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SOME CONSIDERATIONS ON THE EXISTENTIAL FORCE OF ROMAN LAW IN THE EARLY HISTORY OF THE UNITED STATES*

MITCHELL FRANKLIN†

I.

Except in Louisiana and in Puerto Rico the United States has been dominated by uncodified Anglo-American common law as distinguished from the modern Roman law which obtains elsewhere in a greater part of the world, including Ibero-America and Québec. But it is correct to write that there has been a "History of American Roman and Civil Law."¹

In 1942 the writer discovered among the papers of the Department of State collected in the National Archives the text of the *projet* of 1806 of the Territory of Orleans, that is, Louisiana, consecrating a legal system founded, among other civilian sources, on the sixth-century codification of Justinian.² The *projet* gave the force of law to the *corpus juris* in Latin and untranslated into English. Moreover, the *projet* of 1806 not only precipitated a confrontation between Anglo-American common law and Roman law, but also a confrontation between the Romanist, bourgeois French civil code of 1804, the so-called Code Napoléon, and the Romanist, feudal and colonial Spanish system, based largely on a collection of medieval civil codes:

Section 1.1 of the text of the *projet* of 1806 justified the proposed consecration of the materials of Justinian because "[t]he roman Civil code" was "the foundation of the spanish law, by which this country:

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1. Franklin, *An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript*, in A REPRINT OF MOREAU-LISLET'S COPY OF A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808) CONTAINING MANUSCRIPT REFERENCES TO ITS SOURCES AND OTHER CIVIL LAWS ON THE SAME SUBJECTS 527 (2d Printing 1971).

2. Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 TUL. L. REV. 319 (1942).

was governed before its cession to France and to the United States . . .”³. Thus, the Romanist feudal *projet* of 1806 was not only directed against Anglo-American common law but against the bourgeois French *code civil* of 1804.

The ideological struggle between the French Romanist bourgeois forces and the Spanish Romanist feudal forces was fully as intense as the struggle of both against Anglo-American common law. But in this struggle both Romanist forces claimed to represent the eighteenth-century Enlightenment. In the Preliminary Report of the Code Commissioners Dated February 13, 1823, which relates to the Louisiana civil code of 1825, Edward Livingston, of New York and Louisiana, and Moreau-Lislet, of Louisiana, described the French *code civil* of 1804 as “the Napoléon Code, that rich Legacy which the expiring Republic gave to France and to the world . . . a system approaching nearer to perfection than any which preceded it.”⁴ In 1814, the de la Vergne manuscript, which relates to the so-called Louisiana Digest of 1808, likewise described the legislation which culminates in the thirteenth-century Spanish *Partidas* as “a general code of laws, which might remedy the abuses of the feudal laws . . .”⁵ The implication seems to be that as the *Partidas* had the same anti-feudal mission as the *code civil français*, it could be received instead of the latter. Nevertheless, the *Partidas* represent the feudal law of feudal social relations. Livingston therefore condemned not only English common law, but in due time also Spanish feudal law. “As the legislation of which I am giving a partial review was made in the thirteenth century,” Livingston said of the *Partidas* (which had provoked him into preparing his modern criminal code), “it is not surprising to find that astrology, witchcraft and incantations, love-powders and wax images make a figure in it.”⁶

The full text of the *projet* of 1806 is as follows:

An Act

declaring the laws which continue to be in force in the Territory of Orleans, and authors which may be recurred to as authorities within the same.

Whereas by the effect of the reiterated changes which the govern-

3. *Id.* at 324.

4. Livingston, Moreau-Lislet, & Derbigny, *Preliminary Report of the Code Commissioners Dated February 13, 1823*, in 1 LA. LEGAL ARCHIVES LXXXV, LXXXIX (1937) [hereinafter cited as Livingston].

5. Franklin, *supra* note 1, at 532.

6. *Id.* at 529.

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ment of this Territory has undergone, the divers matters which now composed its judiciary system, are in some measure, wrapped in obscurity, so that it has become necessary to present to the citizens the whole of those different parts, collected together by which they may be guided, whenever they will have to recur to the laws, untill the Legislature may form a civil code for the Territory; and whereas by the 11th section of the act of Congress, intituled "an act dividing Louisiana into two Territories and providing for the temporary government thereof" passed the 22d march 1804, and by the 4th section of the act of the said Congress, intituled "an act further providing for the government of the Territory of Orleans" it is said, that the laws which shall be in force in the said Territory, at the commencement of the said acts, and which shall not be contrary to the dispositions thereof, shall continue to be in force untill altered, modified or repealed by the Legislature of the Territory.

Sect. 1st. Be it therefore declared by the legislative Council and the House of Representatives of the Territory of Orleans in general assembly convened, that by virtue of said dispositions, the laws which remain in force, and those which can be recurred to as authorities in the tribunals of this Territory, save the changes and modifications which may have already been made by the Legislatures of the said Territory, save also whatever might be contrary to the constitution of the United States, to the laws of the federal government which have been extended to the said Territory by Congress, and to the acts of the said Congress which direct the present government of the said Territory, and save therefore the modifications, which necessarily result from the introduction which the act of the 22d march 1804, has made into the said Territory of the two most important principles of the judiciary system of the common law, to wit, the writ of habeas corpus, and the trial by jury, are the laws and authorities following, to wit: 1. The roman Civil code, as being the foundation of the spanish law, by which this country was governed before its cession to France and to the United States, which is composed of the institutes, digest and code of the emperor Justinian, aided by the authority of the commentators of the civil law, and particularly of Domat in his treaty of the Civils laws; the whole so far as it has not been derogated from by the spanish law; 2. The spanish law, consisting of the books of the *recopilacion de Castilla* and *autos acordados* being nine books in the whole; the seven parts or *partidas* of the king Don Alphonse the learned, and the eight books of the royal statute (*fuero real*) of Castilla; the *recopilacion de indias*, save what is therein relative to the enfranchisement of Slaves, the laws de *Toro*, and finally the ordinances and royal orders and decrees, which have been formally applied to the colony of Louisiana, but not otherwise; the whole aided by the authority of the reputable commentators admitted in the courts of Justice.

Sect. 2. And be it further declared, that in matters of commerce the

ordinance of Bilbao is that which has full authority in this Territory, to decide all contestations relative thereto; and that wherever it is not sufficiently explicit, recourse may be had to the roman laws; to Beawes *lex mercatoria*, to Park on insurance, to the treatise of the insurances by Emorigon, and finally to the commentaries of Valin, and to the respectable authors consulted in the United States.

John Watkins
Speaker of the house of Representatives
Jean Noel Destrehan
President of the Legislative Council⁷

The proposed legal system of 1806 was immediately vetoed by the territorial governor, Claiborne, who opposed all types of Roman law, because he desired to receive the Anglo-American judge-made common law into Louisiana. The situation thus precipitated was so tense that President Jefferson planned, as part of a general solution, to settle a border army of thirty thousand soldiers on the right bank of the Mississippi near New Orleans. In view of the crisis thus produced, the adoption of the Civil Code of 1808 about two years later must, in a limited sense, be regarded as a veritable social upheaval, for this code was based essentially on the materials produced in France by the anti-feudal French revolution. However, the Code of 1808 left slavery as secure as ever.

This veering about from the Spanish medieval law in 1806 to the French anti-feudal law in 1808 possesses great importance, not only in the legal history of the United States, but also in the legal history of the Latin nations of the western hemisphere. In subsequent decades most of these nations repeated and amplified the legal history of Louisiana, for most of them also extirpated the Spanish feudal and colonial political and legal regimes, replacing them by political constitutions derived from Thomas Jefferson and by legal systems based on the bourgeois *code civil français*.

Behind the above-mentioned complex ideological struggles in Louisiana between Roman law and Anglo-American common law and between French bourgeois Roman law and Spanish feudal Roman law, the reality was that of culture struggle, of Louisiana slavery and of Napoleonic imperialism. Because bourgeois production and the world market everywhere required slavery in the colonial world certain bourgeois forces in Louisiana were willing to support the bourgeois Romanist *code civil* of the French metropolis supplemented, as in-

7. Franklin, *supra* note 2, at 323.

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deed it was, by texts maintaining slavery. Moreover, the productive possibilities envisaged by such bourgeois Romanist forces in Louisiana also were founded in part on development of the steamboat by Fulton and monopoly which came to relate thereto. Fulton became closely allied with Edward Livingston, the New York-Louisiana Romanist jurist, who together with Moreau-Lislet ultimately was the most important legal force in the history of Louisiana. On the other hand, the bourgeoisie of the French metropolis, who had formulated the French civil code were, so far as Louisiana was concerned, supporters of the *penchant hispanophile* of Napoléon and Talleyrand. Because of bourgeois imperialist interest Napoléon and Talleyrand struggled in the colonial world not for their own bourgeois Romanist *code civil* but for Spanish feudal Romanist law.

II.

