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DETRIMENTAL RELIANCE IN LOUISIANA LAW—PAST, PRESENT, AND FUTURE (?): THE CODE DRAFTER'S PERSPECTIVE

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INTRODUCTION

The Louisiana Civil Code has undergone piecemeal modernization for the past decade.¹ Beginning in 1976 with the revision of personal servitudes, the legislature has gradually replaced all of Book II, "Things and the Different Modifications of Ownership."² In January, 1980, a modernized law of matrimonial regimes replaced provisions then well over a century old.³ In 1981,

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1. The mandate for revision of the Civil Code of 1870 was delivered by the Louisiana Legislature in 1948. 1948 La. Acts, No. 335, § 1. The actual work of revision began in the 1960's. See LA. STATE LAW INST., BIENNIAL REPORT TO THE LEGISLATURE 10-11 (1968).
2. Book II of the Louisiana Civil Code, comprising Louisiana's property law, was enacted in revised form in five separate acts: 1976 La. Acts, No. 103 (Title III, Personal Servitudes); 1977 La. Acts, No. 169 (Title VI, Boundaries); 1977 La. Acts, No. 170 (Title V, Building Restrictions); 1977 La. Acts, No. 514 (Title IV, Predial Servitudes); 1978 La. Acts, No. 728 (Title I, Things).
3. Book III, Title VI of the Civil Code, dealing with matrimonial regimes, was enacted by 1979 La. Acts, No. 709. A new Chapter Four, dealing with the marital portion,

there followed a revision of partnership,⁴ and, in 1982, a revision of "Occupancy, Possession, and Prescription."⁵ In the summer of 1983, the legislature continued its program of code revision; it began consideration of the repeal both of the obligations provisions that have been effective, practically unchanged, since enactment of the Civil Code of 1825 and of their replacement by a new modernized set of articles. The legislature will further consider these new articles in its 1984 session. This paper demonstrates the merit of several features of the proposed articles and speculates about their potential impact upon the course of Louisiana law. At the same time, using the proposed obligations articles as a model, the paper illustrates the manner in which civilian drafters incorporate certain analogically powerful ideas into the structure of a code to mold apparently disparate provisions together into an organic unity.

To date, the obligations revision is the legislature's single largest effort at code revision. The proposed articles represent a fourteen-year collective effort of the Council and staff of the Louisiana State Law Institute; Professor Saul Litvinoff, reporter and chief drafter for the revision; and a committee of legal scholars, judges, and attorneys. A wide range of influences upon the provisions is apparent. These influences include indigenous legal sources such as provisions of the Louisiana Civil Code previously in force, Louisiana and Anglo-American jurisprudence, the American Law Institute's *Restatements of the Law*, and the Uniform Commercial Code. Less apparent but equally important influences include Roman law and the civil codes and doctrinal works of at least a dozen foreign countries.

The experience of nearly two centuries since 1804, when the French Civil Code was enacted, has taught that the obligations provisions of most civil codes are like plasma⁶ that bathes and

was added to Book III by 1979 La. Acts, No. 710.

4. 1980 La. Acts, No. 150 (Title XI, Partnership).

5. 1982 La. Acts, No. 187 (Title XXIII, Occupancy; Title XXIV, Prescription).

6. Professor J.L. Baudouin applied this term to the Civil Code as a whole. "A code is apparently complete in itself, but it is drafted in such a way that, in spite of its separation or division into books, chapters, and sections, there is a plasma that permeates it totally." Baudouin, *The Influence of the Code Napoleon*, 33 TUL. L. REV. 21, 22 (1958). My argument here is that the provisions on obligations are more like plasma than those on other subjects because obligations provisions generally express legal relations at their most abstract level. On the role of obligations provisions in civil codes of Roman derivation, see generally Herman & Hoskins, *Perspectives on Code Structure: Historical Expe-*

