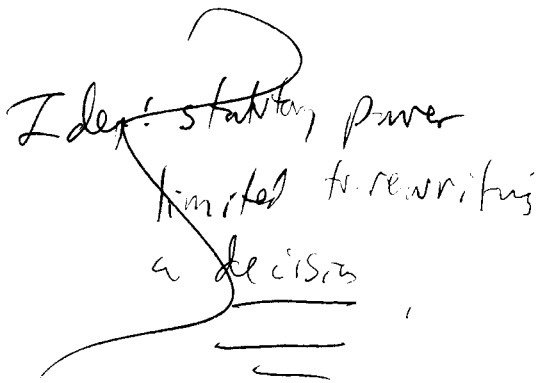
fully mean a better financial basis for the various official programs under this new policy. On the other hand, we can even now observe the unpleasant effects of new oil findings within some Indian communities.



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# PERSPECTIVES ON CODE STRUCTURE: HISTORICAL EXPERIENCE, MODERN FORMATS, AND POLICY CONSIDERATIONS

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## INTRODUCTION

The subject of code revision has received a great deal of attention in Louisiana, much of it designed to urge revision of the Louisiana Civil Code of 1870.[1] The revision is now under-

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1. Even a partial bibliography is substantial. *See, e.g.*, Baudouin, *The Influence of the Code Napoleon*, 33 Tul. L. Rev. 23 (1958); de Grasperi, *El Futuro de la Codificación*, 29 Tul. L. Rev. 223 (1955); Fabre-Surveyer, *The Future of Codification with Regard to the Execution of Wills*, 29 Tul. L. Rev. 210 (1955); Hartkamp, *Civil Code Revision in the Netherlands: A Survey of Its Influence on Dutch Legal Practice*, 35 La. L. Rev. 1059 (1975); Herman, *Command Versus Purpose: The Scylla and Charybdis of the Code Drafter*, 52 Tul. L. Rev. 115 (1977); Herman, *Legislative Management of History: Notes on the Philosophical Foundations Of the Civil Code*, 53 Tul. L. Rev. 380 (1979); Hood, *The History and Development of the Louisiana Civil Code*, 33 Tul. L. Rev. 7 (1958); Hubert, *Techniques Used in the Revision of the Code of Practice*, 33 Tul. L. Rev. 153 (1958); Jolowicz, *The Civil Law in Louisiana*, 29 Tul. L. Rev. 491 (1955); Lawson, *Some Reflections on Sales and Civilian Methodology*, 44 Tul. L. Rev. 750 (1970); Levasseur, *On the Structure of a Civil Code*, 44 Tul. L. Rev. 693 (1970); Maillet, *The Historical Significance of French Codifications*, 44 Tul. L. Rev. 681 (1970); Morrison, *Legislative Technique and the Problem of Suppletive and Constructive Laws*, 9 Tul. L. Rev. 544 (1935); Morrison, *The Need for a Revision of the Louisiana Civil Code*, 11 Tul. L. Rev. 213 (1937); Morrow, *An Approach to the Revision of the Louisiana Civil Code*, 23 Tul. L. Rev. 478, 10 La. L. Rev. 59 (1949); Morrow, *Civilian Codification Under Judicial Review: The Generality of "Immorality" in Louisiana*, 21 Tul. L. Rev. 545 (1947); Morrow, *Current Prospects for Revision of the Louisiana Civil Code*, 33 Tul. L. Rev. 143, 6 La. B.J. 247, 236 La. 85 (1958); Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 Tul. L. Rev. 537 (1943); Morrow, *Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered*, 17 Tul. L. Rev. 1 (1942); Morrow, *The Future of Codification in Louisiana*, 29 Tul. L. Rev. 249 (1955); Morrow, *The 1942 Louisiana Criminal Code in 1945: A Small Voice from the*

way;[2] several parts of the new code have already been enacted[3] and others, complete in *projet* form, await legislative action.[4] Despite these successes, one suspects that the current status of the revision effort in Louisiana would be less than satisfactory to the civilians who first urged the undertaking. Although the revision is occurring, it has not been the ordered process its early advocates envisioned.[5] Blueprints for revision, unveiled decades

*Past*, 19 Tul. L. Rev. 483 (1945); Morrow, *The Proposed Louisiana Criminal Code—An Opportunity and a Challenge*, 15 Tul. L. Rev. 415 (1941); Niboyet, *La Question d'un Nouveau Code Civil en France*, 29 Tul. L. Rev. 254 (1955); Rabel, *Private Laws of Western Civilization*, 10 La. L. Rev. 1, 107, 265, 431, 449 (1950); Smith, *A Proposed Code Revision on Tort Liability*, 10 La. L. Rev. 253 (1950); Smith, *Law Reform in a Mixed 'Civil Law' and 'Common Law' Jurisdiction*, 35 La. L. Rev. 927 (1975); Trudel, *The Usefulness of Codification: A Comparative Study of Quasi-Contract*, 29 Tul. L. Rev. 303 (1955); Tucker, *The Code and the Common Law in Louisiana*, 29 Tul. L. Rev. 739 (1955); Tucker, *Tradition and Technique of Codification in The Modern World: The Louisiana Experience*, 25 La. L. Rev. 698 (1965); Tunc, *Limitation on Codification—A Separate Law of Traffic Accidents*, 44 Tul. L. Rev. 757 (1970); Tunc, *The Grand Outlines of the Code Napoleon*, 29 Tul. L. Rev. 431 (1955); Walton, *Civil Codes and their Revision. Some Suggestions for Revision of the Title "Of Ownership"*, 1 S.L.Q. 95 (1916); Zengel, *The Real Actions—A Study in Code Revision*, 29 Tul. L. Rev. 617 (1955).

2. The mandate for revision of the 1870 Code was delivered by the legislature in 1948. 1948 La. Acts, No. 335. The actual work of revision, however, was not undertaken until the mid-1960's. La. State L. Inst., Biennial Report to the Legislature (1968). The Institute's charter appears in La. Rev. Stat. Ann. §§ 24:201-:205 (West 1950).

3. Book III, Title VI of the Civil Code, dealing with matrimonial regimes, was enacted by 1979 La. Acts, No. 709. A new Chapter 4, dealing with the marital portion, was added to Book III by 1979 La. Acts, No. 710. Book II of the Civil Code, comprising the property law of the state, 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); 1980 La. Acts, No. 150 (Title XI, Partnership). Title II of Book II, dealing with Ownership, was enacted by 1979 La. Acts, No. 180.

4. The portion of the Code dealing with Obligations has been completed in *projet* form. Litvinoff, *Consumer Protection and the Civil Code: Louisiana Perspective*, 10 Revue Générale de Droit 24, 25 (1979).

5. *Compare, e.g.*, Morrow, *An Approach to the Revision of the Louisiana Civil Code*, 23 Tul. L. Rev. 478, 10 La. L. Rev. 59 (1949) [hereinafter cited, with reference to 23 Tul. L. Rev. 478 only, as *Approach*], *with* Morrow, *Current Prospects for Revision of the Louisiana Civil Code*, 33 Tul. L. Rev. 143 (1958) [hereinafter cited as *Current Prospects*].

The first article, *Approach, supra*, was an address delivered to the Louisiana State Law Institute in May of 1949, *id.* at 478 n.*, shortly after the Institute had received its legislative mandate to revise the Civil Code. *See* note 2 *supra*. In that address, Professor Morrow outlined the approach to revision he felt was essential to success: 1) the revisions should turn to civil law models, including the modern European codes, for inspiration, *Approach, supra*, at 482-83; 2) the project should be viewed as a long-term effort, with no less than five years—and more realistically, ten years—set aside for the project, *id.* at 483; 3) in preparation for the effort, the Institute should undertake and fund scholarly



ago, stand neglected and unrealized as standards against which

research in civil law and comparative law topics, the production of doctrinal writings, and the translation of foreign treatises and codes, *id.* at 483-84; 4) in the actual drafting of the new *projet*, the revisers should relegate purely doctrinal and didactic materials to the *Exposé des Motifs* (excising them from the Code itself), seek the substantive law in civil law rather than common law doctrine, critically assess any common law concepts already accepted into the private law, and avoid producing a mere restatement of the jurisprudence, *id.* at 484-87; 5) the revisers should seriously consider abandoning the format of the 1870 Code in favor of the German model with its General and Special Parts, and at the same time avoid excessive particularity in the drafting of substantive rules, *id.* at 487-88; 6) the revisers should include a clarified and expanded discussion of civilian methodology in the Preliminary Title or General Part, which would include discussions of the respective roles of the court and the legislature, the rule of *stare decisis* in Louisiana jurisprudence, the role of jurisprudence as a source of law, and the appropriate gap-filling methodology, and would provide for constant revision of the Code, *id.* at 488-89; 7) finally, the Institute should undertake a comprehensive educational and lobbying program designed to assure the successful enactment of the finished product, *id.* at 489-90.

Ten years later, Professor Morrow again addressed the question of Code revision, this time focusing on the obstacles to that effort. *Current Prospects, supra*, at 144. The tone of this article is much less optimistic.

> We have paid a high price for our refusal to accept Livingston's plans for constant recodification . . . . Law school faculties have continued to teach the necessity for Code revision for at least the last 30 years. . . . Revision of the Civil Code remains in the "talking" stage. I contributed to the "talking" in an address before the Louisiana Law Institute in May, 1949, almost ten years ago . . . . In that paper I suggested in quite specific terms the approach which I thought should be made to . . . revision . . . . It seems pointless to repeat here what was said on that occasion, and I have not changed my mind, although practicality compels the realization that perhaps no one here is familiar with . . . that paper. Today I have thought it best to speak frankly and realistically about some of the more obvious obstacles to a successful revision of the Code. After all, many persons believe a revision is necessary, the machinery exists and there is ample precedent for such a step. . . . I can put the question to those assembled here as bluntly as it has been put to me: "What the hell are we waiting for?"