The defeated *projet* of 1806 was followed by the promulgation of the so-called "Digest" or Civil Code of 1808. In 1941, the writer said: "Mr. Charles E. de la Vergne and Mr. Pierre de la Vergne possess an unpublished manuscript in which Moreau-Lislet gave, in detail, the exact legal sources for the various articles of the Louisiana Civil Code of 1808."⁸ For many years thereafter Mr. Louis V. de la Vergne has been the chief force concerned with the de la Vergne manuscript, which was dated 1814. In 1958 the writer said:

In the future it is prerequisite to scholarly work relating to the Louisiana Civil Code that resort be made to the de la Vergne manuscript. It may also be mentioned that it is a highly valuable document relating to the history of Roman law in the new world. . . . It consists of a preface . . . and of perhaps thousands of citations to Roman and civilian legal sources, arranged pertinently to the successive articles of the bilingual (French and English) Louisiana Digest or Civil Code of 1808. [I]t may be assumed that the manuscript was prepared about fourteen years after the publication of the French *projet* of the Year VIII (1800) and about a decade after the promulgation of the French Civil Code in 1804.⁹

The writer continued:

Nevertheless, the most marked characteristic of the manuscript is the omission of reference to the texts of what both Edward Livingston and

8. Franklin, *Libraries of Edward Livingston and of Moreau-Lislet*, 15 TUL. L. REV. 401, 403-04 n.10 (1941).

9. Franklin, *An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript*, 33 TUL. L. REV. 35 (1958).

Moreau-Lislet called in 1823 “. . . the Napoleon Code, that rich legacy which the expiring Republic gave to France and to the world . . . a system approaching nearer to perfection than any which preceded it.” Indeed, Domat, who flourished before the French Revolution, is the only French name mentioned in the preface of the de la Vergne manuscript.¹⁰

In a footnote the writer said: “Pothier, who also flourished before the French Revolution, is mentioned in the list of abbreviations (*explications du abrégations*).”¹¹ Both Domat and Pothier influenced the redaction of the *code civil* after the revolution. In the main part of his paper the writer proceeds to observe that

[t]herefore, as the major sources collected in that manuscript are not those of the modern French law, which had introduced the law of the post-feudal world, but those taken from medieval Spanish and ancient Roman law, a crisis is disclosed. The nature of this crisis may be understood by recalling the *projet* for a Louisiana code proposed in 1806, which was ultimately vetoed amidst great excitement The *projet* of 1806 and the manuscript under consideration therefore both seek to direct Louisiana toward the Spanish feudal law and away from the bourgeois French Civil Code of 1804. Behind this struggle are the opposed ideas of Jefferson and of Napoleon and Talleyrand. Jefferson had in mind the ending of slavery within the Louisiana Purchase and the introduction of the force of the French Enlightenment. But after the 18 *brumaire* Talleyrand had oriented Napoleon toward support of slavery and toward imperialism, one Western hemispheric aspect of which was a “*penchant hispanophile* on the subject of Louisiana.” Hence, Jefferson’s thought required the introduction into Louisiana of the French Civil Code; and Talleyrand’s thought required the exclusion from Louisiana of the French Civil Code and the acceptance of Spanish medieval law. The writer of the de la Vergne manuscript is aware of the crisis.¹²

The materials mentioned in the de la Vergne manuscript are similar to those consecrated in the vetoed *projet* of 1806, that is, the texts of Justinian and of Spanish feudal law. But there is a most important difference between the *projet* of 1806 and the de la Vergne manuscript in that the materials which had been given the force of law in the *projet* of 1806 are described in the de la Vergne manuscript as “having some relation” to the “Digest of the laws of this state.”¹³

10. *Id.*

11. *Id.* at 36 n.3.

12. *Id.* at 36.

13. Franklin, *supra* note 1, at 531.

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The theme which now emerges urgently is whether the activist feudal materials presented in the de la Vergne manuscript are judicially designed to "overcome" as "enemy"¹⁴ the activist Digest of 1808 and to accomplish what the vetoed *projet* of 1806 did not accomplish and thus to veer feudal Romanist defeat into victory. The theme is whether feudal Romanist materials mentioned in the de la Vergne manuscript are an incognito of a feudal Romanist legal system. The *problématique* is what Hegel in another connection described in his *System der Sittlichkeit* as "different laws (*Rechte*)" coming into "collision."¹⁵ On both sides there is "risk of struggle" and "risk of death."¹⁶

The phrase "some relation" stated in the de la Vergne manuscript between the activist Digest of 1808 and the activist materials indicated in the manuscript, understood profoundly, that is, understood as *mobiles* or as *Beweggrund*, signifies that the de la Vergne manuscript has established rival, contradictory, activist legal orders, the bourgeois legal order consecrated by the promulgated, codified, enacted texts of 1808, and the feudal legal order, unpromulgated and secreted in the so-called sources. As the two legal orders, one bourgeois and the other feudal, are both Romanist, there seems to be some kind of a simulated identity or unity or "some relation" between them, although they reflect hostile social structures, as the French revolution in truth had shown. The truth of the antagonism between the two Romanist legal orders is in the rival social structures and the untruth is in the ideology of "some relation" obtaining between Romanist legal regimes. "Difference in relation," Hegel says in *System der Sittlichkeit*, is "enemy," "enemy of the *Volk*."¹⁷

Because there is "some relation" stated in the de la Vergne manuscript between the activist Romanist bourgeois promulgated Code of 1808 and the activist Romanist feudal unpromulgated materials indicated in that manuscript, the de la Vergne manuscript is "dualistic." Such "dualism" connotes that the de la Vergne manuscript consecrates Kantian antinomies.

In *The Philosophy of Law*, published in 1796, Kant presents his con-

14. G. HEGEL, *SYSTEM DER SITTLICHKEIT* 58 (2d ed. G. Lasson ed. 1923). On the accuracy of this writing, see 2 G. HEGEL, *WERKE* 584 (Suhrkamp ed. 1970).

15. *Id.* at 74.

16. *Id.* at 58.

17. *Id.* Hegel's discussion here passes later into his discussion of the terror of the French revolution. See G. HEGEL, *THE PHENOMENOLOGY OF MIND* 599 (2d ed. J. Baillie transl. 1931). See generally GLOCKNER, *EL CONCEPTO EN LA FILOSOFÍA HEGELIANA* (G. Margadant transl. 1965).

siderations relative to "collision of duties." This may be briefly mentioned. Kant says that

two opposite Rules cannot be objective and necessary at the same time Hence a *Collision* of duties and Obligations is entirely inconceivable There may, however, be two grounds of Obligation . . . connected with an individual under a Rule prescribed for himself, and yet neither the one nor the other may be sufficient to constitute an actual Obligation . . . and in that case the one of them is not a Duty. If two such grounds of Obligation are actually in collision with each other, Practical Philosophy does not say that the stronger *Obligation* is to keep the upper hand . . . but that the stronger ground of Obligation is to maintain its place.¹⁸

This hints at theory of social *mobiles* or social *causa*. Then Kant discusses "Natural and Positive Laws," saying that "An External Legislation, containing pure Natural Laws, is . . . conceivable; but in that case a Previous Natural Law must be presupposed to establish the authority of the Lawgiver by the Right to subject others to Obligation through his own act of Will."¹⁹ Then Kant, as a jurist, passes to his theory of subjective "Maxims" and later to his moral theory of "The Categorical Imperative." Of this as an activist he writes:

And we may well wonder at the power of our Reason to determine the activity of the Will by the mere idea of the qualification of a Maxim for the *universality* of a practical Law, especially when we are taught thereby that this practical Moral Law first reveals a property of the Will which the Speculative Reason would never have come upon either by Principles *à priori*, or from any experience whatever; and even if it had ascertained the fact, it could never have theoretically established its possibility. This practical Law, however, not only discovers the fact of that Property of the Will, which is FREEDOM, but irrefutably establishes it. Hence it will be less surprising to find that the Moral Laws are *undemonstrable*, and yet *apodictic*, like the mathematical Postulates; and that they, at the same time, open up before us a whole field of practical knowledge, from which Reason, on its theoretical side, must find itself entirely excluded with its speculative idea of Freedom and all such ideas of the Supersensible generally.

The conformity of an Action of the Law of Duty constitutes its *Legality*; the conformity of the Maxim of the Action with the Law constitutes its *Morality* On the other hand, the Principle of Duty is what Reason absolutely, and therefore objectively and uni-

18. I. KANT, THE PHILOSOPHY OF LAW 32 (W. Hastie transl. 1887).

19. *Id.* at 33.

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versally, lays down in the form of a Command to the individual, as to how he *ought* to act.²⁰

The Kantian idea of law justifies the activism or freedom of the jurist to choose among possibilities, that is, in the de la Vergne manuscript to choose between the bourgeois Louisiana Civil Code of 1808 and the feudal materials in the de la Vergne manuscript. But it was not necessary that Moreau-Lislet follow Kant. It would have been sufficient for him to be aware of the theory of natural law of Malebranche or French Physiocratic jurists.

Hegel showed that the activism of Kantian dualism or Kantian antinomy justified *déplacement*, equivocation, duplicity, hypocrisy or what Hegel called *Verstellung* or shifting. This may be briefly shown. In *The Phenomenology of Mind*, published in 1807, Hegel says that

The moral attitude is, therefore, in fact nothing else than the developed expression of this fundamental contradiction in its various aspects. It is—to use a Kantian phrase which is here most appropriate—a “perfect nest” of thoughtless contradictions. Consciousness, in developing this situation, proceeds by fixing definitely one moment, passing thence immediately over to another and doing away with the first. But, as soon as it has now set up this second moment, it also “shifts” (*verstellt*) this again, and really makes the opposite the essential element. At the same time, it is conscious of its contradiction and of its shuffling, for it passes from one moment, immediately in its relation to this very moment, right over to the opposite. Because a moment has for it no reality at all, it *affirms* that very moment as real; or, what comes to the same thing, in order to assert one moment as *per se* existent, it asserts the very opposite as the *per se* existent. It thereby confesses that, as a matter of fact, it is in earnest about neither of them. The various moments of this vertiginous, fraudulent process we must look at more closely.²¹

An important element in Hegel's *Philosophy of Law* is condemnation of the legal history and legal theory of *Verstellung*, *déplacement* or irony.

Because the exact and activist “posited” so-called sources given in the de la Vergne manuscript and the exact and activist formulated texts of the Louisiana Digest of 1808 may exchange places and force, each is as inexact or its own negation as it is exact. Each active, exact pole

20. *Id.* at 34.

21. G. HEGEL, *THE PHENOMENOLOGY OF MIND* 629-30 (2d ed. J. Baillie transl. 1931). See Franklin, *The Kantian Foundations of the Historical School of Law of Savigny*, 22 *REV. JUR. U.P.R.* 64, 74, 87 (1952).

of such antinomy is ironical because its activity or *Tätigkeit* connotes that it may also become its other. Because of its activity the good faith of each pole, as perhaps Sartre might say, also is the bad faith of each pole. The "positivity" of each pole bears within it the negativity of each and also new "positivity." If the activist so-called source, seemingly feudal, "plunders," seizes, appropriates or alienates the activist bourgeois text, the latter becomes a feudal force. If the activist, so-called source, seemingly feudal, is "plundered," seized, appropriated or alienated by the activist enacted bourgeois text, it acquires the force of a bourgeois source.