nourishes an entire code and its institutions. The obligations articles are traditionally rich in analogies, making them, in Portalis' famous phrase, "fertile in effects."⁷ Because property rules are relatively more prone to imperative provisions⁸ than are obligations articles, they are not as useful as the latter for filling gaps by analogy. By contrast, obligations rules are generally suppletive; they fill gaps where the parties have not clearly expressed themselves.⁹ In the Louisiana Civil Code, the analogical power of obligations rules is also apparent each time the following shorthand incorporation by reference appears in titles on articles governing special contracts: "In all cases, where no special provision is made under the present title, the contract of sale [or lease, or partnership] is subjected to the general rules under the title: *Of Conventional Obligations*."¹⁰ This provision, repeated with minor variations like a musical refrain, signals the drafters' intention to make the titles on obligations a storehouse of general principles for matters they could not have foreseen. Their approach is not unique. In conjunction with the general

rience, Modern Formats, and Policy Considerations, 54 TUL. L. REV. 987, 1022-41 (1980).

7. "[F]éconds en conséquences." J.E.M. Portalis, among the most important French code drafters, coined this phrase in his *Discours Préliminaire*. 1 P. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL XIX, at cxiii (1927).

8. For a time after the enactment of the French Civil Code, jurists who did not fully appreciate Portalis' characterization of the Civil Code treated the document as if it were gapless. In fact, Portalis and his colleagues realized that history was too full of quirks and surprises to permit a fully comprehensive code. More information on the analogical power of civilian legislation generally is supplied in Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125 (1982) [hereinafter cited as *Llewellyn the Civilian*]; Herman, *Quot Judices Tot Sententiae: A Study of the English Reaction to Continental Interpretive Techniques*, 1 LEGAL STUD. 165 (1981) [hereinafter cited as *Quot Judices*]; Herman & Hoskins, *supra* note 6, at 1035-51.

9. Proof of this statement is beyond the scope of this paper. But every civilian recognizes that he has more flexibility in inventing hybrid contracts than in the creation of hybrid property interests. The taxonomy of such property rights consists of usus, fructus, abusus, habitation, servitudes, and a few other interests. It may be argued that building restrictions, LA. CIV. CODE arts. 775-783, constitute a "new property right" in the nature of a predial servitude. The strict approach of civil law to the creation of new property interests is discussed in Merryman, *Ownership and Estate: Variations on a Theme by Lawson*, 48 TUL. L. REV. 916 (1974).

10. The gap-filling role of the obligations provisions is developed in Herman & Hoskins, *supra* note 6, at 1035-51 and Herman, *Legislative Management of History: Notes on the Philosophical Foundations of the Civil Code*, 53 TUL. L. REV. 380, 385 (1979).

11. LA. CIV. CODE art. 2438 (sale); see also LA. CIV. CODE arts. 2668 (lease), 2802 (partnership), 2441, 2457, 2516, 2547. For provisions establishing analogies among special contracts, see LA. CIV. CODE arts. 2659, 2667.

part of the German Civil Code, its titles on obligations constitute a storehouse of general ideas that permit expansion of legislative joints to accommodate new circumstances. The Swiss and Italian code drafters likewise sought to make their obligations provisions a source of analogies and general ideas consistent with the legal principles of their respective systems. Elsewhere, I have discussed in more detail the "storehouse" role acquired by the obligations articles of various civil codes.¹¹ Here it is necessary only to mention that the obligations reporter and his committee, mindful that they could not have foreseen every eventuality, have insured that the proposed obligations provisions constitute a general source of analogies without so labelling them. Accordingly, they have systematically planted throughout these provisions many ideas of potentially general application.

This paper demonstrates how modern civilian drafters, assisted by common sense and a careful review of jurisprudence, have incorporated one such general idea—detrimental reliance—into the proposed obligations articles. Civilians are aware intuitively that code drafters identify key ideas (good faith, unjust enrichment, abuse of right) and build them into the legislative fabric at strategic points to make the code a harmonious unity. But even a casual reader may find intriguing the way in which the legislative drafter sounds a fundamental theme and then replays it in fugue-like patterns in seemingly unrelated contexts. On a more practical level, this paper also speculates on implications for Louisiana jurisprudence of codifying this doctrine. The concept of detrimental reliance, like any other legal idea, is practically meaningless in a vacuum. Hence, this paper first sketches the context of this idea and its common doctrinal variants. Then it examines several new provisions that expressly incorporate the idea of detrimental reliance. Finally, it speculates on how these proposed articles might affect certain factual patterns heretofore resolved without explicit legislative reference to detrimental reliance.¹²