*Id.* at 143-44 (footnotes omitted). After recognizing the "obvious" and "publicly assigned" reasons for the delay—the Institute's "carefully drawn" plans to undertake lesser projects first, the lack of adequate financial resources, and the shortage of qualified personnel,—Professor Morrow delineated the "more important" hidden obstacles. 1) The Institute, ten years after receiving its legislative mandate, had not been able to secure the support of the legal profession of the state:

> The prospect of creating a stillborn product to be placed on the shelf with Livingston's dead Criminal Code, is a dismal one . . . . It is my conviction that the Law Institute should not proceed until it is assured of support for the project by a large majority of Bench and Bar, which I do not believe it has at the present time.

*Id.* at 145. 2) The Council of the Law Institute had been unable to reach agreement on the type of document it should seek to produce—a mere editorial revision incorporating a restatement of the jurisprudence, an adaptation of the code of some other civil law jurisdiction, or a true recodification designed to meet the needs of Louisiana, *id.* at 145-49.

current progress might be measured. Yet the annual progress of piecemeal revision requires attention to issues of general structure and design.

This paper addresses an important, though neglected aspect of the revision process: whether the current three-book structure of the Louisiana Civil Code should be retained or discarded in favor of another format. Our inquiry is necessarily poised between contrary impulses—a reverence for tradition and a desire

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[T]here simply is no agreement, even among those who wish to proceed, about the type of document for which we *should* strive. . . . The Council must decide first what kind of Code, basically, is to be produced. If it merely appoints a group of draftsmen or "reporters" and asks them to begin work without any indication of the general approach expected of them, there is too great a danger that the draftsmen themselves will be working at cross-purposes

. . . .

*Id.* at 145-46. 3) Those charged with the task were simply shrinking from the sheer difficulty of the effort and the bitter controversy it was likely to engender. *Id.* at 149. "At the outset, merely undertaking a project of ten or more years duration requires a degree of vision, patience and dedication for which the modern American is not noted." *Id.* at 150. "A State which cannot, or will not, finance an adequate public school system is not likely to find funds for a project so lacking in popular appeal as revision of the Civil Code." *Id.* "Will the Legislature accept the judgment of the Council of the Institute? Will the Council accept the judgment of the draftsmen . . . ? . . . The grave doubt that this will occur causes even our most enthusiastic exponents of Civil Code revision to hesitate." *Id.* at 151.

Thus, ten years after the legislature had directed the *Institute* to revise the Civil Code of 1870—but before the task was actually undertaken—one of the chief advocates of the effort was moved to conclude that:

If the project is begun under existing conditions, it will limp along from financial crisis to financial crisis under the handicap of harassed, overworked, frustrated, ever-changing personnel, thus depriving the project of essential continuity.

. . . .

. . . I personally have never abandoned hope that in time, through all the various aspects of the legal-educational process, the law people of this state may be induced to let our *present* Code speak for itself and realize its enormous potential. . . . [U]ntil we are *very* sure that the doubts and fears about which I have spoken can be overcome, so that we have complete confidence we are moving forward and not backward, our efforts to achieve the truly mature legal system must rest upon intelligent loyalty to the very Code [1870] we seek to honor today.

*Id.* at 150-52.

Today, 30 years later still, it would be interesting to compare Professor Morrow's remarks to the candid assessments of the current reporters and research associates to determine which, if any, of these obstacles have truly been overcome.

*But cf.* Tucker, *Tradition and Technique of Codification in the Modern World: The Louisiana Experience*, 25 La. L. Rev. 698, 707-19 (1965) [hereinafter cited as *Louisiana Experience*] (the jurists of Louisiana are quite ready for and capable of the undertaking of revision).



to be as up-to-date as the twenty-first century demands and the human imagination permits. While tradition may dictate retention of three books, contemporary circumstances may call for more books, different arrangements of topics within books, or an utterly different format. In the civil law tradition, no particular number of books has been sacrosanct for compilations of law or doctrinal works. Drafters in the Romanist tradition realized that any structure had both virtues and drawbacks; their trick was to be the masters of the structure, not its slaves. If, after much labor, the drafters found a particular format unsuitable for intelligent elaboration of the law, they experimented with others. On the whole, however, they showed a healthy respect for traditional structures and did not reject them cavalierly.

More than a century has passed since the last revision of the Louisiana Civil Code. According to Colonel John H. Tucker, Jr., the revision of 1870 was undertaken mainly to account for the political changes wrought by the Civil War.[6] For all practical purposes the overall structure of the Louisiana Civil Code has been ignored since Moreau Lislet, Livingston, and Derbigny executed their mandate to remodel the Digest of 1808[7] and saw their code of 1825 approved and promulgated on April 12, 1824.[8] This inattention to the Code's overall structure is perfectly understandable for several reasons. First, civil law jurisdictions of the modern *mos gallicus* had generally followed the French model, and nothing had happened to suggest a deviation. Second, the Prussian *Allgemeines Landrecht* of 1794, with its nineteen thousand-odd paragraphs,[9] offered a warning against cumbersome structures. Third, the Austrian *Allgemeines*

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6. Tucker, *Source Books of Louisiana Law*, 1 La. Legal Archives xv, xxx (1937).
7. *See id.* at xxiii.
8. *Id.* at xxiv. According to Colonel Tucker, the "Code of 1870 [was] substantially the Code of 1825 with these changes: 1) Elimination of all articles relating to slavery; 2) Incorporation of all acts, amendatory of the Code, passed since 1825; 3) The integration of acts passed since 1825, dealing with matters regulated by the Code, but not specifically amending it." *Id.* at xxxi.
9. This Code's chief defect appears to have been its excessive particularity. "Frederick the Great desired . . . a separate provision for every case. This excessive particularity is the greatest fault of the Prussian Code . . . otherwise favorably distinguished from all others by clarity of expression, sound views, and exhaustiveness." A General Survey of Continental Legal History 437 (1912) [hereinafter cited as Survey]. One might think Portalis had the Prussian experience in mind when he said the drafter should write general provisions that were *"féconds en conséquences"* (fertile in effect). *See* Levasseur, *Code Napoleon or Code Portalis?*, 43 Tul. L. Rev. 762, 769 (1969).

*Bürgerliches Gesetzbuch* of 1811 followed the three-book scheme. Fourth, the five-book structure of the Pandectist tradition only began to evolve in the mid-nineteenth century—too late to influence Louisiana's revision of 1870. The first test of the Pandectist model was the Civil Code of Saxony, proposed in 1863 and enacted in 1865.[10] Even if Louisiana's legislators knew of the Saxony Code during the period of the revision of 1870, nothing in it seems to have suggested a need for structural change in the Louisiana Civil Code. Finally, if, as Colonel Tucker suggests, the drafters of the revision of 1870 thought that they were supposed to make a code substantially like that of 1825, except for inevitable changes brought on by the Civil War, their inattention to continental developments is all the more understandable.

A popular and credible explanation of the three-book structure of the French Civil Code is that it had a Roman pedigree. The drafters adopted the tripartite division, we are told, "as a natural heritage of a juridical tradition."[11] The structure is generally attributed to Gaius' famous maxim, *"Omne autem ius quo utimur uel ad personas pertinet, uel ad res uel ad actiones"* (The whole of the law observed by us relates either to persons as to things, or to actions).[12] Justinian's *Institutes* followed this format, thereby endorsing it to future generations of civilians. The tripartite structure has been durable indeed. As recently as 1977, Professor A.G. Chloros wrote of the new civil code of the Seychelles that it "had not broken its links with the French Civil Code as regards its shape and structure."[13]

According to most writers, the Civil Code was a natural outgrowth of Roman heritage. Two lawmakers of revolutionary France, Tronchet and Jaubert, thought it was natural in terms of logic and arrangement as well. For them, the Code's divisions were "born out of the nature of things" and conformed "with

10. Zweigert & Dietrich, *System and Language of the German Civil Code 1900*, in Problems of Codification 38 (S.J. Stoljar ed. 1977) [hereinafter cited as Zweigert & Dietrich].

11. Levasseur, *On the Structure of a Civil Code*, 44 Tul. L. Rev. 693, 696 (1970) [hereinafter cited as *Structure*].

12. Institutes Gai. 1.8. *See generally* 1 F. de Zulueta, The Institutes of Gaius 4-5 (1969) [hereinafter cited as Gaius].

13. A. Chloros, Codification in a Mixed Jurisdiction 6 (1977) [hereinafter cited as Chloros].



the natural movement of ideas."[14] Other writers disagreed, however, pointing out that the tripartite plan of the French Civil Code was an historical accident rationalized after it had occurred by reference to Gaius' maxim. They argued convincingly that the redactors of the French Civil Code avoided serious debate on the merits of the tripartite division. Jean Ray, for example, in his *Essay on the Logical Structure of the Civil Code*, wrote that "the plan of the code was neither seriously examined nor absolutely willed."[15] Ray's observation appears valid well into the 1790's: Cambacérès' *projet* of 1793 was divided into four books—the status of persons, things, contracts, and actions. Although Cambaefès' second and third *projets* followed a tripartite scheme, Jacqueminot's *projet* of 1799 did not,[16] demonstrating that on the very eve of the Code's adoption there was still no consensus about its ultimate shape.