If the enacted text and the so-called source may be "plundered" or seized by its other, its other to which it has "some relation," it is merely formalistic or abstract to classify (with several mechanistic or undialectical degrees of classification, as has been done) the texts and the so-called sources merely ideologically. As things-in-themselves the activist materials classified juridically or ideologically become deactivated, that is, seemingly deprived of their historical motion or force.

If the above discussion is correct, there are two tasks. One task is to discover which activist social structure is strong enough to overcome or to "plunder" its rival. The second task is ideological. This is to master the activist legal ideology, legal methodology and legal instrument of mediation by which the triumph of the stronger social structure may be juridically justified and even acknowledged or recognized by the other social structure. This states the profound intentionality or *mobile* of the de la Vergne manuscript, the aim of which is to overcome by legal method the bourgeois Digest of 1808 by means of the system of legal materials set out in the manuscript. Thus the defeat of the *projet* of 1806 would be negated.

Behind the mask or incognito of the ideology of natural law there was at hand the existential possibility through legal method for the alienation, appropriation or "plundering" of the Digest of 1808 by the feudal Romanist-Spanish materials set out in the de la Vergne manuscript. Because of the presence of the promulgated Digest of 1808 the hegemony of the ideology of the mask of natural law over the positive law had to be justified as a certain kind of equity or of paralaw. The history of equity or of paralaw appears not only in ancient Roman law, in feudal Roman law, but with opposed sense in bourgeois Roman law after the French revolution. Its role in the history of Anglo-American law need not be forgotten. In 1951 the writer said:

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The mission of equity may be that of overcoming the existing or the strict positive law. However, the force of such negative equity is not a mere destruction or cancellation of the existing strict law. The rival legal systems seem to "co-exist" within the state, each presupposing and yet opposing the other. However, the rivalry between such "parallel" systems is an illusion, if negative equity has the means of veering and of interpenetrating the strict law. Such means exist, although they vary in each historic period and are appropriate thereto.²²

The method of equity or paralaw is the opposite of the method of legislation, which repeals defeated law. Negative equity, both Roman and English, purports not to affect the existing law. The writer stated in 1951:

"Equity follows the law," says English equity. "The praetor cannot alter the civil law," Buckland says of Roman equity. The older law is said to remain intact in spite of the existence of the equitable institutions. Nevertheless, by means which are appropriate both technically and ideologically negative equity overcomes, veers, and interpenetrates the positive law which it purports to accept. . . . Hence in Roman law "[t]he *formula* does not deny the civil law right. The *exceptio* paralyses it." Buckland said of this that "[t]he new praetorian actions, not known to civil law, may seem an infringement of civil law rights, for the person is certainly deprived of a right or immunity. But it is not so looked at: it is a supplement to the civil law, not contradiction."²³

The writer said, moreover, that

the hegemony of negative equity over the positive law was justified on ideological grounds, which for historical reasons were regarded as hierarchically superior to the positive law. Hence, the supremacy of Roman equity was ultimately justified by natural law, and, indeed, equity often has been identified with undialectical metaphysical natural law.²⁴

In *The Batture at New Orleans*, published in 1810 and directed against Edward Livingston, Jefferson mastered the dialectic of positive law and equity. He perceived in such historical situation that there exists unity between law and paralaw and within this unity there is contradiction and struggle. Hence Jefferson said that English equity "tallied" with English common law and

22. Franklin, *A New Conception of the Relation Between Law and Equity*, 11 PHIL. & PHENOMENOL. RES. 474 (1951).

23. *Id.* at 482.

24. *Id.* at 474.

with no other body of law on earth. The Roman law has something similar in its *Jus Praetorium* But to apply the *Jus Praetorium* to our common law, or our chancery to the *leges scriptae* of the Romans, would be to apply to one thing the tally of another, or to mismatch the parts of different machines, so as to render them inconsistent and impracticable.²⁵

Jefferson's *habilité dialectique* has been applauded by Barcia Trelles.²⁶ Jefferson, who was the leader of the American Enlightenment, was oriented toward a French conception of Louisiana law, and opposed to the *penchant hispanophile* of Napoléon and Talleyrand.

The de la Vergne manuscript is not only an erudite document in the history or the scholarship of Roman law, far beyond the level of Anglo-American common law scholarship, but it is an important document in the history of the rivalry between dialectical and Kantian thought, and it is significant as a partial anticipation of the theory of possibility of twentieth-century philosophical existentialism.

The de la Vergne manuscript was reproduced and made public in 1968 and again in 1971. It is already resulting in a secondary literature, none of which thus far seems to take account of the relation of the manuscript to the defeated *projet* of 1806, nor to the social history or "otherness" of the *projet* of 1806, of the Civil Code of 1808 or of the de la Vergne manuscript itself. However, Pascal has casually indicated certain interest in the role of natural law as masking or sanctifying the feudal Spanish and Roman materials in the de la Vergne manuscript.²⁷

III.

In his *avant-propos* to the de la Vergne manuscript, Moreau-Lislet said that

[t]he purpose of this work is to make known, by written notes on the blank pages attached to the Digest of the laws of this state, the texts of civil and Spanish laws having some relation to them.

For this purpose, there will be found, besides the English text, a general list of all the titles of the Roman and Spanish laws, which relate to the materials treated in each chapter of the Digest, and be-

25. T. JEFFERSON, *The Batture at New Orleans [1810]* in 18 THE WRITINGS OF THOMAS JEFFERSON 119-20 (Lib. ed. 1903).

26. Barcia Trelles, *La doctrine de Monroë*, 32 RECUEIL DES COURS ACADEMIE DE DROIT INTERNATIONAL 391, 439 (1930).

27. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 625 n.57 (1972).

side the French text, article by article, the citation of the principal laws of the various codes from which the dispositions of our local statute are drawn.

In citing the laws which have some relation to the various articles of the Digest, indications have not been limited to those which only contain similar dispositions; but those laws have been added which may present differences in prescription regarding the same matter, or which may contain exceptions to the general principle therein contained.²⁸

Thus, it will be noticed that in the first and third paragraphs (and in his title) Moreau-Lislet said that the materials cited had ideologically "some relation" to the Digest of 1808. But in the second paragraph he said that "for this purpose" he gave a general list of materials which ideologically "relate" to the Digest of 1808. Through his play on the abstract phrases "some relation" and "relation" Moreau-Lislet was stating the superstructural dialectic of his enterprise, that is, the dialectic of the unity-in-opposition required by the theme of the unity-in-opposition of law and parala. The second paragraph, using the word "relation" in masked fashion suggests ideological unity or identity between the Digest of 1808 and certain materials indicated in the de la Vergne manuscript. But the ideological phrase "some relation," used in the first and third paragraphs and in the title suggests in masked fashion contradiction between the Digest of 1808 and certain materials of the de la Vergne manuscript. The words "[f]or this purpose" in the second paragraph suggests in masked form both the unity between the Moreau-Lislet manuscript and the promulgated texts of the Digest of 1808 ("relation") and the contradiction between the promulgated texts of the Digest of 1808 and the de la Vergne manuscript ("some relation"). Such superstructural unity-in-opposition between the Digest of 1808 and the de la Vergne manuscript will not be acknowledged by undialectical scholars. Moreover, it is a disservice to say, as has been done, that in all three paragraphs Moreau-Lislet employed only the words "some relation," when in truth this phrase appears exclusively in the first and third paragraphs and in the title. However, as the phrase "some relation" suggests rivalry the error of translation will be at this point ignored for the sake of further discussion.

As has been shown, in the second paragraph of the *avant-propos* Moreau-Lislet said that he would cite "the principal laws of the various codes from which the dispositions of our local statute are drawn."

28. Franklin, *supra* note 1, at 531.

The phrase, "our local statute," is a translation of the French words, "*notre statut local*." It would be incorrect and even misleading to translate *statut local* as "local status" instead of "local statute," so that Moreau-Lislet would be providing citations to civil and Spanish laws which formerly and only formerly supplied the rules of local "status" or local "condition" or local "state of affairs." This would mean, apparently without the use of temporal adjectives, that the de la Vergne manuscript dealt with historically obsolete feudal and Roman materials and hence that there would be no contemporary, immediate rivalry between the feudal Spanish content of the de la Vergne manuscript and the bourgeois French content of the texts of 1808. But although the text of 1808 is essentially French, the de la Vergne manuscript, it must be repeated, means that there is a rivalry or confrontation between the Digest of 1808 and the materials of the de la Vergne manuscript. The de la Vergne manuscript, as has been said, presents in more subtle form, the same struggle between bourgeois Romanist and feudal Roman law which resulted in the catastrophic defeat of the *penchant hispanophile* in 1806.²⁹

The title of the *projet* of 1806 said that it was "An Act declaring the laws which continue to be inforce . . ." The preamble referred to the act of the Congress of the United States, in which it was said that "the laws which shall be inforce in the said Territory, at the commencement of said acts . . . shall continue to be inforce until altered, modified or repealed by the Legislature of the Territory." Section 1 then said that "the laws which remain inforce, and those which can be re-ferred to as authorities in the tribunals of this Territory . . . are the laws and authorities following, to wit: 1. The roman Civil code . . . aided by . . . Domat [and others] . . . the whole so far as it has not been derogated from by the spanish law; 2. The Spanish law . . ." The enumeration of Spanish materials which follows in the *projet* of 1806 is virtually the same as the enumeration of Spanish materials in the de la Vergne manuscript.³⁰ It would not be useful to show the relationship more closely. It may be repeated that the *penchant hispanophile* of the *projet* of 1806 reappears in more subtle form as the *perchant his-*

29. For details of the emergence, content and defeat of the *projet* of 1806, see Franklin, *supra* note 2; Franklin, *The Eighteenth "Brumaire" in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806*, 16 TUL. L. REV. 514-61 (1942) [hereinafter cited as *Brumaire*]. On the role of the Creoles before the French Revolution, see *Créoles* in 14 OEUUVRES DE DENIS DIDEROT 495 (1821).

30. The materials of the *projet* of 1806 have already been reproduced fully earlier in this paper.

panophile of the de la Vergne manuscript. The word “*statut*” in the de la Vergne manuscript does not merely mean obsolete or past “status,” past “condition,” past “state of affairs.” The de la Vergne manuscript represents an activist legal system, which rivals the activist Digest of 1808. The de la Vergne manuscript is thus not merely antiquarian.