11. See Herman & Hoskins, *supra* note 6, at 1019-37.

12. This paper will demonstrate that recovery for detrimental reliance has been previously recognized under the current code articles, *see infra* text accompanying notes 26-33, and that courts have occasionally seized upon the articles to legitimate results. But the proposed articles would broadly generalize detrimental reliance throughout the Civil Code.

THE PROBLEM

No legal system supposes that all promises should be enforced. Identifying which promises deserve judicial enforcement is crucial to any system of laws. For American law students, marking the boundary between enforceable promises and unenforceable ones is an exercise that they are asked to perform almost from the day they enter law school. Let us consider the following problem, which is based upon several cases in a typical contracts text.

A, a relative of B, invites B to leave his home and to live upon a parcel of land A owns. To encourage B to move and to cultivate the land, A also promises B the eventual deed to the land. B, not well-to-do in his own right, seizes upon A's invitation, raises his family on the land, and makes valuable improvements. One day A (or A's heirs) try to evict B, whereupon B sues to enjoin the eviction and to have his possession quieted, even though he has no deed, and all of A's promises to B were informal.¹³

Legal systems differ in their solutions to this case, though all would recognize that B had gone to great expense on the faith of A's promise. Unfortunately, except for the value of improvements B has made, B's losses are not matched by any corresponding gain to A that B could claim as unjust enrichment. Therefore, B's condition captures the essence of detrimental reliance. If B cannot get relief based upon his own expenditures rather than upon A's enrichment, he cannot get meaningful relief at all.

Sometimes, as we shall see in succeeding pages, a relying party's expenditures may directly inure to the promisor's bene-

13. This hypothetical is a composite of several familiar cases in which the courts characterize the A-B relationship as either a parol contract or a parol gift of land accompanied by possession. Of course, "contract" in this context means an onerous contract, because at common law, unlike civil law, a contract is either onerous or it is no contract at all. *See, e.g.,* Seavey v. Drake, 62 N.H. 393 (1882) (Equity will protect a parol gift of land as if it were a parol agreement of sale, if the agreement is accompanied by the transferee's possession and the donee, induced by the promise to give it, has made valuable improvements on the property.). *See also* Horsfield v. Gedicks, 118 A. 275 (N.J. Ch. 1922), *aff'd*, 96 N.J. Eq. 384, 124 A. 925 (1924) (same holding as *Seavey v. Drake*). A contrary holding appears in *Kirksey v. Kirksey*, 8 Ala. 131 (1845). Among the issues typically treated by these cases are (1) whether the promisee's trip and improvements were bargained for or incidental and (2) whether the promisor received a benefit corresponding to the promisee's reliance expenditures.

fit. Nevertheless, the nature of the case and the degree of the promisee's reliance make it difficult and even unfair to repair the promisee's harm by returning to him only the value of the benefit he has conferred upon the promisor. Thus, for example, in the A-B case, B could probably demonstrate a gain to A in the form of improvements to A's land. But reimbursing B for such improvements, especially if the value of the improvements was discounted for depreciation, wear, and tear, despite the fact that they had appreciated the value of the land, would be a paltry recovery in comparison with B's nearly inestimable reliance upon A's original promise. As we will note in succeeding pages, once the decision is made to base enforcement upon a promisee's detrimental reliance, there is a further problem of tailoring the extent and quality of the promisee's relief.

Solutions of the A-B case range from denying B all relief¹⁴ to a judicial order that A or his heirs execute and deliver a deed to B.¹⁵ The nature of Louisiana law increases the quality and quantity of solutions beyond those usually available elsewhere in the country. According to Corbin, A's invitation is a mere "social engagement," a phrase indicating that neither party thought the offer enforceable, and thus B should never have expected to sue upon it.¹⁶ According to this view, B's reliance was not well-founded, though he has suffered a detriment. This characterization of A's offer is bare of legal analysis, but no less bare than the occasional judicial declaration that to such-and-such a domain "the King's writ does not seek to run, and . . . his officers do not seek to be admitted."¹⁷ From the view that A's commitment was no commitment at all, the student moves to other modes of analysis.