According to Jacques de Maleville, the Code's tripartite division was among the French redactors' last concerns. Discussion of the division occurred only after debate on the various provisions, and the "division . . . into three books was adopted without contradiction by the legislation regulating the classification of titles."[17] Addressing the Conseil d'Etat, he questioned the claims of Tronchet and Jaubert:

> This division might well be doubtful if only because of the enormous disproportion between the third book and the other two. The first book contains only 509 articles; the second only 195; and the third . . . 1571. If this disproportion resulted necessarily from the nature of things, it should not prevent us from following the division adopted; but not every one agrees [that there is such a naturally ordained division]; the first book concerns persons; the second things; the third [concerns] modes of acquiring. It is said that this last division is the whole purpose of the Code and of all civil legislation and that the treatises on persons and things are no more than preliminaries; that this is so true, that the first two books were given some consistency by mixing many things that could be related to the

14. 1 P. Fenet, Recueil Complet des Travaux Préparatoires du Code Civil lxix, cxiii (Paris 1827).

15. J. Ray, Essai sur la structure logique du code civil français 208 (1926) (author's trans.) [hereinafter cited as Ray].

16. For these *projets*, see Fenet, *supra* note 14.

17. 1 J. Maleville, Analyse Raisonée de la Discussion du Code Civil au Couseil d'Etat 2 (3d ed. Paris 1822) [hereinafter cited as Maleville].

> last as (they) are also modes of acquiring. Such examples, in the first book, are the absentee whose relatives profit from absence, marriage, divorce, filiation, adoption, paternal authority; and in the second book, accession, usufruct, use, habitation, and servitudes. Also, did not the judicious Domat, by putting in a preliminary book necessary ideas about persons and things, thus divide his work into two parts, contracts and successions? Despeisses, who treated all the topics of the civil law with great method and clarity, followed the same division; and these two authorities could be followed. Meanwhile the division of the Civil Code can be defended on good grounds; it is simple; each book offers quite distinct objects; it is certainly better than that of Justinian's Institutes . . . and finally it must be agreed that as the same objects can be envisaged from different aspects, every division of these grand subjects is necessarily a bit arbitrary.[18]

Earlier we said that a fixed number of books was not sacrosanct for any compilation of laws. Maleville's observations show that even the French Civil Code should not be excepted from this generalization, if only because it is doubtful that the number of books was ever seriously debated. It is easy to assert that the tripartite structure of the French Civil Code was not sacrosanct. But the truth of the proposition can be demonstrated only by means of historical and comparative surveys of experiments that preceded and followed the enactment of the French Civil Code. Such a survey is necessary to make an informed decision on the structure of the Louisiana revision.

The remainder of this paper is divided (accidentally) into nine parts. Parts II-VI survey a panorama of structures in antiquity and the work of important systematizers of Roman and French law; parts VII and VIII concern the Pandectist heritage and a number of codes enacted after the French Civil Code. Part IX briefly examines current French revision efforts. Part X suggests general criteria for the new blueprint in light of policies associated with Louisiana's unique role as a hybrid legal system.

## II. The Variety of Structures in Antiquity

Although Gaius and Justinian subscribed to a view of society as a civil drama that develops successively the actors (persons), the stage set (things), and the dramatic action (modes of acquisition), neither jurist allowed this conception to dictate the number of books in his work. Each developed his *Institutes* in four books. While Gaius used two books for things, and included obligations in them, Justinian divided obligations between his third and fourth books because obligations were then thought to fit the categories of both things and actions.[19] No number of books appears to have had special significance in Roman literature and legislation. Twelve was the important number for the Twelve Tables and the *Codex Iustinianum*.[20] The Pandects (or Digest) numbered fifty,[21] and the *Codex Theodosianus* had sixteen books.[22] Paul's *Sentences* were in five books.[23] Other divisions of classical Roman works ranged from one book to sixty.[24]

In the Byzantine Empire, the *Ecloga* of Leo the Isaurian consisted of eighteen titles,[25] and the *Basilica* of Leo the Wise, a major restatement and modernization of all of Justinian's legislation, was compressed into sixty books.[26] A later medieval work, the *Hexabiblos* of Constantine Harmenopoulos, written in 1345, consisted of six books.[27] The standard codifications of Eastern ecclesiastical law contained fourteen and fifty titles respectively.[28]

This survey illustrates that classical jurists imposed no preconceived structure on their expositions of law. The tripartite division was chosen principally to permit ample elaboration of the law. The modern civil law owes a debt to Roman law but it is also indebted to medieval glossators and commentators whose revival of the study of Roman law marked the birth of the Romano-Germanic family of legal systems.[29] Medieval scholars ad-

18. *Id.* at 2-3.

19. *See* J. Moyle, The Institutes of Justinian v-viii (1913).
20. J. Wolff, Roman Law 56, 164 (1951) [hereinafter cited as Wolff].
21. *Id.* at 166.
22. *Id.* at 162.
23. Pauli Sententiarum ad filium libri quinque. *Id.* at 137.
24. *Id.* at 133-47.
25. A. Watson, The Law of the Ancient Romans 95 (1970) [hereinafter cited as Watson].
26. H. Jolowicz & B. Nicholas, Historical Introduction to the Study of Roman Law 503 (3d ed. 1972). *See also* Watson, *supra* note 25, at 95; Wolff, *supra* note 20, at 182.
27. Watson, *supra* note 25, at 96; Wolff, *supra* note 20, at 182.
28. The *Nomocanon* in fourteen titles and the *Nomocanon* of fifty titles. *See* J. Meyendorff, Byzantine Theology 80-84 (1974).
29. R. David & J. Brierley, Major Legal Systems in the World Today 49 (2d ed. 1978) [hereinafter cited as David & Brierley].

ded important ideas to the structure of classical Roman law and contributed a new literature. Early in the revival, medieval jurists abandoned rules on outmoded institutions such as slavery because they had disappeared from society. Some classical Roman rules were replaced by rules of different origin. For instance, canon law regulated marriage and wills.[30] The Post-Glossators went still further in adapting Roman law to new social conditions unknown to classical Roman jurists. Their contributions include a rudimentary commercial law, an elaboration of conflict of laws, and new doctrines of criminal law.[31]

According to Professors David and Brierley, "[t]he methods of the Roman jurists were abandoned by European continental scholars: they no longer merely sought to rediscover the Roman solutions, but endeavored to continue, perfect and complete Roman legal scholarship by using Roman law to explain rules adapted to the society of their own time."[32] Although the civil codes of France and Germany reflect the imprint of Roman law, the reflections are rendered impressionistically, rather like Monet's depictions of the Reims cathedral. A modernized Roman law, a *usus modernus pandectarum,* required the efforts of many minds over many years. It has come to us through the Middle Ages, the Renaissance, and the early modern period retouched, and sometimes recast, by members of the Humanist school, the modern school of natural law, and the historical school.

## III. The Contribution of the Enlightenment: A Drive to Systematization

There probably cannot be an exhaustive list of influences and sources of the French Civil Code. Roman law, French customary law, royal ordinances, Germanic sources, and the works of doctrinal writers like Pothier and Domat all exercised an influence, and sometimes even contributed the precise wording of

30. *Id.* at 41.

31. *Id. See also* Wolff, *supra* note 20, at 189-90. A renowned medieval jurist, Bartolus of Sassoferratto, tried to bring order out of the chaos that had resulted from competing systems of Roman law, canon law, and the customary law of his time. His teaching on the theory of statutory interpretation is sometimes considered the real beginning of analysis of the conflict of laws. *See, e.g.*, Bartolus on the Conflict of Laws (J. Beale trans. 1914).

32. David & Brierley, *supra* note 29, at 41.



code articles.[33] Along with these influences must be counted the drafters' drive to systematize and to clarify their law—in short, the intellectual attitude with which they approached their task. The drafters' work figured in a much broader intellectual movement that we now describe as the Enlightenment.

> It was . . . a period inspired . . . by optimism and by faith in the capacity of reason to guide the course of human affairs. Minds were directed toward the discovery and ordering of general ideas, both as standards for criticism and as premises from which consequences could be deduced. There was a strong tendency . . . toward system building.[34]

This system building was nurtured by an era of logic in Europe heralded by Descartes' *Discourse on Method.* "I have been very lucky," wrote Descartes in a self-deprecating tone,

> for certain paths that I have happened to follow ever since my youth have led me to considerations and maxims out of which I have formed a method; and this, I think, is a means to a gradual increase in my knowledge that will raise it little by little to the highest point allowed by the mediocrity of my mind and the brief duration of my life.[35]

According to Descartes, his method imitated the mechanical arts: it developed independently because it contained instruments appropriate for its development. He believed that nature had engraved upon the human mind elementary precepts or rules for the improvement of knowledge.

> The first [rule] was never to accept anything as true unless I knew it was evidently so. The second [rule] was to divide every problem under examination into enough parts for its best resolution. The third . . . to order my thoughts by starting with the simplest objects most accessible to knowledge and to move by degrees to the more complicated ones . . . and the last rule was always to make large enough accumulations and summaries to assure that I had not missed anything.[36]

These rules, dressed in a variety of clothes, appear in the doctri-

33. R. Batiza, Domat, Pothier and the Code Napoléon: Some Observations Concerning the Actual Sources of the French Civil Code 3-4 (private printing 1973).

