Louisiana Law Review

THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES

Robert A. Pascal

For Stephan H. Kinsella
with the regards &
best wishes
Bob

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BOOK REVIEW

The Louisiana Civil Code: A European Legacy for the United States. By Shael Herman. New Orleans: Louisiana Bar Foundation, 1993. Pp. vi, 80.

Robert A. Pascal[*]

This is a misleading booklet. That it is so is especially serious, for it seems to have been intended for wide distribution to persons, including high school students, few of whom can be expected to have knowledge sufficient to challenge its accuracy. Many of its readers, therefore, will receive a false perspective on Louisiana's Civil Code, legal history, and legal culture.

The booklet is in actuality a second edition of the elaborate 1981 pamphlet, *The Louisiana Civil Code: A Humanistic Appraisal*, "prepared by the Tulane Law School in conjunction with the Tulane Office of University Relations," and authored by Professors Herman and Thomas E. Carbonneau and Law Librarian David Combe, all of the Tulane Law School. Professor Herman probably was the principal author of that pamphlet, for much of the text relating to the French Civil Code seems based on a 1980 article of his in the Tulane Law Review.[1] Professor Herman has provided footnotes for the new booklet, a feature the original pamphlet did not have, and has updated it in parts. The booklet's abandonment of the pamphlet's subtitle, "A Humanistic Appraisal," and its elimination of the adjective "humanistic" in other places, may indicate a sensitivity to political correctness. The original subtitle, nevertheless, probably was more indicative of the character and evident purpose of both pamphlet and booklet, that to have their readers view the Louisiana Civil Code as a basically French humanistic document, in substance as well as form, in spite of the historical record that it was meant to reflect, and did reflect, Spanish substantive civil law.

Professor Herman would have his readers believe that the codification of Louisiana's substantive civil law, begun in 1808, signalled "a commitment to a French perspective on law and society" (p.11). He tells his readers that the Louisiana Civil Code has the French Civil Code as its "ancestor" (p.11) and "shares with [it] the spirit of the Enlightenment" (p.12). This spirit, he explains, is essentially secularistic, rationalistic, individualistic, democratic, and economically liberal (pp.12-17). He regards the French Civil Code, and the Louisiana Civil Code as well, as embodying these notions, but nevertheless manifesting a spirit of community and patriarchism in a strong family structure (p.38) and reflecting secular natural law principles throughout the whole (pp.14, 38-44). Professor Herman is careful to affirm that the Louisiana Civil Code is

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1. Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 Tul. L. Rev. 987 (1980).

not a copy of the French Civil Code (p.32), admitting substantial influence from Spanish Law, Roman Law, and even Common Law (p.75), but he does leave his readers with the impression that the whole has been given a French stamp.

Professor Herman seems to base his wish to view our civil law as primarily French on two factors. The Louisiana drafters of the 1808 *Digest of the Civil Laws in Force in the Territory of Orleans* certainly used the French Civil Code of 1804 and its preliminary draft, or *Projet of 1800*, as models of form and style. In addition they used the very texts of these documents in many articles of the Digest, as was detailed by Professor Rodolfo Batiza of Tulane in 1971.[2] But what Professor Herman ignores is that these French texts were used only where they were understood to reflect the substance of Spanish law as well as French or could be modified to reflect the Spanish rule. There is no evidence of an attempt to substitute French law for Spanish law. It would have been strange indeed for a people passing from Spanish to American rule to urge the adoption of French Law.

That the Spanish civil law, or Roman-Spanish civil law, if one prefers, had prevailed during the Spanish domination is a fact no one disputes. Professor Herman, however, perhaps in the effort to appease those who would like to believe French law had more influence in Louisiana than it has had, suggests "there is a disagreement over the extent to which [the French governor] Laussat, during his twenty days in power, replaced Spanish law with French law," citing a high school history text (p.28), even though Laussat's papers show he refrained from imposing French law on the population because of the impending transfer of Louisiana to the United States.[3] After the transfer—all as Professor Herman himself details—the Congress of the United States retained in force the civil laws in effect in the Territory until the territorial legislature changed them; in 1806 the legislature of the Territory of Orleans declared that the Roman civil laws as modified by the Spanish civil laws in effect at the time of the Louisiana Purchase *were* the civil laws of the territory (but Professor Herman's language leaves one with the impression that the legislature sought *to restore* the Roman and Spanish laws, rather than recognize their being in force); and in the same year the Orleans territorial legislature ordered the drafting of a "code" with the civil laws in force as its base (pp.28-31). The drafters then produced and the legislature enacted, *not a civil code* to replace the civil laws in effect, but a *digest* of those very same civil laws in codified form, the Digest of 1808, leaving intact the whole of those civil laws to the extent they were not incompatible with the provisions of the Digest. The population and the legal profession regarded it as a digest and not as a French type civil code meant to stand as the sole statement of the law. The Projet of the Civil Code of 1825 was drafted as and entitled

2. Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4 (1971).

3. Alain Levasseur, *Les Codifications en Louisiane*, 1986 Revue de la Recherche Juridique: Droit Prospectif 171, 184-87. Professor Herman did not mention this article.

"Additions and Amendments" to the Digest of 1808. Comments of its drafters imply that the base law yet was understood to be Spanish, not French.[4] All this has been detailed in a 1987 book that Professor Herman failed to mention in text, footnotes, or bibliography, Richard Kilbourne's *A History of the Louisiana Civil Code: The Formative Years, 1803-1839*.[5]

There is also the testimony of Louis Moreau-Lislet, one of the two drafters of the Digest of 1808. In 1814 he prepared two sets of notes to the "Roman and Spanish" laws having "some *rapport*" with those of Louisiana, which notes he inscribed on interleaves bound with the pages of certain copies of the Digest volume.[6] One list, on the interleaves opposite the English texts of the Digest, contained references to Roman and Spanish laws "relating to matters treated in each chapter of the Digest." The second list, on interleaves opposite the French text, listed "article by article, the citation of the principal laws of the various codes from [the substance of] which were drawn the dispositions" of the Digest.[7] Nowhere is any reference made to the French Projet of 1800 or to the French Civil Code. There are some references throughout to the works of Domat, a French jurist, but Moreau-Lislet himself states that he cites Domat as a way of referring to the Roman texts so fully cited by him.[8] Moreau-Lislet evidently did not consider the Digest of 1808 to be French in substance. (There are also references to Pothier, another French jurist, particularly as to articles on contracts, but at this time contract law was not very different in France and Spain and Pothier even was in use in England and in America).