In typical contracts textbooks, the facts of this case may appear under the rubric of consideration: assuming A intended to be bound, did B bargain for A's commitment? What, if anything, was A supposed to have received from B in return for A's invitation? The emphasis on bargained-for consideration superficially offers a better analytical framework to the student than does the

14. *E.g.*, Kirksey v. Kirksey, 8 Ala. 131 (1845).

15. *E.g.*, Seavey v. Drake, 62 N.H. 393 (1882); Horsfield v. Gedicks, 118 A. 275 (N.J. Ch. 1922), *aff'd*, 96 N.J. Eq. 384, 124 A. 925 (1924).

16. 1 A. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 34 (1963).

17. *Balfour v. Balfour*, [1919] 2 K.B. 571, 579 (C.A.) (Atkin, L.J., concurring).

characterization of a promise as a social engagement. But an essential drawback of bargained-for consideration as an index of enforceability is that it seeks to convert into a business deal an engagement in which the parties probably did not mean business. In the context of donative promises, this drawback reveals a fundamental limitation of the consideration doctrine: it supposes that people are in the market place even when they are far from it.

Assuming there was no bargain between A and B on which to base legal analysis, the student's next port of entry might be the concept of reliance expressed in the *Restatement of Contracts*:¹⁸ Did B, even assuming he did not bargain for A's promise and that A did not attach legal consequences to his invitation, reasonably rely upon A's promise?¹⁹ Even if A's promise, standing alone, is unenforceable, was B's detriment sufficient to require A to make it good? These questions indicate that A's offer, though unenforceable, could be a tortious act, (perhaps a version of common-law deceit).²⁰ Echoes of these issues are also

18. This concept is expressed most notably in the *RESTATEMENT (SECOND) OF CONTRACTS* § 90(1) (1981):

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

19. "In adopting Section 90, the Restatement has given recognition to case law which used an injurious reliance criterion of consideration, promissory estoppel, without insisting that the reliance had to be bargained for. The Restatement, therefore, has in substance introduced a competing theory of consideration . . ." F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* 204 (2d ed. 1970). A central argument of this essay is that the new obligations articles of the *Louisiana Civil Code* codify antagonistic concepts of cause that appeared in the jurisprudence long ago. But if Kessler and Gilmore are right, Louisiana's experience on this score may mirror the experience of the Restatement's drafters with the consideration doctrine.

20. The comments to proposed article 1967 reproduce the following from Snyder, *Promissory Estoppel as Tort*, 35 IOWA L. REV. 28, 45 (1949) (quoting Comment, 36 ILL. L. REV. 187, 204, 203 (1941)) (footnotes omitted):

No complete identification of the doctrine of promissory estoppel can be made: in the generalization of the doctrine, some "re-uniting of tort and contract principles" appears and this makes it hard "to categorize the principle of promissory estoppel as one of 'tort' or 'contract.'" Pertinent analogies though, such as those on the measure of damages and causal connection between the promisee's detriment and the promise, indicate the appropriateness of tort rather than contract reasoning.

Without characterizing the doctrinal solution as promissory estoppel, one writer has traced the delictual nature of the recovery to *Grotius*.

familiar in Anglo-American equity. A's promise, though unenforceable at law because originally gratuitous, still may not be withdrawn or denied once B relies upon it. Failure to enforce A's promise would be plainly unfair, and therefore equity may give B relief even if the common law will not.

This catalogue of characterizations of A and B's engagement hardly exhausts the possibilities. A civilian, unhampered intellectually by the need to locate a bargain where none was intended, would acknowledge that one person can seriously intend to confer a liberality on another. In French and Louisiana law, an engagement *nudum pactum* may be enforceable on the basis of gratuitous cause: one may have the motive to confer a gift; his donation is a gratuitous contract.²¹ But the Civil Code requires its adherents to seek a formal writing as a badge of serious intent rather than to accept consideration as a substitute for the form.

