a missed opportunity—rather than declaring that the common law approach has been abandoned, the comment recommitting the text to the uncertainty of pre-revision law.

The foregoing examples provide a sampling of the confusion that may be wrought by comments as a result of inattentive drafting. Another difficulty is that the comments, though beyond reproach when drafted, may become corroded over time. This is because comments, once published, are not systematically revised. Indeed, any seasoned lawyer will have encountered in the comments numerous consequences of the slow march of time. In some cases, the legal principles articulated in the comments are no longer accurate due to revision elsewhere in the law. Take, for example, comment (c) to Civil Code article 518, which states:

310. LA. CIV. CODE art. 2012 (emphasis added).

311. *Id.* art. 2012 cmt.

312. *Id.* (citing *Pennington v. Drews*, 49 So. 2d 5 (La. 1949)).

313. 49 So. 2d at 10.

314. See SAÚL LITVINOFF, 6 LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS § 13.6 (1999).

315. See *id.*

[T]he ownership of movable property is transferred upon the consent of the parties, and according to Article 2467 of the same Code, the risk of loss is transferred to the buyer at that time. Thus, in Louisiana, the risk is placed on the buyer at an earlier point in time than under the U.C.C.³¹⁶

While accurate at the time of publication, this comment now restates a legal anachronism (*res perit domino*), which was discarded in 1995.³¹⁷ Due to the sales revision effective that year, Civil Code article 2467 now provides, consistent with the common law, that the risk of loss of the thing sold “is transferred from the seller to the buyer *at the time of delivery*.”³¹⁸

With age also comes the risk that the comment will reference provisions that have not been merely revised, but have instead been eliminated. This is the case, for example, with the comments to Civil Code article 517.³¹⁹ Comment (b) refers the reader to article 2015 of the Civil Code of 1870, which stated that “no one can transfer a greater right than he himself has.”³²⁰ While the general principle of article 2015 subsists as an undercurrent of many provisions, the article itself was eliminated in the 1980s.³²¹ The outdated cross-reference, though unlikely to wreak havoc, brings less rather than more clarity to the law.

Yet another consequence of time is that the comments, by explaining that a prior institution is “eliminated” or “suppressed” eventually refer to dinosaurs that only the most veteran attorneys recall. For example, the distinction between continuous and discontinuous predial servitudes was entirely eliminated from Louisiana law in 1977,³²² a change that is confirmed in the comments to Civil Code article 706.³²³ Presumably to explain the relationship between the old and new law, the comments accompanying five

316. LA. CIV. CODE art. 518 cmt. c.

317. Act No. 841, 1993 La. Acts 2239; *see also* DIAN TOOLEY-KNOBLETT & DAVID GRUNING, 24 LOUISIANA CIVIL LAW TREATISE: SALES § 3:12 (2012) (noting that the principle of *res perit domino* was abandoned in the 1995 revision of the sales title).

318. LA. CIV. CODE art. 2467 (emphasis added).

319. *See, e.g., id.* art. 517 cmt. b.

320. *Id.* (quoting LA. CIV. CODE art. 2015 (1870)).

321. *See* 2 LOUISIANA CIVIL CODE 610 tbl.1 (A.N. Yiannopoulos ed., Thomson Reuters 2016).

322. A.N. YIANNOPOULOS, 4 LOUISIANA CIVIL LAW TREATISE: PREDIAL SERVITUDES § 1:16 (4th ed. 2013).

323. *See* LA. CIV. CODE art. 706 cmt. c (2017) (“The distinction of servitudes into continuous and discontinuous has been suppressed in this revision.”).

additional provisions discuss the nuances of the prior distinction.³²⁴ In the forty years following the revision, the need for lawyers to appreciate the pre-revision law has declined considerably, as have the utility of comments devoted to its exposition. Other dated comments refer opaquely to the prior laws by number alone, without any mention of the substance of suppressed or eliminated institutions.³²⁵ These comments themselves provide little meaningful help to the practitioner or judge, and new lawyers may have no hope of understanding the meaning of these comments without looking up and spending considerable time studying the source provisions to which they cite.³²⁶