The uninformed indeed might ask why jurists charged with drafting a "code" based on Spanish law should have chosen the French Projet of 1800 and the French Civil Code as models of form and style and even as sources of texts. The reasons are not difficult to surmise. The Spanish law in force at the time had not yet been codified in the manner of the French law. The Projet of 1800 and the French Civil Code were in form and style marvels of succinctness, clarity, integration, and completeness. The legal institutions of Spain and southern France, the latter much reflected in the Projet of 1800, were similar, both influenced heavily by Roman law and Visigothic law. The French and Spanish laws of obligations were very similar, as has been mentioned. To attempt a codification of the Spanish law without a model or guide would have

4. *[Proposed] Additions and Amendments To The Civil Code of The State of Louisiana* (1823), *reprinted in* 1 Louisiana Legal Archives (1937) [hereinafter *Additions and Amendments*]. See, for example, the comments under proposed articles on the effects of putative marriage on the status of the children. The proposed articles are declared "conformable to" the law in *Las Siete Partidas*, but to incorporate an amelioration "taken from the French Code" because of its evident equity. *Id.* at 10.

5. Publications Institute, Paul M. Hebert Law Center, Louisiana State University (1987).

6. The copy of the Digest with interleaves believed to have been Moreau-Lislet's, now in the possession of Louis V. de la Vergne, was reproduced in 1968 with the subtitle "The de la Vergne Volume" by the Law Schools of the Louisiana State University and the Tulane University. This reprint was published again by Claitor's Publishing Company in 1971.

7. *Id.* in the *Avant-Propos*, at 1 and 2. Translation from the French by the author.

8. *Id.*

represented folly, given the short time the Louisiana drafters had to finish their work. The organizational plans of the Projet of 1800 and of the French Civil Code could be used to advantage, and the actual provisions could be used to the extent they reflected Spanish law as well as French, or modified to do so, or new provisions drafted to that end in instances in which the Spanish law varied from the French.[9]

Professor Herman's failure to see the Digest of 1808 and the Civil Codes of 1825, and therefore the Revised Civil Code of 1870, as primarily Spanish law documents may be attributable to his evident passion for French Enlightenment thought, particularly its secularism, its rationalism, and its individualism, and the desire to have the Louisiana codifications envisioned in that light. It may very well be that without their rationalist spirit the French would not have attempted, much less succeeded, in stating their civil law so simply, so beautifully, and in such magnificently organized form as they did in the French Projet and in the French Civil Code. But that form could be utilized by Louisianians seeking to state the basically Spanish law as simply, as beautifully, and with as much organization, without in any way subscribing to French secularism and French legislative positivism. And the drafters in 1808 and 1825 did just that.

Thus whereas the French restricted law (in the sense of the legal order) to legislation enacted by the French Assembly, not even recognizing custom, and refused to allow judges to resort to philosophical notions of just order even in the absence of legislation, in the Louisiana Digest of 1808 and the Civil Codes of 1825 and 1870 the view of the legal order is quite different. Both legislation and custom (which Professor Herman does not mention) are recognized as positive law to this day and, in the absence of legislation and custom, judges are directed to decide according to *equity*, defined in 1808, 1825, and 1870 as resort to received usages, natural law, and reason. Strangely Professor Herman not only ignores this difference, but gives the reader the impression that Article 1 of the Digest and Codes as originally enacted, reading "Law is the solemn expression of legislative will," means not simply that *legislation* (statute) is the solemn expression of legislative will—which it does mean—but also that legislation *alone* is law (pp.17, 18). Certainly he must have known that Article 1 appears in the same chapter as Article 3, defining custom, and that both are in the chapter listing the sources of positive law. He states correctly that the words of Article 1 were taken from the French Projet of 1800 and this too would indicate that he must have known that that Projet listed the three sources of the law (*droit*, the legal order) of any nation as natural reason, legislation (*loi*, statute), and custom, and referred judges to equity in the absence of positive law.[10] The French Assembly adopted none of these articles, such was the

9. The reviewer explained this in his *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1972). Confirmation of this view is contained in the book by Richard H. Kilbourne, A History of the Louisiana Civil Code: The Formative Years 1803-39 (1987).

10. *Projet de l'An VIII*, Liv. Prel., Title 1, Arts. 1, 4-6; Title V, Art. 11.

determination to restrict the legal order to the expression of legislative will; but this was not the Louisiana attitude. It is true that the three commissioners appointed to draft the additions and amendments to the Digest of 1808, which, with the Digest, became the Civil Code of 1825, did recommend the removal of custom as a source of positive law, but they recommended strongly the reference to equity in the absence of legislation.[11] The legislature, however, refused to abolish the reference to custom and of course retained the directive as to equity. Professor Herman's exposition is misleading, to say the least.

There are other equally untenable assertions by Professor Herman on the influence of French Enlightenment thought on the substantive law in the Louisiana Civil Code. Thus he states that the French Civil Code abolished feudal estates, and that the Louisiana drafters, "inspired by their French counterparts" rejected the feudal system (p.46). Actually feudal estates never prevailed in Louisiana. The French kings had refused to grant feudal domains, though repeatedly requested to do so,[12] and no feudal landholdings existed during the Spanish domination. Again, he asserts that "like the French Civil Code, the Louisiana Civil Code outlawed" the sale of land for a perpetual rent or annuity (p.49); but even today the Louisiana Civil Code has a chapter on the subject entitled "Of Rent of Lands," consisting of Articles 2779-2792. Similarly Professor Herman would have his readers believe that the Louisiana Civil Code, following the French in the spirit of democracy and individualism, promoted economic liberalism (p.12). But this point is overstated. Whereas the French Civil Code restricted labor agreements to a leasing of services, the Louisiana Civil Code originally allowed slavery and only in 1990 were the articles on indentured service and bound apprenticeship repealed. Again whereas the French Civil Code made all movables negotiable, thus protecting the good faith buyer in his transaction, the Louisiana Civil Code gave the good faith purchaser title only after he had possessed the thing for three years. And, finally, it may be observed that the Digest of 1808 and the Civil Code of 1825 gave very little security to creditors of a deceased person and even the Civil Code of 1870 failed to contain articles on voluntary bankruptcy. Thus the Louisiana Civil Code hardly can be said to have as much spirit of economic liberalism as Professor Herman claims.

There are many other facets of Professor Herman's exposition with which one may take issue. They cannot be discussed adequately in the space of a review, but mention may be made of some. Thus he uses the phrase "legislative supremacy" when he means "legislative positivism" (p.17); wrongly reads Civil Code Article 4, requiring promulgation of legislation, as requiring that all law be positive, that is to say, consist of legislation (p.17); apparently treating the Civil Code's reduction of the number of impediments to marriage as evidence of a

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11. *Additions and Amendments*, *supra* note 4, at 1, and *Preliminary Report of the Code Commissioners*, February 13, 1823, *reprinted in* 1 Louisiana Legal Archives lxxxv, at xcii.

12. Marcel Giraud, A History of French Louisiana 287-88 (LSU Press 1974).

secularist move similar to the French Civil Code's sanctioning of divorce by consent (pp.16, 17), even though the law of marriage in the Digest of 1808 and the Civil Code of 1825 as enacted reflected closely the Spanish civil laws on marriage, themselves reflecting the canon law of the Catholic Church. So too, more generally, one might object that he fails to note the significant differences between the Louisiana substantive law on persons and family property and that of the French, thus leaving his readers to assume that he regards them as French. And so on.