HISTORICAL EXCURSUS ON DETRIMENTAL RELIANCE

Anglo-American jurisprudence did not invent detrimental reliance as a substitute for consideration or a basis for enforcement. On the continent, it already had long and venerable antecedents before the Norman Conquest. It appeared in Roman texts, and so venerable was the idea of detrimental reliance that it even acquired its own Latin maxim: *venire contra proprium factum* (no one can contradict his own act).²² In its usual applications, the maxim performed the function of estoppel: after an assertion that a certain fact presently existed, reliance on the assertion barred proof that the assertion was false.

In classical sources, there were even traces of reliance as a ground for the limited enforcement of gift promises. The Digest,

But if the promisor has been negligent in his investigation, or in the expression of his intention, and the other party has suffered damages in consequence thereof, the promisor will be bound to pay compensation: not on account of his promise, but on account of damages caused by delict (*damno per culpam dato*)

Hofmann, *The Basis of the Effect of Mistake on Contractual Obligations*, 525 AFR. L.J. 432, 443 (1935).

21. See generally Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2 (1951) [hereinafter cited as Smith, *Refresher Course*].

22. See generally J. DAWSON, *GIFTS AND PROMISES* 188-89 (1930). See also Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936) (explicitly acknowledging a debt to Roman, French, and German Law).

for example, narrates a case in which a promisor promised another a sum of money if he took a trip. After the promisee had taken the trip, the promisor sued for recovery of the money he had meanwhile paid him. Although the promisee received a deduction for his expenditures from the payor's recovery of the money, he was denied damages in excess of that sum.²³

The concept of detrimental reliance is also present in many modern civil law systems. A study of French and German cases has led Dawson to conclude that French courts, at least *sub rosa*, must factor detrimental reliance into their decisions, even though reliance rarely constitutes an express ground for enforcement because French courts prefer to search for "onerosity" in the donor's motive. By contrast, in the more recent German decisions that use the good faith clause of the German Civil Code to dispense with requirements of form, the promisee's reliance can at times appear as the predominant reason for enforcement and may now be almost a requirement for the promisee's recovery.²⁴ In the twentieth century, detrimental reliance as a fundamental principle has gained ground among some European authors. Some twentieth-century German and Italian writers have urged the express adoption of detrimental reliance as a basis for enforcing promises that "fall in the borderland between exchange and gift."²⁵

LOUISIANA'S EXPERIENCE WITH DETRIMENTAL RELIANCE

For nearly a century, Louisiana courts, in a variety of factual situations, have enforced promises on the ground of detrimental reliance.²⁶ Yet judicial treatment of the idea has been uneven over the years; the effect of a party's detrimental reliance has been left to the trial judges' sovereign appreciation, and they have not always agreed on the role of this doctrine. Furthermore, to the extent that they have seen detrimental reliance as a "foreign" importation, Louisiana judges have occasionally

23. Dawson reproduces this example from the German scholar, Riezler. J. DAWSON, *supra* note 22, at 189.

24. *Id.*

25. *Id.* at 188.

26. See cases cited in Comment, *Promissory Estoppel and Louisiana*, 31 LA. L. REV. 84 (1970). For an interesting modern decision that examines comparatively common law and civilian doctrines, see *Sanders v. United Distribs., Inc.*, 405 So. 2d 536 (La. App. 4th Cir. 1981), *cert. denied*, 410 So. 2d 1130 (La. 1982).

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rejected it on a doctrinaire basis without fully exploring its practical utility.