A further source of frustration, if not futility, is the layering of comments, stemming from the repeated revision of provisions over time. With each new reform comes a new set of comments geared toward explaining the updated rule. Understandably, the comments must all be read together with an eye to determining which statements in earlier comments, if any, are superseded by revisions in the law. The layering usually occurs as a result of revisions to the *same* provision; in such a case, the reader happily finds all relevant comments in a single place.³²⁷ In some cases, however, the layering occurs across *multiple* articles, with revised comments to one provision referring to unrevised comments to another. Such is the case with the law of parol evidence, where the 2012 revision comment to article 1849 admonishes that the 1984 revision comments to article 1848 are no longer to be trusted.³²⁸ Undeniably, while the later-

324. See *id.* arts. 740 cmt. a, 741 cmt. a, 754 cmts. b-c, 759 cmts. b-c, 760 cmt.

325. See, e.g., *id.* art. 1853 cmt. e (“Civil Code Article 2290 (1870) has been eliminated since the rule it contained lost its weight owing to jurisprudential developments.”). No information is given regarding the substance of the prior article, which has undoubtedly been forgotten by most lawyers during the thirty-three years since article 1853 was revised.

326. Unfortunately, researching pre-revision law is no easy task, as the Code of 1870 is not widely available outside of law libraries, and Westlaw’s “Historical Statutes” database contains versions of the law dating only to 1987. See *Louisiana Statutes Annotated—Historical*, WESTLAW, <https://1.next.westlaw.com/Browse/Home/StatutesCourtRules/HistoricalStatutes/LouisianaStatutesAnnotatedHistorical> (last visited Oct. 23, 2017).

327. See, e.g., LA. CIV. CODE art. 466 cmts. (1978). These comments are incomplete given the 2008 revision of the article and its accompanying comments. See *id.* cmts. 2008. The reader seeking further understanding of the text of article 466 must read both sets of comments to gain a complete understanding of the law. Another example of comment layering appears in the law of filiation, where article 196 is accompanied by three sets of revision comments. See *id.* art. 196 cmts.

328. See, e.g., *id.* art. 1848 cmt. c. This comment states that “testimonial or other evidence is admissible to prove an absolute or relative simulation.” While this statement may have been accurate at the time it was written, it is no longer correct. In 2012, article 1849 was enacted to provide that “a counterletter is required to prove that an act purporting to

drafted comment seeks to bring clarity to the law, the failure of the Law Institute to simply revise the comments as the law evolves around them presents a hazard for all but the sharpest minds.

While errors, omissions, ambiguities, and anachronisms of comments are significant, it is vital to caution that their drafters should not be vilified. The comments are the product of a process that is often quite starved for resources, both human and monetary. Comments often must be drafted quickly, revised frequently prior to finalization of a bill, and hastily reviewed as a projet winds its way through the legislative process. And without any formalized mechanism in place for the post-enactment revision of comments, it is hardly a surprise that the comments become stale and inaccurate over time.

Nevertheless, the many and various shortcomings of the comments must be documented, even highlighted. While individual inaccuracies may be shrugged off as the consequence of human error, taken together, the comments' substantive flaws reveal the need for systematic attention. It is the practical utility of comments that justifies their use. If practical utility is lacking, then the great compromise of the comments (theoretical integrity for pragmatic value) is called into question. Likewise, it cannot be forgotten that the unofficial rank and status afforded to the comments is grounded significantly on their presumed quality. If that quality turns out to be exaggerated, then so too is their authoritative strength.

2. Repercussions for the Law

A final, but substantial, functional critique is that the comments may detract from the quality of the text itself. Relying on the comments to expand or provide exceptions to legislative provisions, drafters compose law that is necessarily incomplete. Consider again the comments to Civil Code article 1837, which provide a rule (counter to the text) that an act under private signature may be valid if signed by one party alone.³²⁹ At the time of the revision, the proposition now stated in the comment was entirely

transfer immovable property is an absolute simulation." *Id.* art. 1849. Thus, contrary to comment (c) of article 1848, testimonial evidence is not admissible in that case. While the comments to article 1849 state that comment (c) to article 1848 "should no longer be considered," no correction has been made in the now inaccurate comment itself. *Id.* art. 1849 cmt. a.