The word “*statut*,” as used by Moreau-Lislet, is bound to the word “*Digeste*” in the title of the Louisiana promulgation of 1808. The word “*digeste*” does not have the English meaning of the word “digest.” It means not merely particularistically one juristic component in Justinian’s *corpus juris*, but also is a comprehensive word, signifying the totality of the *corpus juris*. The word, “pandects,” a synonym for “digest,” similarly enjoys a role indicating the totality of Roman law in vigor. The word “code” also has a particularistic as well as general significance. From a Romanist point of view it was not incorrect for the promulgated Louisiana texts of 1808 to be described as “the digest of the formulated law” as meaning a comprehensive or total system of law (“*le Digeste de la Loi Civile*”), with a stated methodology for closing gaps in the system by means of article 4.21 of the preliminary title (which today is article 21 of the Louisiana Civil Code). This means that “Digest” of 1808, “Civil Code of 1808,” “our statute” (*notre statut*) may be employed interchangeably.

However, this is a problem because the phrase used by Moreau-Lislet was not “*notre statut*,” but “*notre statut local*.” It is obscurantist to suggest that this phrase connotes not “our local statute,” but past “local status,” past “local conditions,” past “local state of affairs.” The phrase “*notre statut local*” must be studied as a totality and as employed in Moreau-Lislet’s second paragraph of his *avant-propos*, where he wrote of “the principal laws of the various codes from which the local dispositions of our local statute are drawn.” The French word “*statut*” and the English word “statute” enjoy an exceptionally prominent role in the early history of Louisiana law. *Saul v. His Creditors*,³¹ which is probably one of the most scholarly opinions in the history of American law, was concerned with statutes real and statutes personal of conflict of laws, as these emerged in feudal Roman law. Livermore’s book, *Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations*, was published in New

31. 5 Mart. (n.s.) 569 (1827). See 1 M. PLAINOL & G. RIPERT, *TREATISE ON THE CIVIL LAW* pt. 1 no. 183 (12th ed. 1939), for a discussion of recent date in English. See also note 53 *infra*.

Orleans in 1828 in response to *Saul v. His Creditors*. It is elementary knowledge that Livermore's work which was "[t]he first American book on conflict of laws reflected the views of the medieval statistists."³²

Nothing is gained by suggesting that "*notre statut local*" means our "local status" and not local statute. These words all signify imperatively and hierarchically fixed or determined legal situation, and both have the same origin in Latin and in French. However, in modern French law the status or determinate position of a subject of law before the law may not be described as status but as "*état civil*." In Roman law such status was often described as "*caput*."³³ As regards "*notre statut local*," as used by Moreau-Lislet, the word "*statut*" relates to the sovereign or hierarchical determination of the being of the law itself, so that it is hierarchically established or posited law, both in rank and in content, that is, "*statut*" does connote statute.

In his *Encyclopedic Dictionary of Roman Law* Berger writes that "*statutum*" means "[a] law, an enactment."³⁴ There seems to be no English verb related to the English noun "statute." But in French there is both the noun "*statut*" and the verb "*statuer*." As the verb "*statuer*" may be translated as "to posit," the noun "*statut*" may be translated, with elegance, as hierarchically enacted, established, posited or positive law or statute, both in rank and in content. Reference may be made here to elementary usage by Capitant. He says that "the legislator posits (*statue*) for the future . . ."³⁵

At page 588 of his opinion in *Saul v. His Creditors*, Judge Porter said of statutes real and statutes personal that

Holland and France appear to be the countries where the greatest number of these questions have arisen, and where the subject has excited most attention. The doctrine which they denominate that of real and personal statutes, is not, as it might from the terms used, be supposed, confined to written and positive law; but is applied, also, to unwritten law or customs, by which the state or condition of man is regulated . . .

This suggests that the words "*notre statut local*" as words of hierarchy may be related to the ideological hegemony of natural law.

The translation of German legal writing also may be considered.

32. R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS* 3 (1968).

33. Berger, *Encyclopedic Dictionary of Roman Law* 714 in 43 *TRANSL. AM. PHIL. SOC.* 333, 714 (1953).

34. *Id.* at 715.

35. H. CAPITANT, *INTRODUCTION A L'ÉTUDE DU DROIT CIVIL* 96 (5th ed. 1929).

In paragraph 211 of his *Philosophy of Law*, Hegel, possibly under the influence of old Germanic ideas, says that law (*Recht*) is not law unless it is positioned or posited (*gesetzt*). There is a play here on the two words for law which are found in many languages, though not in English: *lex* and *ius*, *loi* and *droit*, *Recht* and *Gesetz*. The ideological hierarchy, supremacy or subordination, or hegemony, within each pair veers or shifts historically (to use Hegel's language). Knox's somewhat faulty translation of Hegel may be noticed. "The principle of rightness [law, *Recht*], becomes the law (*Gesetz*)," Hegel writes, "when, in its objective existence, it is posited (*gesetzt*), i.e., when thinking makes it determinate and makes it known as what is right and valid; and in acquiring this determinate character, the right becomes positive law in general."³⁶ Hegel then goes on to justify codification and to condemn the "monstrous confusion" of English common law.³⁷

Before continuing with the problem of Moreau-Lislet's meaning of "*notre statut local*," and of the relation of the noun "*statut*" to the verb "*statuer*," it may not be amiss to recall that certain languages have two verbs indicating being—one indeterminate being, the other determinate being. This is important in studying Hegel and in confronting Heidegger.

The import of the word "*local*" in Moreau-Lislet's phrase, "*notre statut local*" as a totality and as used by him, justifies the translation of "*statut*" as "statute." After his presentation of "*statutum*" as "a law, an enactment," Berger continues, "*statuta imperialia*=imperial constitutions."³⁸ In his discussion of "*Locus*" in Roman law, Berger writes: "*Locus*. Distinguished from *FUNDUS* (piece of land, estate) as a part of a whole."³⁹ Perhaps this may suggest that Moreau-Lislet hierarchically distinguished imperial statute from subordinate or local statute, or like Porter, hierarchically distinguished natural law from positive law.

In the next to the last paragraph of the *avant-propos* of the de la Vergne manuscript Moreau-Lislet discussed the hierarchy of the Spanish feudal materials in "the colonies of this nation,"⁴⁰ that is, in Louisiana, or perhaps in the total, enormous space of the original Louisiana purchase, now partitioned into various states or territories. This was

36. G. HEGEL, *PHILOSOPHY OF RIGHT* § 211 (T. Knox transl. 1952).

37. *Id.*

38. Berger, *supra* note 33, at 715.

39. *Id.* at 568.

40. Franklin, *supra* note 1, at 534.

to become the *problematiqué* subsequently of the Missouri Compromise of 1820. The phrase "the colonies of this nation" thus suggest the subordinate and partial position of each colonial *statut* within a legal metropolis, empire (presumably French or Spanish) or any greater sovereignty. It seems to condemn the notion of imperative subordination contained in the word *statut* as meaning obsolete "local status," obsolete "local condition," obsolete "local state of affairs."

To what other regime or ideology could the Louisiana Digest of 1808 have been subordinated? The *projet* of 1806 acknowledged the hegemony of the constitution of the United States and congressional legislation. At the date of the de la Vergne manuscript Louisiana was a state of the union. As the phrase "*notre statut local*" has hierarchical meaning, was this an unstated reference to the state constitution and the national constitution? Considering the struggle over the *projet* of 1806 and also the military struggles involving Europe and the United States, including New Orleans itself, does the phrase "*notre statut local*" in 1814 have some esoteric political or philosophical meaning?

It seems likely that the phrase "*notre statut local*," as it does connote subordination, justifies the subordination of the formulated texts of 1808 to natural law. Judge Porter had pointed to this.

Because of his high place as a scholar of Roman law, as an historian of feudal Roman law and as a theorist of conflict of laws, aspects of Savigny's discussion in 1849 of the role and meaning of *statut* must be brought forward.

(1). In volume 8 of his *System des heutigen Römischen Rechts*, which he devoted to conflict of laws, Savigny writes:

We find this origin of particular municipal laws as far back as the time of the Roman Empire, whose separate communities not only had the right of legislating for themselves before their union with the Empire, but did not thereby entirely lose that right, although they were always subject to the new laws promulgated at Rome. It was entirely owing to these municipal laws that the Roman jurists had occasion to direct their attention to the questions we are here considering. They are contrasted [*Gegensatz*], as particular laws, with the common [*gemeine*] law of Rome. Still more extensive and important were the municipal laws [*Stadtrechte*] which in the middle ages developed themselves in almost every town in Italy, and which, as particular laws [*Particularrechte*] were contrasted [*gegen*], not with the Roman law only, but also with the Lombardic, both regarded as common [*gemeine*] laws. It was in connection with them that the technical term [*Kunstausdruck*] *Statuta* was first used; and it was afterwards transferred to

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other countries; and the doctrine of *Statuta Personalia, realia, mixta* was added.⁴¹

Thus Savigny holds that *statut* has hierarchical, technical, professional, esoteric meaning, which developed out of the history of feudal Italian law and which passed into the international or general language of Roman law. The word *statut* preserved such hierarchical, international, technical Romanist usage, even when used by French-speaking jurists in Louisiana, such as Moreau-Lislet. In the language of American law schools, *statut* is a Romanist term "of art." In the language of Savigny *statut* also has the technical force of "*Kunstausdruck*."

(2). Savigny devotes attention in his history of feudal Roman law, an edition of which appeared between 1834-51, not only to "*Statuten der italienischen Städte*" or cities, but also to the *statuta* of many European universities.⁴² In the eighth volume of his *System des heutigen Römischen Rechts*, to which reference already has been made, Savigny points out that a confrontation between general and particular law may be between "positive law" and "custom." He writes: "Different territorial laws within one and the same state have been noticed in a former part of this work under the name of *Particular Laws*, in contradistinction to the common law of such a state; and they may exist either in the form of positive statutes [*von Gesetzen*] or in that of customs [*von Gewohnheiten*]."⁴³ There is suggestion here (and difference, too) of the problem discussed by Porter, already quoted. The de la Vergne manuscript enjoys the role of establishing hierarchical rivalry, or subordination, between Spanish feudal Romanist law understood as natural law and the bourgeois French Romanist Civil Code or Digest of 1808. As is well known, Savigny condemned both natural law and codification. For him there could be no legitimate discussion of a hierarchial relation between natural law and positive law.