In a nineteenth-century Louisiana case in which a plaintiff invoked detrimental reliance, the defendant tried to remove the remains of the plaintiff's ancestor from a sepulchre belonging to the defendant's family, despite an earlier commitment that the remains would never be disturbed. The court, in granting a permanent injunction to prevent the removal of the remains, held that "[t]he principle of estoppel, so often applied in controversies involving pecuniary rights, will not permit the withdrawal of promises or engagements on which another has acted."²⁷ On the basis of detrimental reliance, Louisiana courts have enforced an insurer's promise to insure even though the insurance policy was not yet issued;²⁸ an employer's offer of a benefit plan to an employee at the employer's expense when the employee, relying upon it, remained in the employer's service;²⁹ a pipeline owner's promise of payment to a vessel owner after the latter relied upon the promise to his detriment;³⁰ and an attorney's commitment to permit his opponent to answer a suit even though the court had not formally ordered an extension of time.³¹

Despite these examples, however, Louisiana courts have not been uniformly receptive to an aggrieved party's invocation of detrimental reliance, particularly when it has been overtly characterized as the promissory estoppel of the *Restatement of Contracts*. *Ducote v. Oden*,³² for example, concerned the alleged breach of a verbal contract under which the plaintiff was employed to remove overburden from the defendant's gravel pit. The suit alleged that the defendant owner agreed that the employment was to last three years; on the strength of the agreement, the plaintiff alleged that he had incurred large expenses for equipment. Within seven months, the defendant terminated the contract, and the plaintiff argued that the defendant should

27. *Choppin v. LaBranche*, 48 La. Ann. 1217, 1218, 20 So. 681, 682 (1896).

28. *E.g.*, *Brunt v. Standard Life Ins. Co.*, 259 So. 2d 575 (La. App. 1st Cir. 1972). See also *Thomas v. Life Ins. Co.*, 219 La. 1099, 55 So. 2d 705 (1951); *Harding v. Metropolitan Life Ins. Co.*, 188 So. 177 (La. App. Or. 1939).

29. *Robinson v. Standard Oil Co.*, 180 So. 237 (La. App. 1st Cir. 1938).

30. *Continental Casualty Co. v. Associated Pipe & Supply Co.*, 447 F.2d 1041 (5th Cir. 1971).

31. *Southern Discount Co. v. Williams*, 226 So. 2d 60 (La. App. 4th Cir. 1969).

32. 221 La. 228, 59 So. 2d 130 (1952).

have expected his representations to induce his substantial change in position and that justice dictated enforcement of the promise. The Louisiana Supreme Court rejected the plaintiff's claim, asserting that promissory estoppel had no place in Louisiana law.

Professor J. Denson Smith applauded the court's position in *Ducote*:

Some . . . cases from common law jurisdictions demonstrate misapplications of [*Restatement of Contracts*] Section 90 sufficiently flagrant to have given the draftsman of that section cause to doubt the wisdom of its inclusion or the choice of language it contains. It is heartening that our court is not willing to succumb to its wiles.³³

Intellectual independence, it is submitted, deserves applause; slavish resistance to "outside" influences does not. It was apparent by the time of Professor Smith's editorial that Louisiana courts had often used variants of promissory estoppel without so labelling them. One may wonder if the Louisiana Supreme Court would have been equally hostile to the plaintiff's claim if he had invoked the venerable Roman maxim, venire contra proprium factum, instead of the *Restatement of Contracts* section 90.

THE DEFINITION AND REDEFINITION OF CAUSE

In the legal literature, cause has usually been contrasted with consideration. Cause, it is said, is the subjective motive that impels a party to bind himself. Doctrines of consideration, unlike cause, require the identification of a tangible benefit for the party. As Professor Smith has written:

In the civil law, agreement without more equals contract, as long as the agreement is a lawful one. In Anglo-American common law, agreement plus consideration equals contract. One theory subscribes to the view that a promise should be enforced because it is a promise, the other holds to the belief that a promise should not be enforced unless the promisor asks for and receives something in return for it.³⁴

Doctrines of cause exaggerate the importance of individual

33. Smith, *Conventional Obligations, The Work of the Louisiana Supreme Court for the 1951-1952 Term*, 13 LA. L. REV. 236, 241 (1953).