329. *Id.* art. 1837 cmt. b; *see also supra* notes 236-239 and accompanying text (discussing the conflict between article 1837 and its comment).

uncontroversial.³³⁰ Indeed, the comment itself makes clear that the enforceability of an act signed by one party alone is well accepted not only in the Louisiana jurisprudence, but also in French law.³³¹ Given these circumstances, why then was the exception not codified in the revision? What reason can justify the deliberate choice to relegate this nuance of the law to a comment rather than giving it legislative force?

One possibility is that the decision to opt for textual brevity is the product of careful drafting. Keeping the aims of simplicity and elegance top of mind, the drafter is required continually to choose between a provision that, though sparse, is clear and concise, and another that, through the incorporation of additional detail, risks confusion or undue narrowing of the law. However, another explanation for this overuse of comments is laziness in drafting. Details that could be carefully incorporated into revised legislation are too often relegated to comments as a matter of convenience. It is far easier to define a rule by reference to its many past iterations than to craft a general, enduring principle that encompasses those cases without excessive generality. Additionally, it is far easier to gain political consensus on a general legal tenet than on its various permutations. When the wary legislator or Council member asks, “but what about this?” and poses a counter-rule that undercuts the drafted text, the response, “put it in a comment” often quells concerns without the need for additional, tedious and possibly contentious drafting.

The relegation of substantive rules to the comments—whatever its motivation—comes at a great cost. Civil Code article 1837 provides a chief example of the tradeoff. The simple text of article 1837 belies the great complexity that surrounds the requirements of formality. In truth, written consent in the form of a signature should be required of all parties if the law imposes a form requirement for reasons of solemnity (i.e., to impress upon the parties the magnitude of the commitment they are making); but if the requirement is evidentiary only, then other forms of proof may be allowed.³³² Since

330. See Palmer, *supra* note 200, at 261-62.

331. LA. CIV. CODE art. 1837 cmt. b (“This exception is based on the same rationale as the French doctrine of *commencement de preuve par écrit* (commencement of proof in writing). Under that doctrine, a party who does not sign a writing under private signature is nevertheless held to its terms if he has in any manner ‘intellectually appropriated’ those terms.”).

332. See LITVINOFF, *supra* note 314, §§ 12.12, 12.29.

the act under private signature is generally required for evidentiary purposes only, a party's signature to such an act should not be required if that party has otherwise clearly manifested an intent to be bound to the contract.³³³ Ideally, the codified principle would clearly state the rule, pointing to the distinction between proof and solemnity. Unfortunately, neither the text nor the comments reveal the underlying sense of the law. It is thus no surprise that the jurisprudence on the requirement of signatures is largely undertheorized. While the comments provide a convenient means for addressing complexity, they do harm when that complexity is unduly minimized.³³⁴

There is another possible reason why the comments often say clearly what the law does not: comments provide a safety valve for drafters to accomplish ends not attainable in the text. Comments may permit drafters, whose initial proposal has been rejected by committee or Council, to preserve the sense of the original, rejected draft.³³⁵ The comments may thus allow a defeated proposition to endure, to the detriment of both the political process and the clarity of the resulting law.

A less treacherous but perhaps more salient risk is that comments will be used to avoid commitments, whether political or doctrinal. Consider again the drafter's configuration of the law and comments surrounding undue influence in the law of donations. In its simplicity, Civil Code article 1479 remains coy. What type and magnitude of influence results in nullity of a donation? How does one determine whether the volition of the donee has been substituted for that of the donor? These questions remain unanswered, conveniently and, apparently, intentionally so. As comment (b) candidly admits, "This Article intentionally does not use the word 'undue' to describe the influence (although the word is intentionally used in the title of the Article and in two later Articles that refer to this

333. *Id.* § 12.29.