There can be no doubt that after the enactment of Act 40 of 1828, by which "all the civil laws in force" before the promulgation of the Civil Code of 1825 were repealed, Louisiana lawyers and judges turned increasingly to the commentaries on the French Civil Code to seek enlightment on the interpretation and application of our own, thereby often giving ours meanings it was not intended to have. In time popular, uninformed thought mistakenly did come to regard the Louisiana Civil Code as French. This may have been inevitable, given the absence of commentaries on Spanish law as convenient to use as those on the French Civil Code, the decreasing popular knowledge of the Spanish language, and the tendency of persons of French ancestry to wish to consider themselves and all aspects of their culture to be French. But Professor Herman does not mention this, giving the impression instead that the intent from 1808 was to convert to French law and French social thought. This position is untenable.

One must assume that Professor Herman's view of the Louisiana Civil Code is one given in good faith. But, assuming that, it nevertheless remains that the booklet is a serious misrepresentation of historical fact, one that will ill serve both good scholarship and a people's right to be given a true account of their legal heritage.

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January 12, 1994

The Editors-in-Chief of:
The Louisiana Law Review
The Loyola Law Review
The Southern Law Review
The Tulane Law Review
The Louisiana Bar Journal

Dear Editors-in-Chief:

It is my hope that each of you will publish the enclosed Review of *The Louisiana Civil Code: A European Legacy for the United States*, by Professor Shael Herman.

As indicated by both the review itself and my le er of October 14, 1993, to the president of the Louisiana Bar Foundation, its publisher, copy enclosed, I judge the booklet erroneous and misleading in its basic aspects. Accordingly, I deem it my professional obligation to do what I can to warn its potential readers of that fact.

It is my intention to write a shorter review oriented to the layman rather than the professional and to urge various newspapers in the state to publish it.

Very truly yours,

Robert A. Pascal

Robert A. Pascal
Professor of Law Emeritus
Louisiana State University

RAP/tjs

Re: "Sarca" debate,

Pascal v. Ratigo.

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October 14, 1993

Mr. Ledoux Provosty, President
Louisiana Bar Foundation
601 St. Charles Avenue, 3rd Floor
New Orleans, Louisiana 70130

Dear Mr. Provosty:

On Friday October first I received from Mr. Cyrus Greco, with compliments of the Louisiana Bar Foundation, a copy of its recent publication, authored by Professor Shael Herman of Tulane, entitled *The Louisiana Civil Code: A European Legacy for the United States.* I had not seen this booklet before and, indeed, had had no knowledge of its existence before Mr. Greco, on Sunday, September 26, asked me if I had read it.

I regret to say I must regard the booklet as a serious misrepresentation of historical fact.

The major inaccuracies can be stated as two. Professor Herman, first, fails to give serious consideration to the historical record that, when the U.S. acquired Louisiana, the Congress retained the Spanish law then in force, that the *Digest of the Civil Laws* in force in 1808 was intended to be and was a digest of this Spanish law, and that the Louisiana judiciary and bar regarded the Digest of 1808 and the Civil Code of 1825 as basically Spanish. It may be significant that Professor Herman even fails to mention, in text, endnotes, or bibliography, the publications that expound this historical record, the book by Richard H. Kilbourne, Jr., *A History of the Louisiana Civil Code*, published in 1987 by the Publications Institute, Paul M. Hebert Law Center, LSU, and the article by Professor Alain Levasseur, *Les Codifications en Louisiane*, Revue de Recherche Juridique (1986) 171-280.

The second major inaccuracy of the booklet is that Professor Herman would have readers believe not only that French civil law forms the substantive basis of our own, but that "Louisiana drafters, by implanting conceptions of the civil law in Louisiana, affirmed a commitment to a French perspective on law and society", and that "the Louisiana Civil Code shares with the French Civil Code the spirit of the Enlightenment", that is to say, a spirit of secularism and high individualism. Certainly this was not true of Spanish law in 1803, for Spain had been very little affected by Enlightment thought, and neither the Civil Code's Preliminary Title (before recent amendment) nor its substantive provisions (before amendments) give any evidence of this. Here Professor Herman has made assertions without proof. He has expressed how he would like to have us regard the Civil Code, not given a factual account of our legal history.

The booklet is, as Professor Herman acknowledges, largely an updated and elaborated version of a 1981 pamphlet by him and Professors Combe and Carbonneau of the Tulane law faculty, "*The Louisiana Civil Code: A Humanistic Appraisal*". I regret that circumstances of my life in 1981 did not enable me to criticize that work immediately. For years I consoled myself by rationalizing that probably serious scholars would know better and that perhaps it would not have wide circulation among the general public. Now that the new booklet has been published in "pop culture" format and must have been intended for circulation even to high school students, I deem it imperative to warn the public of its errors. Thus I intend to review the booklet in greater detail for publication in newspapers and journals. Indeed, this whole affair may inspire me to renew my efforts to write an accurate monograph on our Civil Code's underlying principles. If I complete it, I might ask the LBF to consider publishing it.

Yours for truth in law, sincerely,

Robert A. Pascal
Professor of Law Emeritus

RAP/tjs
cc: Prof. Shael Herman
Mr. Cyrus Greco
Mr. Richard H. Kilbourne, Jr.
Prof. Saúl Litvinoff, Director,
Publications Institute, Paul M. Hebert Law Center, LSU
Prof. Alain A. Levassuer
Chancellor Winston R. Day
Paul M. Hebert Law Center, LSU
M. Gérard Marcel Leroux
Consul General of France
Sr. Pablo Sanchez-Teran
Consul General of Spain

BOOK REVIEW

Shael Herman, *The Louisiana Civil Code: A European Legacy for the United States*, Louisiana Bar Foundation, 1993, vi, 80.

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[1]Herman, *Perspectives on Code Structure*, 54 Tulane Law Review 987-1051 (1980).

correctness. The original subtitle, nevertheless, probably was more indicative of the character and evident purpose of both pamphlet and booklet, that to have their readers view the Louisiana Civil Code as a basically French humanistic document, in substance as well as form, in spite of the historical record that it was meant to reflect, and did reflect, Spanish substantive civil law.

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Professor Herman seems to base his wish to view our civil law as primarily French on two factors. The Louisiana drafters of the 1808 *Digest of the Civil Laws in Force In The Territory of Orleans* certainly used the French Civil Code of 1804 and its preliminary draft, or *Projet of 1800*, as models of form and style. In addition they used the very texts of these documents in many articles of the Digest, as was detailed by Professor Rudolfo Batiza of Tulane in 1971.[2] But what Professor Herman ignores is that these French texts were used only where they were understood to reflect the substance of Spanish law as well as French or could be modified to reflect the Spanish rule. There is no evidence of an attempt to substitute French law for Spanish law. It would have been strange indeed for a people passing from Spanish to American rule to urge the adoption of French Law.