34. J. Dawson, The Oracles of the Law 236 (1968) [hereinafter cited as Dawson].

35. Descartes, *Discourse on Method,* in Descartes' Philosophical Writings 8 (1st ed. E. Anscombe & P. Geach trans. 1971).

36. *Id.* at 20-21.

nal works of jurists examined later in this paper. They are rules of evidence, analysis, synthesis, and formal induction; though they are characteristic of mathematics, the universal instrument for thinkers of the Enlightment, other disciplines also relied on them. In particular, jurists and philosophers stressed the importance of rigor, order, and certitude; these cardinal virtues of mathematics reached beyond the domain of measurable size and quantity.

"This veritable method," said Pascal of mathematical reasoning "that would form the most excellent demonstrations . . . should consist of two principal items: First, no term should be used unless its meaning was clearly explained. Second, no proposition should be advanced unless it was demonstrated by truths already known . . . all terms should be defined and all propositions should be proved."[37] Pascal's observation expressed an important reorientation for a variety of disciplines: it reflected the growing conviction that conclusions for the legal order could be deduced from general propositions that were permanently valid and were discoverable by the exercise of human reason alone.

Faith in human reason altered the whole mode of discourse current in political and social philosophy in the late 1600's. Hobbes, Spinoza, and Pufendorf, though their purposes differed, "had in common a method which derived from central postulates a series of consequences in a descending level of generality, rigorously organized into a system of mathematical forms of logic."[38] At the same time, Grotius ranged widely over most of private law in search of basic postulates for a society governed by human reason. "The secularization of natural law, which Grotius helped promote, continued under the influence of rationalism in philosophy and new discoveries in mathematics."[39] Just as Galileo had defended the autonomy and systematic integrity of mathematical physics, Grotius, Hobbes, and Pufendorf contended for the autonomy and systematic integrity of law. A general interest in mathematics and a belief in the applicability of

37. B. Pascal, Pensées et opuscules 165 (de Brunschwicg ed.) (quoted in A. Arnaud, Les Origines Doctrinales du Code Civil Français 127 (1969) [hereinafter cited as Arnaud]).

38. Dawson, *supra* note 34, at 235.

39. *Id.*



mathematical principles to other fields cannot be overemphasized. Perhaps it can be driven home with two short anecdotes recounted by Professor A. Arnaud. Arnaud points out that while jurists of the sixteenth century customarily used their leisure to cultivate the *belles-lettres*, during the eighteenth century mathematics became quite the rage for a number of them. Even small local journals helped cultivate and popularize the new passion. The *Affiches de Provence*, that Portalis and Mirabeau may have read, weekly published mathematical problems to be solved by its readership as modern readers would solve crosswords and anagrams.[40] In 1771, the *Galerie française* reported that Chancellor Daguesseau loved mathematical problems because he considered them the natural avenues and routes of the human mind. He acknowledged mathematics as the source of the "luminous order admired in all judicial pleadings, wherein truths are born one from the other."[41]

If human reason could guide the course of human affairs, then the Civil Code was a product and a tool of that reason. Sagnac captured this rationalistic spirit of the code in the following passage:

> The Civil Code should be simple and clear, like the laws of nature. It must be reduced to a small number of articles that flow logically from general principles of the new democratic society. The individual will know the laws that govern him; he will be delivered from the subtleties and infinite complications that deceivers invent at his expense.[42]

While French revolutionaries did their work in the political arena, the jurists, by rationalizing their laws, revolutionized traditional analysis. For law and politics, the Civil Code symbolized a generally held belief that deductive systems based upon certain axioms and postulates could apply to many different disciplines. Among the axioms of the Civil Code were the right to private property and freedom of contract. From these premises could be derived a broad range of specific rules. For example, if the right to private property was axiomatic, then a servitude grant should be strictly construed against the owner of a domi-

40. Arnaud, *supra* note 37, at 123.

41. *Id.*

42. P. Sagnac, La Législation civile de la Révolution Française (1789-1804), at 385 (1898) (author's trans.).

nant estate. Likewise, if freedom of contract was axiomatic, then a contract constituted legislation between the parties, and transfer of ownership required only mutual consent on object and price, not delivery of possession.[43]

We have said that the Civil Code expressed the conviction that human reason could guide the course of human events. Our characterization of the Code as a large deductive system has stressed the element of human reason. But if the Code were just a deductive system, it might have been nothing more than a complex toy. The Code's effect on human events suggests that it was also a powerful tool of social and political change. The French Civil Code was rooted in a new ideology associated with economic liberalism, the dissolution of feudal institutions, the rise of the bourgeoisie, and the emergence of the French nation state. A commonly cited objective of the codification movement in France was the desire to unify French law.[44] That impulse toward unification had several aspects.[45] In large measure, it was a reflection of French nationalism. Unification of the law through codification tended to bring about territorial integrity in France, centralizing political control over the once diverse and fragmented regions of the country by placing them all under the umbrella of a uniform and common body of law.[46] Similarly, unification tended to centralize political control by establishing statute as the primary source of law and by restricting the law-making prerogative to the legislative branch.[47] At the same time, the impulse toward unification had a social aspect. As the Code was blind in its application to the geographical boundaries that

43. These points are developed in Herman, *The Uses and Abuses of Roman Law Texts*, 29 Am. J. Comp. L. _ (1980).

44. *E.g.*, R. David & H. de Vries, The French Legal System 13 (1958); J. Merryman, The Civil Law Tradition 29 (1969); Audit, *Recent Revisions of the French Civil Code*, 38 La. L. Rev. 747, 793 (1978) [hereinafter cited as *Recent Revisions*]; Dawson, *The Codification of the French Customs*, 38 Mich. L. Rev. 765 (1940) [hereinafter cited as *French Customs*]; Maillet, *The Historical Significance of French Codifications*, 44 Tul. L. Rev. 681, 687 (1970) [hereinafter cited as *Historical Significance*]; Pound, *The French Civil Code and the Spirit of Nineteenth Century Law*, 35 B.U. L. Rev. 77, 77 (1955) [hereinafter cited as *Spirit*]; Tunc, *The Grand Outlines of the Code Napoleon*, 29 Tul. L. Rev. 431, 432 (1955) [hereinafter cited as *Grand Outlines*].

45. *Historical Significance*, *supra* note 44, at 687-88.

46. *Id.* at 688. *See* David & de Vries, *supra* note 44, at 15; Merryman, *supra* note 44, at 28-29; *Grand Outlines*, *supra* note 44, at 433.

47. *Historical Significance*, *supra* note 44, at 688. *See* Merryman, *supra* note 44, at 28-29, 30.



had once stitched the face of France, so too was it blind to the social hierarchy that had once stratified the population.[48] This aspect of unification can be seen as a function of natural law theories that had developed in Europe during the seventeenth and eighteenth centuries.[49] The egalitarianism implicit in natural law philosophy demanded that individuals be protected from the arbitrary administration of justice. In England, that protection was sought in the rule of *stare decisis* and the concept of trial by jury; in France, appeal was made to the notion that the law should be written and thereby rendered accessible to the individual citizen.[50] In this way, natural law theory pointed the way toward codification of the private law.[51] But it also had a profound impact upon the nature of legislation that was to embody the rules of private law.[52] As André Tunc has put it, the law, to be accessible, must not only be written—it must be *clear*.[53]

> This justification of a Code [*i.e.*, clarity] may explain the traditional French approach to codification. A Code, for a Frenchman, should be complete in its field; it should lay down general

48. *Historical Significance*, *supra* note 44, at 687. *See* David & de Vries, *supra* note 44, at 12; Dawson, *supra* note 34, at 394; Merryman, *supra* note 44, at 29; *Recent Revisions*, *supra* note 44, at 793-94; *Spirit*, *supra* note 44, at 78; *Grand Outlines*, *supra* note 44, at 432, 434.

49. David & Brierley, *supra* note 29, at 60-61; David & de Vries, *supra* note 44, at 12, 14-15; Dawson, *supra* note 34, at 392-461; Merryman, *supra* note 44, at 29-30; *Recent Revisions*, *supra* note 44, at 793-94; *Historical Significance*, *supra* note 44, at 687; *Spirit*, *supra* note 44, at 77; *Grand Outlines*, *supra* note 44, at 434.

50. *Grand Outlines*, *supra* note 44, at 431-32. *See* David & de Vries, *supra* note 44, at 9-12.

51. The natural law theorist believed that there was a universal law which would provide all men for all time with rules to govern their actions and engender equality and justice. In public law, this philosophical approach provided a legal basis for reaction against royal caprice; in private law, it pointed the way toward codification of the diverse rules existing within a single national territory.

David & de Vries, *supra* note 44, at 12. *See* Dawson, *supra* note 34, at 392. On the school of modern natural law, see text accompanying notes 56-68, 81-84, 103-06 *infra*.

52. David & Brierley, *supra* note 29, at 60-61; David & de Vries, *supra* note 44, at 14-16; Merryman, *supra* note 44, at 29-31; *Recent Revisions*, *supra* note 44, at 793-94; *Spirit*, *supra* note 44, at 77.

53. What remains . . . the permanent basis for a Code, is the principle which was also, historically, its first justification: *The Law Should be Clear*, and stated in written form so that, as much as possible, every citizen would know what are his rights and duties. *Only by this clarity may litigation be decreased, injustices avoided, and freedoms preserved.*

*Grand Outlines*, *supra* note 44, at 434 (citations omitted) (emphasis added).