334. Examples of the Law Institute's reluctance to legislate nuanced but well-established and sensible exceptions to otherwise clear rules abound. *See, e.g.*, LA. CIV. CODE art. 1847 cmt. d (noting the jurisprudential rule that "a writing is not required to prove a promise to pay the debt of a third person when the promisor had a material interest in making the promise and has received something in return therefor," despite the article's clear admonition that "[p]arol evidence is inadmissible to establish . . . a promise to pay the debt of a third person"); *id.* art. 3467 cmt. d (noting that the jurisprudential doctrine of *contra non valentum* "continues to be relevant" despite the article's clear statement that "[p]rescription runs against all persons unless exception is established by legislation").

335. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS 13-14 (5th ed. 2000) (citing Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 782 (1953)).

Article).³³⁶ Does this omission and the attendant relegation of the common law “rules” to the comments signal that lawmakers were reluctant to commit to the common law framework for undue influence, or even the very idea of a legal transplant? If deliberate, the decision was a costly one. Without certainty that the legislature intended to fully embrace the American doctrine of undue influence, courts are quite reasonably reluctant to rely upon common law sources to interpret and apply the law.³³⁷

V. SUGGESTIONS FOR IMPROVEMENT AND FURTHER STUDY

The aim of this Article has been to initiate a conversation about the comments—their status, their role, their philosophical and practical weaknesses, and their potential utility as a source of guidance for judges and practitioners. This conversation has just begun, and a great deal more research and discussion about the comments is required; it would therefore be inappropriate for this Article to set forth a definitive list of solutions for the challenges that comments pose. Nevertheless, some initial observations may be made.

First, the comments are here to stay. The tradition of drafting and publishing comments alongside the law is seventy-five years in the making. Attempting to put an abrupt halt to the use of comments would not only be futile, it would be disruptive, as judges and lawyers have grown used to the idea that comments are a valuable source of information about the law. Thus, the conversation surrounding comments should focus predominantly on the ways in which their flaws can be minimized and their quality improved.

Second, while the conventional wisdom that the comments are *not law* accurately states the formal status of comments, it masks their informal significance. While a change to the comments’ formal status is neither appropriate nor desirable, the rhetoric surrounding the comments should be adapted to reflect the complexity of the comments’ informal stature. In the courtroom, in the classroom, and in scholarly writing, jurists calling upon the comments should

336. LA. CIV. CODE art. 1479 cmt. b.

337. At least one Louisiana trial court has looked to common law cases for guidance in construing article 1479. *See, e.g., In re Succession of Reeves*, 97-20, p. 9 (La. App. 3 Cir. 10/29/97); 704 So. 2d 252, 257-58 (discussing the trial court’s reliance on a four-part test to establish undue influence derived from common law jurisprudence). However, this approach has not been the prevailing one. That said, it is not altogether clear that the comments are responsible for courts’ reluctance to utilize common law authorities in their application of the article.

acknowledge their quasi-legislative and de facto force. Overt recognition of the comments' special status will, it is hoped, stimulate increased debate about the comments, clarify courts' thinking about their utility, and motivate lawmakers to insist upon their improvement.

Third, given the instrumentality of the comments in the edification of the legislature, bench, and bar, and in the outcome of legal disputes, it is undeniable that comments must be carefully drafted, unquestionably accurate, and free of political agenda. Thus far, the Law Institute and legislature have taken great care, while using limited resources, to ensure that highly trained legal experts craft the comments, subject to collective review and approval, and revise them for accuracy prior to the publication of the law. Any deficiencies in this process or its ultimate product that have been identified in this Article are wholly forgivable given that the work of the Law Institute is accomplished almost entirely through the efforts of volunteers who dedicate, without compensation, their labor and energy to the mission of law reform. However, more can and should be done to ensure the quality of comments.