34. Smith, *Refresher Course, supra* note 21, at 4.

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will, but this exaggeration is historically explainable. Although Roman law routinely stressed formality as a requisite for enforceability, canon law stressed free will an ideological pillar of modern civil law.³⁵ As Frenchmen sought to loosen the feudal fetters that bound their society, freedom of the will, particularly in the hands of natural lawyers like Domat, acquired exaggerated importance and became the rallying cry for the bourgeoisie. The doctrine of free will was eventually enshrined in the French Civil Code.³⁶ Thus, for example, the French Code drafters endorsed the concept that a contract constituted private legislation for the parties to it.³⁷ They also viewed the contract of sale, which for many pre-Revolutionary French jurists was incomplete until delivery of the object, as a purely intellectual state in which the parties agreed upon the price and the object, although the price was unpaid and the object undelivered.³⁸ Given the stress on individual will, it was a short step to the conclusion that a man might bind himself to an important transaction by a declaration of will even if he received nothing in return at the moment of his declaration. To support this result, doctrinal writers developed the notion that gratuitous cause supported such a promise. On the other hand, if the person received an equivalent counterperformance, then onerous cause supported his promise. In case of either onerous cause or gratuitous cause, there was no need to find a manifestation of the parties' bargain in the form of a tangible benefit or detriment between promisor and promisee as the common law traditionally has demanded for many centuries. Cause was wider than consideration; it covered all kinds of agreements, not only marketplace transactions. It supposedly characterized one's subjective intentions, whereas consideration, the tangible badge of serious intent, was an objective manifestation of such intentions.³⁹

35. The role of the doctrine of free will in the French Civil Code is elaborated in Herman, *The Uses and Abuses of Roman Law Texts*, 29 AM. J. COMP. L. 671, 673-83 (1981) [hereinafter cited as *Uses*], and citations therein.

36. *Id.*

37. This sentence translates French Civil Code article 1134 and captures the substance of article 1901 of the Louisiana Civil Code.

38. *Uses*, *supra* note 35, at 682-83. See also LA. CIV. CODE art. 2456.

39. The literature on cause is vast. Among the leading French works is H. CAPITANT, *DE LA CAUSE DES OBLIGATIONS* (3d ed. 1927) and G. CHEVRIER, *ESSAI SUR L'HISTOIRE DE LA CAUSE DANS LES OBLIGATIONS* (1929). The most comprehensive work for Louisiana lawyers is I. S. LITVINOFF, *OBLIGATIONS* §§ 196-399 (La. Civ. L. Treatise vol. 6, 1969). In addition to Smith's *A Refresher Course in Cause*, see *supra* note 21, there are several

For Louisiana lawyers both cause and consideration are meaningful, but for different reasons. Cause is important because of the Civil Code and the continental tradition it speaks; consideration is important because Louisiana shares a largely common-law national tradition, and as a consequence, Louisiana attorneys can hardly escape daily reference to consideration. One dilemma, particularly in dealing with lawyers outside Louisiana (and those in Louisiana unfamiliar with the Civil Code), has been to interpret each legal doctrine or collection of doctrines in terms faithful both to itself and to the other.

The reformulation of cause in the new obligations articles capsulizes this dilemma and attempts reasonably to resolve it. Proposed article 1967 provides:

Cause is the reason why a party obligates himself.

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.⁴⁰

In one view, proposed article 1967 straddles the intellectual boundary between the civil law and the common law; it indicates a policy choice to avail ourselves of both civilian and common-law traditions. The article at least confirms Professor Smith's prescient remarks published over thirty-five years ago:

One of the most significant and perhaps troublesome problems that will confront the drafters of a *Projet of a Revised Civil Code*, as envisioned by Act 335 of 1948, will be what

other helpful articles in English. Among them are Lorenzen, *Causa and Consideration in Contracts*, 28 YALE L.J. 621 (1919); Markesinis, *Cause and Consideration: A Study in Parallel*, 1978 CAMB. L.J. 53; Mason, *The Utility of Consideration—A Comparative View*, 41 COLUM. L. REV. 825 (1941); Von Mehren, *Civil Law Analogues to Consideration*, 72 HARV. L. REV. 1009, 1024-26 (1959).

