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The French Connection and The Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law

Vernon Valentine Palmer*

"It is a matter of public notoriety that our St. Domingo Lycurgus is avowedly copying his new code from that of Bonaparte, to the infinite delight of the whole party by whom he is employed."

Jeremiah Brown¹

"... the great difficulty which history records is not that of the first step, but that of the second step. What is most evident is not the difficulty of getting a fixed law, but getting out of a fixed law; ...not of making the first preservative habit but of breaking through it and reaching something better."

Walter Bagehot²

INTRODUCTION

The approaching bicentennial of the *Code Napoléon* is a useful moment in which to take stock of the past and future of our own Civil Code. The *Code Civil des Français* has been vital to Louisiana's entire experience with codification. It was one of the models for the Digest of 1808, and it again served as a model for the Civil Code of 1825. Even today, it appears to be serving as one of the models for our present Code's revision. My paper, however, deals with a broader subject than just the influence of the *Code Napoléon* on Louisiana codification. Since Louisiana codifiers have borrowed copiously from French commentators, *projet* drafts, and other French sources, it is necessary to speak more widely of the influence of French law on Louisiana civil law.

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* Thomas Pickles Professor of Law and Director of European Legal Studies, Tulane University. This article began as a paper commissioned by the Cour de Cassation to commemorate the bicentennial of the *Code Napoléon* in 2004. The present article is an outgrowth of that paper. I have many friends and colleagues to thank for their kind comments and criticisms of earlier drafts. My special gratitude goes to Alain Levasseur, Michael McAuley, John Lovett, and particularly Thomas Tucker for his insightful observations, patience, and encouraging advice. Any errors that remain are of course mine alone.

1. A Short Letter to a Member of Congress Concerning the Territory of Orleans (Washington D.C. 1806).

2. Physics and Politics 53 (2d ed, 1999).

It is convenient for my purposes to consider French influence in four historical phases. There is, first, the rise of French law in the colony of Louisiana in the period 1699-1762. In this period the *Coutume de Paris* and the great royal *Ordonnances* were in force.³ This early period will not receive much discussion, however, since it had only limited impact upon the nineteenth century codification movement. In the second period, 1762-1803,⁴ the province was ceded to Spain, and Madrid officially replaced French law with Castilian law. The effect was to transform Louisiana into a Spanish ultramarine province whose legal order now "derived from Castilian law to the exclusion of other peninsular fueros."⁵ The non-foral Castilian private law which Governor O'Reilly introduced was taken in about equal parts from the *Recopilación* of Castile and the *Siete Partidas*. The Spanish period plays a more important role in this study because a complicated legal dualism developed over the course of it. There is evidence that officially-imposed Spanish law had limited geographical and cultural reach and Louisianians clung to their original private law at a folk level. The legal situation took on additional complexity when Spanish rule ended. Spanish law officially continued, but now it purported to serve as the *derecho común* of a French society entering an American union.

The third period, 1803-1828, comprises the early years after the Louisiana Purchase. It saw the establishment of territorial government, the quest for statehood, and most important to this inquiry, Louisiana's push toward codification. Louisiana enacted two procedural codes (1805, 1828), a crimes act (1805), two civil codes (1808, 1825) and drafted but did not enact a criminal code and a commercial code (1825). French legal influence emanated from within and without: the Louisianians had an innate attachment and preference for things French and French legal science exerted a magnetic attraction on codifiers not only in Louisiana but in many lands. The freshly-minted *Code Napoléon* was never more highly prized. By virtue of its sheer modernity, relevance, and accessibility to Louisianians, it excelled in ways that its chief competitor at that time—uncodified Spanish law—could not. The Legislature and its

3. Professor Baade describes the legal system of French Louisiana as consisting of four discrete masses: (1) French royal legislation of general applicability, as of 1717; (2) The Custom of Paris; (3) French royal legislation enacted after August 1717; and (4) the enactments of the Superior Council in New Orleans. Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 Tul. L. Rev. 3, 9 (1978).

4. The cession from France to Spain occurred in 1762, but Spain took no steps to take possession of the province until 1766 and did not formally introduce its own laws until November 1769.

5. Baade, *supra* note 1, at 40-43.

appointed juriconsults drafted and enacted civil codes borrowing heavily from the *Code Napoléon*, the *Projet* (1800) and French commentators. All in all, nearly 85% of these new codes contained French-derived articles. The actual motives of the redactors have been difficult to reconstruct due to incomplete historical records, and it has also been a daunting task to demonstrate what effect, if any, these appropriations had on the existing Spanish law. Some scholars theorize that the Legislature intended to codify Spanish substantive ideas and merely used French-language equivalents out of convenience. According to this "Spanish thesis," our present law may still be, at a substantive level, Spanish. On the other hand, other scholars, based upon meticulous tracing and overwhelming evidence of verbatim and almost verbatim borrowings, believe that the true sources were French (the "French thesis") and that French influence remains predominate today. Depending on the proper outcome of this debate, this third period is either the zenith or the nadir of French legal influence in Louisiana.

This interesting controversy brings us to the modern era and a period of declining French influence. The modern revision of the Civil Code (1976-present) is the first serious attempt since 1825 to modernize Louisiana civil law. The process of modernization has considerably weakened the French connection.

This article covers a considerable amount of ground, and it may be helpful to summarize where it leads. It begins in the third period by taking a historical look at the Digest of 1808 and the Civil Code of 1825 [§§1.0-1.2] in order to summarize the basis for French law in Louisiana and to establish a certain baseline for comparative purposes. The two codes are compared as to their form, structure, and style. Next, the famous controversy over whether these two civil codes are more influenced by Spanish than French law is examined in some detail [§1.3]. The merits of the debate are central to an inquiry on the extent of French influence, since if the "Spanish thesis" is essentially correct, then scholarly claims and popular perceptions about French influence must be seriously revised. The discussion attempts first to clarify the debate and then to advance it in three new directions [§1.4 (1-3)].

One new path is to focus attention upon substantive comparisons between the two laws. It is observed that the only type of investigation which could resolve the Pascal/Batiza debate, at least from the Pascalian point of view, has never been carried out. Although there has been comparative research on a few topics, we have not had the benefit of a comprehensive *substantive* comparison between the existing Castilian law and the borrowed French provisions. Consequently we do not know the extent of the substantive deviations, if any, which French models introduced into

Louisiana. In addressing this issue, I sketch a suggested methodology to measure substantive differences and I employ a newly discovered tool which Moreau Lislet himself provided in the de la Vergne volume.⁶ The discovery is that Moreau's own hand points to many salient areas of substantive difference. The first fruits of this analysis are presented, and it is pointed out where research should be directed in the future. The evidence, though partial and preliminary (a limited number of subject areas were studied) makes clear that the introduction of French models in 1808 did have deep substantive repercussions. It brought in material original and indigenous to France, often unknown to Spanish law and/or incompatible with it, and in greater amounts than previously known or shown. The analysis strongly supports the French thesis.

The second new direction focuses the inquiry less around the Digest and more on the Civil Code of 1825. Being the later expression of legislative will and also the immediate predecessor of the modern law, the contents of this Code and the intentions of its drafters are far more important to the question of *substantive* sources. In the past, historians have dwelt almost exclusively upon the obscurest link in the chain of evidence—the cloudy history and inscrutable intentions of the Digest redactors. This new approach looks ahead to the far clearer historical record surrounding the Civil Code of 1825 to compare the evidence and test out theories. Analysis of that record, in my view, is a second buttress for the French thesis. As shown in their *exposé des motifs* and their Preliminary Report of 1823, the three Commissioners openly executed a plan to receive French law at a substantive level. The methodology of 1825 is to disclose and carefully distinguish Spanish and French sources. Moreau Lislet II's procedures, as compared to the disputed and arcane methods of Moreau Lislet I, show no evidence of an intent to codify Spanish substance via French equivalents. This conclusion, I argue, is of capital importance to the debate. It means that some controversial claims and conjectures about the Digest have been incorrectly projected beyond the Digest, even into the modern law. Whatever one's theories about the Digest, Louisiana's Civil Code of 1825 represents an openly-stated and expanded reception of French substantive law and codification ideals. That reception undermines these wider claims.

The third new direction is to recognize that the merits of the debate are intertwined with shifting judicial perceptions of the Code's pedigree. For the last 150 years the prevailing view from the bench

6. Vernon V. Palmer, *The Recent Discovery of Moreau Lislet's System of Omissions and its Importance to the Debate Over the Sources of the Digest of 1808*, 59 Loy. L. Rev. 301 (2003).

has been that our Civil Code embodies French law. This mid-century shift, being grounded in a literalist tradition, promoted an interactive relationship with French civil law and basically foreclosed further relationship with Spanish law. It objectively increased French influence in Louisiana in many ways (e.g., cites to the Cour de Cassation, translation of French authors). Much as the Spanish-oriented outlook of earlier judges caused increased citations to Spanish authorities and led to translation of the *Las Siete Partidas*, so the prevailing "French perception" has increased French influence, led to the translations of French commentators, and has even influenced the views of historians. Historians use judicial views as evidence of the merits of the debate. Even though this is a circular form of proof, the objective changes brought about lend another type of support to the French thesis.

Having completed this re-analysis of the Pascal/Batiza debate and having unveiled new supporting evidence for the French thesis, the article next inquires into the reasons why this tectonic shift in the private law foundation should have occurred during the codification period. Considerable discussion is devoted to the practical and pragmatic explanations, [§1.6] but it is also argued [§1.7] that the link between law and culture is equally important. Relying upon specific historical events as well as similar experiences in other mixed jurisdictions, the article argues that strong cultural attachment to French law combined with Creole control of local democratic institutions pulled the redactors and legislators toward this end.

The treatment of the third period closes with the observation that the Civil Code remained essentially intact over the next 150 years, 1825-1975 [§2.0]. The discussion then turns to the modern Revision of the Civil Code [§3.0]. Institutional areas such as Persons, Property, Obligations and so forth are reviewed in order to gauge how much of the original French contribution is still perceptible and where it is now thin or nonexistent. One finds that a number of new legal ideas and institutions have been introduced into the revised Civil Code, but it is unlikely that one of these has a French stamp. From a dynamic standpoint, it seems the French Civil Code is no longer a supplier of new ideas for Louisiana. Nevertheless, the brick and mortar from antecedent codes has not entirely disappeared, and the reenacted articles still contain a perceptible French groundwork. Research indicates, for example, that nearly sixty percent of the revised law of property still has a substantive *and* linguistic basis in the *Code Napoléon*. Plainly the Revision was not a revolution. The Code wears a new façade, but much of the original foundation is left undisturbed.

French influence in the modern era, however, cannot be adequately assessed simply by tracing the lineage of the substantive

law or by a count of French-inspired articles. This article argues that French legal influence has plunged in recent years mainly because an important intangible—the intrinsic qualities expected of a code—was lost during the revision process [§4.0]. One of the residual gifts of the *Code Napoléon*—the specifically French concept of codification—is no longer alive and well in Louisiana. A master architect of the revision has recently written a “Requiem” for the Code,⁷ agreeing that it is now merely a Digest, a conclusion that the present writer first presented in 1988.⁸ In the final section [§5.0] this Article describes and illustrates in structural and methodological terms the deterioration from code into digest.

*1.0 The Historical Starting Point: Louisiana's First Ties to the Code Napoleon and Other French "Sources"*⁹

It is not my purpose to trace the history of Louisiana from the earliest days of French settlement or to discuss the laws and institutions which French sovereigns introduced in the 18th century. I begin immediately in the period after the Louisiana Purchase of 1803 when the immense estate was sold to the United States by Napoleon, and a new state consisting of “Lower Louisiana” was created and entered the Union. In this period Louisiana launched on the course of codification, first with the Digest of 1808 (more properly called “A Digest of the Civil Laws now in force in the Territory of Orleans”) and later with the enactment of the Civil Code of 1825.¹⁰ The character and content of these codes, enacted at a time when Louisiana was still intensely French in culture and language were closely based upon the *Code Napoléon*, the *Projet* of 1800 and writings of early French commentators. No extended demonstration of a filial relationship will be necessary, for detailed research by Professor Rodolfo Batiza has already produced abundant evidence of it.¹¹

7. A.N. Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 Tul. L. Rev. 379 (2003).

8. Vernon V. Palmer, *Death of a Code—The Birth of a Digest*, 63 Tul. L. Rev. 221 (1988).

9. As explained *infra* in note 36, in most cases I will use the word “source” of law in a restrictive, linguistic sense.

10. Other codes were also enacted or planned in this period, including the Practice Act of 1805, a Crimes Act of 1805, The Code of Practice of 1828, and a Commercial Code (drafted but not enacted).

11. The sources of both codes were traced linguistically and conceptually in a wide-ranging examination and the results were compiled into a four-fold classification scheme. Professor Batiza's study of the 1808 Code or Digest is found in Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4 (1971) [hereinafter *1808 Code Sources*], and

1.1 *The Use of French Models in Writing the Digest of 1808 and the Code of 1825*

The drafters of the 1808 Digest used the *Projet du Gouvernement* of 1800 and the Code Napoléon of 1804 as their chief models. It had long been falsely supposed that the redactors had no copy of the Code Napoléon at their disposal in New Orleans and thus used the *Projet* of 1800 as their principal model, but Professor Batiza's research dispels that myth entirely.¹² The *Projet* was the source of 807 provisions and the French Civil Code was the source of 709 provisions. These sources alone account for about 70% of the Digest provisions. This was not by any means the full extent of the French contribution, however, for another 15% of the provisions were taken from Domat, Pothier, the Custom of Paris, and the Ordonnance of 1667. All in all, 85% of the Digest came from French sources. Strikingly, 617 articles were exact equivalents (in Professor Batiza's schema, "verbatim" borrowings), 913 were classified as "almost verbatim," and 225 were listed as "substantially influenced." This wholesale transplant produced a work of clear French pedigree.¹³ The premises of that conclusion have been challenged and remain quite controversial, since the Pascalian school of thought regards the Digest in a completely different historical light. This difference of opinion plays a central role in this Article (see § 1.3) since there would be little to recommend in a study of the scope of French influence that ignored the possibility that Spanish law may instead be the core of the private law system.

The framers of the Civil Code of 1825 did not discard the contents of the Digest and simply begin on a fresh slate. They retained nearly three-quarters of the Digest's 2160 provisions and transposed them directly into the corpus of the new Code.

his study of the 1825 Civil Code is found in Rodolfo Batiza, *The Actual Sources of the Louisiana Project of 1823: A General Analytical Survey*, 47 Tul. L. Rev. 1 (1972) [hereinafter *1825 Code Sources*].

12. Indeed, four original editions of the 1804 Code were found in Moreau Lislet's personal library. See Mitchell Franklin, *Libraries of Edward Livingston and of Moreau Lislet*, 15 Tul. L. Rev. 401, 406 (1941). In addition, Henry Garland discovered an original edition of the Code Napoléon with the autograph of Moreau Lislet on the title page. *The Times-Picayune*, May 1, 1932, at col. 1, 25.

13. The remaining 15% of the articles were taken from an array of texts and writers: Las Siete Partidas, Febrero, the Institutes, Blackstone, Justinian's Digest, Curia Philipica, Gaius, the Fuero Real, the Code Noir, the Ordinances of Bilbao, and local Louisiana statutes. For John Cairns, the presence of these sources indicates that the Digest is not a slavish copying of the *Code Napoléon* or its *Projet*. He accepts that it is a "free mixture" of many sources and with some original invention. J.W. Cairns, *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change* 632 (1980) (doctoral dissertation, Edinburgh).

Consequently the French lineage of the retained Digest provisions passed into the bloodlines of the next Code. But the drafters added another 1746 provisions of their own. This greatly lengthened the Code (the Code's 3522 articles were far more than the *Code Napoléon* and almost one and one-half times the number of the 1808 Digest) without in any way weakening the connection to French models. Two-thirds of this new material (more than 1,000 provisions) was taken from the writings of Pothier (246 articles), Toullier (228 articles), the French Civil Code (150 articles), the Louisiana 1808 Digest (139 articles), and Domat (55 articles). Thus, in this lengthened and highly didactic Civil Code, French writers assumed an expanded importance, now second only to the *Code Napoléon*. Furthermore, French influence appeared to advance *vis à vis* other competitors if only because Spanish and Roman sources were used less than in the Digest. But was the advance of French law in 1825 merely a matter of appearance, like the hall of mirrors at Versailles, as the proponents of the Spanish thesis contend? I will look at that interesting question after making comparisons with the *Code Napoléon* as to form, structure, and style.

1.2 *A Few Comparisons as to Form, Structure, and Style*

Structurally, both the Digest and the Civil Code followed the classic three-book arrangement of Gaius and the *Code Napoléon*. The style of the drafting was elegant and retained the epigrammatic quality of the French texts. These literary qualities are evident in the original texts drafted in French, however, the English version was a poor translation that fell far below the French standard of drafting and even contained substantive errors. Not surprisingly, the French original was quickly recognized as the controlling version in case of doubtful or conflicting meaning.

The outcome was a remarkable code with many original and distinctive features. Sir Henry Maine believed that the 1825 Code was a great achievement. To him it was ". . . of all the republications of Roman law, the one which appears to us as the clearest, the fullest, the most philosophical, and the best adapted to the exigencies of modern society."¹⁴

An obvious deviation from French-style codification occurred in the Digest and the Code with respect to inclusion of didactic materials (including definitions of terms,¹⁵ abundant use of

14. Peter Stein, *Judge and Jurist in the Civil Law: A Historical Essay*, 46 La. L. Rev. 241, 245 (1985).

15. Instances of this type are the definitions of third persons and solvency: "With respect to a contract or judgment, third persons are all who are not parties to

illustrations, and instructions to judges on code interpretation), all of which were kept to a minimum in France.¹⁶ The expansion which this entailed, as Mitchell Franklin characterized it, “was a difference, in no small way, between a code that was a code, and a code that was a code, a law school and doctrine all at once.”¹⁷ An extraordinary didactic feature of the Digest was a lengthy “Table Alphabétique des Matieres” (beginning with *abandon*, *abrogations*, *absens*, and so forth) that was placed prior to the title page at the front of the volume. This was a finder’s guide to principal words and concepts used in the Digest, in French and English, with internal page references. Disguised as a table of contents, its real function appears to have been that of an index, and seems to have been intended for the average citizen and journeyman lawyer completely unfamiliar with codes. This user-friendly feature may have been un-French but it was very American and indicative of codification with a common touch.¹⁸ An example of the same tendency, which had no counterpart in the *Code Napoléon*, was the inclusion of a Preliminary Title in both enactments. The Preliminary Title contained instructions to the judges regarding recognized sources of law, rules of interpretation, how to fill gaps in the law, and so forth, all of which was objectionable as being doctrinal and excluded in France for that reason.¹⁹ There was nevertheless a plausible reason to include material of this kind in Louisiana. In this earliest period Louisiana had no universities, law faculties, established chairs, nor any developed legal literature. In short, Louisiana lacked the standard

it” “Solvency is the ability to pay one’s debts. He who can not pay all that he owes is not solvent.” La. Civ. Code art. 2078 (1870). Aside from a few useful definitions, Article 3556 also contained a host of pedanticisms, including that the masculine gender comprehends the two sexes, men include women, sons daughters, and the singular often designates several persons or things.