(3). However, Savigny did perceive and acknowledge that the feudal idea of the *statut* could involve hierarchy and confrontation and subordination of certain other legal forces, but he was not able to master the dialectic thereof. As an objective idealist, related to the objective idealist outlook of Schelling, he could perceive law (*Gesetz*)

41. F. SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS 65 (W. Guthrie transl. 1880).

42. 3 F. SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IN MITTELALTER 420-21, 513-14 (4te Aus. der 2ten Aus. von 1834); 8 *id.* at 338-41, and index references at 221.

43. F. SAVIGNY, *supra* note 41, at 64.

here, custom (*Gewohnheit*) there; but he could not penetrate to the reality of their unity-in-opposition. Some attention should be given to Hegel's considerations of the dialectic of struggle between law (*Gesetz*) and ethical custom (*Sittlichkeit*). In due course this will appear.

(4). As has been suggested, the rivalry between the promulgated French bourgeois Romanist Digest of 1808 and the unpromulgated Spanish feudal Romanist de la Vergne manuscript, presented by Moreau-Lislet, involves the further question of the sovereignty of the United States in Louisiana, that is, the problem of subordination presented by Moreau-Lislet's phrase, "*notre statut local*." In effect, Savigny also addresses himself to this matter in the eighth volume of his *System des heutigen Römischen Rechts*, the volume devoted to conflict of laws. Particular laws, Savigny writes, ". . . differ greatly in their historical origin, as well as in the limits assigned by it to their authority. The most important instances of such laws during the subsistence of the German empire, arose from the relation of the individual German states to the empire embracing them all."⁴⁴ In a footnote to this Savigny adds: "A similar relation, yet not quite the same, existed among the little sovereign states composing the United Netherlands, which were not united, like the German states, by a common supreme government and legislation. By the cases of collision which very often arose there, the jurists of Holland . . . were led to give great attention to this subject. The relation of the free states of North America is similar." The importance of this in connection with the matters discussed in this essay is obvious. Savigny wrote this without knowledge of Moreau-Lislet, probably without knowledge of Livermore, but with great knowledge of Story.

What already has been mentioned concerning the "dualism" or "parallelism" of the formulated law of 1808 and the paralaw of the materials set forth in the de la Vergne manuscript must be pursued further. The subordination of the French bourgeois Digest of 1808 to the materials of Roman and feudal Spanish law, which, because of the de la Vergne manuscript, were an ideological unity of opposites, was a possibility and only an existential possibility, unless the *hispanophile* jurist could in effect appropriate, alienate, seize or "plunder" the formulated materials of 1808. This means that through legal method such jurist might determine the conflict of such legal materials. Roman law

44. *Id.* at 65.

has had a history of approximately twenty-five centuries of activist legal method. Although these materials were not studied comprehensively until Savigny in 1840, the possibility of subjective interpretation was understood earlier. In *A Treatise on Man*, Helvétius in 1773 wrote that "[w]hen any one is the interpreter of a law, he changes it at his pleasure, and at length becomes the author of it."⁴⁵ This means that the jurist enjoys the role of the external mediator or unhistoric prince, whose activity is to choose among his possibilities, here the Romanist Digest of 1808 or the materials or so-called sources suggested in the materials set forth in the de la Vergne manuscript, understood as ideological unity-in-opposition.

Because of the power of the external mediator or unhistoric prince the promulgated code of 1808 may be veered into *projet* and the *projet* of the materials set forth in the de la Vergne manuscript may be veered into positive law. The hegemony of the Digest of 1808 or of the materials or so-called sources indicated in the de la Vergne manuscript is each a possibility dominated by the possibility or freedom of the methodology of the jurist. If both the formulated Code of 1808 and the materials in the de la Vergne manuscript are *projets*, such *projets* and their force are determined by the existential *projet* of the juridical methodology of the jurist as the external mediator or unhistoric prince. For the time being the question, whether the methodological *projet* of the jurist is controlled by the *projet* or *mobile* of social structure itself, will be put only temporarily to one side. In the struggle of the Enlightenment against feudalism, the struggle to regain lost rationalism, understood as natural law, the unhistoric prince or external mediator had been introduced by the mechanistic Enlightenment to educate or to teach rationalism, through law, that is, through posited natural law (usually codification). Diderot and Helvétius held that the magistrature enjoyed such rationalist power. In the face of Bourbon weakness the French Physiocratic jurists, primarily Mercier de la Rivière, had justified the hegemony of the magistrature as a reflection of economic structure of society. They were the founders of economics and related their theory of natural law and of the role of the magistrature to their economic theory. The existential *projet* of the jurist itself is controlled by the *projet* or *mobile* of the social structure and this means, so far as the ideological parallelism or "dualism" of the Code of 1808 and the materials in the de la Vergne manuscript are concerned, that the existen-

45. 2 HELVÉTIUS, A TREATISE ON MAN 150 (W. Hooper transl. 1810).

tial *projet* of the jurist concerns the rivalry in Louisiana between French bourgeois and Spanish feudal legal systems or *projets* of systems.

But, as has been said, this required that the materials of the de la Vergne manuscript be masked as natural law in order to confront the formulated Code of 1808. As also has been said, this was accomplished by Moreau-Lislet through his use of the phrases "some relation" and "relation." Historically such "some relation" and "such relation" obtained because the texts of both were Romanist and antagonistic. Philosophically such "some relation" and such "relation" obtained because each reflected natural law, an idea that, as has been suggested, Moreau-Lislet indicated by his phrase "*notre statut local*." Both feudal and bourgeois legal theory purported at that time to be natural law theory. Indeed, Hegel conceived that the Enlightenment had "plundered" feudal theory of the origin of law. Though feudal theory of natural law was in truth philosophically idealistic and bourgeois theory of natural law was in truth philosophically materialistic, as Hegel well knew, in his *Phenomenology of Mind*, he discussed bourgeois "plundering" of feudal thought as a struggle over theory of property.

The most important judicial discussion of the irrevocability of natural law in Louisiana was stated in *Reynolds v. Swain*,⁴⁶ which was decided in 1839. As this formulation seems to have been inspired by Chief Justice Marshall's opinion in *Fletcher v. Peck*,⁴⁷ decided in 1810, perhaps it may be ventured that in the United States generally the mask of natural law could readily be put in 1814 over the materials of the de la Vergne manuscript and over the Code of 1808 itself. The concluding paragraph of the *avant-propos* of the de la Vergne manuscript may here be mentioned. "In regard to the dispositions of the Roman law," Moreau-Lislet wrote, "they cannot be cited as laws in Spain, but as written-reason. (See Murillo, *Cursus iuris canonici*, no. 23, vol. 1, p. 9.)"⁴⁸

In the already noticed paragraph prior to the last paragraph of the *avant-propos* Moreau-Lislet opens up the vista of the legal role of customary law, to which as will be shown, the Digest of 1808 itself makes reference, though as "received," that is, as bourgeois usage. "In the Spanish tribunals of the Indies and of the colonies of this nation," Moreau-Lislet says:

46. 13 La. 193, 198 (1839). See *Brumaire*, *supra* note 29, at 551.

47. 10 U.S. (6 Cranch) 87, 127 (1810).

48. Franklin, *supra* note 1, at 534.

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[T]he laws of the *récopilation des Indes* should first of all control everything that they provide for; in default of these laws, the laws of the *Récopilation de Castilla* should rule, and finally the *Partidas*. But in regard to the laws of *Fuero Real* and of *Stile*, it is necessary to establish their usage before they can control, unless they have been included in the *Récopilation*.⁴⁹

Thus Moreau-Lislet suggests the possibility that the formulated Digest of 1808 was also paralleled by customary Spanish feudal and colonial materials or sources and the further possibility that the unhistoric mediator-jurist, putting the mask of natural law or custom over the Spanish materials, might veer such sources into positive law or, on the contrary, veer the positive law of 1808, alternately, as Hegel's discussion of Kantian shuffling, *Verstellung* or *déplacement*, already discussed, shows.

Hegel's presentation of *déplacement* appears in his *Phenomenology of Mind*. In his earlier considerations on the relation of natural and positive law published in 1802-03, Hegel lays the foundation for his criticism of *Verstellung* through his discussion of law and ethical custom (*Sittlichkeit*). Although Moreau-Lislet would not have known of this earlier essay, Hegel indicates therein the Kantian and Fichtean vocation of the de la Vergne manuscript with its establishment of a confrontation between bourgeois French formulated Roman law and the medieval Spanish Romanist materials. Hegel writes that the necessary unity is ". . . made formal. And the two determinations are posited (*gesetzt*) as absolutes; consequently, with this they fall in their existence beneath ideality (*Idealität*), that inasmuch as both are mere possibility."⁵⁰ By "ideality" Hegel means that the antinomy collapses into the antinomy of self-relation, or finiteness and particularism, or being-for-self,⁵¹ that is, into ideology. Hegel continues:

It is possible that law and duty, as determinate particulars, separated from the subjects and the subjects separated from them, have reality; however, it is also possible that both be connected. And it is absolutely necessary that the two possibilities be separated and differentiated, so that each founds its own science; the one, which concerns the unity of the pure concept and the subjects, or the morality of activity: the other, which concerns their non-unity or legality. And thus it is true that if in this separation of ethical custom into morality and legality,

49. *Id.*

50. G. HEGEL, *Ueber die wissenschaftlichen Behandlungsarten des Naturrechts*, in 1 HEGEL, *WERKE* 322, 360 (Vollständige Ausgabe, 1832).