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Louisiana to the United States.[3] After the transfer — all as Professor Herman himself details — the Congress of the United States retained in force the civil laws in effect in the Territory until the territorial legislature changed them; in 1806 the legislature of the Territory of Orleans declared that the Roman civil laws as modified by the Spanish civil laws in effect at the time of the Louisiana Purchase were the civil laws of the territory (but Professor Herman's language leaves one with the impression that the legislature sought to restore the Roman and Spanish laws, rather than recognize their being in force); and in the same year the Orleans territorial legislature ordered the drafting of a "code" with the civil laws in force as its base (28-31). The drafters then produced and the legislature enacted, not a civil code to replace the civil laws in effect, but a *digest* of those very same civil laws in codified form, the Digest of 1808, leaving intact the whole of those civil laws to the extent they were not incompatible with the provisions of the Digest. The population and the legal profession regarded it as a digest and not as a French type civil code meant to stand as the sole statement of the law. The Projet of the Civil Code of 1825 was drafted as and entitled "Additions and Amendments" to the Digest of 1808. Comments of its drafters imply that the base law yet was understood to be Spanish, not French.[4] All this

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[3]Levasseur, *Les Codifications en Louisiane*, 1986 Revue de la Recherche Juridique 184-187. Professor Herman did not mention this article.

[4]*[Proposed] Additions and Amendments To The Civil Code of The State of Louisiana* (1823), reprinted in 1 Louisiana Legal Archives (1937). See, for example, at p. 10, the comments under proposed articles on the effects of putative

has been detailed in a 1987 book that Professor Herman failed to mention in text, footnotes, or bibliography, Richard Kilbourne's *A History of the Louisiana Civil Code: The Formative Years, 1803-1839*.[5]

There is also the testimony of Louis Moreau-Lislet, one of the two drafters of the Digest of 1808. In 1814 he prepared two sets of notes to the "Roman and Spanish" laws having "some rapport" with those of Louisiana, which notes he inscribed on interleaves bound with the pages of certain copies of the Digest volume.[6] One list, on the interleaves opposite the English texts of the Digest, contained references to Roman and Spanish laws "relating to matters treated in each chapter of the Digest". The second list, on interleaves opposite the French text, listed "article by article, the citation of the principal laws of the various codes from [the substance of] which were drawn the dispositions" of the Digest.[7]

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marriage on the status of the children. The proposed articles are declared "conformable to" the law in *Las Siete Partidas*, but to incorporate an amelioration "taken from the French Code" because of its evident equity.

[5]Publications Institute, Paul M. Hebert Law Center, Louisiana State University (1987).

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[7]Ibid, in the *Avant-Propos*, pp. 1 & 2. Translation from the French by the author.

Nowhere is any reference made to the French Projet of 1800 or to the French Civil Code. There are some references throughout to the works of Domat, a French jurist, but Moreau-Lislet himself states that he cites Domat as a way of referring to the Roman texts so fully cited by him.[8] Moreau-Lislet evidently did not consider the Digest of 1808 to be French in substance. (There are also references to Pothier, another French jurist, particularly as to articles on contracts, but at this time contract law was not very different in France and Spain and Pothier even was in use in England and in America).

The uninformed indeed might ask why jurists charged with drafting a "code" based on Spanish law should have chosen the French Projet of 1800 and the French Civil Code as models of form and style and even as sources of texts. The reasons are not difficult to surmise. The Spanish law in force at the time had not yet been codified in the manner of the French law. The Projet of 1800 and the French Civil Code were in form and style marvels of succinctness, clarity, integration, and completeness. The legal institutions of Spain and southern France, the latter much reflected in the Projet of 1800, were similar, both influenced heavily by Roman law and Visigothic law. The law of obligations throughout France and Spain was very similar, as has been mentioned. To attempt a codification of the Spanish law without a model or guide would have

[8]Ibid.

represented folly, given the short time the Louisiana drafters had to finish their work. The organizational plans of the projet of 1800 and of the French Civil Code could be used to advantage, and the actual provisions could be used to the extent they reflected Spanish law as well as French, or modified to do so, or new provisions drafted to that end in instances in which the Spanish law varied from the French.[9]

Professor Herman's failure to see the Digest of 1808 and the Civil Codes of 1825, and therefore the Revised Civil Code of 1870, as primarily Spanish law documents may be attributable to his evident passion for French Enlightenment thought, particularly its secularism, its rationalism, and its individualism, and the desire to have the Louisiana codifications envisioned in that light. It may very well be that without their rationalist spirit the French would not have attempted, much less succeeded, in stating their civil law so simply, so beautifully, and in such magnificently organized form as they did in the French Projet and in the French Civil Code. But that form could be utilized by Louisianians seeking to state the basically Spanish law as simply, as beautifully, and with as much organization, without in any way subscribing to French secularism and French legislative positivism. And the drafters in 1808 and 1825 did just that.

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[9]The reviewer explained this in his *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tulane Law Review 603 (1972). Confirmation of this view is contained in the 1987 book by Richard H. Kilbourne, cited in the text at footnote 5.

Thus whereas the French restricted law (in the sense of the legal order) to legislation enacted by the French Assembly, not even recognizing custom, and refused to allow judges to resort to philosophical notions of just order even in the absence of legislation, in the Louisiana Digest of 1808 and the Civil Codes of 1825 and 1870 the view of the legal order is quite different. Both legislation and custom (which Professor Herman does not mention) are recognized as positive law to this day and, in the absence of legislation and custom, judges are directed to decide according to *equity*, defined in 1808, 1825, and 1870 as resort to received usages, natural law, and reason. Strangely Professor Herman not only ignores this difference, but gives the reader the impression that Article 1 of the Digest and Codes as originally enacted, reading "Law is the solemn expression of legislative will", means not simply that *legislation* (statute) is the solemn expression of legislative will — which it does mean — but also that legislation *alone* is law (17, 18). Certainly he must have known that Article 1 appears in the same chapter as Article 3, defining custom, and that both are in the chapter listing the sources of positive law. He states correctly that the words of Article 1 were taken from the French Projet of 1800 and this too would indicate that he must have known that that Projet listed the three sources of the law (droit, the legal order) of any nation as natural reason, legislation (loi, statute), and custom, and referred judges to equity in the absence of positive law.[10] The French

[10]*Projet de l'An VIII*, Liv. Prel., Title 1, Arts. 1, 4-6; Title V, Art. 11.

Assembly adopted none of these articles, such was their determination to restrict the legal order to the expression of legislative will; but this was not the Louisiana attitude. It is true that the three commissioners appointed to draft the additions and amendments to the Digest of 1808, which, with the Digest, became the Civil Code of 1825, did recommend the removal of custom as a source of positive law, but they recommended strongly the reference to equity in the absence of legislation.[11] The legislature, however, refused to abolish the reference to custom and of course retained the directive as to equity. Professor Herman's exposition is misleading, to say the least.

There are other equally untenable assertions by Professor Herman on the influence of French Enlightenment thought on the substantive law in the Louisiana Civil Code. Thus he states that the French Civil Code abolished feudal estates, and that the Louisiana drafters, "inspired by their French counterparts" rejected the feudal system (46). Actually feudal estates never prevailed in Louisiana. The French kings had refused to grant feudal domains, though repeatedly requested to do so,[12] and no feudal landholdings existed during the Spanish domination. Again, he asserts that "like the French Civil Code, the

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[11]*Additions and Amendments*, cited note 4, at p. 1, and *Preliminary Report of the Code Commissioners*, February 13, 1823, reprinted in 1 Louisiana Legal Archives lxxxv, at xcii.