16. Yiannopoulos, *supra* note 7.

17. Mitchell Franklin, *Some Observations on the Influence of French Law on the Early Civil Codes of Louisiana*, in *Le Droit Civil Français—Livres Souvenir des Journées du Droit Civil Français* 841 (*Le Barrdeau De Montreal* 1936).

18. We shall see that, by contrast, the present revised code is directed to a restricted audience—the legal profession. The Revision has accordingly attempted to eliminate didactic materials and to make technical lawyers’ law an annex of the code. See *supra* notes 159-60 and accompanying text. According to Michael McAuley, however, codes have a “teaching vocation” and the inclusion of didactic materials such as examples and definitions should be one of the central ambitions of modern redactors. Michael McAuley, *The Pedagogical Code*, 63 *La. L. Rev* 1293 (2004).

19. J.J. Morrison, *The Need for a Revision of the Louisiana Civil Code*, 11 *Tul. L. Rev.* 213, 241 (1937). The famous interdictions to judges about the “déni de justice” and “arrêts de réglemant” are indeed found in the “livre préliminaire” of the French Code (Arts. 4, 5) but these injunctions have a historic constitutional purpose that is surely more than didactic.

accessories of the civil law and the framers felt it was necessary to incorporate a good deal of doctrine within the code itself. The judges to whom these instructions issued were all trained in the common law and would have brought with them a completely different methodological inclination.²⁰ Further, if the general effect of a more explanatory code was to make it more accessible to the average citizen, this too furthered a Napoleonic ideal.

The Digest particularly represented a striking departure from French-style codification in dealing with past laws. The Digest did not purport to repeal every past law touching the subject of private law; it only repealed those parts of Spanish private law which were specifically incompatible with its provisions. Accordingly, in contrast to the *Code Napoléon*,²¹ the Digest made no definitive break with the past and was never complete in its field. Code historian Richard Kilbourne describes it as a kind of "restatement" of the essential principles of the Spanish and Roman law.²² It left in place great expanses of uncodified Spanish law on the same subject matter. It was to be later realized that this extrinsic law could be controlling whenever the Digest might treat a point with a general rule that was not specific enough to oust a more precise Spanish rule on the same subject. Such cases had to be decided by Spanish law rather than by the Digest²³ and this caused considerable legal uncertainty for many years to come. The problem featured prominently in the reasons for enacting a second code in 1825. Using unusually strong language, that Code declared the repeal of all former law *in pari materia*,²⁴ but

20. Whether their inclinations and proclivities could be effectively tempered by these pedagogic devices is another question. See Thomas Tucker, *Interpretation of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title* (1972) (Thesis, Univ. of Glasgow). One study indicates that Art. 21—Louisiana's famed "directory clause" about equity—was not successful in confining the judges to its procedures. See Vernon Palmer, *The Many Guises of Equity in a Mixed Jurisdiction*, 69 Tul. L. Rev. 7 (1994). The portrait of Louisiana judges sketched by Symeon Symeonides shows them to be extraordinarily independent and creative law makers who openly challenged the notion that all law is to be found in the enactments of the Legislature. Symeon Symeonides, *The Louisiana Judge: Judge, Statesman, Politician*, in *Louisiana: Microcosm of a Mixed Jurisdiction* 89 (Vernon Palmer ed., Carolina Acad. Press 1999).

21. The law of Ventose 30, Year XII abrogated every past law in the same *subject-matter category* as the Code; that is, it repealed everything in Roman law, French ordinances, general or local customs, statutes and regulations which pertained to private law.

22. R.H. Kilbourne, *A History of the Louisiana Civil Code: The Formative Years, 1803-1839* 69 (Paul M. Hebert Law Center Publications Institute 1987).

23. The realization dawned with the famous case of *Cottin v. Cottin*, 5 Mart. (o.s.) 93 (La. 1817). It immediately prompted the Legislature to have all relevant parts of the *Siete Partidas* translated into English. For details, see Palmer, *supra* note 8, at 244-45.

24. Louisiana Civil Code article 3521 was drafted by the Legislature upon its

the judges found clever ways of keeping the moribund Spanish law alive.²⁵ Legal uncertainty persisted. The death blow was finally delivered by the so-called Great Repealing Statute of 1828 which expressly abrogated "all the civil laws which were in force before the promulgation of the civil code lately promulgated."²⁶

The Louisiana codes again departed from the French approach with respect to the question of recognized sources.²⁷ The extreme legal positivism of the *Code Napoléon* that elevated legislation to the status of the single source of law was not followed. Custom was given its traditional place as a source of law. Interestingly, the Louisiana jurists in their *projet* recommended suppressing custom altogether, in the belief that law ought to be the monopoly of the Legislature.²⁸ The Legislature, however, was not nearly this Benthamite and overruled their position. Louis Baudouin argues that the Louisiana framers still displayed greater attachment for legislation than in France.²⁹ He views the famous statement in Article 1 (1825), "[I]aw is a solemn expression of legislative will" ("*La Loi est une déclaration solennelle de la volonté législative ...*"), to have been a bulwark against unwritten common law. This statement in English (but not in French) reads as a ringing declaration that legislation alone qualifies as law. Baudouin thought that, consciously or not, it set up a barrier to intrusion of the Common law and served as a mechanism of self-defense in a country surrounded by Anglo-American jurisdictions.³⁰

own initiative and was probably added after the three jurists submitted their final draft. Nevertheless, their Report of 1823 (at xcii) strongly recommended to the Legislature "an express repeal of all former laws and usages" so the concept was certainly theirs as well. Article 3521, which passed 26-2 in the House, provided as follows:

From and after the promulgation of this code, the Spanish, Roman and French laws which were in force in this state, when Louisiana was ceded to the United States . . . are hereby repealed in every case for which it has been specially provided, and they shall not be invoked as law, even under the pretence that their provisions are not contrary or repugnant to those of this code.

25. See *Cole's Widow v. His Executors*, 7 Mart. (n.s.) 41 (La. 1828).

26. 1828 La. Acts No. 160. Even this statute did not at first end the story. See *Reynolds v. Swain*, 13 La. 193, 198 (1839).

27. Yiannopoulos, *supra* note 7, at 388.

28. In suppressing Article 3 of the Digest, they wrote, "*Dire que les coutumes ont force de la loi dans un pays où toutes les lois sont écrites, nous parait un contre-sens*," which was quoted from Symeon Symeonides, *An Introduction to the Louisiana Civil Law System* 130 (2d ed. Paul M. Hebert Law Center Publications Institute 1983).

29. Louis Baudouin, *The Influence of the Code Napoleon*, 33 Tul. L. Rev. 21, 24 (1958).

30. If it ever was the barrier Baudouin thought it to be, it has since been torn down by the 1987 revision. The revisers turned the principle into a platitude by

1.3 The Controversy over "The Sources" of the Digest of 1808

There has been extended controversy as to why Louis Casimir Moreau Lislet, who is usually regarded as the mastermind of the Digest,³¹ turned so decisively toward French models. Spanish law was considered the official law in force in Louisiana at that time and his instructions were to follow the law in force.³² Superficially the enactment appeared to be Spanish derived (and thus in compliance with his instructions) since it was entitled, "A Digest of the Civil Laws now in force in the territory of Orleans ..." (Emphasis added) The mystery is how a code in which eighty-five percent of its provisions were French-derived could be offered to the Louisiana people as the equivalent of Spanish law. Was this "code" inconsistent with the concept of a Digest of laws "now in force" and incompatible with the author's instructions? This question has produced more riddles than convincing answers.

Professor Batiza's pioneering efforts to trace the true "sources" of the Digest ignited a controversy about his methodology and findings.³³ Professor Pascal dismisses Professor Batiza's research as "purely philological" because in his view it does not trace the *substantive* sources of the Digest, but dwells upon "word and phrase" analysis. In Professor Pascal's words, "If this substance is predominantly Spanish-Roman, then it does not matter that it is expressed in terms French and English rather than Spanish and Latin, or that the specific terms employed often were inspired by, adapted from, or even copied from text on French or other systems of law."³⁴

writing: "Legislation is a solemn expression of legislative will." La. Civ. Code. art. 2 (1987).

31. James Brown was appointed co-drafter with Moreau, but Brown's contribution, if any, is not clear. Some historians, such as Professor Batiza and, more cautiously, Thomas Tucker, believe that Moreau worked alone. This view is based upon the statement in the Report of 1823 referring to the "unaided exertions of one person" in confecting the Digest. Sources, *supra* note 11, at 28. On the other hand, Cairns finds the sole authorship theory to be improbable and unconvincing. *Supra* note 13, at 110. For details of Louis Moreau Lislet's life and a vigorous defense against slights to his integrity, see Alain Levasseur, *Louis Casimir Elisabeth Moreau-Lislet: Foster Father of Louisiana Civil Law* (LSU Law Center Publications Institute 1996).

32. The instructions from the legislature were to "make the civil law by which the territory is now governed the ground work of said code." Res. of June 7, 1806, Terr. of Orleans Acts 215 (1806).

33. See Robert Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1972). See also Joseph Modeste Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 Tul. L. Rev. 585 (1972).

34. Pascal, *supra* note 32, at 606.

In fairness, Professor Batiza did not actually ignore the conceptual or substantive origins of provisions, for as he points out, "The language of provisions . . . of necessity embodies concepts or principles . . ." His methodology distinguished between the direct source (a text which was simply copied verbatim or paraphrased almost verbatim) and an indirect source (a text which was not so copied or paraphrased but had similar essential content). He showed that French texts were the direct source of more than 1400 articles in the Digest, but he acknowledged that many Spanish texts were substantively concordant and could be regarded as indirect sources of the same provision.³⁵ Professor Yiannopoulos has considered the issue of whether Batiza's use of the word "sources" to denote the works from which legislative provisions were taken is "legitimate." The eminent author agrees that this usage is legitimate and indeed that it is commonly employed among legal historians.³⁶

Nevertheless, the debate has become bogged down in conflicting claims with no resolution in sight, and my purpose in the next paragraphs is to clarify the issues as much as possible and then to suggest new lines of inquiry that can advance the debate.

1.4 *A Few Clarifications and Three New Directions*

It is incontrovertible that a large number of articles were in fact taken bodily—linguistically and structurally—from French models and used in both nineteenth century codes. Is this enough to constitute a reception of French law? In regard to the Digest much debate has been devoted to inconclusive side issues, such as the question whether the enactment should be properly called a 'code' rather than a 'digest,'³⁷ whether the redactors had a positivist outlook

35. See Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 Tul. L. Rev. 628, 630-39 (1972).

36. See A.N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in *Louisiana's Legal Heritage* 98, 102 (Edward Haas ed., Perdido 1983). In this paper, rather than take sides in the fray, I will simply use the word "sources" (in a way acceptable, I believe, to all sides) to refer at a linguistic level to those prior texts which served as the French language model for the Louisiana codes.

37. Battle is engaged over this point because if in the redactors' own minds they felt restricted to producing a digest, this would suggest they intended simply to replicate the existing Castilian law and not deviate from it. To claim that the product was in reality a code would imply that the drafters exercised some choice over the content and could borrow, adapt, and invent provisions as they pleased, which suits Professor Batiza's position. John Cairns believes it suits Professor Pascal's position to insist that it is a digest because this supports the view that it must embody Castilian law irrespective of its textual origins. Cairns believes Pascal's reasoning is basically circular, i.e., "since only Spanish sources were used, the 1808 redaction is a "digest;" that it is a "digest" proves that only Spanish

or followed natural law thinking,³⁸ whether the redactors abused their discretion and violated their instructions, whether they intended to use French law as a proxy for Spanish, and of course a special fascination about the role and meaning of the de la Vergne volume.³⁹

sources were used." Cairns, *supra*, at 86.

38. Cairns, *supra* note 13, at 76-81. This point is stressed by Cairns. In his view, Pascal assumes that the general orientation of the redactors would be that of the positivist theory—they would feel free to examine only those sources formally in force. Other sources would have no validity because they lacked the sanction of the sovereign. Since Spanish law was never formally abrogated either by the Spanish or the Louisianians, the redactors were following Castilian law at a substantive level, because the sovereign had not authorized the introduction of French law. The logical mistake, says Cairns, is to attribute a positivistic outlook to the redactors when in fact they, like so many lawyers and judges of that time, were imbued with natural law thinking. Natural law conceived of law in universal rather than national terms. It led to the view that the "civil law" transcended national legal systems and was supra-national. *Id.* at 76. The prevalence of natural law thinking explains why the redactors of the Digest were so cosmopolitan in accepting texts from Blackstone, Domat, Gaius, and Pothier; why the preliminary title refers the judge directly to "natural law and reason" when positive law is silent (Art. 21 Dig. of 1808); and why the custom developed, and continued even after enactment of the Digest and Code, of citing authorities and writers from any part of Europe as persuasive authority in Louisiana. If natural law concepts informed legal thinking in this period, then the instructions to the redactors to make "*the civil law* by which the territory is now governed the ground work of said code" would be referring to an international civil law and would have entailed discretion to go beyond Spanish law to other sources. See *supra* note 32.

39. This designation refers to Moreau Lislet's personal copy of the Digest of 1808 in which he purports to list, in hand-annotated entries on interleaved sheets, the sources of the provisions. Known as the de la Vergne volume (after the family which possessed and preserved it) the volume is bound with interleaves containing citation references in manuscript to various laws and commentaries. The title sheet states "Loix de l'Etat de la Louisiane avec des notes qui referent aux Loix civiles et Espagnoles qui y ont rapport. 1814." Though dated 1814, internal evidence within the volume actually shows some annotations were added as late as 1817. See Art. 27, at 43. The plan of the author is stated in the handwritten "Avant-Propos." On the interleaved pages facing the English text, the author says he is providing a list of references to Roman and Spanish law which have *general relevance* to the subject of the *chapter* of the Digest. In contrast, on the pages facing the French text, he says he is placing citations to the *specific laws* of diverse codes from which the *articles* in the chapter were taken ("d'où sont tirées les dispositions de notre statut local"). The puzzling fact, however, is that despite the great number and variety of listed citations, there is not a single mention of the *Projet du Gouvernement* of 1800 nor the *Code Napoleon*, though research convincingly shows these were the direct verbal sources for more than 1400 articles. This omission has caused much *confusion* as to whether Moreau Lislet was listing his sources, hiding his sources, or simply making a table of concordances to Spanish and Roman law only. See Sweeney, *supra* note 33, at 599-600. J. M. Sweeney argued that since Moreau used the ambiguous words "notre statut local" that he was only providing sources of "our local status" rather than of the Digest itself.

Professor Baade speculates that Moreau could not publicly acknowledge the

These interesting points, however, are somewhat secondary in attempting to gauge whether there was a substantive reception of French law. I believe the focus should move to three other points which will be simply summarized here and then discussed more fully below. The first point is that the only type of investigation which all sides would accept as meaningful has not been carried out. We have never had the benefit of a comprehensive, side-by-side comparison of the substantive differences between Castilian law and the borrowed provisions in the Digest. A comprehensive comparison would be the best means of assessing the amount of French law admitted into Louisiana by the Digest.⁴⁰ For obvious reasons, no detailed comparison of this kind is ever likely to be attempted. The present writer submits, however, that a highly efficient method of pointing out the substantive differences has been at hand since Moreau's day, or since the discovery of the de la Vergne volume (and its facsimiles), but it has been overlooked and thus not used by prior investigators. The present study applies this method to a number of subject-matter areas, some of which were previously researched, and concludes that the substantive differences are far larger than previously known or shown. The present research will indicate the equivalent of Moreau's own admission of his *substantive*

borrowings from French sources, so he created the de la Vergne volume to provide a "positive law alibi" for himself. See Baade, *supra* note 3, at 84. John Cairns' theory as to the role and purpose of the manuscript is more persuasive. He believes that the real reason for the volume's existence was tied to the revival of Castilian law in the period 1812-1817. See Cairns, *supra* note 13. Compiling a list of Spanish references article by article was a way to win cases by citing Castilian law on point. Moreau Lislet was in a position to execute such a work and had such a need in his law practice. Additional copies were made for other practitioners. This would explain why somewhat similar annotated versions have been found in various libraries (for instance, the Henri Raphael Denis copy in the Tulane Law Library) and also why, though the work is dated 1814, it received updates as late as 1817. See Darby & McDonald, *infra* note 44, at 1211. Finally, it agrees with the present discovery about the volume, namely that there are 645 articles with omitted cross-references, which shows that the entire focus was on referencing Spanish/Roman law, not on providing an exhaustive list of sources. This practitioner orientation further explains why Moreau would go to the trouble to compile a thirty page index of "principal words" (in French only) at the end of the volume that is far more detailed than the original printed index. The reason, according to Cairns, why no French sources are cited is because no one doubted that French law was the principal source of the Digest provisions themselves. The practical aim was to relate the Digest back to Spanish law. See Cairns, *supra* note 13, at 661-64.

40. As to the Code of 1825, however, we shall see that these questions have little pertinence since the instructions gave maximum latitude to change the law as the redactors saw fit, and they explicitly informed the Legislature of their intent to borrow from the French codes and writers. See *infra* note 62 and accompanying text.

indebtedness to French sources in nearly thirty percent of the Digest articles. Of course this discovery cannot resolve how much French content may exist in the other seventy percent of the Digest articles. No doubt debate will continue about Moreau's loose and associative way of cross-referencing to Spanish law and the extent to which this may have concealed (not necessarily purposefully) the extent of the reception. Nevertheless, the conclusion is inescapable that a broad substantive reception of French law took place when French models were introduced into the Digest.