> rules, and it should arrange them logically . . . . A fourth important feature should also be mentioned, namely, the fact that the Code is grounded in experience.[54]

Professor Tunc's passage, reminiscent of Sagnac's characterization of the civil code, indicates the essential objective of codification: to render the law accessible to citizens by making it clear. For Tunc, this objective demands that the Code have certain characteristics—completeness, an optimal level of generality, a logical arrangement, and a grounding in experience.[55] In short, the objectives of codification demand that a code be a structured artifact. In succeeding sections we shall see a startling variety of techniques and organizational plans utilized by jurists to render the law accessible. Despite individual variations, however, nearly all the plans—and certainly those of French jurists—reflect two ideas: First, the indispensability of a clear comprehensive body of law to achievement of political and territorial unification; second, man's centrality in the legal order and a corresponding emphasis upon the doctrine of subjective right.

## IV. Systematizers of the Roman Law

### *Donellus*

Thanks to the Glossators and Commentators, study of classical Roman law flourished in Italy and France by the twelfth century. Some writers, confident of the powers of human reason, turned the plan of the *Institutes* to their own particular purposes. Loisel's *Institutes Coutumières,* for example, grouped topics of feudal customary law in a framework similar to that of Justinian's *Institutes,* thereby stripping the latter of its classical content. The drive to systematize materials was likewise apparent in the work of Donellus, a French author whose influence in Germany exceeded his influence in France until the 1760's. Unlike Loisel, Donellus systematized the ensemble of available Roman texts. He discarded the accumulation of glosses and commentaries on the *Corpus Juris* and focused on the text of the *Corpus Juris* itself. His overriding purpose was to organize the whole complex of rules as a logically structured, self-contained

54. *Id.* at 435. Compare Sagnac's description given in text at note 42 *supra.*

55. For an elaboration of the relationship between clarification as the essential objective of French codification and the four salient features that describe a civil code, see *Grand Outlines, supra* note 44, at 435-44.



system. According to Professor Dawson, "the method of Donellus was primarily that of strict and rigorous analysis; he repudiated almost entirely the medieval constructions and sought to found his system on the logic of the texts."[56] Donellus evidently conceived his *Commentarii de Iure Civili* as a methodical treatment of law, although the name "commentary" suggests that he wanted it to fit into a traditional genre. For Donellus, however, tradition had limits. His plan did not slavishly follow that of the *Digest* or any other collection of Roman texts. In organizational terms, he distributed the texts according to Gaius' tripartite division—persons, things, and modes of acquisition. Like Domat, whose work would appear two centuries later, he put generalizations about the law at the beginning of his work. Donellus' work resembled the French *Projet* of the Year Eight which also contained a preliminary book on the law in general, and three books concerning respectively persons, things, and the modes of acquisition. Eventually, the French Civil Code itself would reflect these principal divisions.

### *Grotius*

Hugo Grotius is generally credited with having founded the school of modern natural law; and his epoch-making work, *De Jure Pacis ac Belli* (1625), reflected his commitment to rationalistic system building, for it proceeded from the postulate that men are innately reasoning, moral beings imbued with an impulse toward ordered fellowship with one another. Beginning with this postulate Grotius recast the law of nations.

> The original contribution of Grotius is . . . that he separated law from theological speculations, and placed it upon a purely worldly basis of utilitarianism. And this contribution was . . . especially significant . . . because . . . it made its appearance precisely at the moment when the medieval community of peoples, based upon a community of religion, had collapsed.[57]

To appreciate Grotius' contribution, we must distinguish his brand of modern natural law from the earlier medieval natural law, espoused by scholasticism. The difference is elementary, but it bears repeating. For the scholastics, who regarded law as an aspect of theology, law was a natural, unchanging order imposed

56. J. Dawson, Unjust Enrichment 82 (1951).

57. Survey, *supra* note 9, at 412-13.

upon man and nature by a divinity. For Grotius, man was the source of law. This fundamental switch from a divinely ordered law to one that was humanly ordered could occur, so went the argument, if one accepted the postulate that men are innately reasoning beings imbued with social impulses. Napoleon later capsulized the switch: "Who has the place of God on earth? The legislator."[58] Assuming society had a natural, logical, and knowable order, Grotius deduced the private rules of this society from Roman law. From Justinian he borrowed rules of self-defense, property, obligations, contracts, and damages. Grotius deemed the coincidence between his deductions and Roman law a "reciprocal voucher of correctness."[59] He is legitimately credited with having elaborated a "natural" private law down to the smallest details.[60]

*Pufendorf*

Samuel Pufendorf went even further than Grotius. In *Libri Octo de Jure Naturae et Gentium* (1672), he started from individualistic premises of the modern natural law and founded a system based upon the concept of subjective rights. According to Pufendorf, men, by definition, had inherent natural rights that they could enforce. These rights of the individual were independent of family and state; they rested upon doctrines of self-preservation, mutual fair conduct, and the performance of contractual duties under the social compact. The laws of property and obligations rested upon the same bases. He divided his *magnum opus* into eight books: generalities on the moral sciences; duties of man to himself regarding his soul and body; duties of man toward others; agreements in general; rights over property; duties flowing from property; duties growing out of engagements; rights and duties toward persons in the *familia*, including children and servants; and in the last two books, rights and duties of the sovereign.[61]

At the center of Pufendorf's system was man, the subject of all rights. Precursors of Bentham's prudent pleasure maximizers, by now familiar fixtures to every law student engaged in utilitarian interest balancing, Pufendorf's men had understanding, and could thus calculate the consequences of their acts. They were autonomous and thus could select their acts. If these assumptions were correct, then legal precepts became imperatives directed at man's free will and threatening him with punishment for disobedience. Pufendorf's work shows that he was thoroughly familiar with Roman law, to which he adhered in almost all points except for a few isolated Germanic legal sources. He almost always justified his appeal to Germanic sources on grounds of simplicity, clarity, and *aequitas juris naturalis*.[62]

58. Ray, *supra* note 15, at 129.
59. Survey, *supra* note 9, at 411.
60. *Id.*
61. *Id.* at 415-16.



In contemporary scholarship there is debate over the extent to which Pufendorf's system emphasized rights over duties. To some writers, Pufendorf's system was unduly egoistic; it was a system "of rights, not duties."[63] They viewed the French Declaration of the Rights of Man as the culmination of Pufendorf's "unruly emphasis on rights and a subordination of corresponding duties."[64]

This observation is contradicted, to an extent, by Pufendorf's division of law into two parts, the first devoted to general rules that guide human actions and the second to social life where the main cells are the family and the state. It may be argued that Pufendorf's entire work was based on a notion of duty, expressed even in the title of his *De Officiis Hominis et Civis Juxta Lege in Naturalem Libri Duo*. According to Professor Peter Stein, the combative and cooperative impulses in Pufendorf's man were probably in equipoise. Altruism balanced egoism. In support of this proposition Professor Stein quoted the following passage:

> [M]an is an animal extremely desirous of his own preservation, in himself exposed to want, unable to exist without the help of his fellow-creatures, fitted in a remarkable way to contribute to the common good, and yet at all times malicious, petulant and easily irritated, as well as quick and powerful to do injury.[65]

Some scholars consider Pufendorf's man essentially altruistic and cooperative. According to Professor Michel Villey,

62. *Id.* at 417.
63. *Id.* at 416.
64. *Id.*
65. S. Pufendorf, De jure naturae II.3.15 (C.H. & W.A. Oldfather trans. 1934) (quoted in P. Stein, Legal Evolution 5 (1980)).

Pufendorf acknowledged that "a certain order is imposed morally on men and it is discovered through observation of nature."[66]

> Whoever examines nature realizes that society consists of the individuals living in it. Everyone has, at the outset, duties to fulfill toward himself and others. And because legal agreements are the very expression of links among individuals, men's duties are expressed notably by the sincerity in the agreements. Whoever says agreements means also reciprocal duties, for duties have correlative rights, the most typical one being the right of property resulting from acquisition of goods. Finally, from the management of property flows a series of contracts in which individuals recognize mutually their rights and duties. . . . Man still has duties in his role as a member of society, whether he is in the family or the state.[67]

Whether Pufendorf's human being was essentially combative, cooperative, or a complex combination of many impulses, the trio of individual, family, and state formed the basis of his organization.

*Leibniz*

Leibniz, an important metaphysician and the inventor of the calculus, applied the methods of rationalistic systembuilding to the division of Justinian's *Institutes*. Influenced by Donellus, whom he often cited, Leibniz had already seen Grotius' great achievement before he published his *Nova Methodus discendae docendaeque jurisprudentiae* in 1667. Like Descartes, Leibniz linked reasoning to logic and mathematical principles. For him, reason meant "not the faculty of reasoning, that may be either well used or badly used, but the interconnection of truths that can only produce truths; one truth cannot contradict another."[68] As a logician, Leibniz stressed that logic, if it was to become truly inventive, had to abandon traditional scholastic paths.[69] For Leibniz Roman law required reorganization. Justinian's *Institutes*, as well as those of Gaius, were chaotic, and therefore

66. Villey, Les fondateurs de l'école du droit natural modèrne au XVII siècle 86 (1961) (quoted in Arnaud, *supra* note 37, at 137) (author's trans.).
67. Arnaud, *supra* note 37, at 137-38.
68. 9 G. Leibniz, Oeuvres historiques et politiques 300 (Belaval trans. 1768).
69. E. Cassirer, The Philosophy of the Enlightenment 253 (F. Koelin & J. Pettegrove trans. 1951).



impossible to study. For example, Leibniz asked whether it was sensible to divide matters into persons, things, and actions. Because actions arose from either persons or things, he did not see the need to put actions in a separate category. It should be remembered that Gaius' *Institutes* treated freedmen and slaves in a single book on persons. Fragmentary regulations on this subject were scattered throughout Justinian's *Institutes*. One could argue that if slaves belonged to the category of things, freedmen belonged to a book on persons.