The sharp distinction between cause and consideration emerged rather recently. In the nineteenth century, English lawyers apparently treated cause and consideration alike. According to the English scholar P.S. Atiyah, both doctrines "performed the function of insisting that a person was not to be made liable under an obligation without some good reason." P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 452 (1979). The term "consideration" acquired its fully technical meaning and its objective character as the executory contract became the focal point of contract law. *Id.*

40. LA. H.R. 746, 9th Leg., Reg. Sess. 140 (1983).

Free will

CONSIDERATION PROMISEES

porter and the committee on revision of obligations, by including among the proposed articles such generalized statements recognizing reliance as an interest worthy of protection, have reemphasized the importance of detrimental reliance in this sensitive area of law.

CONCLUSION

This paper has had two main purposes: first, to show concretely how civilian drafters, to compensate for the quirks of history, stitch into the fabric of a code analogically potent ideas such as detrimental reliance; and second, to speculate on the effect of the incorporation of this concept upon the course of the jurisprudence. A few concluding remarks may be useful here.

Civilian drafters, freed to do their work properly, show more confidence than do their common-law counterparts in the ability of lawyers to make connections among seemingly unrelated areas of legislation. Typically, therefore, a civilian drafter frames rules more generally¹³⁸ and abstractly than does an Anglo-American statute drafter, who by contrast assumes that his product should be more particularistic so as not to derogate from the common law.¹³⁹ Thus, we have seen in this paper how the Louisiana drafter has tried to introduce detrimental reliance into the key article on cause and then to echo it in offer-acceptance, dissolution, nullity, error, contractual capacity, and the public records doctrine. This drafting technique reflects the civilian's assumption that a properly wrought code, though incomplete, is an organic and harmonious unity, a tapestry executed under a single guiding spirit. The civilian's assumption about his code inverts the common lawyer's assumption that statutes, far from being harmonious, will disturb the lovely harmony of the common law because they arise "outside the usual developmental machinery of the legal system."¹⁴⁰

138. According to Professor Morrow, "[g]eneralization is the soul of civilian codification." Morrow, *An Approach to the Revision of the Louisiana Civil Code*, 23 TUL. L. REV. 478, 487, 10 LA. L. REV. 59, 69 (1949).

139. "Common law legislation, designated . . . to address specific ills, and subject to the 'vigilant skepticism' of the common law judge, is necessarily characterized by extreme particularity and prolixity." Herman & Hoskins, *supra* note 6, at 1049 (quoting 1 K. ZWEIGERT & H. KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 270 (T. Weir trans. 1977)).

140. *Id.* at 1047. More background on the varying attitudes of the civil lawyer and the common lawyer toward statutes, and their respective drafting styles, can be found in *id.* at 1033-51; *Llewellyn the Civilian*, *supra* note 7, at 1127-28, 1161-67.

When a civilian and a common lawyer come to state fundamental assumptions about law, they inevitably speak in metaphors and paradoxes. Like a theologian seeking to reconcile God's goodness with evil and original sin, the civilian characterizes his fundamental law as a harmonious yet unfinished tapestry. Similarly, no one really understands what the common lawyer means by the phrase that the common law is working itself pure through the proliferation of thousands of decisions issuing from thousands of minds separated in time and space. Like cause and consideration, both civilian and common-law metaphors about statutes coexist in Louisiana law. The Louisiana State Law Institute believes that enactment of provisions on detrimental reliance will make the coexistence more tranquil. A purpose of this paper has been to make the case for the Law Institute's conviction, but making that case, in many ways, has required speculation. In any case, we would be foolhardy ever to expect perfection of any legislation. As Portalis said, in response to his colleagues' criticism of the projet of the French Civil Code because it did not cover every imaginable problem: "It is for experience gradually to fill up the gaps we leave. The codes of nations are the *fruit of the passage of time*; but *properly speaking*, we do not make them."¹⁴¹ In 1984, when the Louisiana legislators reopen consideration of the obligations project, it is hoped that Portalis' attitude will inform their approach and that they will recognize the proposed articles as a major improvement over the provisions now in force.

141. Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 773 (1969) (S. Herman trans.).