The second point is that the controversial claims and conjectures surrounding the Digest have been incorrectly projected upon later codes and legal periods. I shall attempt to show they do not apply in the altered circumstances of the Civil Code of 1825. From the perspective of a much clearer historical record we can see that an intensified reception of French law was planned and carried out by the redactors. The evidence refutes the view that French models were treated as fungibles or substitutes for Spanish law.

The third point is to note that the "perception" that our civil code is essentially French and not Spanish has prevailed for the past 150 years. That perception is now as important as the now-discarded 'Spanish' perception once was to judges in the first quarter of the 19th century. The modern perception has created its own interpretative reality out of which objective consequences have flowed. One of these has been an interactive relationship with French law, not Spanish law.

1.4.1 Substantive Comparisons

As mentioned previously, whether the French appropriations in the Digest caused substantive deviations from existing Castilian law is a basic issue at the core of the debate. Substantive comparisons would provide the best proof of the degree to which, if any, there was a reception of distinctly French ideas in 1808 or only a reception of French form instead. For understandable reasons no comprehensive comparative study of this kind has ever been attempted. There is prior research in a few substantive areas which indicates that the redactors did depart from the substance of Spanish law, but the proof has not been quantitatively convincing. To this research I will add my own, using a method which allows us to envision the areas where borrowed French law had no Spanish counterpart or actually contradicted Spanish law. Before turning to these points, however, it is important to describe the various levels at which substantive comparisons between French and Spanish law can be made.

We might think of the substantive divergence between Spanish and French law on an ascending scale: the first and lowest level is

one of minor and incidental dissimilarity; somewhat higher is the level of under-inclusive and over-inclusive provisions where in various respects Castilian law and borrowed rules do not substantively match; and the highest level is that of directly incompatible provisions where the borrowed law clashes with Castilian substantive law. Let us discuss each of these more closely.

The first level need not detain us long. Clearly the existing Spanish law often possessed and expressed concepts and rules roughly coextensive in substance with French law, but these were approximate expressions which, even when concordant and coextensive, could not match the exact conceptual structure of the borrowed French wording. One will routinely find small differences in the contours of rules, the emphasis or the phrasing, and inevitably small substantive differences arise at an interstitial level. But this is a minor level of deviation. It would hardly support the thesis that a major reception of French substantive law took place.

As we move up to the second level, however, substantive discrepancies between French and Spanish law have greater probative value for the Pascal/Batiza debate. There are two kinds of divergences at this level: (a) a relevant Spanish provision may be under-inclusive (only correspond to a certain segment of the borrowed rules),⁴¹ or (b) the relevant Castilian law may be over-inclusive (Castilian law contains more segments than the borrowed rule).⁴² In the famous case of *Cottin v. Cottin*,⁴³ Spanish law was overinclusive. An unrepealed Castilian provision dating to the 14th century was controlling.

Large amounts of Spanish law were “different” in the sense of being more inclusive than the borrowed French law, but these

41. Castilian rules disqualifying women from public office would furnish a simple example. These were less inclusive than the French-derived rules of the Digest. The Digest of 1808 states “. . . women are, by their sex alone, rendered incapable . . . thus, for example women cannot exercise the offices of magistrate or representative nor have they a right to elect or to be elected representatives of the people.” Bk. I, Tit. I, Art. 2, p.8. According to Professor Batiza, this text originates in Domat. See Batiza, *supra* note 11, at 46. According to the de la Vergne volume, comparable Spanish rules are found in the Partidas: see Part. 3, t. 4, l.4 and Part. 4, t. 23, l. 2. The Spanish rules, however, disqualify women less categorically and in fewer situations. They exclude women from the office of judge or magistrate (with an exception if she is a queen, countess, or other noble), and do not disqualify women from being voters or as representatives of the people, as the Digest provision does. The scope of the French rule goes well beyond that of the cited Spanish provision.

42. When Spanish law was overinclusive, Moreau did not have to worry about the problem of substantive deviation. So long as the French borrowing was narrower, he knew that any extra segments of Spanish law were not repealed and could be used to supplement the article.

43. 5 Mart. (o.s.) 93 (La. 1817). This case is discussed in context in Palmer, *supra* note 8, at 244-45.

differences produced no repugnancy and did not lead to their repeal under a digest system. They remained available to supplement the Digest and to decide particular cases. For that reason the existence of over-inclusive Spanish rules can provide no evidence of a reception of French substantive law.

In contrast, however, when Spanish law was *underinclusive in relation to the French borrowing*, every extra segment of the broader French rule amounted to a change in the existing law since it was new and without counterpart in Castilian law. This could reach dramatic proportions in cases where Spanish law was *radically underinclusive*. Radical underinclusiveness describes the situation where Spanish law has nothing at all to say on the subject matter introduced by the borrowed rules. In that instance the borrowed French rules could concern a peculiarly French institution, or an original concept or procedure developed by French redactors for which the Castilian law has no counterpart. To introduce such laws into Louisiana was to import laws that Spain did not recognize. The question arises: Did such areas actually exist? And how can we find them?

These areas are systematically illuminated by an unusual feature of the de la Vergne volume which previous investigators have not noted nor discussed.⁴⁴ I am referring to Moreau Lislet's pervasive and systematic use of omissions. *Moreau left blank spaces next to 645 articles of the Digest.*⁴⁵ The Digest contains only 2160 articles. This means, therefore, that in nearly thirty percent of the provisions he listed no sources or cross-references at all. In his *Avant-Propos* Moreau carefully described the meaning of his cross-references to Spanish and Roman laws but he did not mention that he was leaving any articles blank. Hence there is no explanation as to what a blank signifies. It is very likely that Moreau expects the book's user to

44. This oversight is remarkable because the volume, or similar versions of it, has received considerable attention and study. See Robert Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 with Marginal Source References in Moreau Lislet's Hand*, 26 La. L. Rev. 25 (1965); Mitchell Franklin, *An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript*, 33 Tul. L. Rev. 35 (1958); Joseph Dainow, *Moreau Lislet's Notes on Sources of Louisiana Civil Code of 1808*, 19 La. L. Rev. 43 (1958); L. Darby, III & T. McDonald, Jr., *A Recent Discovery: Another Copy of Moreau Lislet's Annotations to the Civil Code of 1808*, 47 Tul. L. Rev. 1210 (1972); see also Thomas Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat and the French Codes*, 44 Tul. L. Rev. 264, 266 n.8 (1970).

45. Professor Dainow seriously underestimated the number of these omissions. In his description he stated, "Only here and there does an article appear with no citation at all." See Dainow, *supra* note 44, at 50. This is perhaps why he overlooked their significance. The other authors, excepting Tucker, fail to make any mention of these omissions. See *supra* note 44.

know what a blank meant and what role it played in his system of citations. Of one thing we may be sure, however, he cannot be saying that these provisions have no source or that he himself does not know their sources or has forgotten them. As redactor, he knows very well from where they were taken, and we too, with the aid of Professor Batiza's research, are in a position to fill in the blanks as easily as Moreau. *They turn out to be predominantly French, and of course never Spanish.*⁴⁶

Why then, we may ask, did he not simply provide these French references instead of leaving a blank? Because the entire purpose of the volume has a Spanish/Roman focus and Moreau's intended audience is aware of that purpose. It was never his plan in the de la Vergne volume to provide a complete list of sources or authorities. The blank references are a confession that French sources are intentionally suppressed, since Moreau withholds citing French law when it is the *only* possible source available to him. His purpose is only to provide a list of Spanish and Roman authorities with "*quelque rapport*" to the articles of the Digest. The blank references indicate articles which have "*aucun rapport*" or relevance to Roman-Spanish law. The blanks are Moreau Lislet's own designation of his *non-Spanish* sources.

Interestingly, these blanks are not randomly or evenly distributed. They form concentrated pockets around particular subjects within the private law.⁴⁷ There are no fewer than 20 clusters of omissions within particular Titles of the Digest. The existence of a cluster is closely tied to subject matter. To illustrate, there are 25 blank sources next to the articles on party walls and other related servitudes,⁴⁸ 18 blanks for articles on the interdiction and curatorship of incapable persons,⁴⁹ 12 blanks for tutorship over minors, undertutors, and the duties of the family council,⁵⁰ 26 blanks for absent persons,⁵¹ and 36 blanks for the provisions on vacant

46. As mentioned earlier, the significance attributed to the blank references should not be taken to suggest that cross-referenced Spanish authorities in the other seventy percent of the Digest should be credited as authentic substantive sources. That conclusion simply goes beyond the scope and findings of *this* paper. It is not clear that Moreau himself believed that the *full* extent of French sources was captured in the blank articles only.

47. A complete Tableau showing Moreau's omissions is appendix in Palmer, *supra* note 6, at 317-37. This same scheme of omissions is found, article for article and blank for blank, in the Moreau Lislet volume owned by Henri Raphael Denis which was discovered in the Tulane Law Library. See Darby & McDonald, *supra* note 44, at 1211.

48. See Digest of 1808, Book II, Tit. 4, Chs. 2-3, pp 129-135.

49. See Digest of 1808, Book I, Tit. 9, Ch. 1, pp 79-83.

50. See Digest of 1808, Book I, Tit. 8, Ch. 1, pp 63-67.

51. See Digest of 1808, Book I, Tit. 3, Ch. 2, pp 15-23.

successions.⁵² When we recall the origins of these institutions, the reason for the omitted references becomes perfectly clear. Party walls, undertutors, and the family council are all indigenous French ideas unknown to Spanish or Roman law;⁵³ vacant successions and absent persons (subjects resting partly on French customary law and fully remodeled in the Code Napoleon) were barely known or dealt with in Castilian law.⁵⁴

Using Moreau's system of blank entries as a key or entry point into the Digest, the present writer conducted research into Spanish and French law with a view to confirming whether the theory just presented holds true. It was found that the provisions with blank sources point directly to French rules and institutions which are indeed "legal blanks" in Spanish law. The provisions of the Digest on 'party walls' and 'common enclosures' furnish a clear illustration. There are blanks next to some twenty-five articles devoted to this subject because the rules on party walls originated in the old walled French cities under the northern customs and were not part of Castilian law.⁵⁵ The redactors took five of these articles from the *Coutume de Paris* and the rest were taken from the French *Projet* (1800) and the *Code Napoléon* (1804).⁵⁶ The blank references regarding absent persons are due to a similar reason. The law in France had been a jumbled mass of local usages, jurisprudence, customs and royal ordonnance. The French code drafters consolidated and remodeled this material in their first draft, and after discussions in the *Conseil d'Etat*, it received several further redactions. M. Bigot-Préameneu, in presenting the finished product

52. See Digest of 1808, Book III, Tit. 1, Ch. 7, pp 173-185.

53. See *infra* note 55, at 109-12.

54. Of course not every blank necessarily means a borrowing of *indigenous* French law. Some of the articles may have been the original invention of the French or the Louisiana redactors, or may have been taken from a common law source such as Blackstone. Thomas Tucker in his study of the sources of the law of persons was at one point on the verge of reaching this conclusion. "Ironically," he wrote, "the *absence* of cited authority for an article proved a fairly consistent indication that the article was either an original work, or that its source was the common law." See Tucker, *supra* note 44, at 266 n.8.

55. See M. Berlier, Conseiller d'Etat, *Exposé des Motifs du Code Napoléon*, Speech 190-96 (Jan. 20, 1804) (1810) (Gaunt reprint 2001). This origin is confirmed by Professor Yiannopoulos. See A.N. Yiannopoulos, *Louisiana Civil Law Treatise: Predial Servitudes* § 66 (2d ed. 1997). ("In walled French towns during the Middle Ages . . . economies of space and construction compelled utilization of fences and ditches as common enclosures of adjoining estates, and of walls as common supports of adjoining buildings. This led to the development of customary law dealing with common enclosures. The detailed rules of the Custom of Paris and of the Custom of Orleans in this field proved most influential in the drafting of the *Code Napoléon* and of the Louisiana Civil Code.")

56. Batiza, *supra* note 11, at 69.

to the *Corps Législatif*, called it something “newly created.”⁵⁷ That is another way to say an original set of provisions. The use of inventions of this kind cannot be explained away as French verbiage replicating Spanish ideas. Rather, it is a genuine reception of indigenous French law into a Digest supposed by some to be consecrated to Spanish law. Moreau’s blank source references in 645 articles are his own demonstration of the degree to which the Digest is authentically French.

We come now to the third and highest level of differences. Here the two laws will sometimes be substantively contradictory or repugnant and hence the borrowed French provisions would effect a repeal of existing law. Clearly under Professor Pascal’s theory, Moreau should have avoided this type of antagonism as much as possible. Yet the evidence would suggest otherwise. On the one hand, instances of incompatibility can be found even when Moreau indicated a Castilian cross-reference for a French-derived article. On the other hand, the possibility that an incompatibility may be found increases when he left the source blank. A clear illustration is the Digest’s declaration in Article 40 (Bk. III, Tit. 2, Ch. 4) that “[s]ubstitutions and fidei commissa are and remain prohibited.” Moreau was wise to leave a blank next to Article 40 since *Partidas* VI, Title V expressly permitted substitutions. The Digest prohibition was actually taken from the *Code Napoléon* (substitutions fideicommissaire were abolished in France in 1792) so the Digest provision flatly contradicted (and abrogated) *Partidas* VI, Title V.⁵⁸

Turning briefly to the example of marriage contracts, the scheme of omitted references in the *de la Vergne* volume lends support to the detailed research of Professor Hans Baade. His research demonstrates that the Digest redactors adopted the French “contractual” model of matrimonial property rather than the Castilian “statutory” model. The French folk custom of making marriage contracts to govern future transmissions of wealth between spouses was recognized under the Custom of Paris and it was carried to Louisiana. That custom, as shown by the notarial records, remained

57. P.A. Fenet, *Recueil Complet des travaux préparatoires du Code Civil* 462 (Zeller reprint, Osnabruck 1968) (1827).

58. Moreau Lislet and Carleton did not deem it necessary to translate Title V of the Sixth Partida on “Substitutions” on the ground that it was repealed by the Digest and was not in force in Louisiana. They explained in a footnote that “[s]ubstitutions have been abrogated by the civil code [sic], as well as *fidei commissa*. C, art. 4, [sic] p. 216.” *The Laws of Las Siete Partidas Which Are Still in Force in the State of Louisiana*, vol II 1008 (L. Moreau Lislet & H. Carleton, trans., James M’Karaheer ed., 1820). See Ronald Scalise, *Prohibited Substitutions: Louisiana’s Experience with a French Institution*, 48 *Loy. L. Rev.* 715, 727 (2002); John Tucker, Jr., *Substitutions, Fideicommissa and Trusts in Louisiana Law: A Semantical Reappraisal*, 24 *La. L. Rev.* 439, 470 (1964).

alive in Louisiana after introduction of Spanish law and even after the cession of the territory to the United States. Castile had no equivalent custom. Indeed the interspousal donations presupposed in such contracts were "directly contrary" to Castilian law which treated them as invalid unless accomplished by will and testament.⁵⁹ This substantive incompatibility was already signaled in the de la Vergne annotations: Moreau can give no Spanish cross-references for five of the relevant articles.⁶⁰ Once again this suggests that Moreau's system of omissions leads research to the correct starting point. John Cairns' research points out that two important areas of family law in the Digest—the concepts of *puissance maritale* and *puissance paternelle*—differ from those of Castilian law as they are founded in the northern French *droit coutumier*.⁶¹ The Louisiana Supreme Court too has noted that in some cases the cross-references to Castilian law in the de la Vergne manuscript are directly contrary to the text of the Digest.⁶²

A full study of French/Spanish incompatibilities has yet to be made, but it is fair to say that the list of Spanish cross-references in the de la Vergne manuscript includes contradictory references and cannot pass for a set of "sources." The articles with blank cross-references in Moreau Lislet's list also contain contradictory material and further study may well reveal that those articles contain the largest cache of it. The overall point is that the decision to follow the French model did lead to considerable deviation away from Spanish law, even if the degree is variable and the overall extent is yet to be determined. For reasons of both substance and form, the Digest was a significant step toward a general reception of French law in Louisiana. It was the prelude to a far deeper reception of French law in the second Louisiana Civil Code.

The discovery of Moreau's omissions allows us to understand that Moreau was not hiding his French sources nor seeking to establish an alibi for himself. His scheme of omissions indicates he is candid with himself and respectful of history. It was a failure to understand his system which led some to question his integrity, but also led others to believe in a Spanish purity he never intended.

59. See Baade, *supra* note 3, at 87.

60. See arts. 3, 5, 6, 9, 11, p. 325.

61. See Cairns, *supra* note 13, at 630.

62. See Yiannopoulos, *supra* note 55, at 98, who cites several Louisiana Supreme Court opinions stating that Moreau Lislet's references to Spanish law "contradict" the provision in question or "bear little resemblance in text and substance to the Louisiana code article adopted . . ." See *Dickson v. Sandefur*, 250 So. 2d 708, 717 (La. 1971); *Holland v. Buckley*, 305 So. 2d 113, 119 (La. 1974). Thomas Tucker similarly found that the Spanish authorities cited proved to be, at best, only obliquely related to a given article and often totally irrelevant. See Tucker, *supra* note 44, at 266.

1.4.2 *The Code of 1825: A Fresh Reception with Openly-Stated French Appropriations*

The historical record surrounding the second Louisiana codification is much improved over the record surrounding the first. It contains statements of the redactors' goals and philosophy, their view about the position of the judge, their motives, their sources, and their views on foreign systems. These views are found in three documentary forms: the Commissioners's Preliminary Report to the Legislature 1823; their *Projet* setting forth proposed amendments, deletions and additions; and finally their comments and sources intercalated between the new articles of the *Projet*. This record indicates that the redactors intended a new start with a bold repeal of prior law and fresh reception of French law.