51. G. HEGEL, *THE LOGIC OF HEGEL* 178 (2d ed. W. Wallace 1892).

both of these become mere possibilities and even, for that reason, both may be equally positive. The one is for the other indeed negative; but both are like that. One is not the absolute positive, the other absolutely the negative; but each is both in relation to the other, and thereby, first, both are only relatively positive, neither legality or morality is absolutely positive or truly ethical. And, then, because both, each in this way is as positive as the other, both are absolutely necessary; and the possibility that the pure concept and the subject of duty and law may not be in accord must be posited irrevocably and plainly.⁵²

This leads to Hegel's discussion of coercion.⁵³

As has been indicated, Hegel shows that Kant's thinking justifies finiteness and particularism or "idealities" and ideologies. Such presentation controls Hegel's discussion of Kantian social antinomies and explains Kantian *déplacement*, *Verstellung*, shuffling or bad faith, the last as used today by Sartre. Hegel's presentation leads to writing that the Louisiana civil code of 1808 and the content of the de la Vergne manuscript fall into particularism and finiteness, though both were masked or dissembled as natural law. Hegel says that

dualism, in putting an inseparable opposition between finite and in-

52. G. HEGEL, *supra* note 50, at 360.

53. *Id.* at 362, 366. Planiol-Ripert says of statutes real and statutes personal that "[T]he problem arose from the clash between the municipal or provincial laws called 'statutes' and the Roman or Lombard laws, which held sway throughout the entire country and were known as 'laws.'" Planiol-Ripert, *supra* note 31. Thus, Planiol-Ripert also directs attention to the inerness of the struggle for hierarchy in law. In the confrontation between the Louisiana Digest of 1808 and the de la Vergne manuscript there may lurk, in general, something of the role of *intercessio* in ancient Roman law and of the role of cassation in and after the French revolution. See Franklin, *Concerning the Mission and Contemporary Force of Romanist "Intercessio,"* in 2 *STUDI IN ONORE DI VINCENZO ARANGIO-RUIZ* 269 (1952). See also G. HEGEL, *PHILOSOPHY OF RIGHT* [LAW] § 273 (T. Knox transl. 1952); G. HEGEL, *supra* note 50; G. HEGEL, *SYSTEM DER SITTlichkeit* 74 (2te Aus., G. Lasson ed. 1923); Franklin, *Concerning the Dialectic of Romanist Tribunitial "Intercessio" During a Period of Social Ambiguity and Social Irony*, forthcoming. Of the situation in medieval Germany Huebner writes:

The rule, namely, became gradually recognized that the more special should take precedence of the more general law. . . . As men were wont to express the rule in a legal proverb: "Arbitrariness breaks town law, town law breaks provincial law, and provincial law breaks general law." ("*Willkür bricht Stadtrecht, Stadtrecht bricht Landrecht, Landrecht bricht gemein Recht*"). In this predominance . . . of the local and special law, the persistent decentralization of German law found its clearest expression.

R. HUEBNER, *A HISTORY OF GERMANIC PRIVATE LAW* 22 (F. Philbrick transl. 1918). (The translation has been altered by this writer.); See also R. SOHM, *BÜRGERLICHES RECHT, SYSTEMATISCHE RECHTSWISSENSCHAFT* 66, 69 (2te Aus. 1913); H. PLANITZ, *DEUTSCHES PRIVATRECHT* 5 (3te Aus. 1948).

Probably because of his feudal orientation, Savigny misquotes the material presented by Huebner *supra*. See Savigny, *System des heutigen Römischen Rechts*, § 347, n.(g) (1849).

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finite, fails to note the simple circumstance that the infinite is thereby only one of two, and is reduced to a particular, to which the finite forms the other particular . . . The being of the finite is made an absolute being, and by this dualism gets independence and stability . . . But it must not be touched by the infinite. There must be an abyss, an impassable gulf between the two . . . [T]he infinite of understanding, which is co-ordinated with the finite, is itself only one of two finites, no whole truth, but a non-substantial element.⁵⁴

The rivalry of the two finite natural laws, the two "idealities" or ideologies necessitated, in the thinking of the eighteenth-century Enlightenment, the external mediator, the unhistoric prince, the agility of the legal method of the jurist-mediator. Hegel says that, after Kant, Fichte ". . . founds a system, according to which, despite their separation, the concept and the subject of ethical custom both ought to be reunited, yet exactly for this reason only in a formal and external manner—and this relation is called compulsion."⁵⁵ Such external mediation is the weapon of the stronger or more violent force. Thus may be uncovered the reality of the coercive role of the external mediator-jurist in the unity of rival, antagonistic natural law systems, each in truth masked particularisms. Kant, too, masked the weapon of compulsion in his presentation, already set forth, that ". . . Moral Laws are *undemonstrable*, and yet *apodictic* . . ."⁵⁶

There existed forces in Louisiana which could be directed against the *penchant hispanophile* of the de la Vergne manuscript. (1) Jefferson himself held that the law of Louisiana was and had been French Romanist and not Spanish Romanist.⁵⁷ (2) Moreover, Livingston and Moreau-Lislet himself deepened the attack on Spanish feudal legal ideas when the scope of Roman law and Romanist sources as sources in Louisiana was widened. The Romanist system of Louisiana, they later said, had to take account of "Spanish Statutes, ordinances and usages, Latin Commentaries, the works of French and Italian Jurists, and the heavy tomes of Dutch and Flemish annotations . . ."⁵⁸ What was ultimately felt to be important was the culture struggle against Anglo-American law. In this sense Romanist legal history is important as a prototype of national liberation struggle against certain imperialism. However, this culture struggle in Louisiana was ironic because it was

54. G. HEGEL, *supra* note 51, at 176.

55. *Id.* at 362.

56. I. KANT, *supra* note 18, at 34.

57. *Brumaire*, *supra* note 29, at 544 n.143.

58. Livingston, *supra* note 4, at lxxxvii, xcii.

a struggle to maintain slavery within the United States. Paine therefore condemned the Louisiana culture struggle.⁵⁹ Moreau-Lislet's own politics remain to be discovered. At one time before coming to Louisiana he had been secretary to Toussaint l'Ouverture. Perhaps it may be discovered that Napoléon explains his *penchant hispanophile* at the time of the de la Vergne manuscript. On the whole Moreau-Lislet seems identified with the pro-American politics of Governor Claiborne and President Jefferson; and he was a Louisiana leader in the fight against nullification during the period when Livingston was Jackson's secretary of state.⁶⁰ It does not seem too much to suggest that Moreau-Lislet, Livingston, Roselius, and Pound have been the most brilliant American Romanists. (3) The most formidable bulwark against the force of the de la Vergne manuscript is the Digest of 1808 itself. This text as particularistic bourgeois text of natural law condemns the Spanish particularistic, feudal materials of the de la Vergne manuscript as a rival system of natural law. It excludes other external (in Hegel's sense) natural law, save insofar as bourgeois natural law justifies the inner development of the Digest of 1808. This appears in article 4.21 of the preliminary title, which is taken immediately from the French bourgeois *projet* of the Year VIII (1800). This text of legal method reads as follows: "In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent." Article 4.22 of the preliminary title reads as follows: "The judge cannot, in a criminal matter, supply by construction, any thing omitted in the law."

Elsewhere in this paper the historic role of equity in overcoming law, of parolaw overcoming law, was discussed. Such equity is forbidden by article 21. However, equity in the history of Roman law has also enjoyed the role of justifying the development of the positive content of the texts to solve the problem of *lacunae* or gaps in the texts consistently with the social structure reflected in the formulated law. This is what article 21, following the bourgeois French *projet* of the Year VIII (1800), accomplishes. This text as such excludes the force of the "plundering" appropriative or alienating paralegal feudal materials gathered in the de la Vergne manuscript.

Some French jurists seem to have opposed the proposed text of the

59. *Brumaire*, *supra* note 29, at 540.

60. Franklin, *Libraries of Edward Livingston and of Moreau-Lislet*, 15 TUL. L. REV. 401, 403 (1941).

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Year VIII concerning equity on the ground that the reference to equity would justify English negative equity, so that the French courts could dispense with or negate the new *code civil*. But Portalis, *orateur* for the government, answered that the equity consecrated under the new regime was a positive or affirming equity and not a negative or dispensing equity.

"One of the orators has pretended," Portalis said, "that we are giving the judges a power denied by the Constitution. 'I think,' he has told us, 'that we have no tribunals of equity which may dispense with the statutes. There is a court of equity in England; in Rome the praetor was a judge of equity; in France the king had the right to give dispensation and the *Parlemens* often deviated from the letter of the statute. But, among us the calling of the judge is confined to the faithful application of the statutes.'"

"All of these objections," Portalis answered, "establish nothing against the article; they only prove that the article has not been understood."

"The author of the objection," Portalis continued, "would be sound if we should allow the judges the liberty of putting natural equity in place of positive law. Thus in Rome the praetor did not apply the law when he believed it contrary to natural equity. He introduced the actions of good faith in order to escape the laws which had established exact formulae for each action; in England the court of equity and in France the courts of the sovereign often made law in order to modify the laws; but this is not how this article works. Our article only fits the cases where the law is obscure or insufficient and the cases where there even is no law. In these several instances should the judge surrender his calling or fulfill it?"⁶¹

IV.

It already has been pointed out that Moreau-Lislet's veering during his career may have been dialectical. This requires some discussion of the contradictory social structures reflected in the particularism of the hostile legal idealities or ideologies of the early legal history of Louisiana, including the bourgeois Digest of 1808 and the feudal materials of the de la Vergne manuscript. The structural rivalry was the struggle over slavery. President Jefferson, the leader of the American eighteenth-century Enlightenment, intended the destruction of Louisiana slavery.

61. Discours de M. Portalis, *orateur du gouvernement*, prononcé dans la séance du Corps Législatif du 23 frimaire, an X, 1 Loqué, *La législation de la France* 480-81 (1827). See Franklin, *Equity in Louisiana: The Role of Article 21*, 9 *TUL. L. REV.* 485 (1935).

It will be recalled that at the time of Jefferson's purchase Louisiana meant the space of probably a million square miles. In part Jefferson weakened slavery by partitioning this space into numerous states. In Louisiana itself Jefferson actively sought to destroy slavery. This explains his conception that the Roman law of Louisiana had been feudal French and should become bourgeois French. On the other hand, Napoléon and Talleyrand, who intended the restoration and maintenance of slavery in Louisiana and in Ibero-America, at that time controlled by them, did not introduce the bourgeois *code civil* of the French metropolis into this French colonial empire. The maintenance of slavery in the colonial world explains the French *penchant hispanophile* of Talleyrand who probably regarded the transfer of Louisiana to the United States as masking a deposit of Louisiana into the safe-keeping of the United States. Because of the power of the bourgeois French Enlightenment in the United States the defeat of the *projet* of 1806 was a defeat for feudalism.