At present, standards for the drafting of comments are lacking; indeed, the content and style of comments is currently left nearly entirely to the discretion of individual reporters.³³⁸ Oversight to ensure accuracy and quality, though present, is minimal. The addition of a specialized committee of the Law Institute tasked not only with review and coordination of comments, but also the development of guidelines for their drafting, would be a step in the right direction for the comments' improvement.³³⁹ This body, once appointed, should also consider whether recommendations should be made to the legislature regarding the revision and publication of comments. These recommendations will require careful deliberation and further study. The revision of comments during the legislative process may increase their quality, but would come at the cost of increased politicization. Similarly, while the publication of final, revised comments on the legislature's website would increase their visibility, it may unduly increase the perception of legislative endorsement.

Fourth, comments must be judiciously maintained over time. The comments historically have been regarded as a static resource,

338. See *supra* Part II.B.1.

339. These guidelines might make recommendations regarding the length and content of comments, standards for the citation of cases and provision of examples, and rules regarding cross-references, all with an eye to enhancing the utility of comments and ensuring that they neither directly contradict the text nor quickly become outdated.

providing information about the relationship between revised law and prior law at the moment of the revised law's enactment. But the comments, once published, endure. To prevent comments from becoming stale or inaccurate over time, comments must be regarded as a living source of law.³⁴⁰ Admittedly, the task of updating and maintaining comments is staggering and would require the efforts of more than the members of a single committee. Luckily, specialized bodies capable of performing this task are already in place, as the Law Institute has dozens of standing committees tasked with the continuous revision of numerous areas of the law. Those standing committees that have become defunct over time can be revived, and additional standing committees appointed as necessary.³⁴¹ While all of this labor may require more resources, the importance of revising comments cannot be understated. Continual cultivation of the comments will not only ensure that most errors and inconsistencies are eliminated, it will undoubtedly lead to insights about ways in which the legislative text can be improved. Continual revision of the comments has another advantage as well: post-enactment revision reduces the quasi-legislative force of comments, bringing them more into the realm of traditional doctrine, while also increasing their intellectual weight and practical utility.

Fifth, the character of comments as a form of legal doctrine must be both emphasized and scrutinized. As a source of legal doctrine, comments are designed to provide guidance regarding the law's proper interpretation. However, comments serve another, more

340. The Law Institute's legislative mandate is broad enough to include the authority, if not the duty, to continually revise commentary in order to ensure that it does not become anachronistic over time. See LA. REV. STAT. § 24:204(A)(1)-(2), (5), (7) (2017) ("[I]t shall be the duty of the Louisiana State Law Institute To consider needed improvements in both substantive and adjective law and to make recommendations concerning the same to the legislature To examine and study the civil law of Louisiana and the Louisiana jurisprudence and statutes of the state with a view of discovering defects and inequities and of recommending needed reforms To recommend from time to time such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of the state, both civil and criminal, into harmony with modern conditions [T]o provide by studies and other doctrinal writings, materials for the better understanding of the civil law of Louisiana and the philosophy upon which it is based.").

341. The Law Institute's website differentiates between active and non-active committees as many of its committees ceased meeting long ago. *Committees, supra* note 69. For example, the Leases (Book III) Committee is inactive, but recent research and reform work concerning leases has been undertaken by a new, ad hoc committee: the Landlord-Tenant Committee. The Sales Committee stopped meeting after the 1995 revision of the law of sales but was revived to revise the law of exchange. To the extent possible, comments should be revised by standing committees having broad authority over an entire field (Property, Sales, Family Law, Leases, etc.).