It will be recalled that the two jurists who produced the Digest had precise instructions to make "the existing laws the groundwork" of their effort, but the three redactors of the Code of 1825 were given far greater latitude. The Legislature placed no restrictions on the contents of the Code nor on the strain of civil law they were to follow. In the Joint Resolution of March 14, 1822 the Commissioners were authorized "to revise the civil code by amending the same *in such manner as they will deem it advisable* . . ."⁶³ The same charges of infidelity to mandate, therefore, cannot be leveled at the Commissioners as they once were leveled at the authors of the Digest. Whatever the amount of borrowed law, or its national stripe, its use would have been consistent with their charter. This immediately distinguishes the circumstances surrounding the Code from the Digest. There is no reason to conflate the two situations as if they were similar or to carry over old arguments from one situation to the other. The great freedom of choice given to the drafters of the Code has significance for Professor Pascal's point that in 1808 Moreau Lislet may have intended to express Spanish concepts via verbatim borrowings from France. That is perhaps relevant as a theory to explain how Moreau intended to fulfill his original instructions, but the theory loses all relevance in the case of the Code of 1825. "Moreau II" was not facing the limitations he faced as "Moreau I." Moreau I was given narrower instructions and left behind almost no trace of his French appropriations. Moreau II and his fellow Commissioners, however, enjoyed a wide-open mandate which permitted them unfettered discretion to go beyond existing law. They responded with an open disclosure of sources and borrowings. They dropped the word Digest as a descriptive title and

63. See Acts Passed at the Second Session of the Fifth Legislature, at 108 (J.C. De St. Romes 1822) (emphasis added).

called the work a Code. They informed the Legislature through their Preliminary Report that they planned to borrow from French law: "[T]he comprehensive Codes of France," they wrote, "are so many rich mines from which we can draw treasures of Legislation."⁶⁴ Their attitude toward the *Code Napoléon* is one of unbounded admiration: "In the Napoleon Code, that rich Legacy which the expiring Republic gave to France and to the world, we have a system approaching nearer to perfection than any which preceded it."⁶⁵ Their Report, incidentally, is imbued with distinctly French attitudes towards judges. They express the same suspicion of robed power that pervaded French thinking after the Revolution. They accordingly embrace the radical French version of separation of powers which would deprive the judges of power to make precedents even for cases of "construction." As in France, they wished to require the judges to report regularly to the Legislature to explain their decisions.⁶⁶ Enthusiasm for these exaggerated ideas may be taken as a sign of their warmth for French civil law.

In addition to their Preliminary Report, the redactors left behind an *exposé des motifs* in which they openly identified their borrowings. The *exposé des motifs* I am referring to is the set of comments and references inserted in small print between the *Projet* articles.⁶⁷ These comments indicate in many cases the individual and particular sources to the new code articles. This list is an eclectic blend of Spanish, Roman, and French authorities, but the vast majority are French. There are articles attributed to Febrero and the Partidas, but a much greater number are attributed to Pothier, the "*Code Français*," and even post-code commentators like Toullier, Maleville, and Pardessus. In contrast to the privately-maintained and retroactively-executed notations in the de la Vergne volume, these motifs were contemporaneous with the redaction and were intended for the legislature's information. In addition, unlike that volume, the French references are in the open.

In making a comparison between the redaction of the Code and the Digest, it is interesting to consider who wrote these notes. According to Colonel Tucker's deductions, Moreau Lislet was the principal author of Book I of the 1825 Civil Code. Professor Batiza's

64. See Report from E. Livingston, Moreau Lislet, & P. Derbigny to the Senate & House of Representatives of Louisiana (Feb. 13, 1823), in 1 La. Legal Archives, Project of the Civil Code of 1825, at x (1937).

65. *Id.* at lxxxix.

66. *Id.* at xcii.

67. See 1 La. Legal Archives, Project of the Civil Code of 1825 (1937). Professor Batiza takes the similar view that the Report of 1823, together with the references and comments in the *Projet*, fulfilled the essential purposes of an *exposé des motifs*. See Batiza, *supra* note 11, at 2.

opinion is that he played a far greater role, that he was the probable author of both Books I and II as well as the first two titles of Book III, leaving Edward Livingston responsible for the rest of Book III.⁶⁸ If Moreau was indeed the principal author of Books I and II, then it is probably correct to assume that he penned the pertinent notes in the *exposé* which accompanied those provisions.⁶⁹ The great majority of the comments in this *exposé* (there are 346 in all) are concentrated in the first two books and the first portion of the third book, which corresponds to Batiza's view of Moreau's contribution.⁷⁰ Even if we cannot pinpoint individual authorship of the comments, Moreau is, at the very least, *participating* in a transparent method.⁷¹ The inscrutable trail which the erstwhile author of the Digest left has been replaced by a method that seeks to identify sources and to reveal reasons for selecting them. The new approach is consistent with instructions that allowed freedom to choose among different laws. Such choices need to be shown and justified to fellow team members and legislators.⁷²

68. See J. Tucker, Jr., *Foreword*, in 1 La. Legal Archives, Project of the Civil Code of 1825, at viii (1937); Batiza, *supra* note 11, at 4-5.

69. Yet since it was a team effort, attribution is not positive. It is possible that Moreau Lislet drafted the comments to Book I (and possibly Book II) and made amendments in accordance with suggestions from Derbigny and Livingston. That at least was the advance plan stated in the Report of 1823: "This, [the writing of comments] although originally the sole work of that one of us to whom the consideration of that part of the Code was assigned, in our division of the labor, will be discussed by all; and when finally modified or agreed to, will be submitted with the entire work, to the consideration of the Legislature." See *supra* note 64, at xciv.

70. After the third title of Book III to the end of the 1825 Code, source cites for particular articles are no longer stated in the notes. The number and style of the comments changes abruptly, and this may reflect the stage at which Livingston became the principal redactor.

71. It is important to notice that by this time Moreau is an establishment figure. He is no longer the newcomer to Louisiana whose position is unassured and whose knowledge of Spanish law is limited to two years of practice. By 1823 he had served as a judge, a Senator, member of the House, Attorney General, and had continued a flourishing practice. Besides this, he had written an explanation of the criminal laws of Orleans in 1806, drafted the Digest of 1808, translated (with Carleton) *Las Siete Partidas* into English in 1819, and besides co-authorship of the Civil Code of 1825, would go on to prepare the Code of Practice of 1825 with Livingston. His knowledge of Spanish, French, Roman, and Louisiana law must have vastly increased by that time.

72. It is true that this list of sources is "unevenly distributed" as Professor Batiza says. See Batiza, *supra* note 11, at 3. Furthermore, as already noted, the redactors did not bother to list any sources for the old Digest provisions brought forward, and quite a few French materials are purloined without attribution. See 1 La. Legal Archives, Project of the Civil Code of 1825, 235-37, 264-75, 346-47 (1937). This may be because each redactor was responsible for his own comments and the execution was simply inconsistent. Nevertheless, there is enough cohesion and accuracy to make the point that their method sought transparency, distinguished

Two examples at random will illustrate the method in operation. In adding a series of rules on successions, the Commissioners first suppressed some previous Spanish rules dealing with "representation" in the collateral line (citing to the *Partidas* and the *Recopilación*) because they were "contrary to the spirit of our government." The Commissioners then substituted articles which, the *exposé des motifs* says, were taken from the "*Code Français*," a statement which is accurate.⁷³ In another place, the drafters added provisions on property boundaries, stating that the provisions were taken from "Thoulier" [sic], a statement that is well-founded. Professor Batiza's research confirms Toullier was the "almost verbatim" source of these articles.⁷⁴ This was, at least, the recurrent pattern whenever new material was brought into the Code, particularly in Books I and II. The redactors gave no sources at all for articles of the Digest that were being retained. It is therefore beyond cavil that whenever they referenced particular French works or Spanish works, they considered these to be the "source" itself of the article and not a proxy for another source. The references are straightforwardly accurate, not like the cites in the de la Vergne manuscript which have been characterized as "oblique," "irrelevant," or "contradictory."⁷⁵ In my view, therefore, the drafters engaged in openly stated appropriations from Spanish, French, and Roman sources. It is implausible to argue that a reference to, say, Toullier is meant to be merely formal, not substantive, whereas a reference to Febrero is meant to be substantive. There is not the slightest evidence of any substance/form distinction in their method. The Preliminary Report promised they would draw upon "treasures of legislation" from many rich mines, and in light of that announcement, they would have no reason to disguise their intentions or hide their sources.

If we put aside polemical positions and examine their *notion* of sources on the basis of what was said in the Preliminary Report and *Exposé*, the picture is clear. The Commissioners actually extracted ore from the mines they indicated. They in fact took far more from France than anywhere else, but this was consistent with their

carefully between French and Spanish sources, and betrayed no desire to pour Spanish wine in French bottles, much less to mingle Bordeaux with Rioja. The bottles and wines are segregated and marked and, in most cases, Professor Batiza's independent historical research confirms the labels.

73. See 1 La. Legal Archives, Project of the Civil Code of 1825 at 108-11.

74. *Id.* at 96-97; see Batiza, *supra* note 11, at 47.

75. See *supra* note 62 and accompanying text. Professor Batiza, with his usual meticulousness, points to several exceptions where there were inaccuracies, and these lead him "to wonder what the purpose was in concealing or omitting the actual source" in the *Projet*. See Batiza, *supra* note 11, at 8. I do not share his suspicion that there is any intentional concealment.

instructions and their announced intentions, and the Legislature was well advised of those intentions.⁷⁶

1.4.3 The “French Perception”

It may have indeed been Moreau I’s subjective intent to use French law as a proxy for Spanish law, but that intent did not bind later interpreters who were unaware of that intent. Generally, lawyers are literal-minded positivists who accept the provenance of code articles at face value. If they know that an exact set of words was devised by a French legislator or author and that the Louisiana redactor has literally transcribed the text, then the form *and* the content of the borrowing will be regarded as French. Their perception is not influenced by hidden intent. In consequence, sharing the same texts with France—as opposed to simply sharing underlying concepts and rules with Spain—forged a strong bond with France and caused prior Spanish connections to wither. There is a considerable difference between having the same exegetical starting points, time and again, with France and simply having convergent solutions with Spain. A positivist sees the utility and ease of comparing identical texts. By the mid-nineteenth century the perception was widespread that Louisiana and French civil law were so conceptually and textually linked that French authorities acquired persuasive value in Louisiana. Decisions of the Cour de Cassation as well as writings of French code commentators came to be accepted as authorities in Louisiana.⁷⁷ It led talented Louisiana judges, such as Provosty and Tate, to cite the modern French commentators in their opinions. Tellingly, they paid little or no attention to Spanish commentators. Beginning first with the translation of Planiol in

76. For these reasons I respectfully disagree with recent assertions that the bulk of the Code of 1825 is “substantively” Spanish. See Mark Fernandez, *From Chaos to Continuity: The Evolution of Louisiana’s Legal System, 1712-1862* 79 (Louisiana State University Press 2001). Professor Pascal has long endorsed that position. See R.H. Kilbourne, *Foreword, in A History of the Louisiana Civil Code: The Formative Years, 1803-1839* vii-viii (Paul M. Hebert Law Center Publications Institute 1987). The learned author assumes that the French-for-Spanish methodology which he perceives Moreau to have followed in drafting the Digest occurred once again in the drafting of the Code of 1825. That view, however, ignores the difference of mandate and the differences of method discussed above. With unfeigned respect for the learned author’s views, I believe this aspect of his argument is without foundation.

77. A computer scan of Louisiana cases from 1809 to present found approximately 84 cases referring to Cour de Cassation holdings. (Westlaw research on file with author.) An interesting instance was the first “wrongful death” claim to arise in Louisiana in *Hubgh v. N.O. and Carrollton R.R. Co.*, 6 La. Ann. 495 (1851). See also Vernon V. Palmer, *The Fate of the General Clause in a Cross-Cultural Setting: The Tort Experience of Louisiana*, 46 Loy. L. Rev. 535 (2000).

1959, the Louisiana Law Institute commissioned the translation of Aubry et Rau, Gény, and Baudry-Lacantinerie,⁷⁸ and conspicuously bypassed the Spanish authors. In the 1940s the Louisiana Law Institute published the "Compiled Edition of the Civil Codes of Louisiana" and it placed next to the Louisiana code articles the corresponding provisions of the *Code Napoleon* (1804) and the French *Projet* (1800). Significantly, no attempt has ever been made to enter the Castilian texts into the Compiled Edition. The famous civil law "renaissance" led by Justices Barham and Tate in the 1970s and 1980s was really a revival of interest in French civil law, not in Spanish law.⁷⁹ Clearly for the past 150 years, then, Louisiana has had some kind of interactive legal relationship with France and very little, if any, with Spain. This is not to say that Louisiana's French connection is today particularly rich or active, for it is actually very weak. Nevertheless, the man in the street holds a different opinion.⁸⁰ As a matter of tradition and folklore, France is considered the mother country of Louisiana civil law. The judicial perception that our code is French-inspired and basically French in content has been rich in consequences and has produced a reality that overshadows the merits of the debate over actual sources. To maintain today that Louisiana law is substantively Spanish, rather than French, runs counter to general opinion and professional perception.

Of course the promulgation of the Digest did not produce by itself any immediate shift from Spanish to French law. The word "Digest" in its title drew attention to a porous design, and the weak tactic of repealing Spanish law solely on the basis of repugnancy clearly

78. Joseph Dainow, *Planiol Citations by Louisiana Courts: 1959-1966*, 27 La. L. Rev. 231 (1967). This article points to rather extensive use of the Planiol treatise in translation by the Louisiana appellate courts. Between 1959 and 1966, there were 62 cases and 67 citations to Planiol and sometimes to other French authorities. *Id.* at 239. An updated search through the Westlaw database shows 711 Louisiana cases citing to Planiol in translation, and 217 cases citing to the translation of Aubry et Rau. (Research on file with author.)

79. Mack Barham, *A Renaissance of the Civilian Tradition in Louisiana, in The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 38 (Joseph Dainow ed., Louisiana State University 1974).

80. Even Stanley Kowalski had this perception.

Stanley: Have you ever heard of the Napoleonic Code?

Stella: No, Stanley, I haven't heard of the Napoleonic Code and if I have, I don't see what it —

Stanley: Let me enlighten you on a point or two baby.

Stella: Yes?

Stanley: In the state of Louisiana we have the Napoleonic Code according to which what belongs to the wife belongs to the husband and vice versa . . .

Tennessee Williams, *Streetcar Named Desire*, Scene Two, 32 (New Directions 1980).

suggested that there must be a brooding *derecho común* beyond the Digest. It seems fair to say, however, that Moreau Lislet's choice of model was an advance sign that the days of Spanish influence were waning. A legislative watershed came later with the enactment of the Civil Code of 1825. That Code magnified the scope of French borrowings and sealed off Spanish law much more thoroughly than the Digest had done. Even then the Louisiana judges were not yet prepared to shed their perceptions.⁸¹ The professional class remained wedded to the idea that Spanish law was the general common law (*derecho común*) of Louisiana. Studies of the period from 1809-1828 show that the lawyers and judges continued to cite and apply Spanish authorities quite frequently.⁸² This pro-Spanish attitude survived the effects of the 1825 codification and even lingered after the great repealing statute of 1828, but it finally collapsed of its own weight by mid-century.⁸³

1.5 Considering the Larger Historical Problem: The Tectonic Shift

It is a curious aspect of the Batiza/Pascal debate that there has not been much explanation as to why it matters whether Spanish or French "sources" prevailed in 1808 or why the issue may still be important today. Some have wondered whether this is simply an internal debate among lawyers over the provenance of legal rules or whether there are larger questions at stake that have been obscured by the technical discussion.⁸⁴ To my mind we have lost sight of an

81. See *infra* notes 82-83 and accompanying text.

82. This has been shown by a statistical study of the period. See Raphael Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana*, 42 La. L. Rev. 1485 (1982).

83. Citations to Spanish authorities severely declined after 1850. For example, according to a computer scan on file with the author, the Spanish author Febrero was cited 249 times in reported cases between 1809-1850, an average of six cases per year. But, in the 153 year period, 1850-present, he was cited in merely 22 cases, which is an average of one case every seven years. The negligible treatment of Spanish authorities in the great case of *State v. Martin*, 2 La. Ann. 667 (1847) (in stark contrast to the overwhelming numbers of French authorities cited in the opinion) suggests that the turning point had been reached. The full list of these authorities is set forth in David Combe, *An Analysis of the Civil Law Authorities in State v. Martin*, in *Louisiana: Microcosm of a Mixed Jurisdiction* 295-320 (V.V. Palmer ed., Carolina Acad. Press 1999).

84. Warren Billings, for instance, complains that much of Louisiana legal history written by lawyers, including the Batiza-Pascal debate, tends to be autonomous "internal legal history" which separates law from its cultural links to the past. See Warren Billings, *Louisiana Legal History and Its Sources: Needs, Opportunities and Approaches*, in *Louisiana's Legal Heritage* 194-95 (Edward Haas ed., 1983). For Mark Fernandez the tendency to dwell upon fine points of the

important historical problem. The debate only obliquely approaches the question of why this tectonic shift in the private law foundations took place. There was a return of French law in the first quarter of the nineteenth century, but why?⁸⁵ Most historians would agree that Spanish law was officially the common law of Louisiana at the time of the Louisiana Purchase and that it was never thereafter abrogated by name.⁸⁶ Most historians also recognize that French law was

law has caused the "homegrown" historians to interpret Louisiana as "a unique, almost mystical jurisdiction whose study is open only to civil law experts." *From Chaos to Continuity*, *supra* note 74, at xiv. Billings' and Fernandez' plea for cultural linkage is correct and to be welcomed. Nevertheless, it is not easily executed. For example, the school of "New Louisiana Legal History" tends to derive its view of Louisiana's basic similarity to other American jurisdictions mainly from the study of Louisiana's judicial institutions. This is an important area of study, but it places the entire stress upon Louisiana's most American feature and of course the characteristic institution of common law process. Such study may provide links to legal culture rather than general culture, and in Louisiana's case, the link is to only one part of legal culture. This, in my view, does not necessarily liberate us from autonomous internal legal history. It could lead us to discount the role of the particular cultural forces and linguistic demands which produced the only Romanist codes enacted in the United States.

85. In his contribution to this symposium, Professor Randy Trahan of the Paul M. Hebert Law Center at Louisiana State University writes that by the late 1820s the use of Spanish authorities greatly slowed and use of French authorities increased. He explores various reasons for this "French turn." See J.-R. Trahan, *The Continuing Influence of le Droit Civil and el Derecho Civil in the Private Law of Louisiana*, 63 La. L. Rev. 1019 (2004).