[12]Giraud, *A History of French Louisiana*, LSU Press 1974, pp. 287, 288.

Louisiana Civil Code outlawed" the sale of land for a perpetual rent or annuity (49); but even today the Louisiana Civil Code has a chapter on the subject entitled "Of Rent of Lands", consisting of Articles 2779-2792. Similarly Professor Herman would have his readers believe that the Louisiana Civil Code, following the French in the spirit of democracy and individualism, promoted economic liberalism (12). But this point is overstated. Whereas the French Civil Code restricted labor agreements to a leasing of services, the Louisiana Civil Code originally allowed slavery and only in 1990 were the articles on indentured service and bound apprenticeship repealed. Again whereas the French Civil Code made all movables negotiable, thus protecting the good faith buyer in his transaction, the Louisiana Civil Code gave the good faith purchaser title only after he had possessed the thing for three years. And, finally, it may be observed that the Digest of 1808 and the Civil Code of 1825 gave very little security to creditors of a deceased person and even the Civil Code of 1870 failed to contain articles on voluntary bankruptcy. Thus the Louisiana Civil Code hardly can be said to have as much spirit of economic liberalism as Professor Herman claims.

There are many other facets of Professor Herman's exposition with which one may take issue. They cannot be discussed adequately in the space of a review, but mention may be made of some. Thus he uses the phrase "legislative supremacy" when he means "legislative positivism" (17); wrongly reads Civil Code Article 4, requiring promulgation of legislation, as requiring that all law be

positive, that is to say, consist of legislation (17); apparently treating the Civil Code's reduction of the number of impediments to marriage as evidence of a secularist move similar to the French Civil Code's sanctioning of divorce by consent (16, 17), even though the law of marriage in the Digest of 1808 and the Civil Code of 1825 as enacted reflected closely the Spanish civil laws on marriage, themselves reflecting the canon law of the Catholic Church. So too, more generally, one might object that he fails to note the significant differences between the Louisiana substantive law on persons and family property and that of the French, thus leaving his readers to assume that he regards them as French. And so on.

There can be no doubt that after the enactment of Act 40 of 1828, by which "all the civil laws in force" before the promulgation of the Civil Code of 1825 were repealed, Louisiana lawyers and judges turned increasingly to the commentaries on the French Civil Code to seek enlightment on the interpretation and application of our own, thereby often giving ours meanings it was not intended to have. In time popular, uninformed thought mistakenly did come to regard the Louisiana Civil Code as French. This may have been inevitable, given the absence of commentaries on Spanish law as convenient to use as those on the French Civil Code, the decreasing popular knowledge of the Spanish language, and the tendency of persons of French ancestry to wish to consider themselves and all aspects of their culture to be French. But Professor Herman does not mention

this, giving the impression instead that the intent from 1808 was to convert to French law and French social thought. This position is untenable.

One must assume that Professor Herman's view of the Louisiana Civil Code is one given in good faith. But, assuming that, it nevertheless remains that the booklet is a serious misrepresentation of historical fact, one that will ill serve both good scholarship and a people's right to be given a true account of their legal heritage.

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January 21, 1994

The Book Review Editors of:
The Advocate (Baton Rouge)
The Times-Picayune (New Orleans)
The Daily Advertiser (Lafayette)
Lake Charles American Press
Alexandria Daily Town Talk
The Shreveport Sun
The News Star (Monroe)

Dear Editors:

It is my hope each of you will publish the enclosed review of Shael Herman's *The Louisiana Civil Code: A European Legacy for The United States.*

The booklet is erroneous and misleading in its major aspects. You would be doing a service to the people of Louisiana by publishing the review.

A more detailed appraisal, written for legal professionals, has been sent to the Louisiana Bar Journal and to the four university law school reviews published in Louisiana.

Very truly yours,

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RAP/tjs

Book Note

Shael Herman, *The Louisiana Civil Code: A European Legacy for the United States*. Louisiana Bar Foundation, 1993, vi, 80.

Professor Herman, of the Tulane Law School, would have the readers of the booklet believe that Louisiana's codification of its civil substantive law, begun in 1808, "affirmed a commitment to a French perspective on law and society". Neither the historical record nor Louisiana's actual legislation bears this out.

Louisiana's first attempt to state the essence of its civil substantive law in a concise, orderly, and integrated form was in 1808 in *A Digest of the Civil Laws in force in the Territory of Orleans*. That work was in the *form* of a civil code, a form modelled on that of the French Civil Code of 1804 and its preliminary draft of 1800; but the *substance* of the law digested there was that of the Spanish civil law then in force, all in accordance with the directives of the Orleans Territory's legislature. It is true that many of the provisions of the Digest were copied from the French Civil Code or its draft of 1800, but in those instances the French texts conformed to Spanish law as well. Where the Spanish law differed, the French texts were amended to reflect the Spanish rule or abandoned. This was true notably in matters pertaining to persons, family, and family property.

Even more importantly, the Digest of 1808 and the later Civil Codes of 1825 and 1870 did not adopt the French notion of the legal order, as Professor Herman seems to believe. France in 1804 had come to consider legislative enactments as the only sources of the rules of the legal order. Louisiana, on the contrary, recognized both legislation and custom as sources of legal rules and, in the absence of legislation and custom, directed resort to equity, defined in 1808, 1825, and 1870 as resort to received usages, natural law, and reason. Thus whereas the French limited the legal order to the rules specified by human will, Louisiana admitted the validity of resorting to philosophical determinations of the requirements of justice in the absence of humanly specified legal rules. Professor Herman, however, fails to note this.

These and other inaccuracies render the booklet unreliable. This is a pity, for the author demonstrates a seductive style well suited to interesting readers in his message.

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CHAPTER FOUR

THE LEGAL AND PHILOSOPHICAL SOURCES OF THE RULES OF SOCIETAL ORDER ACCORDING TO THE CIVIL CODE

The Civil Code's *Preliminary Title*, on *Law* (*droit*, the legal order, in the French texts of the Digest of 1808 and the Civil Code of 1825), was revised by Act 124 of 1987 pursuant to the suggestions of the Louisiana State Law Institute, the state agency charged with recommending revisions of existing legislation. Article 1 of the revised *Preliminary Title* states clearly that the two sources of (positive, man-made) *law* are *legislation* and *custom*. Article 2 defines *legislation* as "a solemn expression of legislative will" and Article 3 declares that *custom* "results from practice repeated for a long time and generally accepted [by the people] as having acquired the force of law".[1]

Thus (positive) Louisiana *law* is of only two kinds: rules declared to constitute such by the legislature acting as representatives of the people and rules implicit in practices accepted generally by the people themselves

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[1]It may be noted that the present Article 2 corresponds to Article 1 of the Preliminary Title before its revision in 1987, the English Text of which read "Law is the solemn expression of legislative will". For two reasons, however, it is certain that *law* there meant *legislation*, the word used in Article 2 of the revised Preliminary title. First, *law* in the English text of original Article 1 corresponded to *loi* in the French text, which is translated properly as *legislation*. *Law* was not a translation of *droit* (the legal order, law in general), as used in the French text of the name of the Preliminary Title. Then, the first chapter of the Preliminary Title also always listed *custom* as a source of legal rule, or a form of *law* in the sense of *droit*. Thus *legislation* was never the only form of law under the Civil Code.

as having the force of law. The existence of legislation is proven by the record of its regular passage and promulgation according to the requirements of the Louisiana Constitution. If there is a question whether a long established practice has been accepted generally by the people as having the force of law, therefore constituting custom, a court must answer the question as a matter of fact.