It is true that the Digest of 1808 and the Civil Code of 1825 maintained slavery and such was a defeat for the American Enlightenment. But Marx pointed out before the American Civil War that American slavery was the pedestal of world-wide bourgeois production. Bourgeois productive possibilities were felt in Louisiana at a relatively early date. Even the *projet* of 1806 legitimates certain commentators on commercial law. In this sense the *projet* of 1806 was closer to bourgeois interest than the materials of the de la Vergne manuscript. As there was tremendous land speculation in Louisiana during the period under consideration certain Anglo-American common lawyers supported the *penchant hispanophile* because of the incognoscibility of the feudal Spanish Romanist materials. This, too, was the period of the adventures of Aaron Burr and, later, of the battle of New Orleans. Fulton had invented the steamboat and had been absorbed by the family of Edward Livingston, the greatest of the Louisiana Romanists. This conquest had led to the struggle to create legal monopolies in various ports.

The bourgeois Romanist Civil Code of 1825, the history of which goes back to 1823, succeeded the Digest of 1808. This signifies the end of the struggle between the bourgeois code of 1808 and the feudal paraly of de la Vergne manuscript. At this time the defeat of Jefferson's intention to destroy Louisiana slavery was acknowledged by the Missouri Compromise of 1820, weakening the interest of Louisiana slaveholders in Talleyrand's *penchant hispanophile*. Indeed, the Ibero-American

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world itself, through a series of revolutions, was destroying the feudal *penchant hispanophile* and turning to the French bourgeois *code civil*. Moreover, in 1823, the year of the report of Moreau-Lislet, Livingston and Derbigny relative to the new bourgeois Louisiana Civil Code of 1825, the Monroe doctrine was announced. This proclamation meant the United States had become strong enough to exclude certain forces, including the *penchant hispanophile*, from intervening in internal American life through the door of American federalism.

V.

As has been said, the commentaries which have thus far been published since the de la Vergne manuscript became publicly available ignore the *projet* of 1806 and the social structure which gives meaning to legal texts. This means that such work is abstract and formalistic. It would not be sufficient today to discuss the BGB (German Civil Code of 1900) without taking account of its successive meanings under the empire, under the Weimar Republic, under the Nazi regime and under BRD, and, above all, of its rival meanings today in the BRD and the DDR. So, too, the French *code civil*, which probably has been the most influential legal system in world history, has had an appropriate variety of meanings over a course of almost two centuries.

As has been said, the natural law ideology of the Enlightenment and of feudalism masked particularism. This particularism has been intensified, has become hopelessly abstract, in recent legal writing in Louisiana, insofar as each text or article of the Louisiana Digest of 1808 is treated in isolation from other articles, and merely compared with similarly isolated texts of the de la Vergne manuscript. Indeed, this is the worst kind of Anglo-American legal scholarship, which knows nothing of the organic and totality conceptions of modern Romanist codification. The latter conceives that the meaning of formulated law should be derived from the texts understood as a system of interrelated and inter-penetrating formulations. If each text of the Louisiana Digest of 1808 and of the materials of the de la Vergne manuscript is discussed in total isolation the outcome is that such texts are Leibnizian windowless monads, requiring that their unity be established through preestablished harmony, the alienating role of which is similar to that of the external mediator-jurist and the unhistoric prince mentioned earlier in this paper. Even if there were Louisiana interest in the organic or organized force of legal texts, Llewellyn, the redactor of the new Amer-

ican Uniform Commercial Code, said that "no historian of today has any business to stop with legal records."⁶² Llewellyn's thought should lead beyond any ideological fetters to social theory of law. It already has been indicated that Hegel required "innerness" in his discussion of the relation of natural and positive law, which fell into particularism through lack of "innerness."

If the texts of the code are monadized or treated as things-in-themselves, they become nothingness or anythings through lack of inter-relation. Thus, it becomes possible to hold, perhaps arbitrarily, that a text of the Digest of 1808 is either feudal Spanish or bourgeois French, especially if there are variations in formulation. Hence the controversy which has developed as to whether the Digest of 1808 is itself not bourgeois French but feudal Spanish, is essentially a controversy in which decisions may conflict and may be ideological. It will not suffice separately or in isolation to examine each text of the Digest of 1808, classify it as French or Spanish, and then to count or to arithmeticize the count.

Moreover, the further weakness in such absolutely particularistic, monadic method is that it considers all texts of the digest of 1808 as equal in force, forgetting that there are certain texts which are paramount. Perhaps these may be called "*mobile*" or "*Beweggrund*" or "*causa*" or "presuppositional" texts, thus invoking thought of the Physiocratic jurists or of Domat or of Hegel. Of course, the sixth-century texts of Roman law were Roman and neither French nor Spanish. Furthermore, it may be mentioned that the history of Roman law, feudal or bourgeois, has been that of an international legal science. In this Roman and civil law, together with international law, differ from other law. Again, it may be said here this signifies that the meaning or the force of law of such abstract Romanist text is not a relationless thing-in-itself, but struggles to get its meaning not only through other texts, but from the social structure which the text reflects. As a text of Roman law may be ancient, feudal or bourgeois, it gets its truth and force from its social otherness. As has been said, the French civil code has served not only bourgeois, but also feudal and semi-feudal social regimes. Even if the texts of the Louisiana Digest of 1808 had been firmly feudal Spanish, their meaning as feudal or as bourgeois would

62. Llewellyn, Book Review, 31 COLUM. L. REV. 729 (1931). In his essay on *Liaison* before the French revolution, Diderot wrote of "the universal connection of all things." 17 OEUVRES DE DENIS DIDEROT 120, 121 (1821).

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be determined not by such texts as monads or as ideology, but by the social structure or social otherness promulgating them.

Heidegger conceives of language as violence, but the violence of language is social violence. It must be remembered that the presupposition of the de la Vergne manuscript is that even if the texts of the Digest of 1808 are not feudal Spanish, the mission of the violence of the language of the de la Vergne manuscript was, through legal method, to impose Spanish feudal force on the formulated texts of the Digest of 1808. As has been shown, this is what Hegel called "coercion" or "constraint" in discussing the "dualist" legal ideas of Kant and Fichte. But this force is true also of the Digest of 1808. The rival violences are rival struggles.

If it is assumed that the texts of 1808 are often feudal Spanish texts, what the writer has just called its "*mobile*" or "*causa*" or "presuppositional" texts are bourgeois French. Louis de la Vergne, Esq., the active donor of the de la Vergne manuscript, Mrs. Nina Nichols Pugh, research assistant to Professor Robert A. Pascal of Louisiana State University, and Professor Robert A. Pascal himself, seem to believe that the problem of the derivation of the content of the Digest of 1808 as a system of monads has not been accomplished satisfactorily; and that the Digest should be studied by a commission of scholars, despite the elaborate monadist study of the matter at another law school. This is correct, provided the methodology of such commission also takes account of the interrelationship of the texts of 1808 and of the social structure of such code. Such fresh study, in assessing these texts, should also acknowledge the hegemony of the *mobile*, *causa*, or presuppositional texts. Furthermore, the commission should relate the problem of such *causa*-texts to Kelsen's theory of the *Grundnorm*, which, like Kant and Fichte, may have to be criticized because of what Hegel called "externality," "separation" or what today may be called "distance."

Perhaps some *causa*- or *mobile*-texts of the Digest of 1808 may be mentioned. Reference already has been made to the importance of the formulations in the Digest of 1808 relative among other things to legal method. These materials, which constitute something of an aspect of an eighteenth-century idea of a general part of the code, permeating its entire determinate being, have already been somewhat referred to, in particular article 4.21 of the preliminary title, dealing with *lacunae* or gaps in the code. In large measure and in explicit words these articles

derive from the *projet* of the Year VIII (1800). It may be mentioned that this *projet* of the Year VIII may have been more valuable from an educational or institutional point of view than the definitive French *code civil* of 1804. This would be important in Louisiana which then had no law faculties.

Article 1.2 of the preliminary title, among other things says that "the law (*La loi*)" announces "rewards and penalties." Nothing could be more bourgeois than these important words. In *Characteristics*, which first appeared in 1711, Shaftesbury, whose tutor had been Locke, opened the discussion which leads to the embourgeoisment of the idea of rewards and punishment. He in effect secularized the problem and removed it from the sphere of religion to the sphere of profane law. After a biblical discussion, he writes that ". . . the heroic virtue of these persons had only the common reward of praise attributed to it, and could not claim a future recompense under a religion which taught no future state, nor exhibited any rewards or punishments, besides such as were temporal, and had respect to the written law."⁶³ In pursuing this thought Shaftesbury, who more or less adumbrates the role of secularized theory of bourgeois rewards and punishments in confronting the chilling or coercive effect of state terrorism, suggests the relation of such theory to bourgeois, Anglo-American contract theory of "bargain" consideration; considers the relation of his theory to infamy (important in understanding the fifth amendment of the United States Constitution); and anticipates the role of death or nothingness in existentialist social death. Shaftesbury's thought passed to France through Diderot. However, only that portion of Shaftesbury's presentation on rewards and punishments which touches the Louisiana Code of 1808 by suggesting bourgeois *mobile* or *causa* or *Voraussetzung* will be here noticed. "Thus in a civil state or public," Shaftesbury writes,

we see that a virtuous administration, and an equal and just distribution of rewards and punishments, is of the highest service, not only by restraining the vicious, and forcing them to act usefully to society, but by making virtue to be apparently the interest of every one, so as to remove all prejudices against it, create a fair reception for it, and lead men into that path which afterwards they cannot easily quit. For thus a people raised from barbarity or despotic rule, civilized by laws, and made virtuous by the long course of a lawful and just administration, if they chance to fall suddenly under any misgovernment of