86. This statement does not overlook the opposed view, notably that taken by President Thomas Jefferson, Colonel John Tucker, and Gustavus Schmidt, that French law was never actually replaced by Spanish law and thus was still in effect at the time of the retrocession. This theory is discussed in Yiannopoulos, *supra* note 55, at 87-96. However, the partisans of the "French theory" have been refuted. Professor Baade has shown that O'Reilly was authorized to introduce the Spanish system subject to subsequent approval. He did, in fact, introduce Spanish-Castilian law and received subsequent approval by royal *Cédula* dated August 17, 1772. Hans Baade, *The Formalities of Private Real Estate Transactions in Spanish North America*, 38 La. L. Rev. 656, 682 (1978). See also the important essays of Elizabeth Brown, *Law and Government in the "Louisiana Purchase": 1803-1804*, 2 Wayne L. Rev. 169-89 (1956) and Rodolfo Batiza, *The Unity of Private Law in Louisiana under the Spanish Rule*, 4 Inter-American L. Rev. 139-56 (1962). Furthermore, the "French theory" cannot square with the evidence in Louisiana's archival records showing the actual application of Spanish law for more than thirty years and the statements of so many contemporaries in the American period, including those of the judges of the Supreme Court, that Spanish law came abruptly into effect after 1769 and remained in effect in 1803 and thereafter. If the French theory were correct, all contemporaries were massively mistaken, including the Supreme Court in deciding the case of *Cottin v. Cottin*, 5 Mart. (o.s.) 138 (La. 1817) and, likewise, the Legislature of 1819, which believing that Spanish law was still in vigor, commissioned the translation of *Las Siete Partidas* into English. Finally, Moreau Lisset himself would have been mistaken, since he stated in the preface to the translation that Spanish law came into effect by virtue of O'Reilly's

abrogated in 1769 and was never formally reintroduced by name.⁸⁷ Absent other facts therefore, one might conclude that Spanish law remains the basis of the Louisiana private law system. And yet, an objective observer will find that French private law was reinstated as the *droit commun* of Louisiana. The judiciary resisted this change, but, as already mentioned, by the 1850s the resistance was finally over. This is only the bare outline of what occurred, however, and still does not furnish an explanation for it.

The debate over the Digest, because it has been waged in positivistic terms, i.e., by analyzing sources and the intentions of drafters, has not produced any wider rationales for this development. The positive enactments alone reveal little about the mind of the legislature or the society. There is not even a *projet* or *exposé des motifs* for the Digest, nor any record of the debates in the Territorial Legislature. In the case of the Civil Code of 1825, the Report to the Legislature of 1823 and the *exposé des motifs* accompanying the *Projet* are the best indication we have of the thoughts of the juriconsults, but that is somewhat insufficient for these purposes. Searching for answers under these circumstances two centuries later is somewhat hazardous. It is usual, in attempting to explain the abundance of French "sources" in the Digest, to stress the convenience and practicality of accepting the French models as surrogates for Spanish law. Those arguments provide important explanations and are explored in the next section. Nevertheless, to my mind there is a missing element that makes the case more persuasive. In an excursus immediately following, I will argue that socio-cultural forces played an important role and that the Digest represents, consciously or unconsciously, the first of several steps taken by a French-oriented society to restore its own legal tradition.

1.6 Practicalities and Legal Realities in Context

A few points should be made about the political context in which the Digest was written. First, at that particular time Louisiana, Creole forces were more united in their opposition to the English common law than in raising questions about the specific kind of civil law they sought to retain. The Digest satisfied their political and cultural demands first and foremost because it enacted civil law rather than common law. Whether it embodied too much French or too little

1769 proclamation and from that time "French law ceased to have any authority in this country." Moreau Lislet & Carleton, *The Laws of Las Siete Partidas*, Translators' Preface xix-xxi (Madrid reprint, 1996) (1820).

87. Rodolfo Batiza, *The Influence of Spanish Law in Louisiana*, 23 Tul. L. Rev. 29 (1958). "The law of France, in its own name, never reappeared in Louisiana." *Id.* at 31.

Spanish civil law, it can be argued, was of secondary importance.⁸⁸ As a political matter, keeping the common law out of Louisiana was the first concern, a point which would tend to explain why historians have uncovered no contemporary criticism about the heavy French borrowings in Moreau-Lislet's work.⁸⁹ While this permitted a unified front, the specific French character of the borrowings is not by any means accidental but has its own socio-political rationale.⁹⁰ Moreover, there were strong pressures upon Moreau Lislet to adopt a *prêt à porter* solution to the task at hand. He had neither enough time nor the requisite expertise (Moreau-Lislet, born in St. Domingue, studied law in Paris and his knowledge of Spanish law must have come from two years of legal practice in New Orleans)⁹¹ necessary to draft an original code out of the Spanish law of that period. Spain itself was unable to codify its law until the late

88. My view as to the secondary nature of that question is influenced by two of the most important documents of the era: the "Manifesto" by the General Assembly in 1806 and the Constitution of 1812. In the Manifesto, see further note 120, the Creoles did not mention the national basis of the civil law they wished to retain. They simply argued that they wished to retain the law which they had known since childhood ("He has sucked this knowledge at his mother's breast, he has received it by the tradition of his forefathers and he has perfected it by the experience of a long and laborious life," 9 Terr. Papers 642, and which was written in the language spoken by the population. The main thrust of the argument was to keep out the common law and retain the civil law, perhaps giving the impression that either Spanish or French civil law would do. Of course, the argument actually pointed in the direction of retaining French civil law without really saying so, since Spanish law was not written in the language spoken by the population nor inculcated since childhood. But, the Manifesto proceeded by indirection and carefully avoided naming the law it had in mind. In the Constitution of 1812, Creole forces placed a famous restriction on the power of the Louisiana legislature to adopt a legal system by general reference, a provision certainly directed against the common law system, since it was unwritten and uncoded and could only be adopted by means of general reference. The provision also operated as a safeguard to preserve the existing civil law. It did not differentiate between Spanish and French varieties though, here again, only French law at that time was ripe for adoption by specific legislation. See also Cairns, *supra* note 13, at 80; Tucker, *supra* note 20, at 104. Tucker writes, "The ancient Louisianians . . . did not codify [in 1808] so they could do away with the old laws. They codified so they could keep them." *Id.* at 105.

89. There is abundant evidence that this copying of French law was public knowledge at the time. See *infra* notes 122-25 and accompanying text. Further, Cairns argues that those surprised by the amount of copying from French law are simply mistaken. Many countries adopted versions of the French Code far closer to the original. The redactors of the Digest were in effect following the civilian tradition, though not to a slavish extent. Cairns, *supra* note 13, at 81.

90. See *infra* section 1.7.

91. His proficiency in Spanish was acquired in the course of a year he spent in Cuba before coming to New Orleans. During the first six months after his arrival in New Orleans, he was employed as a translator. Levasseur, *supra* note 31, at 114-15.

nineteenth century (1889), so it is difficult to see how this was feasible in Louisiana eight decades earlier.⁹² Even assuming such a task lay within his powers, it would have taken many years, perhaps five, ten, or more, to reduce the intractable Spanish law into codified form, and political events could not be put on hold. Given the influx of Americans into Louisiana, Creole political control of the legislature was already disappearing rather quickly.⁹³ The condition of Spanish law, however, provided one of the strongest reasons to prefer French law on its merits. Louisiana had a pressing need for clear and simplified laws expressed in the French and English languages. Spanish law was, by any standard, an inaccessible and disorganized mass of material, which was once succinctly described as "eleven codes, in twenty-three volumes, containing 20,335 laws" all in a foreign language,⁹⁴ "of which a complete collection has never been seen in the state . . ."⁹⁵ French civil law afforded an opportunity to adopt a crucially new kind of law. As Shael Herman notes, it was a turning point in human thinking about law.⁹⁶ The spirit of the *Code Français* confided a supreme faith in rationalism into the hands of a god-like legislator. This bourgeois Code embodied a secular morality consecrated to human autonomy, a new system of ownership, greater economic and commercial freedoms, and greater liberty of marriage and divorce. It was stripped of many feudal, theocratic, and monarchical features found in Spanish law. It

92. Ironically, Spain relied greatly upon the French Civil Code as a model for its civil code of 1889, and followed the Louisiana Civil Code of 1825 as well. See José Maria Castán Vasquez, *Reciprocal Influences Between the Laws of Spain and Louisiana*, 42 La. L. Rev. 1473 (1982); Shael Herman, *Louisiana's Contribution to the 1852 Project of the Spanish Civil Code*, 42 La. L. Rev. 1509 (1982).

93. The demographic change in Louisiana was so swift that the founding of the civil law system has been described as a 'race against time.'

Had the French population of Louisiana not been ascendant and somewhat chauvinistic in the period 1803-1812, it seems to me that Louisiana might have opted for a complete somersault to the common law. Had the founding been delayed perhaps twenty years, Louisiana might have gone the way of Texas and of other jurisdictions that might have been mixed, but never were.

Vernon Palmer, *Two Worlds in One: The Genesis of Louisiana's Mixed Legal System, 1803-1812*, in *Louisiana Microcosm of a Mixed Jurisdiction* 23, 39 (Vernon V. Palmer ed., Carolina Acad. Press 1999).

94. William H. Byrnes, Jr., John Tucker, Jr. & Gaston Porterie, *Foreword*, 1 La. Legal Archives, v, vi (1937). "This multiplicity of laws was further complicated by the conflict of their provisions, and from the uncertainty of the authority of opposing enactments, in cases of conflict." *Id.* at vi.

95. Edward Livingston, Moreau Lislet, & P. Derbigny, *Preliminary Report of the Code Commissioners dated February 13, 1823*, 1 La. Legal Archives, LXXXV (1937).

96. Shael Herman, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 U. Ill. L. Rev. 597.

was among the first to delete all references to the King from its provisions and to presuppose that the King's former powers now resided in the legislature, courts, and the executive.⁹⁷ It divorced Church teaching from its provisions and unlike the *Partidas*, did not define duties in terms of "sins" nor rely upon the separate courts of the "holy church."⁹⁸ This was, for Louisiana, a chance to fill the entire private law sector with the most advanced legal science of its day.

All of these reasons were no doubt rational pragmatic grounds for adopting the French models, but I wish to argue that there is something more important behind the scenes. There were, I believe, strong cultural, historical, and instinctive forces within Louisiana society itself which pulled the redactors and the legislature toward this end. Comparative law teaches us that this is not at all strange or unusual. Legal chauvinism and cultural identification have been the "invisible foundation" on which the original inhabitants in mixed jurisdictions have usually made their claim to keep 'their' civil law.⁹⁹

97. I wish to thank Thomas Tucker for the insight that the French codes were designed for a republican form of government and therefore did not mention the King or the Crown. The point is also made in Tucker's essay *The King is Lost Upon the Batture*. Thomas Tucker, *The King is Lost Upon the Batture*, in Louisiana: Microcosm of a Mixed Jurisdiction 134-36, n.11-12 (Vernon V. Palmer ed., Carolina Acad. Press 1999). For an account of the historical circumstances surrounding the enactment of the Digest, see Vernon V. Palmer, *Two Worlds in One: The Genesis of Louisiana's Mixed Legal System, 1803-1812*, in Louisiana: Microcosm of a Mixed Jurisdiction 23-39 (Vernon V. Palmer ed., Carolina Acad. Press 1999). See also Vernon V. Palmer & Mathew Sheynes, *Louisiana, in Mixed Jurisdictions Worldwide: The Third Legal Family* 257-69 (Vernon V. Palmer ed., Cambridge 2001).

98. Sin and church are inextricably interwoven into the fabric of the *Partidas*. Adultery as a marital offense, for example, is dealt with as follows:

No other person but the spouses themselves, can make an accusation for such a cause [adultery]; and it ought to be made before the bishop or the ecclesiastic judge official either by the parties themselves, or their attorneys. And every man who know that his wife commits adultery is bound to accuse her of it, if he thinks she will not renounce, but persevere in that sin, and if he does not accuse her, he will himself, sin mortally. But if he thinks she will desist from that sin, and do penance for it, then if he does not wish to accuse her, he will not commit a sin And if peradventure the husband should not choose to accuse her; and she should not wish to desist from her wicked practices: then the accusation may be brought against her, by her nearest relations: and if these do not wish to do it, then by any other person whatever. For the holy church think proper, to permit every person to accuse a woman who commits such a sin. For, as all persons are prohibited from committing the sin of adultery; so he who commits it, sins against the right which belongs to all.

The Laws of *Las Sietes Partidas*, Law 2, Part. IV, Title lx, 487 (Moreau Lislet & Henry Carleton trans., Claitor's Publishing 1978).

99. See Palmer, *Mixed Jurisdictions Worldwide*, *supra* note 97, 18-19.

1.7 *Excursus: A Socio-Political Explanation for the Return of French Law*

Let me frankly admit that the argument and the historical account which follows is indeed speculative. Speculation is not terribly new, nor particularly unusual in studies of this kind. Given the minimum amount of historical records, many historical claims about the Digest have also been speculative. Neither I nor another historian can prove, at this remove, what historical actors 200 years ago chose to obscure, or even that they chose to obscure anything. My thesis, however, is persuasive, because it is consistent with the historical facts we have and also it is consistent with our knowledge of what has occurred under similar circumstances in other mixed jurisdictions.

The legal history of Louisiana is sometimes treated as if it were just a saga of shifting sovereigns, the story of a succession of flags which once waved over the capital. The succession of states, however, does not always determine the succession of laws, any more than a shift in sovereignty suddenly determines the language people will speak, the customs they observe, the crops they will plant, or the family recipe for gumbo. Much is deeply located in social conditioning and lies beyond the power of the Crown or the nation state to change within a short period of time. For similar reasons it appears to be historical to assume that French law suddenly disappeared during the Spanish "domination" just because it was indeed abrogated by O'Reilly's proclamation in 1769. Instead, we find that an attachment for French laws and customs persisted and French law was to some extent in force at an unofficial level during Spanish rule and thereafter.

It must not be forgotten that Spanish law in *Luisiana* was imposed law and as such was neither popular nor deeply rooted in the lay consciousness. From the first, rather than accept Spanish rule, the colonists expelled the first Spanish governor, Don Antonio de Ulloa, and took control of the government, claiming they had a legal right to maintain their French institutions and traditions. Quite a few different reasons for the rebellion may have existed (Ulloa's political ineptitude, the severe trade restrictions he imposed, an insufficient military force at his disposal, and so forth),¹⁰⁰ but the *public* justifications offered by the leaders of the revolt of 1768 were heavily based in principles of legality and played to the desire of the Louisiana French to keep their ancient laws and institutions. Indeed, applying their own laws and customs as the test, they claimed that the

100. These are canvassed in David Texada, *Alejandro O'Reilly and the New Orleans Rebels* 19-21 (University of Southwestern Louisiana 1970). For further views, see Vicente Rodriguez-Casado, *Primeros Anos de Dominación Española en Luisiana* (1942); John Preston Moore, *Revolt in Louisiana, The Spanish Occupation 1766-1770* (Louisiana State University Press 1976).

Treaty of Cession to Spain had no validity, as to them at least, since it had not been registered with the Superior Council. Furthermore, Governor Ulloa had usurped lawful power because his credentials and authorization had not been presented and registered with that body.¹⁰¹ Interestingly, the rebellion enjoyed enthusiastic popular support and was led by some of the highest placed colonial officials. One of these was the King's Attorney General who was a member of the Superior Council (*le Conseil Supérieur*), the lawmaking and judicial body which had powers the equivalent to a *Parlement* of France and which formed the heart of France's colonial government.¹⁰²

One is not sure whether the Spanish Crown, had its pride not been wounded by the revolt, might have been content to rule Louisiana through its public and political laws alone and to leave French private law in place,¹⁰³ but the ignominious deportation of Ulloa aboard a

101. See *infra* note 102 and accompanying text. However impractical the argument may have been, this reliance upon French law as the test of the Spanish Crown's own actions was not illogical in view of the fact that French law, to that point, had been left in force. See Baade, *supra* note 3, at 32-37.

102. Thus Lafrénière, the chief leader of the revolt who was the King's Attorney General, justified the rebellion in the form of a remonstrance of Parlement, by claiming that the treaty of cession to Spain had been violated by Governor Ulloa. He argued that the treaty secured for the inhabitants of the colony "the preservation of ancient and known privileges . . . under the protection and shelter of their canon and civil laws," and paramount among these laws was the necessity to register all laws and ordinances and the treaty of cession itself with the Superior Council, which Ulloa was obliged to do if he was to exercise lawful power, but which, among other sins, he had failed to do. For a detailed account, see Charles Gayarré, *History of Louisiana, The French Domination*, vol II, 193-202 (Gresham 1879). In a contemporaneous plea addressed to King Louis XV, the Superior Council described the degree to which French law was inseparable from their social identity:

Men are born under laws which become gradually familiar and dear to them, in proportion as from childhood they grow into manhood, when their attachment to them can no longer be destroyed. Men who have reached the meridian of life cannot, of their own free will, remold their character, their heart, their honest and time-honored habits. It can only be accomplished by force. What a modification of their existence does it require!

Id. at 223-24.

103. In the treaty of cession, Louis XV had requested the Spanish sovereign to retain French law as a favor to his former subjects, though this request was not made a formal reserve of the treaty, as Lafrénière attempted to make it into. Charles III of Spain was initially willing to accede to the request. His instructions to Governor Ulloa were clear:

I have resolved that, in [Louisiana], there be no change in the administration of its government, and therefore, that it be not subjected to the laws and usages which are observed in my American dominions, from which it is a distinct colony, and with which it is to have no commerce. It is my will that it be independent of the ministry of the

frigate apparently moved Madrid to assert its full authority. It sent a heavily-armed force from Cuba, headed by Governor Alejandro O'Reilly, who, as is well known, took control over the colony in 1769, executed the leaders of the *coup*, replaced the Superior Council with a Cabildo, and introduced both public and private Spanish law. The Governor issued an abridged version of the Spanish laws, thereafter known as "O'Reilly's Code," to be followed in all civil and criminal affairs, which was to serve as a guide "until a more general knowledge of the Spanish language be introduced in this province."¹⁰⁴ The apparent abrupt changeover to foreign laws of which the inhabitants were completely ignorant was regarded as a severe blow to the colony.¹⁰⁵

Yet over the course of the next thirty years, Spanish private law never fully monopolized the field and in some ways only shared the field with French law. The extent of Spain's civil and military presence was limited to the capital and selected outlying posts, which meant that the degree to which this law came to be assimilated and used by the general population was far from complete. The colonists continued to regard their old law in the same way they regarded their language, religion, and collective cultural experience. Indeed, as is usual for peoples who have undergone shifting sovereigns and uncertain futures, we may assume that they pinned their hopes upon their native legal system to serve as a means to preserve their culture in all its manifestations.¹⁰⁶

"Lower Louisiana" had been overwhelmingly French in language, *moeurs*, manners, and legal expectations and remained that way throughout Spanish rule. In Lewis Newton's words, Louisiana was a receptacle for a polyglot European immigration in which the prevailing stamp of life and culture was French. Diverse strains of

Indies, of its council, and of the other tribunals annexed to it;
Gayarré, *supra* note 102, at 158.