Article 8 declares that "laws" (legislation) are repealed by other (newer) laws (legislation). The Civil Code does not say so in any article, but it may be assumed that new legislation supersedes existing inconsistent custom. Today later custom does not repeal or abrogate existing legislation, for the second sentence of Article 3 says so expressly; but that sentence was not part of the article before its revision in 1987 and under the spanish law in force from 1803 to 1828 recognized later custom as superseding existing legislation. Hence it may be argued that under Article 3 before its amendment in 1897 later custom did prevail over earlier legislation.

If legislation and custom are the only sources of positive Louisiana law, what provides the rule of order in the event there is no applicable legislation or custom? The problem is very real, for legislators are not omniscient and, besides, as years go by, conditions of life change and produce new situations neither envisioned by existing legislation nor yet regulated by adequate custom. In such circumstances Article 4 supplies the

answer: the judge is to proceed according to "equity", and to do so he is to resort to "justice, reason, and prevailing usages", sources of norms not themselves positive law. What are these "equitable" or extra-legal sources of norms of order?

Usages are not defined generally in the *Preliminary Title* of the Civil Code. Article 2055 as amended by Act 331 of 1984, on the interpretation of contracts, defines a usage as "a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation". Of course there may be usages in other than contract situations and for that reason alone the language of Article 2055 as amended is not sufficiently broad to define *usage* in Article 4. It would be better to say that Article 4 refers to practices lacking one or more of the essential characteristics of customs, either existence for a sufficiently long period of time or the public consensus that they have the force of law.

Justice and *reason* require more explanation. Prior to the revision of the Civil Code's *Preliminary Title* in 1987, the article dealing with the subject matter was Article 21. This article had received its formulation in the drafting of the Digest of 1808 and had been retained unchanged in the Civil Code of 1825 and in the Revised Civil Code until 1987. Then the reference was to *natural law* (*la loi naturelle* in the French texts of 1808 and 1825) rather than to *justice*. According to the *Comment* of the revisors,

published with the revised article but not having the force of law, the change in wording was made because the term *natural law* "has no defined meaning in Louisiana jurisprudence". This reason may be regarded as suspect, both because the substituted term *justice* itself is not defined "in Louisiana jurisprudence" and because, more generally, not every term used in legislation need be defined by the legislation itself. Words are used legitimately without definition in both legislation and other communications, if they are used to indicate the meanings they have in the cultural milieu. One may suspect that the revisors thought the term *natural law* had religious or theological connotations, even though the term is strictly a philosophical one. Indeed, one may suspect even more, that the change reflects the attitude of logical positivism, that is to say, of the denial of the validity of philosophy itself. There are other recent changes in the Civil Code's terminology which seem to indicate the same attitude and they will be noted as the occasions arise.

In spite of the change in the terminology from *natural law* to *justice*, however, the revisors seem to have accomplished nothing, for their *comment* states there has been no change in the substance of the law. The new term *justice*, therefore, must be taken to have the same meaning that *natural law* had in former Article 21. Similarly, the term *reason*, not having been changed in new Article 4, must have the same meaning it had in former

Article 21. It will be proper therefore, to inquire what meanings those terms had in the context of the Digest of 1808, where Article 21 originated.

There can be no doubt that the language of former Article 21 was taken from Article 11 of the *Preliminary Book* of the 1800 *Projet* of the French *Code Civil* of 1804. The French *Code Civil* itself has no such provision, the decision having been made, in the course of the debates on the Projet, to restrict the judge to the application of enacted legislation. It is arguable that *natural law* (*la loi naturelle*) and *reason* in Article 11 of the French *Projet* were understood there to have the meanings ascribed to them in the then prevailing enlightenment thought. *Reason*, accordingly, would have referred to secular, rationalistic philosophy in the eartesian spirit. There, although man's dependence on God the creator was acknowledged, his relationship to God was considered a matter of faith, not of philosophy, and this faith was understood in terms of each individual's relationship to God without reference to the possible relationship of men toward each other. Religion, accordingly, though it may have demanded respect for others, was a private matter and not one of public relevance. Philosophically each man was thought of as an individual free to act as he pleased without obligations whatsoever toward other men save those he assumed toward them by contract in order to secure his own life, safety, and happiness. Accordingly, the *natural law* of this era was a matter of

reasoned prudential judgments concerning how individuals, free (in the sense of licentious) by nature, would act toward others if they wished to live their earthly lives in safety and happiness.

From a philosophical perspective, therefore, all human relations were considered essentially contractual. The Social Contract was the foundation of society and of the order it generated; and private contract was the source of the order not prescribed by the positive law. It is to be noted that philosophically this *natural law* of prudential rules, the social contract, and private contract all were without *moral* force. No moral wrong could be committed by disregarding them in instances in which the individual thought he could do so without sacrificing his own life, safety, or happiness. His only obligation was to himself. For *moral* force to attach to man-made schemes of order it is prerequisite that they be understood as particular specifications of the general obligation of cooperation in life implicit in the concept of an ontological community of mankind; and this concept was foreign to enlightenment philosophy.

It is not likely, however, that the terms *natural law* and *reason* in Article 21 in 1808 were intended to mean what they did in Enlightenment thought. The Digest of 1808, after all, was intended to be a digest of the Spanish civil law then in force in the Territory of Orleans. The Spanish had not succumbed to Enlightenment philosophy and had retained the

traditional Catholic concepts of *natural law* and *reason*. Catholic *reason*, or philosophy, as well as Catholic theology, acknowledges the dignity of each man as a distinct person of free will, but considers all men to form a community of mankind under God and therefore morally obliged to cooperate with each other in life so as to achieve maximally the material and spiritual good of each of them—the common good. Catholic *natural law*, accordingly, consists of rational judgments concerning how men might cooperate with each other, given the circumstances of time and place, to the end that *each* might realize maximally his material and spiritual good. Those judgments, of course, are fallible and therefore forever subject to correction and reformulation. Then, too, new knowledge and new conditions or life over time require new specifications and applications of the basic principles. But, the nature of man and the community of mankind under God being unalterable ontological facts, only the specifications and applications of the natural law may change, not its foundation.