To end the chaos, Leibniz proposed two systematic textbooks. The first would be an elementary work, reminiscent of the Twelve Tables for its lapidary terseness. It would proceed rigorously from general propositions to specifics, from genus to species. The second book was to be a *"Novum corpus juris,"* a newly systematized version of classical Roman law. Legal exegesis even demanded an encyclopedia of law that explained *"philologia juris," "grammatica legalis seu lexicon juridicum," "ethica et politica legalis,"* and *"logica et metaphysica juris."* Unfortunately, Leibniz executed little of his ambitious program. By commission of the electoral prince of Mainz he began work on Justinian,[70] but his greatest scholarship was to be done in mathematics and physics. Nevertheless, his jurisprudential work contained advice on a method for constructing a body of law appropriate for his time. Like a lantern holder in a cave, he showed jurists a way to reconstruct their materials in a logical, quasi-mathematical form. Starting with the *qualitas moralis* of juridical acts as a base for the whole body of law, a jurist could examine serially subjects, objects, and modes of acquiring things. An axiomatic system could be constructed by deriving from first truths immediate consequences and then more remote ones.[71]

## V. French Systematizers

*Domat*

Domat's *Les Lois Civiles dans leur Ordre Naturel* has been called the preface to the *Code Napoleon*.[72] It is remarkable for both its philosophical spirit and its unification of Roman

70. Survey, *supra* note 9, at 422.
71. Arnaud, *supra* note 37, at 132.
72. Survey, *supra* note 9, at 269.

sources, customs, French legislation, and decisions. In the purest Cartesian terms, Domat announced his approach and objectives in the beginning of his work:

> The design of this book is to put the civil laws in their natural order, to distinguish the subjects of law and to assemble them according to their rank in the body they naturally compose; to divide each subject according to its parts; and to arrange in each part the detail of its definitions, of its principles and rules, advancing nothing either not clear in itself or not preceded by all that is needed to make it understood.[73]

Domat's avowed approach sounds so much like Descartes' analytical method that the reader may wonder whether Domat had Descartes' *Discourse on Method* before him as he wrote. The result of Domat's method was a logical rigor uncommon for his time. Portalis said that Domat was the first jurist to "deal in generalities."[74] Boileau expressed his gratitude to Domat for having been the first to show him the hidden plan and wisdom of legal science. He called Domat the "restaurateur" (restorer) of reason in jurisprudence.[75]

Domat, like his close friend, Blaise Pascal, had studied mathematics. He applied the rigor of mathematics to the composition of his work. Starting with the most general maxims, "he arrived by degrees . . . at the most particular dispositions, thereby impressing on all details of the laws the breadth of their first principles, and giving to the whole edifice an austere and majestic simplicity."[76] He viewed himself as a scientist of the law, and with a scientist's dedication he sought to bring order out of the chaos of the *Digest*. On the need for certainty and clarity of law, he said:

> Since . . . there is nothing more necessary in sciences than to possess their first principles, and . . . every science starts by establishing its own principles and by setting them in a light whereby their truth and certainty may be best discovered . . . they may serve as a foundation for all the particulars that depend upon them. It is important to consider the principles of law, in order to know the nature and firmness of the rules that depend on them. . . . The first principles of law have a character of truth, that touches and persuades more than that of the principles of other human sciences . . . a character of truth which everybody can know and which affects the mind and heart, spirit and reason, alike.[77]

73. Rémy, *Préface de l'editeur* to 1 Oeuvres Complètes de Domat, at vi (J. Rémy ed. Paris 1835) (quoting Domat but not identifying source of quotation) (author's trans.).
74. Survey, *supra* note 9, at 269.
75. Arnaud, *supra* note 37, at 146 n.405.
76. *Id.* at 143.



For Domat, a law depended upon "natural, immutable principles of equity," such as no man should injure another, each should receive his due, and each must be sincere in his engagements and faithful in all sorts of agreements. For Domat, these maxims also expressed a Christian ethic. Human links were founded in *caritas*, and they fell generally into two classes: Matrimonial and familial ties on one hand, and relationships of the workplace on the other. Without such ties, there would be no human society. Assuming the correctness of these two categories of relationships, Domat divided the bulk of his work into engagements and successions, the latter requiring separate elaboration because "one generation had to transmit wealth to the next" irrespective of agreements. Domat introduced his work, *Les Lois Civiles dans leur Ordre Naturel*, with a book on notions of law in general. Domat's work was widely read and well received. The Count Portalis wrote that "Domat proceeds as a geometer and ranks in natural order all the subjects of jurisprudence . . . . Domat was the precursor of codification. He inspired Pothier, who is preferred."[78]

It is worth recalling here Maleville's remarks, quoted earlier, on the redactors' uncertainty about the structure of the French Civil Code. "The judicious Domat, by putting in a preliminary book necessary ideas about persons and things, divided his work into two parts, contracts and successions."[79] The French drafters rejected Domat's format; Portalis' preliminary book, probably inspired by Domat, was junked, except for six articles.[80]

*Daguesseau*

In a discussion of the systematization of laws Chancellor Daguesseau may seem anomalous because he did not achieve a

77. Domat, *supra* note 73, at 1.2.
78. Arnaud, *supra* note 37, at 146.
79. Maleville, *supra* note 17, at 3.
80. Later, we shall consider the wisdom of retaining or altering the preliminary title on laws in the Louisiana Civil Code. Several of its articles reflect Domat's influence. *See* text at notes 210-18 *infra*.

full synthesis of French law. But his ordonnances on donations, wills, and substitutions contained numerous articles that appeared ultimately in the Civil Code. Like Domat, Daguesseau wanted to systematize French law and to create a plan inspired by the school of modern natural law founded by Grotius and Pufendorf. Broadly educated in mathematics, Daguesseau showed his commitment to logical systematization even in his daily correspondence. He recommended reading the preliminary book of Domat's *Lois Civiles* because Domat, according to Daguesseau, followed "the method of geometers in which (he) was trained, fixing first the rules and general axioms that influenced all parts of the jurisprudence."[81] In his writing on general notions of natural law, he showed himelf to be a faithful representative of the school of modern natural law, and his system represented a synthesis of Pufendorf and Domat. It will be recalled that Pufendorf derived his system from individualistic principles: man was viewed in terms of his duties toward God, his duties toward himself, and his relationship with society. Domat's system was premised on Christian charity. Daguesseau united Pufendorf's tripartite ensemble with Domat's Christian ethic.

> Man, who is placed by an invisible and omnipotent hand between God, his creator, and other creatures who are his equals, sees easily that all his thoughts, actions, and desires flow toward three main goals. The first is God, author and final end of his being; the second is man himself; the third society, that is, a man's fellows, to whom he is tied by natural inclination and reciprocal needs.[82]

Daguesseau divided obligations into three parts, and in the third part he identified two wellsprings of all obligations, variations on the Golden Rule: "I should never do to others what I would not want done to me," and "I should always act for their advantage or benefit as I would desire them to do for me."[83] These ethical maxims echoed the theme of *caritas*, the essence of Domat's system.

81. Arnaud, *supra* note 37, at 148.

82. H. Daguesseau, *Essai d'une Institution au Droit public*, in 1 Oeuvres d'Aguesseau 447 (Paris 1759).

83. *Id.* at 475.



*The Procedural Plan of Prévôt de la Jannès*

Thus far, we have described a variety of plans—all based on substantive law—to show that there was nothing sacrosanct about the tripartite division of the French Civil Code. To modern eyes, the plan of Prévôt de la Jannès, Pothier's predecessor in the chair of French law at Orléans, seems curious. Unlike the plans of Domat and Daguesseau, this work was based upon procedure because the author felt such an approach would assist practitioners. But Prévôt de la Jannès went well beyond the modest procedural format he first proposed, imbuing his plan with a remarkably modern formulation of subjective right:

> All the rights a man may exercise vis-a-vis his fellows are reducible to two types; rights in things and rights over persons. The first arises when something belongs to me, either in full ownership, or in certain respects. . . . I have the right to oblige its possessor to let me enjoy it, though he has no legal agreements with me. The second arises when someone is obliged by an agreement personal to him to do something for me or to give me something, and in this role I have the right to constrain him. Whence comes the principal . . . division of actions into real ones and personal ones . . . . Real actions are the ones whereby we pursue directly our rights in things. Personal actions are those whereby we pursue our rights over persons.[84]

The author, passing quickly over persons, first analyzed real actions, including possession, ownership, successions and wills, hypothecs, feudal matters, and servitudes. The second major part of his work concerned marriage, obligations, tutorship, and procedure *stricto sensu*. To modern eyes this "procedural" plan might seem to lead up a blind alley, but it did not. For the plan of Prévôt de la Jannès was informed by the theme of subjective rights sounded earlier by Pufendorf and Grotius. His coherent deductive system flowed from the natural lawyers' assumption that man was at the center of the cosmos and ought to shape his own destiny.

As we have seen, three French writers—Domat, Daguesseau, and Prévôt de la Jannès—inventively developed rational syntheses of French law that were not based on the tripartite division suggested by Gaius' maxim. Of these writers, only Domat offered

84. Prévôt de la Jannès, Les Principes de la Jurisprudence française exposée suivant l'orde des diverses espéces d'actions qui se poursuivent en justice 7-8 (Paris 1770).

a work of immediate relevance to the drafters of the *Projet of the Year Eight*. Daguesseau's work remained incomplete. The work of Prévôt de la Jannès had little influence upon the drafters of the Civil Code, perhaps because it appeared superficially to be only a manual of procedure.