104. These laws are reprinted in Gustavus Schmidt, *Ordinances and Instructions of Don Alexander O'Reilly*, 1 La. L.J. 1-60 (1841) and are also excerpted in Gayarré, *supra* note 102, at 8-19.

105. F.-X. Martin, whose history of Louisiana covered all periods down to 1815, said of this decision:

It is oppressive, in the highest degree, to require that a community should instantaneously submit to a total change in the laws that hitherto governed it, and be compelled to regulate its conduct by rules of which it is totally ignorant. Such was, however, the lot of the people of Louisiana.

F.-X. Martin, *History of Louisiana: From the Earliest Period* (3d ed., Pelican Publishing 1975); Gayarré, *History of Louisiana* 209 (5th ed., Pelican Publishing 1975).

106. *Mixed Jurisdictions Worldwide: The Third Legal Family* 18 (Vernon V. Palmer ed., Cambridge 2001).

the “free” population—German, Canadian, Spanish—entered this melting pot and learned the French language, intermarried with French families, and often changed their surnames in order to appear to be of French descent.¹⁰⁷ This process of assimilation did not abate during Spanish rule; even the Spanish Governors and their Iberian settlers adapted to their French surroundings. In more than thirty years, Spain was never able to people Louisiana with a sufficient number to alter greatly the French character of the province.¹⁰⁸ “The Spanish in Louisiana,” writes Christina Vella, “right up to Governors Galvez and Miró married the daughters of Creole planters, served Bordeaux at their official dinners, danced the *galopade*, sedulously gambled their money at *bourré*, and reared children who could not speak a word of Spanish. Almonester and Miró . . . spoke only French at home like many other Spaniards in Louisiana.”¹⁰⁹ James Pitot observed in 1802, “the population of Louisiana, Spanish by its government, is still generally French in its tastes, customs, habits, religion and language.”¹¹⁰

A strong attachment for French laws and customs continued to be felt, particularly outside of New Orleans where Spanish authority was weak. Professor Hans Baade’s detailed research of marriage contracts in the Spanish period shows that formal Castilian law did not govern these contracts except in New Orleans. “Living” Paris notarial contract prototypes were used in the rest of the province. He describes Louisiana’s condition as amounting to a “dual state.”¹¹¹ This suggests that the French population beyond the capital clung to their original law under the Spanish, relying upon French customary ways to regulate wealth transmission through marriage agreements. Equally revealing is Professor Baade’s discovery that soon after the Louisiana Purchase, even those marriage contracts registered in New Orleans stopped following Castilian law and reverted to the Paris notarial forms, though Castilian law was still in force. This spontaneous reversion to French customary marriage contracts in the capital indicates the ingrained nature of these practices. Moreover, research respecting French legal institutions such as the “family council” indicates that the outlying French population continued to call together family meetings on important legal matters, even though the family council was expressly abolished by Governor Unzaga in

107. Lewis Newton, *Americanization of French Louisiana 1803-1860* 17(1980).

108. *Id.* at 13.

109. Christina Vella, *Intimate Enemies* (Louisiana State University Press 1997).

110. James Pitot, *Observations on the Colony of Louisiana from 1796-1802* 31 (Louisiana State University Press 1979).

111. Baade, *supra* note 3, at 73-79, *discussed in* Cairns, *supra* note 13.

1771 and was not recognized in Spanish law.¹¹² This evidence too suggests a dual state. “L’assemblée de la famille” was not recognized in New Orleans¹¹³ but was functioning in the hinterlands. Further, as we have seen, Moreau Lislet brought the family council officially back to life in his Digest, though he was surely aware that Spanish law was still in force and knew no such institution.¹¹⁴ Here again we see an example of spontaneous reversion to a French custom.

This survival at the level of folkway or “living law” is evidence of deep internalization, but it may also indicate that Spanish law remained relatively unpopular and disliked or was only superficially understood by the general population.¹¹⁵ One reason perhaps why French civil law could be so easily revived after Spanish rule was that it had never been forgotten or relinquished in the Creole mind.

As already mentioned, Spanish law had its greatest effect on the citizens and officials of the capital and in the courts and institutions of government located there. It directly affected the small group of legal professionals who were allowed to practice law in the territory after 1803. It was their livelihood to know this law well, and for professional reasons they were strongly attached to it. French and Spanish policy had previously kept all private lawyers out of the province, and thus, ironically, there was no professional class championing Spanish law until after the departure of the Spanish.¹¹⁶

This brings us back once again to Moreau Lislet who, as already mentioned, was a Paris-trained lawyer born on the isle of St. Domingue where he practiced law and held various governmental

112. On the survival of the family council, see Kurt Verheggen, *Tutorship and Emancipation: A Comparative Study Between French and Spanish Colonial Law in Louisiana* (1994) (unpublished paper) (on file with author).

113. See the case initiated by Juan Esteban Boré in 1784, 24 La. Hist. Quarterly (1941), whose contention was upheld in court that husbands can appoint their wives as tutrices to their children in their will, without calling a family meeting.

114. See *infra* section 1.4.1.

115. When the British attempted to impose the common law upon the French Quebec population in the years 1767-1775, they faced strong cultural resistance and boycotts of the legal system. The events and comparisons with the Louisiana experience are described in *Mixed Jurisdictions Worldwide: The Third Legal Family* 23 (Vernon V. Palmer, ed., Cambridge 2001).

116. Lewis Newton writes that at the time of the Purchase, there were not more than three or four lawyers in the entire territory. By 1810 the number of lawyers in New Orleans had risen to about twenty and judging by their surnames they were almost evenly divided between Anglo-Americans and Creoles. The profession was split into two branches, the *avocats* and the *procureurs*, and the latter enjoyed a wider right of audience that included the higher courts. It appears that Moreau Lislet was among this last group. See Newton, *supra* note 107, at 175; and Gayarré, *The New Orleans Bench and Bar in 1823*, in McCaleb, *The Louisiana Book*, 54, 68 (1894).

appointments.¹¹⁷ In the Pascal/Batiza debate it has been suggested that he stretched his instructions, but this is hardly surprising in light of the dominant feelings of the society and his own legal/cultural identity. He emigrated to New Orleans in 1805 with far greater experience and credentials in French than Spanish law. We do not know the story of his appointment by the legislature nor do we have documentary evidence about actual expectations of his appointers. It is important, however, to note that those in control of the legislature were themselves, in cultural orientation and political leanings, decidedly French.

The Territorial Legislature of 1806 was the first democratically-elected institution known to Louisiana and it was dominated by the ancient Louisianians.¹¹⁸ According to Governor Claiborne's census in 1806, the Americans then formed merely 13% of the white population. The bicameral General Assembly consisted of a House of Representatives of 25 directly-elected members. The upper house, called the Legislative Council, consisted of five members to be selected by the President of the United States from a list of 10 names chosen by the House of Representatives. Since the elections of 1805 returned a strong majority of Creoles to the House, the ten names which that body submitted to the President were 80% Creole.¹¹⁹ Thus, President Jefferson had little choice but to allow Creole elements to predominate in the upper as well as the lower houses. Local control set Louisiana apart from some other French or Dutch or Spanish colonies which were destined to become mixed jurisdictions. Louisianians retained private civil law not as a matter of the ruler's grace but because they controlled the legislature and had the political initiative. It is true that the Governor possessed a veto power, but, as events demonstrated, that weapon was relatively weak and needed to be used sparingly.¹²⁰

117. Between 1790 and 1803, he held at various time the posts of public prosecutor, public defender, and interim judge, while apparently practicing law as well. See Levasseur, *supra* note 31, at 95-113.

118. By Act of Congress, March 2, 1805, a democratic General Assembly replaced the old Legislative Council which was a short-lived unicameral institution whose 13 members were appointed directly by the President. Jefferson's policy was to ensure a majority of American representatives on the old Legislative Council ("In the legislative council I think it necessary to place a majority of Americans, say 7 Americans and 6 French . . .") Letter to Claiborne, August 30, 1804, but this policy apparently backfired. Leading Creoles boycotted the institution and refused to serve in the minority.

119. Under these constraints he chose Joseph Bellechasse, Noel Destréhan, Augustin Macarty (a direct descendant of Miró and later Mayor of New Orleans), Pierre Sauv , and Evan Jones.

120. The French members of the Legislature used their preponderant numbers as a means of neutralizing the Governor's veto. They had no difficulty passing an

Although this is speculation, it would seem unlikely that a Legislature would seriously expect Moreau Lislet to produce a code based on Spanish civil law, particularly when his expertise in that respect was not strong. Would not a Creole-dominated legislature be culturally predisposed to welcome a code based in the French legal tradition? James Brown, one of the redactors of the Digest of Orleans and a highly connected political observer, made this very point. In 1805 he opined that the members of the legislature were “generally” attached to French laws and he predicted the kind of code they would produce. He stated, “The members of the Council and House of Representatives will generally be attached to French Laws and will pass only acts resembling the Civil Laws and the Spanish Ordinances formerly in force here.”¹²¹ Brown’s prediction rested solely upon an understanding of the cultural biases of the members. But it may be asked, how much did the Legislature or the public know about the redactors’ work and their borrowings? It would be an error to assume that Moreau’s heavy French borrowings were kept secret from the Legislature or from the public. An oversight committee composed of four members of the House and two of the Legislative Council was charged with responsibility “to meet, whenever requested so to do by the juriconsults, in order to examine and discuss such parts of the new code as may be completed.”¹²² The Digest required the approval of that committee and the General Assembly, and one may reasonably assume that the borrowings were fully known about and discussed before receiving general approval.

Act in 1806 “declaring the laws which continue to be in force in the Territory of Orleans.” When the measure was vetoed by Governor Claiborne, however, they immediately turned to protest. The upper house unanimously passed a Resolution to dissolve the General Assembly dated May 28, 1806, on grounds that Claiborne intended “to reign alone” and the institution had become “expensive and useless.” The body of the motion sets forth a “Manifesto” on the Creole view of the civil law. The motion to dissolve ultimately failed in the House of Representatives by a single vote, but all of the signatories in the House—Boré, Boulogny, Arnould, Andry, Bernard, Sorrel, Prudhome [sic], Hebert, Delorme, and Landry—had French surnames. See 9 Terr. Papers 642-57. When the Legislature immediately commissioned Moreau Lislet and Brown to draft a civil code, and when Claiborne did not veto that act, his veto was effectively lost on that issue. The code or digest would take several years to complete and entailed substantial payments to the redactors. In my view Claiborne would have been in no position in 1808 to block passage of the Digest unless he had done so before the redaction had started. He had effectively estopped himself from exercising it later.

121. Elizabeth Brown, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 Am. J. Legal Hist. 35, 40-41 (1957); also quoted in Cairns, *supra* note 13, at 83.

122. Resolution of June 7, 1806. The committee was directed to report any disagreements between it and the juriconsults at the time the legislature took up the discussion of the code. *Id.* *Le Moniteur* of Jan. 27, 1808 reported that the members of the code oversight committee from the House of Representatives were Villars, Hughes, Kerr, and LaCroix.

It is, however, principally the statements made by individuals outside of the legislature which prove that the borrowings were not kept secret from the public. Three eminent jurists, Edward Livingston, Justice Martin, and Justice Bullard, were well aware of the French indebtedness and spoke of it as if it were a matter of public knowledge.¹²³ In a pamphlet written in New Orleans in 1806, Jeremiah Brown emphasized that it was thoroughly known to the public: "It is a matter of public notoriety that our St. Domingo Lycurgus is avowedly copying his new code from that of Bonaparte, to the infinite delight of the whole party by whom he is employed."¹²⁴ If, as Brown asserts, Moreau was "avowedly" copying his new code, it is probably the redactor himself or members of the code committee who were professing the fact. If the copying caused "the infinite delight of the party by whom he is employed," Moreau's legislative backers must have been aware and satisfied. Under these circumstances do we not have all the ingredients for a conscious reception of French law? Certainly Moreau's conduct *qua* codifier received no reproach; indeed his standing with the legislature continued to rise. When the House of Representatives later selected three Jurisconsults to draft the second Louisiana civil code, he received nearly twice the number of votes received by Edward Livingston and Pierre Derbigny.¹²⁵

1.8 Was There Lasting Impact?

The Pascal/Batiza debate may never be resolved, but the problems with which the protagonists struggle are quite important. Indeed, as I have tried to indicate, the question involves more than verifying the true sources of the Digest. That is only part of a fascinating and important story of social and legal change. It is a valuable example of the tenacious connection between a dominant culture and its laws, of the limits of sovereignty over deeply internalized practices, and of the reassertion and reimplanting of an original native law when the political opportunity arose. The process

123. Thus, Edward Livingston wrote Jefferson, "You are aware, Sir, that in the year 1808 a civil Code was adopted in that State, founded chiefly on that of Napoleon . . ." Letter March 9, 1825, *quoted in* Levasseur, *supra* note 31, at 222. Justice Martin, a contemporary, recorded a similar point in his *History of Louisiana*. Martin, *supra* note 105. Justice Henry Bullard said of the Digest, "This compilation was little more than a mutilated copy of the Code Napoleon." Henry A. Bullard, A. Discourse on the Life and Character of the Hon. Francois Xavier Martin: Late Senior Judge of the Supreme Court of the State of Louisiana, Pronounced at the Request of the Bar of New Orleans 11 (J.B. Steele 1847).

124. *See supra* note 1.

125. *See* Journal of the Louisiana House of Representatives, Fifth Legislature at 73.

of change cannot be really appreciated by studying the Digest in isolation from later periods, for the clearest part of the reimplantation took place with the redaction of the Civil Code of 1825 and the legal evolution thereafter. It is clear that the adoption of France's codistic model in 1808 had long term impact on the future direction and underlying nature of Louisiana's mixed legal system. Had a Spanish-based civil code been *literally* executed by Moreau Lislet, then Louisiana's legal history and its own sense of self would have been vastly different. A second wave of codification might never have been necessary, at least not for the same reasons; and any second code, if and when it came, would have probably deepened the Spanish ties of the first code. To be sure, Louisiana would have still developed into a mixed jurisdiction, but probably one situated in the Spanish tradition along the lines of Puerto Rico and The Philippines.¹²⁶ But this was not to be.

2.0 *The Quiescent Years of the Legislature: 1825-1975*

We have seen the great quantity of French law which Louisiana ingested in the period 1808-1825. Over the next 150 years, the contribution remained basically undisturbed. The legislature enacted very few amendments to the Civil Code. Professor Jolowicz, while visiting Louisiana in the 1950s observed that it was much easier to pass a series of constitutional amendments in Louisiana than a single amendment to the Civil Code. There was a technical revision of the Civil Code which took place in 1870, but this came after the Civil War and was designed only to expurgate provisions dealing with slavery which of course by then were unconstitutional. Outside of this deletion and a few small amendments, the 1870 revision was basically a verbatim re-enactment of the Code of 1825. Accordingly the foundations of the law were hardly affected. Indeed the feelings of continuity were so strong that the French version of the Code of 1825 continued to be used to correct the errors of translation carried forward by the republished English text of 1870.

In 1913, a more substantial revision was begun and a committee of lawyers prepared a *projet*, but it failed to gain the approval of the bar or the legislature.¹²⁷ In the 1930s and 1940s it was increasingly

126. However since Louisiana was not Spanish speaking and had little Spanish legal culture, a Spanish private civil law would probably have been more easily and rapidly Americanized, if the experience in the Philippines, where similar social conditions existed, is any guide. See Palmer, *Mixed Jurisdictions Worldwide*, *supra* note 99, at 28-29.

127. For details, see A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 La. L. Rev. 5 (1992).

noted that the Civil Code was old and anachronistic and that the need for comprehensive revision was pressing and long overdue.¹²⁸ In 1948 the Legislature entrusted the task to the Louisiana State Law Institute, but the first preparatory work was not completed until 1968. At that time the Revision of the Code began in earnest.

It remains to be seen to what extent this Revision has altered the historic relationship with the Code Napoleon and other French sources. The type of codification Louisiana created has also to be characterized.

3.0 The Revision: 1975-2003 and Counting Its Apologists and Its Critics

The so-called "Piecemeal Revision" has been criticized as being something less than an orderly, scientific undertaking. The revision has, however, its pragmatic defenders. It is argued that because the Legislature has not properly funded the undertaking, the Institute is prosecuting the Revision in the only manner feasible under the circumstances.