All this may be well and good, but how does this help the judge who must decide a case on which there is no legislation or custom? Actually, the judge is called upon to do no more or less than a legislator called upon to prescribe a rule for the situation. He must draw upon the body of thought and experience on social ethics, being careful to have his solution fit in as much as possible with the existing legal order and culture and making

certain that, as far as he can judge, it will advance the common good. All that is said and done in the effort to articulate or specify social order in the concrete circumstances of time and place partakes of the natural law, at least intentionally, as long as there is recognition and respect for each man's dignity as a person of free will and as a member of a community of mankind under God in which each is obliged ontologically to cooperate with all others for the good of each and all.

It is important to note here, even if parenthetically, that if natural law and reason are to be considered sources of norms of right order in the absence of legislation and custom, it must be because they are also the norms for legislation and custom. The Civil Code does not say so in so many words, but it would be strange if judges were bound by natural law and reason when they must find and specify the rule of right order, but not legislators. Thus it may be affirmed that Louisiana legislation must conform to natural law and reason to be "valid" substantively, even if the constitutionally prescribed procedure for its enactment has been followed.

The above statement, of course, raises the question whether the judiciary may declare a law invalid if it fails to meet the substantive demands of natural law and reason. The judiciary has never done this overtly, to be sure, and it is not likely that it ever will, our philosophical pluralism making it difficult to pronounce on the matter with conviction for

most persons. The problem, however, has been dealt with by finding the legislation in question in violation of the due process or other clause of the Louisiana or United States constitutions.

What is the effect of judgments rendered according to *equity*? The Civil Code says nothing about this. It can be certain, nevertheless, that they are without juridical, or legal, effect except in the particular cases in which the judgments are rendered. Indeed, neither decisions based on equity nor those based on legislation or custom can be considered to be obligatory rules for the future, for only legislation and custom are law, and not what may be said by courts and legal experts. Of course nothing prevents a judge from rendering a decision consistently with the reasoning found in a previous case, whether founded on law or equity. Indeed, this is quite usual, both in the interest of economy of effort and in that of the protection of the expectancies of people, as far as it is possible to do so without injustice to others. Moreover, the acceptance of judicial solutions as law by the people generally over a long period of time rightly must be considered creative of customs. But care must be exercised here. For years, for example, the Louisiana Supreme Court continued to rule that the husband of the mother was the father of her child even in situations in which the legislation reasonably interpreted was to the contrary; but the continuously repeated attacks on these rulings in subsequent cases

indicated the people's non-acceptance of these decisions by the people as evidence of the law.

The *law*—legislation and custom—and judgments based on *equity*, however, are not the only institutions defining order in society. Foremost among the other institutions specifying order are contracts between and among two or more persons. By agreeing on, say, a sale of a house for a certain price, a loan for a certain time for interest at a particular rate, a partnership to practice law together, or a marriage contract in which the spouses fix the manner of managing and sharing their assets and revenues, the persons involved define their own schemes of order in limited areas of life in which society has not deemed it essential that the order be fixed by law. The contract, then, as stated by Article 1982 as enacted by Act 331 of 1984 (formerly Article 1901), has *the effect of law* for the parties, and like the law, it should be envisioned as a mode of specifying the particulars of the cooperation required generally but unspecifically by the ontological fact of the community of mankind.

Contracts and similar institutions, such as the last will or testament, will be discussed more fully in subsequent chapters.

The last institution to be mentioned here is the one most radically fundamental to the concept of social order being founded on cooperation. According to the rules of *the management of the affairs of another*, as it has

come to be called in English, one who, without being obliged or authorized by law or contract, acts with reasonable judgment in undertaking and completing something in the interest of another, with or without his knowledge, is entitled to his expenses and costs, even if his intervention proves a failure and damaging to the other. Very obviously this is the affirmation of the principle that all should seek to cooperate with others in life. In Roman law, where it originated before the Christian era, it was known as *negotiorum gestio,* and that term will be used here.

In Anglo-American law *negotiorum gestio* is unknown, that law being founded on individualism far more so than is Louisiana civil law. There intervention for others usually is viewed as intermeddling and not entitled to the favor of the law.

More will be said of *negotiorum gestio* in a later chapter. Suffice it to say now that there is opinion to the effect that the sufficiency of mere consent to form a contract, as distinguished from the necessity of satisfying public formalities, was recognized when a Roman magistrate, confronted with a claim of a *negotiorum gestor*, declared the plaintiff would not have to prove his intervention to have been reasonable (usefully conceived) if the defendant had consented to the undertaking in advance, thereby acknowledging it to be an act of cooperation with him. This theory of the foundation of consensual, non-formal contract contrasts vividly with that of

the Anglo-American law, for there again the principle is that of individuals dealing with each other each for his own advantage.

The primary institutions for the articulation or specification of civil order in society for the common good, therefore, are:

1. Legislation,
2. Custom not contrary to legislation,
3. Equity in matters not covered by legislation or custom;
4. Contracts, testaments, or the like, between ordinary persons in matters not inconsistent with imperative legislation; and
5. Unobliged and unauthorized acts undertaken and performed reasonably in the interests of others (acts of *negotiorum gestio*).

CHAPTER FIVE

EXPERT OPINION

The Civil Code says nothing about either, but there are two kinds of expert opinion very influential in the life of the civil law. One is judicial opinion, that voiced by judges in the application of the law to particular controversies. The other is doctrinal opinion, that rendered by professors of law and other legal scholars in the effort to teach the law or to appraise it and offer suggestions for its improvement. Although truth is one, it is inevitable that these human endeavors should prove both mutually opposed and mutually complementary to each other. That of judges is subject to the danger of being distorted by human emotion in the midst of contests between identified persons one of whom at lease will be disappointed by whatever solution is reached; but it is true also that this very setting in which the judge operates, if intensified and clarified by the honest arguments of the interested parties, can contribute to the rendition of opinions that tend to exhaust alternatives. That of doctrinaires, on the other hand, tends to benefit from the leisure of the authors, their detachment from the causes of particular persons, their correspondingly better opportunity to be oriented toward the common good, and their habitual propensity (if they have been trained well) to construe each part of the legal order in the light of its relation to the whole; but it also can suffer from the

lack of opportunity of debate with those whose lives it will affect most immediately. There is an ivory tower. Whereas the civil law judge must be an artisan, and usually it suffices for him to be such, the doctrinaire must be a scientist, treading the path of the artisan only when he seeks to project reforms, as in the recommendation of new legislation, or when he is called upon to assist judges in making their decisions.

Thus judicial and doctrinal opinions can and should enlighten and correct each other. The best of them do. The degree to which each rises to its potential, is frustrated, or is abused, however, depends on many factors, but primarily three: the current thought concerning the proper roles of judges and doctrinaires, the quality of legal education, and the current opinion as to whether the law is to be regarded as the statement of order for the common good of men in society, and respected as such, or considered merely the extant debris of human battles for power to be manipulated selfishly in an endless and meaningless struggle for existence. In the last analysis, it is a people's understanding of themselves that colors all they do and tolerate.