## VI. The Tendency Toward the Archetype of the Institutes

During the seventeenth and eighteenth centuries, the tripartite division of the *Institutes* increasingly intrigued French jurists. Despite individual variation, the works examined here were all organized according to the rubrics of persons, things, and actions. We shall see also how several of these writers, because of individual preferences, filled the classical form with new and distinctive content.

### *Lamoignon*

Earlier we noted that Loisel cast topics of feudal customary law in the framework of the *Institutes*, thereby stripping them of classical content. During the reign of Louis XIV, Lamoignon, President of the Parlement of Paris, used the external structure of the *Institutes* to elaborate the *Arrêtés*, a work based principally on the Custom of Paris. Lamoignon summed up the purpose of his work in these terms: "A principal goal of the ordonnance . . . was to give as much as possible a general law to France and to correct certain extraordinary usages introduced in some places against the common law."[85] His work was in five parts: Persons, things, actions and obligations, rights arising from marriage, and successions and wills. By means of these divisions, he sought to alleviate the disorder of the Custom of Paris. The three legal rubrics of the *Institutes*—persons, things, and obligations—shone through in his organization of materials. Obligations occupied two parts of the work because questions about the community of gains had become more complex than they were in classical Roman law. Successions and wills, which Lamoignon considered modes of acquisition, appeared in a final chapter, and actions, that is, sanctions for failure to perform obligations, were treated together with them. According to Viollet, Daguesseau drew inspiration from Lamoignon's *Arrêtés*, and the

85. P. Viollet, Histoire du droit civil *français* 241 (3d ed. 1905) (author's trans.) [hereinafter cited as Viollet].



redactors of the French Civil Code must have had his work close at hand when they carried out their task.[86]

### *Claude Fleury and Gabriel Argou*

These men were contemporaries as well as close friends. Indeed, scholars like Laboulaye believed for many years that they collaborated on a work called *Institution au Droit francais*, though now it is thought that each man executed his own work but sometimes attributed it to anonymous authors.[87] At first glance, the old plan of the Roman *Institutes* does not seem to form part of Fleury's *Institution au Droit francais*, for it had eight parts: Public law, private law (persons), things, obligations, obligations-part two, civil procedure on the trial level, civil procedure on appeals, and criminal procedure on the trial level. Almost clairvoyantly, Fleury perceived the classical distinctions now taken for granted between public and private law and between civil and criminal procedure. Stripping away public law and procedure, we find the three traditional masses of the *Institutes*, with obligations substituted for the classical category of *actions*. In Fleury's work of the late 1600's, we witness the transformation in France of the Roman *Institutes* into a modern plan based on a tripartite mass that envisaged successively persons, things, and obligations. According to Professor Arnaud, Fleury's elaboration is distinctly modern because the three main subjects are interdependent. As in the work of Grotius and Pufendorf, Fleury elaborated everything in terms of the individual—the holder of subjective rights enforceable against other persons by means of certain procedures. Fleury was aware that he was proposing a conception of law consistent with tenets of modern natural law:

> Private law consists of two points, the rights of each individual and the manner of rendering to each one what belongs to him, which . . . are called substance and form. To treat substance, we must explain who are the persons and which things belong to them. And persons must be *treated first because law is established only for them.*[88]

86. *Id.* at 241.

87. Arnaud, *supra* note 37, at 301.

88. 1 Fleury, Institution au Droit français 215 (Laboulaye & Darest ed. 1858) (quoted in Arnaud, *supra* note 37, at 158) (emphasis added).

Fleury's terminology was distinctly modern. At once he used the word "right" in the sense of "subjective right," a notion rooted in the primacy of the individual; he established utility as a goal of the law; he established as the jurists' goal the organization of the whole mass into a modern rational system in which man is the primary datum; and his fundamental postulate *a priori* was man's inherent and natural freedom to have and to exercise rights.

Like Fleury, Argou split his *Institution* into three parts—persons, things, and obligations—thereby salvaging the framework of Justinian's *Institutes*. But the beginning of his work, like that of Fleury, reflects his intention to transform their content:

> All law of individuals consists in two parts, the rights of each individual and the manner of rendering to each what belongs to him. First we shall examine *persons*, because the laws are made for them only; then we shall explain *things*, and then the necessary means to acquire and to keep them.[89]

The works of both Fleury and Argou infused into the structure of the *Institutes* a utilitarian, individualistic cast of mind that reemerged in the French Civil Code.

*Bourjon*

After reading the works of generations of jurists, Bourjon lamented their failure to compile a unique and comprehensive body of French law. His impatience was reflected in his comments on the *Coutume de Paris*:

> The plans of the Commentaries can be reduced to two categories. Some followed the letter of the custom and commented on the letters as they appeared. Others, more exact and more reflective, . . . gave a certain arrangement to the letter . . . neither method could form a complete body . . . . They had to be reunited, but the size of the reunion was an obstacle to its order. The order was achieved only piecemeal. First, everything was gathered, but the final goal could be reached only by order, precision and harmony over a complete whole.[90]

89. Argou, L'Institution au Droit français 2 (11th ed. 1787) (quoted in Arnaud, *supra* note 37, at 159) (emphasis added).

90. Bourjon, *Dissertation* to Le Droit commun de la France et la Coutume de Paris (Paris 1747) (quoted in Arnaud, *supra* note 37, at 159-60).



Convinced that the text of the Custom needed rearranging, Bourjon set for himself the task of doing for law what Bossuet in his *Discourse on Universal History* had done for history. To attain his goal, he established in Cartesian fashion several principles:

> To divide the whole so that one can find all decisions under the same title and chapter . . . . By means of this precision . . . all the matters or topics can be seen, and all their branches appear in their order . . . They will be born by degrees one from the other; briefly, to put the common law of France, together with the Custom of Paris, into their natural order . . . doing what Domat has done for the civil law, . . . going further than he went in terms of the exactitude of the division.[91]

Using Domat's work as a model, Bourjon intended to write a complete and unified body of French law, a structured artifact useful for practitioners. Although the two authors' methods were similar, their results differed. First, Bourjon's *Droit commun* closely followed the *Institutes*, for he based it on the tripartite division into persons, things and obligations. Second, in contrast with Domat's plan, Bourjon's work was not based upon subjective rights; autonomy of the will and equality of individuals, cornerstones of the French revolutionary legislation, were not essential to the fabric of Bourjon's work.

The drafters of the Civil Code had Bourjon's work before them. The two documents are similar in many ways, both externally and in terms of details. Comparing them closely, however, we see that feudal aspects of Bourjon's work like *"garde noble et bourgeoise"* and *"retrait lignager"* disappeared from the Code. Furthermore, Bourjon's work contained no general theory of ownership or obligations. For such general notions, one must look under Bourjon's title on fiefs and under the various contracts. The echoes of feudal law in Bourjon's work are understandable. Far more than the drafters of the *Code civil*, Bourjon relied on the Custom of Paris, producing what has been called "a new Custom of Paris in lovely order, logically deduced, carefully divided."[92]

91. Bourjon, *supra* note 90 (quoted in Arnaud, *supra* note 37, at 161-62).

92. Viollet, *supra* note 83, at 251.

*Pothier*

No study, however brief, of the precursors of the French Civil Code would be complete without a discussion of Pothier (1699-1772). This is especially true for Louisiana lawyers who, as students and practitioners, know Pothier's name as well as they know Corbin and Williston. Pothier's work, translated into English more than that of any other French jurist of the pre-Revolutionary period, is also familiar elsewhere in the United States. His treatise on obligations is cited by the foremost Anglo-American scholars including Lon Fuller,[93] Grant Gilmore, and Friedrich Kessler.[94] According to Richard Danzig's heavily documented study of the great English case, *Hadley v. Baxendale*,[95] Pothier's thought figured prominently in nineteenth century English damage formulations. Indeed, English judges may have read Pothier as much as they read Sedgwick.[96] Despite his popularity, Pothier's originality has been questioned, most notably by Professor Dawson.

> The draftsmen of the Code, facing an abundance [of scholarship] so overwhelming, chose the simplicities of Pothier. For he had managed, just in time, to produce a shallow but readable statement that for some persons, strangely, still has charms. The lawyers of the old regime, for whom he became the ultimate spokesman, deserved from posterity a better fate.[97]

Dawson's criticism is relentless. In *Unjust Enrichment*, he also attacked Pothier's work:

> The chief feature of Pothier's discussion was its total lack of originality. He was in general a man of quite inferior talent, with a gift for simplification. He was the French Blackstone, without Blackstone's dominant motive of apologizing for existing social and political institutions. The principal sources for Pothier were the Roman texts, which he interwove with contemporary French ideas in an ingenious and readable manner.

93. L. Fuller & M. Eisenberg, Basic Contract Law 27 (3d ed. 1972).

94. F. Kessler & G. Gilmore, Contracts: Cases and Materials 96 (2d ed. 1970).

95. Danzig, Hadley v. Baxendale: *A Study in the Industrialization of the Law*, 4 J. Legal Stud. 249, 257-59 (1975). Professor Danzig credits Professor A.W.B. Simpson with having traced the *Hadley* formulation of liability for breach of contract into Pothier's writings and Sedgwick's *Treatise on the Measure of Damages*. On Pothier's significance in nineteenth century American law, see Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 Va. L. Rev. 403, 412, 422 (1966).