Many criticisms, however, are not necessarily related to resources. Critics contend that the Louisiana Law Institute began the work without developing a vision of what it wanted in a new code and with no policy planning in advance. No outline of the proposed code was ever drafted. The basic structure of the Code was never questioned. More seriously, no discussion of the necessity of expressly repealing the prior code ever took place. Thus a haphazard and inconsistent approach characterized the process. In consequence, there is both a new code and an old code which is unrepealed. Equally significant was the failure to discuss the future of judicial precedents under the old code and to define their relationship with the new code. Without guidance or advance planning, the drafters freely used the jurisprudence as a judicial *acquis* and attached the cases by name and citation to the new code articles.¹²⁹ Furthermore, the Institute and its appointed Reporters proceeded to revise the code in no particular sequence or order, with many scholars of varying ability, credentials and experience working in independent groups on

128. See Morrison, *supra* note 19; C.J. Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 Tul. L. Rev. 351 (1943).

129. In the 1968 discussions on the codification of the English and Scottish law of contract, the problem of "the role of precedent in a system moving towards codification and especially, the authority respectively of pre-code and of post-code decisions" proved thorny and was not resolved. See A.E. Anton, *Obstacles to Codification*, 27 Jurid. Rev. 15, 20 (1982). It was one of the obstacles causing the abandonment of the codification project. Louisiana's nonchalant planning caused it to ignore the problem that the Scots clearly foresaw.

its various books and titles.¹³⁰ A fundamental criticism relates to the piecemeal strategy. The Institute chose not to hold back the revised “pieces” until they could be compared, unified, and submitted as a whole to the Legislature, but decided to have them enacted one by one in the order of their completion. The criticism is not so much leveled at the use of multiple drafting teams under committee oversight, nor at the considerable duration of the process (after all, slow collaborative methods were successfully used in drafting the BGB and more recently the NBW). Rather it is directed at the “rolling enactment” of disparate material which prevented presentation of the whole to the public, greatly limited scholarly criticism and review,¹³¹ and concealed from the Institute as well as the Legislature, the unevenness and imperfections in the overall product. The widely ranging enactment dates of related subject matter are symptoms of serious defects, which range from the incomplete integration of basic principles within the revised parts, the uneven quality of the drafting, to a departure from the qualities to be expected of a code in the French tradition. Some decoupling of the Civil Code from that tradition was to be expected, but now it is clear that the code no longer deserves to be called a code. It has lapsed into an inferior type of codification which would be appropriately called a digest.¹³²

130. For a history, description, and critical evaluation of the process, see F. Zengel, *Civil Code Revision in Louisiana*, 54 Tul. L. Rev. 942 (1980).

131. The benefits of public review led to the rejection of a *projet* to revise the Civil Code in 1910. The work of the three revisers was poorly executed and amounted to a common law style of code. It received widespread criticism from the public and the Bar and was ultimately abandoned by the legislature. For details, see A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 La. L. Rev. 5 (1992). A comparison with the codification process in Germany is also useful. In the twenty year gestation of the BGB there were three stages. A first commission, appointed in 1874, consisted of 11 members which included 6 judges, 2 professors, and 3 functionaries. The commission made its *projet* public in 1887, along with 5 volumes of preparatory works. The *projet* immediately attracted extensive criticism in more than 600 publications, of which the most famous were the critiques of Otto von Gierke and Anton Menger. The negative reaction led the government to appoint a second and larger commission consisting of 10 permanent members and 12 non-permanent members which submitted a revised *projet* (also 6 volumes of preparatory work) to the legislature in 1895. After further corrections and modifications, the BGB was promulgated on August 18, 1896 and went into effect on January 1, 1900. For a synopsis of this background, see Claude Witz, *Droit Privé Allemand: Actes juridiques, droits subjectifs* 28-29 (Litec 1992).

132. See *infra* section 4.0. The results abundantly confirm the wisdom of Descartes' dictum that “there is very often less perfection in works composed of several portions, and carried out by the hands of various masters, than in those on which one individual alone has worked.” Rene Descartes, *Discourse on Method*, 31 Great Books 44 (1952).

3.1 Summary of the Completed Work

By a rough count, this author estimates that as of January 2003, approximately 72% of the Civil Code has been fully revised. Accordingly about 28% of the 1870 Civil Code remains in place, and so there are many enclaves of old articles still coexisting and interacting with the new. Only Books II and IV can be considered totally complete. The summary below is not chronological. It begins at the front of the Code and proceeds book by book and title by title, rather than according to the respective dates of enactment. The haphazard sequence of the completion dates should serve as a first indication of the inherent problems both of coordination and policymaking that have been mentioned above.

Preliminary Title. The Preliminary Title of the Civil Code was revised in 1987.

Book One. The revision of Book I (Persons) began in 1987, but is still incomplete. Certain titles were revised in 1976, 1987, 1990, and 1997 but the subjects of Domicile, Legitimate Filiation, Adoption, Parental Authority, Minors, Tutorship, and Emancipation have not been completed at this time.

Book Two. The entirety of Book II (Property) was revised from 1976-1979. It now consists of seven instead of six titles.

Book Three. The revision of Book III (Modes of Acquiring Property) began in 1981 and has been selective. In Title I, which is devoted to Successions, the first three chapters were revised in 1981, followed by the revision of four more chapters in 1997.¹³³ As to Title II on Donations, the chronology is back and forth. Capacity to make and receive donations was revised in 1991 and new provisions on forced heirship (which caused a vehement polemic)¹³⁴ came into effect in 1996. The subject of prohibited donations was revised in 2001 and chapters on making, revoking, and probating testaments were revised in 1997. Disinherison was revised in 2001. There still remain a few pockets within Title II that have not been revised, such as donations *inter vivos*.

133. Provisions in the law of succession relating to collation have not been comprehensively revised.

134. See Katherine Connell-Thouez, *New Forced Heirship in Louisiana*, 43 Loy. L. Rev. 1 (1997); Katherine S. Spaht, Kathryn V. Lorio, Cynthia Picou, Cynthia Samuel, & Frederick W. Swaim, Jr., *New Forced Heirship Legislation: A Regrettable "Revolution,"* 50 La. L. Rev. 409 (1990); Cynthia Samuel, *Letter From Louisiana: An Obituary for Forced Heirship and a Birth Announcement for Covenant Marriage*, 12 Tul. Eur. & Civ. L.F. 183 (1997).

Continuing with our summary of Book III, the revision of Title III (Obligations in General) and Title IV (Contracts) was completed in 1984. Title V (Obligations Arising Without Agreement) was revised in 1995, and Title VI (Matrimonial Regimes) in 1979. Important particular contracts which have been revised are: Sales (1993), Partnership (1980), Mandate (1997), Suretyship (1987), and Mortgages (1991, 1992). Still awaiting revision are the following particular contracts: Lease,¹³⁵ Labor Contracts, Rents and Annuities, Loan, Deposit, Aleatory Contracts, Transaction or Compromise, Respite, Arbitration, and Pledge. The Titles respectively devoted to Occupancy and Possession and Prescription were revised in 1982 and 1983. The Title devoted to Privileges, however, has not as yet been changed.

Book Four. An unprecedented Book Four was added to the Code in 1991. This Book, devoted to Conflict of Laws, has eight titles, no chapters, and a total of 34 articles.

3.2 The Lingering Influence of French Law in the Revision

It is beyond the scope of the article to attempt a detailed study of the revised code articles and to compare them with the French sources. My purpose here is only to give the most general indication of the new direction which Louisiana has taken. The main tool that I propose to use is a table that appears in the appendix to the current edition of the Louisiana Civil Code.¹³⁶ Table 5 has six columns tracing the sources of code articles back in time, beginning on the left with the 1976-2001 Revision, and moving across the page to corresponding articles of the Civil Code of 1870, the Civil Code of 1825, the *Projet* Civil Code of 1825, the Civil Code of 1808 and finally to the *Code Napoléon*

Relying primarily upon this Table, but sometimes making actual textual comparisons to be satisfied of the Table's accuracy, the author calculates that about 1,288 provisions in today's code (counting both revised and remaining unrevised articles) are traceable to the *Code Napoléon*. This amounts to about one-third of the whole. When the entire revision is completed, however, this fraction may change somewhat, though probably not dramatically.

I should explain that when I say these articles are traceable to the *Code Napoléon*, I am no longer speaking in the sense of "verbatim" or "almost verbatim" sources, as Professor Batiza used those terms,

135. The author is advised, however, that the revision of lease is completed and will soon be submitted to the Legislature.

136. La. Civ. Code Vol. II, Table 5 (A.N. Yiannopoulos ed., 2002).

but in my own, less scientific, sense. The revision, even when it wished to remain faithful to the previous law, almost always varied the language somewhat by rendering the same rule or principle in more colloquial English. At other times the revisers have been known to collapse several rules into one in search of a more efficient *mélange*. Thus, an appreciation of the French influence today must be an evaluation both of substance and form, and perhaps the former more than the latter. Where the redactors have not signaled a change in the law and the French substantive foundation is still perceptible though expressed in a different formula, I have regarded the link as still intact.¹³⁷ The strength and obviousness of these links, however, do vary somewhat from area to area, as will be pointed out below.

Property: A Strong Repository. When one glances at different segments of the Revision, it is clear that the Property provisions retain the greatest French influence. Nearly 60% of the revised law of property, 216 out of 370 articles, has a substantive basis in the *Code Napoléon*. What distinguishes this field is that the linguistic connections to the source articles in the *Code Napoléon* are still apparent after so many years. The tenacity of tradition is always remarkable to observe, but this degree may be surprising, particularly when bearing in mind that no small measure of modernization was also accomplished. A number of modern ideas and institutions were introduced that were inspired by other European codes.¹³⁸ These new features allowed for deimmobilization of property, the personal

137. Perhaps an example, drawn at random, will illustrate how the underlying monument is not totally obscured from view even after considerable linguistic evolution. Code Napoleon art. 589 (1804) states:

Si l'usufruit comprend des choses qui, sans se consumer de suite, se détériorent peu à peu par l'usage, comme du linge, des meubles meublans, l'usufruitier a le droit de s'en servir pour l'usage auquel elles sont destinées, et n'est obligé de les rendre, à la fin de l'usufruit, que dans l'état où elles se trouvent, non détériorées par son dol ou par sa faute.

Revised Louisiana Civil Code article 569 (1976) states:

If the usufructuary has not disposed of corporeal movables that are by their nature impaired by use, wear, or decay, he is bound to restore them to the owner in the state in which they may be at the end of the usufruct.

The usufructuary is relieved of this obligation if the things are entirely worn out by normal use, wear, or decay.

138. This represents of course a new diversification of legal tradition in Louisiana. It often reflects the legal culture of the Reporter. By Professor Yiannopoulos' count, the Greek Civil Code has been cited as the source of 86 articles of the Louisiana Civil Code. See A.N. Yiannopoulos, *The Hellenic Legal Tradition in the United States*, 42 Loy. L. Rev. 1, 8 (1996). For instance, the sources of the revised law of usufruct have been expanded to include references to the Greek Civil Code, the BGB, and the Swiss Civil Code.

servitude of right of use, building restrictions, and special treatment of ownership in indivision.

Contracts: A Surprising Fidelity. The *Code Napoléon* remains an important ground for the field of contracts. It was estimated by the same method that 79 out of the 151, or about 52%, of the revised articles have some grounding in the *Code Napoléon*. At a linguistic level, substantial liberties have been taken and the provenance of the articles has become less apparent.

Partnership and Sales: Illustrating An Uneven Connection. It has been already mentioned that the style and quality of the Revision depends upon personal factors and personnel choices. Attitudes toward maintenance of the French tradition have been known to vary in accordance with the philosophical orientation of the principal drafter. According to the Table, about 46% of the new Partnership articles have antecedents in the Code Napoleon, but a random comparison shows that the Table is misleading. In many cases the French monument can no longer be discerned. The same is true in some cases for the law of sales. Though the Table would indicate that about 49% are French-inspired, this seems to be an overstatement.

4.0 *Loss of Navigational Direction*

It might be said that the greatest influence which the Code Napoleon has had on Louisiana over the past two hundred years has not consisted so much in the specific French content of the law but in the high ideals of codification which it held aloft for all to see. A code must be clear, coherent, complete, and logical.¹³⁹ Well exemplified in the *Code Napoléon*, these qualities served as the north star for first navigators like Edward Livingston and Louis Moreau Lislet, and they continued to be fixed points of reference for lost travelers in the meandering course of Louisiana history.

139. "A Code, for a Frenchman, should be complete in its field; it should lay down general rules, and it should arrange them logically." André Tunc, *The Grand Outlines of the Code Napoleon*, 29 Tul. L. Rev. 431, 444 (1955). For basic criteria of the concept, see J. Vanderlinden, *Le concept de code en Europe occidentale du XIIIème au XIXème siècle*, 67 et seq, 89 et seq (1967); see also Reinhard Zimmermann, *Codification: history and present significance of an idea*, 3 Euro. Rev. of Private Law 95, 96-97 (1995). Zimmermann requires three characteristics in a code: A code must be enacted by the legislature, must aim at being comprehensive, and must be systematically and rationally organized. For this reason, Zimmermann argues, one cannot say that Roman law was ever codified. The Digest of Justinian was a compilation not a code. For a differentiation between codes according to their method and purpose, see Bruno Oppetit, *Essai sur la codification* (PUF 1998); and *De la codification*, in B. Beignier, *La Codification* 14-18 (Daloz 1996) (distinguishing between compilations, consolidations, reform codes, and codes "à droit constant").

Increasingly, scholarly opinion in Louisiana has come to realize that these ideals were either abandoned or severely compromised during the Revision. The present writer ventured to say in 1988, when the Revision was only 40% complete, that the Civil Code had already died at the hands of the Revision and that a Digest had sprung up in its place.¹⁴⁰ There were at first spirited denials and lively debate,¹⁴¹ but then the controversy—which was then rather theoretical—grew quiescent, that is until recently. Professor John Lovett, testing the author's reasoning in an important controversy in the field of property, finds that the analysis correctly prophesied the serious methodological difficulty which is now apparent.¹⁴² Furthermore, a renowned scholar who was also chief architect of the Revision, Professor Yiannopoulos, has recently come to a similar conclusion about the effects of the Revision. In his essay "Requiem for a Civil Code," he writes that the Civil Code has indeed become a Digest and possesses almost nothing in common with traditional codes.¹⁴³

While it is common ground that a dramatic change has occurred, the emphasis in these critical writings is not necessarily the same because the intervening period of fourteen years has added significant new facts to the diagnosis.

Professor Yiannopoulos stresses the multiple and cumulative assault on the Code stretching back as far as 1960. He notes "the swarms" of repeals and amendments to the Code which were prompted by the adoption of a series of other codes, including the Trust Code, the Mineral Code, and the Commercial Code. The curtailment of forced heirship, he argues, was a grave assault which left scores of Civil Code provisions suspended in air with little or no significance. He points to the "undisciplined" and "uncoordinated" nature of the Revision process,¹⁴⁴ and he condemns the Legislature for a host of "*leges barbarorum*" which have dismantled the splendid edifice the code once was. He concludes with this assessment:

140. Vernon V. Palmer, *The Death of a Code—The Birth of a Digest*, 63 Tul. L. Rev. 221 (1988).

141. See *The Great Debate over the Louisiana Civil Code's Revision*, 5 The Tulane Civil Law Forum 49-99 (1990).

142. John 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).

143. Yiannopoulos, *supra* note 7. For the meaning of the word "digest" in civil law and common law, see Palmer, *supra* note 8, at 225-26.

144. "The revision . . . was entrusted to numerous reporters from the bar, the bench, and academic institutions. These reporters did not have a blue print for code revision and did not share the same credentials, education, experience, or even legal orientation." Yiannopoulos, *supra* note 7, at 402.

The comprehensive statute titled "Louisiana Civil Code" is, indeed a Digest.... It is a conglomeration of mini-codes arranged in four Books.... There is not much resemblance left with traditional codes, whether ancient or contemporary. For better or for worse, the Louisiana Civil Code reflects a fusion of the civilian and the common law traditions in a truly mixed jurisdiction.

I respectfully agree with these insights, but I must also return to the central thesis of my 1988 article.¹⁴⁵ That the Code has become a Digest can be shown in two related ways. First, it was clearly demonstrated that the Revision did not make an explicit repeal of the old 1870 code articles. It adopted instead the approach called "implied repeal" whereby old provisions are not repealed unless they are substantively inconsistent with the new articles. The attentive reader will recall, this was the same approach used by the redactors of the 1808 Digest and was the main reason why that enactment was deemed to be a Digest and why, due to the intolerable level of legal uncertainty it entailed, a second code was needed in 1825. The Revision now reverts to the same functional level as the Digest of 1808 since the relationship between the new law and the old is exactly the same. In a recent article, Professor David Gruning of Loyola Law School correctly sums up that situation:

To decide whether amending and re-enacting has worked an implied repeal, one must compare the language of articles of the revised code with that of articles of the 1870 Code. With sufficient lawyerly skill (and sufficient client interest), whenever the language differs one may legitimately argue during litigation that the prior law is still in effect. Indeed, when the prior law is not inconsistent with the revised legislation, the lawyer is in fact ethically obligated to present such arguments.¹⁴⁶

Noting that this deprives the Revision of "the crucial characteristic of exclusivity," Professor Gruning continues:

Without an explicit repeal of the prior law, the revised Code is merely the place where one may begin legal research, just as with a digest; but one cannot stop there. The 1870 Code and the jurisprudence and doctrine interpreting it remain relevant sources of the law. . . . One's research on a given

145. Palmer, *supra* note 8.

146. David Gruning, *Mapping Society Through Law: Louisiana Civil Law Recodified*, 1 Stan. J.L. Gender & Law (forthcoming 2004) (manuscript at 43) (on file with author).

issue will lead the reader immediately into the thicket of jurisprudence, of caselaw.¹⁴⁷

The learned writer could just as well have been describing the legal scene in 1808 as in 2004, for the legal situation under any digest is the same.

The second basis for the transformation into a Digest is the fundamental change brought about at a structural and methodological level. The code has lost the qualities of being coherent and complete in its field. It is no longer possible to develop syllogisms from texts alone, for the texts are not self-contained starting points of analysis. A great number of texts were purposively designed to be limited and incomplete propositions that would receive extensive supplementation from a source which did not need to be submitted to the legislature—the jurisprudence. Such texts contain “planned” gaps (contrast these to unintentional *lacunae* which drafters cannot always foresee) which are to be filled by precedents decided under the prior codes.¹⁴⁸ One naturally expects an old code to have acquired a heavy gloss of interpretive jurisprudence (the unrevised Louisiana Civil Code certainly fell into that category, which was one reason why it needed to be revised) but one does not expect a newly revised code, from its inception, to come loaded down by the gloss of a prior code. In that case, the redactor inflicts decodification¹⁴⁹ upon his own child before it comes into the world.

147. *Id.* (manuscript at 43-44) (on file with author).