63. A. SHAFTESBURY, *An Essay on the Freedom of Wit and Humor*, in *CHARACTERISTICS* 68 (J. Robertson ed. 1964).

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unjust and arbitrary power, they will on this account be the rather animated to exert a stronger virtue in opposition to such violence and corruption. And even where, by long and continued arts of a prevailing tyranny, such a people are at last totally oppressed, the scattered seeds of virtue will for a long time remain alive, even to a second generation, ere the utmost force of misapplied rewards and punishments can bring them to the abject and compliant state of long-accustomed slaves. But though a right distribution of justice in a government be so essential a cause of virtue, we must observe in this case that it is example which chiefly influences mankind, and forms the character and disposition of a people. For a virtuous administration is in a manner necessarily accompanied with virtue in the magistrate.⁶⁴

In *A Treatise on Man*, published in 1773, Helvétius discussed "the Moral Education of Man." The question is asked: "Supposing the laws of nature to be dictated by equity, what means are there of causing them to be observed, and of exciting in the minds of the people love of their country?" The answer: "These are punishments inflicted for crimes, and rewards assigned to virtues." The next question is: "What are the rewards for virtues?" The answer: "Titles, honours, the public esteem, and those pleasures of which esteem is the representative." Next question: "What are the punishments for crimes? Sometimes death; often disgrace, accompanied with contempt." The next question relates the problem of infamy (consecrated in the fifth amendment of the United States Constitution) and of existential anguish before death, natural or civil, or before nothingness, to the theory of rewards and punishments. The question is: "Is contempt a punishment?" The answer: "Yes; at least in a free and well governed country. In such a country the punishment of contempt is severe and dreadful; it is capable of keeping the great to their duty; the fear of contempt renders them just, active, and laborious."⁶⁵

By means of the answer to the next question Helvétius indicates that the theory of rewards and punishments is bourgeois *causa-* or *mobile-* or *Voraussetzung-*theory. The question is: "Justice ought doubtless to rule empires; it ought to reign by the laws. But are laws all of the same nature?" The answer: "No: some of them may be said to be invariable, and without them society cannot subsist, at least not happily: such are the fundamental laws of property."⁶⁶

In his *Discourses on Davila*, published in 1790, John Adams, too,

64. *Id.* at 272.

65. 2 HELVÉTIUS, *supra* note 45, at 427.

66. *Id.* at 428.

stated a bourgeois theory of rewards and punishments, and like Helvétius, adumbrated the dialectic of bourgeois existential anguish or nothingness in such theory.

Nature then has kindly added to benevolence, the desire for reputation, in order to make us good members of society. . . . Nature has sanctioned the law of self-preservation by rewards and punishments. . . . The same nature . . . has imposed another law, that of promoting the good, as well as respecting the rights of mankind, and has sanctioned it by other rewards and punishments. The rewards in this case, in this life, are *esteem* and *admiration* of others; the punishments are *neglect* and *contempt*; nor may any one imagine that these are not as real as the others. The desire of the esteem of others is as real a want of nature as hunger; and the neglect and contempt of the world, as severe a pain as the gout or stone. It sooner and oftener produces despair, and a detestation of existence; of equal importance to individuals, to families, and to nations. It is a principal end of government to regulate this passion, which in its turn becomes a principal means of government. It is the only adequate instrument of order and subordination in society, and alone commands effectual obedience to laws, since without it neither human reason, nor standing armies, would ever produce that great effect.⁶⁷

In *The Philosophy of Law*, Kant in 1796, as an activist, indicates that the bourgeois idea of "rewards" relates to the bourgeois structure of society, that is, to bourgeois property. He says that "The *juridical* Effect or Consequence of a culpable act of Demerit is PUNISHMENT . . . that of a meritorious act is REWARD . . . assuming that this Reward was promised in the Law and it formed the motive of the action. The coincidence or exact conformity of conduct to what is due has no juridical effect.—Benevolent REMUNERATION . . . has no place in *juridical* Relations."⁶⁸

3.2.4.40 of the Digest of 1808 stipulates that "substitutions and *fidei commissa* are and remain prohibited." This is a basic bourgeois accomplishment of the French revolution, putting an end to the pyramid structure of feudalism. It too, is a *mobile-text*. In 1789 Jefferson from Paris sent Madison a document of Lafayette containing materials of "declarations of rights," that is, materials relating to what was to be the American Bill of Rights or second constitution. Lafayette's text

67. J. ADAMS, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 234 (1851).

68. I. KANT, *supra* note 18, at 38. On "reward and punishment," see D. DIDEROT *Récompense* in 19 OEUUVRES DE DENIS DIDEROT 163 (1821); J. RAWLS, A THEORY OF JUSTICE 313-15 (1971); M. SCHELER, LE FORMALISME EN ETHIQUE 366 (M. de Gandillac, transl. 1955); B. F. SKINNER, BEYOND FREEDOM AND DIGNITY 51 (1971).

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was entitled "General Principles Relative to a Political State." Paragraph 14 said: "No substitutions."⁶⁹ Furthermore, in a later letter written by Jefferson from Paris to Madison in 1789, Jefferson also said that the ". . . principle that the earth belongs to the living, and not to the dead, is of very extensive application and consequences, in every country, and most especially in France. It enters into the resolution of the questions Whether the nation may change the descent of lands holden in tail?"⁷⁰ Jefferson's generation theory should be related to that of Ortega y Gasset and of Werner Krauss.

However, the Digest of 1808 also has a *mobile-* or *causa-*text repudiating basic social ideas of French bourgeois law. Article 2279 of the *code civil* is bourgeois because it guarantees the rapid circulation or exchange of movables in the market. It says that "possession is equivalent to title." In the Digest of 1808 this is rejected and replaced with a three-year prescriptive period for movables. This may be anti-bourgeois, but it may also mean that in Louisiana the elliptical phrase, "possession is equivalent to title" was understood in the Roman law sense of *titulus* in prescriptive law in general and not in the Roman law sense of *dominium* or ownership. It must be said that although article 2279 is bourgeois, in that it insures confidence in the market of movables, the French text of the legal formulation thereof was feudal. The Louisiana jurists could have been misled by the seemingly feudal force of the doctrine and thus have repudiated it on the assumption that it was feudal and not bourgeois. What is more likely, the repudiation of article 2279 may mean that though Louisiana received bourgeois law, it received it in terms of its own situation as a colonial supplier of raw, agricultural materials, produced through slave labor, for instance, sugar and cotton, prior to the entry of such products into the world market through the port of New Orleans. If so, *la possession vaut titre* might not become a legal necessity until the specification of such raw materials in the bourgeois metropolis, which was centered outside of Louisiana. It may be also mentioned that the fate of article 2279 in the Louisiana civil codes shows that the articles of such codes cannot be discussed as French or as Spanish in isolation from the codes as to-

69. Cited in Franklin, *The Ninth Amendment as Civil Law Method and its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 TUL. L. REV. 487, 502 n.29 (1966).

70. Letter from Thomas Jefferson to James Madison, September 6, 1789, in 15 THE PAPERS OF THOMAS JEFFERSON 396 (J. Boyd ed. 1958). This letter, along with materials involving Richard Gem, was collected under the title, *The Earth Belongs in Usufruct to the Living. See id.*

talities; thus, there are so many code exceptions to the repudiation of article 2279 of the *code civil* in Louisiana that the exceptions virtually restore article 2279 to the civil codes of Louisiana.⁷¹

VI.

The national history of the United States early in the nineteenth-century justifies the thought that the Louisiana texts of 1808, despite the *penchant hispanophile* of the de la Vergne manuscript, had French bourgeois signification. Though the American revolution had broken English political power it had not broken the force of English law. There was a linguistic problem. The New York and Louisiana jurist, Edward Livingston, was the spokesman for Romanist and civilian ideology in the United States and Jefferson, as has been indicated, was the political leader of such tendency as the American spokesman for the French Enlightenment. Cooper, an Anglo-American eighteenth-century mechanical materialist philosopher, also becomes important as a jurist. Because of the role of the civil law in Louisiana, it was possibly expected to overcome Anglo-American common law within the rest of the United States. This could only happen if Louisiana Roman law was bourgeois or French Roman law. Cooper translated institutional aspects of the *corpus iuris* into English. This juridical tendency failed. Moreover, as a philosophic materialist Cooper was overcome by the influence of German philosophic idealism then represented in the United States by Emerson at Harvard.⁷² These two defeats were ideological turning points in American thought, the effects of which are still felt.

VII.

In concluding this consideration of the nature of the Louisiana Digest of 1808 as bourgeois or as feudal it is necessary to reiterate the importance of a social structural or *mobile*-conception of the Digest of 1808, whether or not the formulated texts may be feudal. In his *Phenomenology of Mind*, Hegel said that the rationalist enlightenment or illumination was a bourgeois plundering or appropriative alienation of medieval faith or fideism, the history of which was a development, through negations, from the rationalism of philosophically idealist natural law ultimately into utilitarianism. He said that

71. Franklin, *Security of Acquisition and of Transaction: "La Possession Vaut Titre" and "Bona Fide" Purchase*, 6 TUL. L. REV. 589-612 (1932).

72. 2 DYNNIK, GESCHICHTE DER PHILOSOPHIE 520 (1960).

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[e]nlightenment illuminates that world of heaven with ideas drawn from the world of sense, pointing out there this element of finitude which belief cannot deny or repudiate, because it is self-consciousness, and in being so is the unity to which both kinds of ideas belong, and in which they do not fall apart from one another; for they belong to the same indivisible simple self into which belief has passed, and which constitutes its life.

Belief has by this means lost the content which furnished its filling, and collapses into an inarticulate state where the spirit works and weaves within itself. Belief is banished from its own kingdom; this kingdom is sacked and plundered, since the waking consciousness has forcibly taken to itself every distinction and expansion of it and claimed every one of its parts for earth, and returned them to the earth that owns them. Yet belief is not on that account satisfied, for this illumination has everywhere brought to light only what is individual, with the result that only insubstantial realities and finitude forsaken of spirit make any appeal to spirit.⁷³

73. G. HEGEL, *THE PHENOMENOLOGY OF MIND* 588 (2d ed. J. Baillie transl. 1931).