The roles of judicial and doctrinal opinions have varied greatly in Civil Law jurisdictions. In France following the enactment of the *Code Civil* judges were required to cite the legislation they applied to reach decisions, but at the same time they were forbidden to pronounce on the meaning of that legislation. The great fear of the French was that if judges were

permitted to do more, the legislated framework of order soon would be superseded practically by the opinions of the judiciary. By restricting judicial utterances, the legislation would remain the point of reference. Thus for a long time the reasoning of the judges could not be ascertained and judges had very little impact on the course of French law. Today French judges rendering decisions often write notes explaining them that are published with the decisions themselves or in other legal publications. Thus today French judicial thought as evidenced by such notes plays a considerable role in contributing to expert opinion on the law.

The French post-1804 attitude toward judicial pronouncements on the law left the field of legal literature to the doctrinaires. Originally the latter were supposed to restrict their efforts to expositions of the law and to avoid appraisal of its quality. The legislative assembly of elected representatives of the people was to be the sole judge of what the law should be. But a civil code is written in terms more general than specific, and, as the pre-1987 Article 2 of the Louisiana Civil Code stated originally it provides for what passes in the ordinary course of events rather than for solitary or singular situations. Thus part of the function of the doctrinaire in expounding the content of a civil code is to illustrate the application of its general propositions to specific situations. Another aspect of the doctrinaire's effort, however, one more important as the conditions of life envisioned by the code change, is to reformulate, or reinterpret, the general rules so that the

principles underlying them might be given effect under unforeseen or changed circumstances. Inevitably the doctrinal writings tend to supersede the legislation itself in practical importance in this process. Napoleon certainly foresaw this, for, if the story is true, on the appearance of Toullier's commentary he declared *"Mon code est perdue"* (My code is doomed).

The restrictions in France on judicial declarations of the meaning of the law compelled judges to consult doctrine to obtain help in the construction and application of the laws. This had the salutary effect of making possible a retention of professional focus on systematic expositions of the law as a whole, written without involvement in the controversies of particular persons and in terms of its conceptual structure. Where judicial opinion on the meaning of the legislation in application to particular cases is available, the attention of practical jurists inevitably turns to fact-orientation. As a result, the deeper meanings of the conceptual structure of order in the Civil Code tend to be ignored. This is one reason why doctrine has been slow to develop in Louisiana.

From the time of the enactment of the Digest of 1808 Louisiana appellate judges were expected to write opinions explaining how they construed the law for application to the particular case at hand. The commissioners appointed to draft the Civil Code of 1825 proposed to the legislature that opinions should be published so that the adequacy of the

law might be appraised and remedial steps taken where indicated. In the first third of the 1800's it was the rule to publish not only the judges' opinions, but also the briefs of counsel, and legislation of 1830 required this to be done. These practices certainly tended to discourage doctrinal writing, but there were other factors that contributed to its non-emergence. University law schools did not exist and thus the absence of scholars with leisure to study and write. After 1811 French doctrinal writing began to appear in profusion and, given the wide knowledge of the French language in Louisiana at the time and the verbal similarity of so many provisions of the Louisiana and French civil codes, the need for local writings may have seemed less to those inclined to use them. The impracticability of publishing for a limited market must have been another reason. Anglo-American lawyers, moreover, were accustomed to relying mostly on judicial opinions for guidance.

Louisiana, in any event, did not produce civil law doctrinal literature of importance until recent times. The first doctrinal works produced in Louisiana were Livingston's System of Penal Law for the United States, 1828, and for Louisiana, 1833, and Samuel Livermore's Dissertations on the Questions which arise from the Contrariety of the Positive Laws of Different States and Nations, 1828, excellent in themselves, but none concerned with the civil law. Magruder, on Marriage and Divorce and related law, appeared in 1884; Cross, on Successions, in 1891; Denis, on Pledge, in 1898; but all

these were primarily works seeking to make some synthesis of the judicial decisions on the subjects. Nothing in the nature of a discussion of the Civil Code as a whole appeared until 1925, and this was an edition of E.D. Saunders' Lectures at the Tulane Law School. Works more in the nature of treatises did not begin to appear until some years later. Even periodical literature was lacking. DeBow's Commercial Review published occasional items of interest on Louisiana law in the 1840's. There was an attempt in 1841-42 by Gustavus Schmidt, a jurist of broad learning and interests, to publish a comparative law periodical, the Louisiana Law Journal, but after four issues he had to abandon the project for lack of articles to print. A journal of the same name produced six issues in 1875-76. Later the Louisiana Bar Journal contained occasional items of interest. Successful, lasting journals had to await the firm establishment of law schools with full time faculties. Even their product, however, often is uneven in quality, without clear direction, and usually more descriptive than critical.

It would be too simplistic, however, to believe that the availability of reported judicial opinions doomed more comprehensive and more scientific legal literature. More of the fault can be attributed to the lack of systematic legal education in codified law. The Civil Code is law projected in conceptual terms and in an integrated state. The Civil Code's law cannot be learned or appreciated sufficiently through the study of specimens of its application. The grand scheme must be appreciated first; then there must

be exercise in applying the grand scheme to the particulars of life. The Civil Code is the mirror of a plan of order already perfected in its conceptualization. This genius of codified law is not likely to become visible to the student who is asked to learn as does a cobbler's apprentice, by imitating the motions of the master and coming to an understanding of why he does what he does, if he ever does at all, only by degrees. But "reading law" during apprenticeship in a lawyer's office was the primary mode of legal education in Louisiana until about 1925. What law schools there were until this time tended to concentrate on what the judiciary had said of the law. Perhaps worst of all, the scions of lawyer families often sought their legal training in Anglo-American law schools in which the learning process was primarily (for lack of authoritative codification) from particulars of fact and their solutions to generalizations, if to any at all, that remained unauthoritative. Indeed, Louisiana law schools all too often fell into this mold, even in teaching the Civil Law, and the same conditions all too often prevail today.

More serious than both the factors mentioned above is the general popular failure to believe that objective criteria of order for man are discoverable. Its consequence for legal education and for law itself has been the belief that the legal order can not be more than an arena in which gladiators fight with words rather than swords. The law becomes the weapon of disguised and sometimes not so gentle force, a sophistry of the

first magnitude through which men seek what they want rather than respect an order designed for the common good. He who does not acknowledge a discoverable ontological bond between man and man cannot be rational and yet concerned with others than himself, and his attitude deprives the law of the willing cooperation on which the success of any legal system must depend. The Civil Code was inspired by a philosophy that, right or wrong in its fundamental orientation or its particulars, conceived of law as the specification of objective right order (*droit*) as far as it could be ascertained. The amoral man cannot give his assent to it except as an instrument to be respected when it will satisfy his criterialess desires and to be disregarded when it will not. It is the disorder of the soul that is the principal enemy of the Civil Code. All others are derivative.

The Louisiana Civil Code, then, is in trouble. Yet one must not abandon hope in men or Divine Providence. For this reason it is worthwhile examining the Civil Code's institutions to understand what we can of the concepts of order for man explicit or implicit in them. Only by knowing what the Civil Code has sought to attain in societal life can we judge its substantive merits.