148. The “encoding” of the old jurisprudence adds an interesting dimension to an old and rather inconclusive debate in Louisiana about whether judicial precedents do have (or should have) a strong or weak value. The traditional debate usually pitted the theory of *jurisprudence constante* (a French theory of precedent dear to civilian purists) against the American version of *stare decisis* (a version which some believe corresponds to actual judicial practice in Louisiana). There is an open clash between the civilian theory found in the Civil Code (jurisprudence is only a secondary source of law: La.Civ. Code art. 1, and Comment (b)), and the realist’s empirical observation that even a single decision by the Supreme Court of Louisiana binds every lower court to follow it. For details, see Palmer & Sheynes, *supra* note 97, at 283-87. The traditional debate, however, usually discussed what weight Louisiana courts attributed to their own precedents. The presence of an encoded jurisprudence, however, adds a new element to this equation. Now the Legislature itself establishes the weight to be given—over and above that which the courts might ordinarily give—to a select set of holdings. For purists who normally think in terms of law as an emanation of the legislative power, this *legislatively-backed* jurisprudence appears to have greater authority than mere *jurisprudence constante*. Has Louisiana stumbled upon the phenomenon of *jurisprudence permanente*?

149. On the concept of decodification, see Natalino Irti, *L’età de della decodificazione* (3d ed. 1989); Vernon V. Palmer, *Celebrating the Quebec Codification Achievement: A Louisiana Perspective*, 38 Loy. L. Rev. 311 (1992); Zimmermann, *supra* note 139, at 103-04.

A planned gap obviously will be filled in accordance with the drafters' plan. It cannot be filled by resort to the traditional technique of code analogy or by internal resort to the directory clause of the code, even though the revision still contains a directory clause.¹⁵⁰ The comments appended to the articles constitute the codifier's plan. They instruct how to splice the code text with particular case rulings from the past—the exact names and citations of these “encoded” cases are given—and in such instances the major premise of a legal syllogism must be one part legislative, one part judicial. The comments are a road map of the unwritten law which lies beyond the texts.

4.1 Some Examples of the Digest Methodology

The examples are legion but I will present only four here. For reasons of space the analysis is very abbreviated.¹⁵¹

1. Revised article 3467 declares that prescription runs against all persons “unless exception is established by legislation.” In Comment (D), however, the redactor states that pre-revision cases like *Corsey v. State Department of Corrections*,¹⁵² are not superseded but are still relevant. The doctrine of *contra non valentem* establishes a judicial rule that halts the running of prescription. Thus, the redactor contradicts himself by encoding an unwritten exception within a text categorically excluding unwritten exceptions.¹⁵³

2. An act under private signature, according to Article 1837, “need not be written by the parties, but must be signed by them.” This text requires an act under private signature to be signed by all parties, which for bilateral engagements means multiple-signatures. But in comment (b) the redactor says that the article is not intended to change the jurisprudential rule that an act under private signature is valid even though signed by one party alone. The redactor's comment cites (and thereby ‘encodes’) six pre-revision cases which recognize circumstances in which single-signature private acts are valid. The redactor contradicts herself therefore by establishing a categorical rule in the text while insisting upon an inconsistent exception found in pre-revision jurisprudence.

150. The directory clause is indeed still there. Article 4 declares, “When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.” It has, however, nothing to do with the strange ‘planned’ gaps of the revised code.

151. For more extended treatment and further examples, see my essay, *Death of a Code*, *supra* note 8; Lovett, *supra* note 142.

152. 375 So. 2d 319 (La. 1979) (recognizing the doctrine of *contra non valentem non currit praescriptio*).

153. Post-revision judicial decisions have continued to apply the doctrine of *contra non valentem*. See also Article 3492, which contains the same contradiction.

3. Component parts of an immovable, according to revised Article 466, are things “permanently attached” to an immovable. The text continues: “Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached.” No test other than that of “substantial damage” is proposed by the article or its comments. Yet it is maintained by learned authority that a “societal expectations” test, derived from pre-revision cases, must be read into the article.¹⁵⁴ The societal expectations test appears to have originated in the case of *La Fleur v. Foret*.¹⁵⁵ If this interpretation of the provision prevails, the pre-revision jurisprudence again supplements or even overrides the revised text.¹⁵⁶ One cannot apply the societal expectations test without employing the methodology of a digest.

Putative marriages produce protective effects for the spouse in good faith and for his/her child.¹⁵⁷ Revised Article 96 declares, “An absolutely null marriage nevertheless produces civil effects in favor of a party who *contracted* it in good faith for as long as that party remains in good faith.” (Emphasis added). This text clearly extends protection to a null marriage when there has been a celebration of the marriage (“contracted” in good faith), but the redactor writes in Comment (e) that because of the pre-revision case of *Succession of Marinoni*,¹⁵⁸ the question of whether these effects flow when there was *no ceremony at all* is deliberately sidestepped. In the 1936 case of *Succession of Marinoni* the Supreme Court applied the putative marriage doctrine to confer legitimacy upon a child of a marriage that had never been celebrated. Comment (e) concludes as follows: “The ultimate decision whether to follow *Succession of Marinoni* in preference to the two contrary cases previously cited, however, is left to the discretion of the court under this revision.”

The redactor refuses to take a position on the question, preferring to empower courts to follow either lines of pre-revision precedent.

154. A.N. Yiannopoulos, *Of Immovables, Component Parts, Societal Expectations, and the Forehead of Zeus*, 60 La. L. Rev. 1379, 1396-97 (2000); Amy Allums, *Prytania Park Hotel, Ltd. v. General Star Indemnity Co.: How a Small Hotel Made a Big Difference in the Component Part Concept*, 74 Tul. L. Rev. 1543, 1550 (2000).

155. 213 So. 2d 141 (3rd Cir. 1968).

156. See Lovett, *supra* note 142, at 703.

157. I am indebted to David Gruning’s essay, *Mapping Society Through Law*, *supra* note 146, at 39, for this example and the following analysis. Gruning uses the putative spouse problem to show that “the current Louisiana Code is one firmly anchored in the prior Code and the caselaw and doctrine that interpreted it. The recodifiers have stayed quite close to the sources involved.”

158. 164 So. 797 (La. 1936). See Charles Marshall, *The Necessity of Ceremony in a Putative Marriage*, 10 Tul. L. Rev. 435 (1936).

The old jurisprudence rather than the text is determinative on this question. The redactor opted for the methodology of a digest.

4.2 Code or Digest: Does it Matter?

Before proceeding further, it may be asked what difference it makes whether Louisiana has a code or a digest. Does this issue amount to just an aesthetic regret by code romantics? Decidedly not. The advantages of codification over unwritten law are that it makes the law public, certain and accessible to the average citizen. A rational citizen's code has always been thought of as an emancipatory instrument which lets the citizen know his/her rights and duties, promotes the rule of law and avoids unnecessary litigation.¹⁵⁹ Our code, however, no longer offers these advantages in my view. The comments, the truncated texts, and the "encoded" jurisprudence are surely no longer addressed to the average citizen. The code is now written for the legal professional, for only a skilled lawyer or judge with access to case reports and possessing the legal skills to reconcile the cases with the code can hope to unravel this technical material. Even for lawyers, however, the code frequently generates such uncertainty on basic legal questions that it cannot guide a professional properly. The efficiency and legal certainty which a true code offers have to a substantial extent been sacrificed to judicial discretion.¹⁶⁰ Too many answers are no longer found in the code itself but in the forehead of the judge. The primary sources are spread out in libraries. The texts of the code are only the tip of the iceberg. The ideal of one book containing the whole of private law and the internal means of its own regeneration has thus been lost. With pre-code cases now functioning as surrogates for positive law, an arcane method and a world of jurisprudence lies just below the surface.

159. See Zimmermann, *supra* note 139, at 100. Here was Paul Crépeau's credo for the Québec Civil Code: "It is my belief that a Code must be written not for the specialist but for the ordinary citizen with as little of the jargon as is compatible with accuracy and precision of language. I have often said my greatest hope is, one day, to see a citizen traveling in the Montreal subway, take out a pocket book edition of the new Code, and watch him get absorbed in it with an air of understanding." See *Civil Code Revision in Québec*, 34 La. L. Rev. 921, 932 (1974). For an excellent discussion of the values in "plain redaction for the citizenry" and the "dialogic" function of codification, see McAuley, *supra* note 18.

160. On the value of legal certainty associated with a Code, see among the papers of this symposium, John Lovett, *On the Principle of Legal Certainty in the Louisiana Civil Law Tradition: From the Manifesto to the Great Repealing Act and Beyond*, 63 La. L. Rev. 1397 (2004).

5.0 Diverse Comparisons Regarding the Form, Structure and Style of the Revised Civil Code

Structure. It has been mentioned earlier that the structure of the Civil Code has now four Books instead of three, but it is clear this produces no deep-seated structural change. Book Four, which is devoted to Conflict of Laws, is simply an add-on of new material. The new book has not caused any sequential rearrangement nor any subtraction from the content of the first three. The importance of this last remark is that the structure inherited from the *Code Napoléon* was neither rethought nor recast. The old tripartite structure—Persons, Things and Modes of Acquiring Things—remains the basic organization of the Civil Code despite the cogent criticisms that led some continental codes to reorganize the arrangement for reasons of greater transparency.¹⁶¹ A separate book devoted to Family Law, for example, as in the Swiss and German codes, would have made a coherent whole out of those parts of Book I and Book III which deal with husband and wife, separation and divorce, marriage contracts, and community of property.¹⁶² A separate book devoted to Successions, as in the German, Greek, Italian, and Dutch codes, is arguably more understandable to the lay mind than to lump it among the means of acquiring things. The general principles of Obligations and the particular contracts might well be broken out into a separate book.¹⁶³ Critics attribute the non-debate of such questions to the piecemeal approach and an unwillingness to engage in debate over general policy.

The fragmented revision process has also resulted in some unsystematic use of civilian concepts. Important organizing ideas which are introduced by a Reporter in “his” part of the Code have been inexplicably ignored by another in “her” part. For example, the

161. Agreeing with Marcel Planiol that prolix Book III is a rag-bag of heterogeneous matters, Zweigert and Kötz conclude that “[t]he structure of the Code civil is plainly unsatisfactory.” Konrad Zweigert & Kötz, Introduction to Comparative Law 93 (Weir trans., 3d ed. 1998).

162. Fred Zengel drew attention to this failure and regarded it a lost opportunity. Zengel, *supra* note 130.

163. In 1980, my colleague Shael Herman made a very valuable study of civilian classification schemes in which he presented a panorama of the structures found in modern codes. The ostensible purpose may have been to foster debate on the subject and his intended audience was probably the Louisiana Law Institute. This type of study, had it been requested before the revision began rather than *in medias res*, might have been of great assistance to the Institute. By the time it appeared, however, the revision was already too far along for it to have the intended effect. Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 Tul. L. Rev. 987 (1980).

concept of the "juridical act" which was first systematized in German law, is new to our code (though not unknown to the doctrine)¹⁶⁴ and has ramifications for every part of the Code. It is inexplicably absent, however, in the vital field of obligations. The omission is completely illogical. Elsewhere the concept appears in about twenty code provisions stretching from the Preliminary Title,¹⁶⁵ the law of Persons,¹⁶⁶ the law of Property,¹⁶⁷ the law of Successions,¹⁶⁸ Mandate,¹⁶⁹ Prescription¹⁷⁰ Matrimonial Regimes¹⁷¹ and ending with the provisions on Conflict of Laws.¹⁷² The general use of this new concept in every connection except the general principles of obligations and contracts provides an important example of the accidental inconsistencies and variations which befall a piecemeal process.

Failure to Repeal the 1870 Code Provisions. As mentioned earlier, the Revised Code of Louisiana makes no attempt to repeal its predecessor. Study of the enacting legislation shows¹⁷³ that the old code articles were not expressly repealed and therefore applying the Code's own principles of repeal, they have not been superseded, except in accordance with the notion of implied repeal. An implied repeal would only occur, however, when the new article flatly contradicts the old so that there is a substantive incompatibility. The study concludes that probably 85% of the old code concurrently survives with the new. The situation compares to the one which existed at the time of the Digest of 1808.

Didactic Materials. The code may now strike an observer as less doctrinal and explanatory than its predecessors. Many of the old examples and definitions have been taken out of the enacted texts. From another perspective, however, the code can hardly be called less didactic than before. The decision to bond the enacted texts to an encoded jurisprudential framework and to place preparatory materials under each article has made the Civil Code into a very bulky and extremely pedagogical document.¹⁷⁴ It is somewhat

164. See Marcel Planiol, 1 La. Civil Law Treatise, Part One, (LSLI transl., 1959); Saül Litvinoff and W. Thomas Tête, Louisiana Legal Transactions: The Civil Law of Juridical Acts (Claitor's Publishing 1969).

165. La. Civ. Code. art. 7.

166. See La. Civ. Code arts. 28, 49, 392, 394, 395.

167. See La. Civ. Code arts. 492, 654, 776, 797, 807.

168. La. Civ. Code art. 1609.

169. La. Civ. Code arts. 2985, 2986.

170. La. Civ. Code arts. 3471, 3483.

171. La. Civ. Code art. 2369.1.

172. La. Civ. Code art. 3541.

173. For details, see Palmer, *supra* note 8, at 222-42.

174. Fred Zengel noted that they add "outrageously" to the length of the Revision and prophetically added "The Comments will effectively become as much

axiomatic that a Digest has a greater need for didactic materials than a true code.

Style. The casual reader of the Revision will immediately notice that the reworked texts fall considerably below the stylistic standards set by our 19th century Civil Code. When the revisers attempted to restate elegant epigrams in their own way, they usually destroyed the cadence and concision. Thus the principle that "[t]he sale of a thing belonging to another is null" became "[t]he sale of a thing belonging to another does not convey ownership."¹⁷⁵ An attempt to improve upon Domat's famous illustration of the sale of a hope produced more words and less clarity. The original text taken from Domat read:

It also happens sometimes that an uncertain hope is sold; as the fisher sells a haul of his net before he throws it: and, although he should catch nothing, the sale still exists, because it was the hope that was sold, together with the right to have what might be caught.

The revisers preferred to say (emphasis added):

A hope may be *the object of a contract of sale*. Thus, a fisherman may sell a haul of his net before he throws it. *In that case* the buyer is entitled to whatever is caught in the net, according to the parties' expectations, and even if nothing is caught the sale is valid.

Professor Yiannopoulos has noted¹⁷⁶ that some provisions are unintentionally amusing. An article dealing with the usufruct of the surviving spouse in community of property states: "This usufruct terminates when the surviving spouse dies or remarries, whichever occurs first." As editor of the Civil Code, he remarked: "This article declares that this usufruct of the surviving spouse 'terminates when the surviving spouse dies or remarries, *whichever occurs first*.' It is hardly likely that a usufructuary may first die and then remarry. Cf. Mark 12.25: 'For when they shall rise from the dead, they neither marry, nor are given in marriage; but are as the angels which are in heaven.'"

The appearance of the Revised Code has been considerably disfigured by literally hundreds of blank provisions which are called "reserved articles." Such articles are actually assigned sequential numbers and are listed on the page though they contain no text. The reason for this strange practice is never explained, but there is no

a part of the Code as the code texts themselves." Zengel, *supra* note 130, at 960.

175. La. Civ. Code art. 2452.

176. Yiannopoulos, *supra* note 7, at 404.

doubt that the practice is out of control. In the Title on Sales, for example, there are 70 “reserved articles” interspersed among 211 actual articles. The result is a Code with a bullet-riddled appearance. Of course one reason to reserve articles could be the belief that the space could be needed for future amendments, but the need for so much space and its arbitrary distribution suggest that this is not the real cause. The likely reason for the anomaly is actually trivial. It is nostalgia for old code numbering. The revisers wanted lawyers and judges to feel comfortable with the new code, so they retained the original numbers of certain cherished provisions. If it is so, this basically weightless justification is not only the cause of aesthetic damage, but worse, it petrifies the structure of the code into an historic numbering system. That numbering system automatically prevented any revamping of the basic structure or organization of the original code material.

Finally, one must appreciate how much jargon has found its way into the revised Code. A large number of revised articles begin with the words “[i]n the absence of contrary agreement” or “[u]nless otherwise agreed.”¹⁷⁷ These are stylistic blemishes in a legal system which can systematically earmark imperative provisions, as opposed to suppletive code provisions that the parties may vary by agreement. Equally distressing is that so many provisions now contain empty crossreferencing formulas such as “Unless otherwise provided by law” (or the equally vacuous “[e]xcept as otherwise provided in this Book”).¹⁷⁸ To continually warn that there may be an exception to a given rule somewhere in the expanse of the law, but then not to disclose which exception is being referred to or whether one really exists, is virtually useless information and a source of annoyance to the reader. This resembles the style of the Uniform Commercial Code, not a code in the French tradition.

CONCLUDING REMARKS

This Essay has been about the legacy which France bequeathed to Louisiana nearly two centuries ago. Two Louisiana codes enacted in the early 19th century received a rich deposit of Napoleonic law that stood the test of time for over 150 years. The modernization and recodification of the past 35 to 40 years, however, brought significant changes to the nature and content of Louisiana’s Civil Code and, in consequence, modified this historic tie to France. The Revision internationalized sources and influences, accepting some from

177. See, e.g., La. Civ. Code arts. 2803, 2807.

178. This type of phrase is particularly recurrent in Book IV on Conflict of Laws. See, e.g., La. Civ. Code arts. 3515, 3523, 3524, 3537, 3541, 3542.

modern civilian codes, others from American law. In the areas where modernization was needed, the Code Civil played little or no role at all. Nevertheless in areas where the Revision was not particularly deep, the old French content was not seriously disturbed. Indeed it is still quite evident and discernible. Since it has been reaffirmed by the Revision, these ties will continue far into the future.

In at least two respects, however, the legacy of the Code Napoleon is now extinguished. First, the Revision has resulted in an inferior form of codification which presupposes an encoded caselaw methodology and no longer resembles the French concept of a code. Second, the revised code has lost some of the stylistic elegance for which the *Code Napoléon* and predecessor Louisiana codes were praised.

It is perhaps a truism to observe that recodification is almost always a more difficult and challenging task than the original act of codification. Apparently it is not easy to rekindle the same combination of spirit, political will, and talented individuals which produced the original.¹⁷⁹ The goals may be less clear, the policies less obvious, and old ideals may be forgotten or no longer shared. Perhaps these are some reasons why recodifiers often take so much longer to complete their work, and often attempt to appease the Legislature by submitting a code in small increments. Perhaps only at the end when these bits and pieces are finally reassembled and examined does one discover whether one still has a code for the twenty-first century worthy of the name. As France prepares to celebrate the Bicentennial of the Code Civil and to contemplate the great recodification task which it must ultimately face, perhaps this experience may be of some interest.

179. On the obstacles to recodification, see Palmer, *supra* note 151, at 313-14, 319 ff.