specialized role as well: they are a form of advocacy, designed to convince the legislature of the wisdom of proposed law reforms. Thought should be given to whether those two functions are at odds with one another and whether the latter is more properly accomplished by the traditional *exposé des motifs* or other scholarly writing. Moreover, as a form of doctrine, comments are uniquely hamstrung. The temporal and physical proximity of comments to the legislative text and their relationship to the legislative intent militate against crafting comments that expressly criticize the logic or policy of legislative rules. Instead, the responsibility to vigorously critique both the law and the comments falls to other forms of doctrine. While it may seem unnecessary to point out that it is the job of legal scholars to critique and thereby advance the law, Louisiana's rich tradition of legal scholarship has evolved over the last several decades, and today, fewer Louisiana scholars are actively writing on Louisiana law (as opposed to national, international, or comparative law).³⁴² Moreover, as time passes following a revision, thoughtful legal scholarship should expose evolutions in the law and social mores that point away from the comments' utility.³⁴³ With more "doctrinal nourishment" from which to draw, courts will be less reliant on the comments, and this will necessarily and appropriately diminish their de facto force.³⁴⁴

Finally, a robust scholarly debate regarding the philosophical, methodological, and practical issues surrounding the drafting and use of comments must be undertaken. The discourse to date has focused almost entirely on the conflict between comments and the ideals of codification. The drafting and use of comments raises many other questions that have yet to be explored by scholars in this state. In conducting an exhaustive analysis, scholars must engage in

342. As evidence of this, the *Louisiana Law Review's* tradition of having local scholars regularly comment upon legislative and jurisprudential developments has declined in recent years. See Board of Editors, *Foreword: Recent Developments and Ruminations in Retrospect*, 70 LA. L. REV. 1099, 1099-1104 (2010). And, while Thomson Reuter's Louisiana Treatise Series contains numerous excellent volumes, they are limited in their number and scope. For example, there is little to no systematic coverage in that series of the family law, the law of contract formation, lease law, or the law of registry.

343. See Cueto-Rua, *supra* note 266, at 171 ("The references to judicial precedents in the comments of the recent Revision are suggestions to the bench and bar. These comments provide specific instances of the individualized meaning of general rules of the law; they assist the interpreter. They indicate a way, yet they are not binding. They may be accepted and followed if they are good solutions for the conflicts awaiting judicial resolution. They probably will not be accepted if new social mores, unexpected events, or changes of attitudes and values make it convenient to seek new normative meanings.").

344. See Panel Discussion, *supra* note 131, at 74.

comparative study. Louisiana lawmakers can draw upon the experiences of other jurisdictions in the civil law and common law traditions, both to inform their thinking about the challenges posed by comments and to provide solutions to those challenges. Any steps that Louisiana lawmakers take to ameliorate the problems of legislative comments will necessarily be an example to other jurisdictions struggling to sensibly draft, update, and manage the use of comments.³⁴⁵

VI. CONCLUSION

Over a half century ago, scholars writing about the revision of the Louisiana Civil Code cautioned against embarking upon the monumental task of law reform without an adequate and detailed plan for drafting legislation.³⁴⁶ Understandably, the focus at the time was on the text. Nonetheless, the admonition is no less applicable to the comments. For too long, the use and making of comments has continued without thoughtful consideration. While the challenges posed by the comments hardly create a crisis of legal methodology, they do raise important questions about the making and application of our law and the principles that underlie those processes. Recognition of the comments' significance is long overdue.

This Article has sought to begin a discussion about the comments, their import, and their flaws. As the first attempt at meaningful scrutiny of the issues, it undoubtedly provides an incomplete account of the comments' significance. Nevertheless, besides initiating a discourse about the comments, describing the process by which they are made, and exploring their rank and status as a source of law, this Article presents a framework for future examination of the comments: while the publication and use of comments can have great practical value, they come at a cost to the values underpinning our legal system. Future evaluations of the comments and the processes by which they are made, as well as suggestions for their improvement must be made with this calculus in mind. Achieving the proper balance is vital both to the methodological integrity and to the quality of our law.

345. For example, although the Uniform Law Commission drafts extensive commentary to accompany its uniform laws, its drafting guidelines make no mention of standards for the preparation of comments. See UNIF. LAW COMM'N, DRAFTING RULES (2012 ed.).

346. See, e.g., Clarence J. Morrow, *Current Prospects for Revision of the Louisiana Civil Code*, 33 TUL. L. REV. 143, 146 (1958).



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