96. Danzig, *supra* note 95, at 259.

97. Dawson, *supra* note 34, at 350.



> On unjust enrichment he went straight back to Roman law but gave a most incomplete version. . . . The ornamentation of Pothier's argument, with equity and quotations from Pomponius, has served to disguise the substance. In substance his appeal to the Roman texts was a misleading simplification. He narrowed down the scope of unjust enrichment remedies to much less than was known in classical Rome. French law was to pay a price for using Pothier as its model.[98]

Equally bitter attacks on Pothier appear elsewhere in Professor Dawson's scholarship. We should take special note of his views for two reasons: First, Dawson is a meticulous scholar who, as a rule, makes judgments cautiously; second, Pothier is among the most often cited French writers in Louisiana jurisprudence. Any survey of Pothier's contribution must acknowledge that while his charm and originality can be debated, his dedication and single-minded purpose cannot. Pothier, by nature timid, even reclusive, must have spent all of his waking hours in legal scholarship, for he left modern civilians at least twenty important treatises on a vast array of subjects including the Custom of Orleans, Roman law, numerous topics in civil law, and even maritime law. He succeeded Prévôt de la Jannès as professor of French law at Orleans, and he continued the work of his predecessor. According to Viollet, these two jurisconsults "were recommended by the same qualities . . . simplicity, clarity, and a spirit of popularization. . . . All of the treatise of Pothier became habitual reading, the bread of jurisconsults who came to draft the Civil Code."[99] Though Pothier was not as original as Domat and Donellus, he shared with them a drive to systematize his materials and to put them in a natural order. This drive appears even in Pothier's earliest works, a treatise on the *Coutume d'Orléans* and a Roman law text, *Pandectae Justinianeae in novum ordinem digestae*. His commentary on the Custom of Orleans, was preceded by a general introduction to the customs consisting of 122 articles and four chapters. Predictably, the chapters reflect the tripartite division of Justinian's *Institutes*.

Superficially, Pothier's *Pandectae* are very similar to Justinian's *Digest*. He deals with the fifty books in their usual order. But at the end of the *Pandectae* there appears the phrase

98. J. Dawson, Unjust Enrichment 95-96 (1951).

99. Viollet, *supra* note 83, at 253.

*"operis divisis,"* indicating that he was beginning a new work. Apparently, Pothier intended to publish the two works separately, but Chancellor Daguesseau persuaded him to combine them. Pothier introduced this *"operis divisio"* as follows: "The work is divided into five parts. The first treats general rules of natural law or of civil law. . . . The second concerns persons, the third things, and the fourth actions. The fifth we depute to public law."[100] Upon Gaius' traditional tripartite scheme Pothier imposed rationalistic notions of the school of modern natural law.[101] His use of *jura* and *jus,* especially in his treatise on property, reflected a sensitivity to the idea of subjective rights. He began, traditionally enough, with the categories of *res in commercio* and *res extra commercium,* and then divided the former category, as did the classical Romanists, into corporeals and incorporeals. But, in his examination of the utility of things, an item of interest to the modern temper, he elaborated *jura* in the sense of subjective rights and further subdivided them into *jura in re* and *juras ad rem.* His division of topics under the rubric "obligations" would become a blueprint for the French Civil Code and codes modelled upon it. Pothier's imprint would appear in the style of the Code as well as its substance. Instead of simply reordering Justinian's texts, he broke up large topics into brief, staccato sections and articles, linked together logically.

In view of what we have said of Pothier, Professor Dawson's observations about him deserve re-examination.[102] Indeed, as Dawson writes, Pothier may have been average in terms of his originality. Perhaps it was this "average" quality that made his work attractive, for the French Civil Code was to be understood by the average French citizen, as well as the scholar. Pothier's clarity, simplicity, dedication, and systematic spirit are virtues not lightly discounted, for they contributed to the pedagogical soundness of his work. They would be welcome in a jurist today, even if he had nothing new to say.

100. 3 R. Pothier, Pandectae Justinianeae in novum ordinem digestae L50, T17 (quoted in Arnaud, *supra* note 37, at 165).

101. Arnaud, *supra* note 37, at 165-67.

102. *See* text accompanying notes 97-98 *supra.*



## VII. The Pandectist Heritage, the German Civil Code and its Influence

The legal community of Louisiana, to have a full inventory of organizational schemes for a new civil code, must take account of the German Civil Code, and the Pandectist heritage that inspired its style and substance. The German Code is today the "other" great civil code of western Europe. In terms of doctrinal ancestry, the German and French Codes have much more in common than might be supposed. Both were based on the premise that territorial and political unity required a comprehensive accessible body of law, and the genesis of both appeared in the work of Donellus. One of the first continental systematizers, Donellus, had a profound impact upon German doctrine, for he spent nine years of his wandering career on German law faculties after he was exiled from France. It will be recalled that Donellus' chief purpose was to organize the whole complex of Roman law rules as a logically structured, self-contained system. Thus, his work was an easily imported commodity. According to Dawson, he was "a precursor of the German nineteenth century Pandectists in his attempt to construct out of Roman law sources a superstructure of theory valid for any time or place."[103]

The founder of the Pandectist School was Christian Wolff (1679-1754), professor at the University of Halle. Because the importance of mathematical precision in legal inquiry has been stressed so much already, the following description of Wolff's approach may already be anticipated:

> [Wolff's] presentation excluded all inductive and empirical elements through deduction, without gaps, of all natural law rules from axioms, down to the smallest details. Every particular rule is derived from the previous, more general rule in the strictest logical sequence and requires in the process the exactness of geometrical proof, which is achieved by a logical chain of reasoning by exclusion of the opposite. In this manner is produced a closed system the basis for whose validity is the freedom from logical contradiction of all its assertions. . . . If the basic method of the older legal science [before Wolff] was derivation by analysis from an authoritative text, the ultimate scientific ground for decision becomes, primarily through his

103. Dawson, *supra* note 34, at 233-34.

> influence, the synthesizing concept, drawn from the rule of next highest generality by means consistent with the system. . . . Wolff thus became the father of the "jurisprudence of conceptions" or "constructions" which dominated the science of the Pandects in the nineteenth century . . . and despite severe crises over legal method is still operative [in Germany] today.[104]

Later German systematizers, chiefly academicians, were influenced by Wolff, even when they reacted against him. According to Dawson,

> Germany had emerged from the Middle Ages with a disordered mass of highly localized rules. The absence of means to organize them had been due most of all to the medieval breakdown of government, the dispersal of the judicial function and reliance on lay adjudicators who were neither equipped nor motivated to express their solutions in intelligible rules that reached beyond particular cases. One of the attractions of Roman law was that it did supply a vast mass of rules, worked over, applied and integrated by concerted efforts over centuries. Even so the reception in Germany had been selective. . . . Much more important was the effect of the reception on German legal method. As one distinguished historian has put it, the lasting effect of the reception was that German law was "scientificized." (*verwissenschaftlicht*).[105]

As the nineteenth century progressed, the ascendancy of academic jurists, established more than 200 years earlier as a by-product of the reception of Roman law, was made more secure. The seeming logic of the Pandectist approach became common coin among German lawyers. The *Pandectenrecht* movement culminated in the work of Windscheid, whose three volume work appeared in stages between 1862 and 1870. According to Dawson, Windscheid's writings, because of their influence, may be compared with the Accursian gloss of medieval Italy. His works were adopted as the statutory law of Greece, and remain the primary source for anyone seeking access to Pandectist learning.[106]

The German Civil Code was a monument to the Pandectist

104. F. Wieacker, Privatrechtsgeschichte der Neuzeit 193 (1952) *cited and translated in* Dawson, *supra* note 34, at 237. *See also* G. Wesenberg, Neuere deutsche Privatrechtsgeschichte 132, 134 (1954).

105. Dawson, *supra* note 34, at 237-38.

106. *Id.* at 459.



school in general and Windscheid in particular for he had a commanding influence over the first drafting commission of the Code. The judges and lawyers who formed a majority of the commission had all been trained in the Pandectist system and knew Windscheid's writings well. Though Windscheid died before the Code was promulgated, it "embodied . . . the methods and the instruments of cerebration that Windscheid had best exemplified."[107]

> The structure and style of the Civil Code clearly mark it as the ultimate triumph of the Pandectists. It opens with a General Part that arches over the whole, cast at the highest level of abstraction. It then proceeds through descending levels of generality—all obligations, then contractual obligations, then particular contracts and noncontractual obligations, and so on. These provisions all interlock and all must be constantly kept in mind. The language is . . . copied from Pandectist textbooks, though extremely condensed; it is a special language, artificial and refined, and is used throughout with rigorous consistency. . . . It was addressed to lawyers, for whom each word should strike a chord resonating back on their own well-tempered scale.[108]

In its treatment of persons, things, and legal transactions, the German Civil Code reflects the Roman division of the *Institutes*. But it is divided into five books: the general part, obligations, things, family law, and inheritance. Although the Roman tripartite division was conceptually helpful to the drafters, it did not fix the Code's structure. The practical structure of the German Civil Code developed around major institutions of the civil law as it had evolved from the *usus modernus Pandectarum* in response to needs of modern society.

The format of the German Civil Code has adherents and has spurred innovation. It has furnished the model for the Civil Code of Greece, as well as the codes of a number of Soviet Socialist Republics, Poland, and Czechoslovakia.[109] Austrian treatises, by including a general part, reflect the influence of the Pandectists. This is so, even though the Austrian Civil Code itself contains no general part.

107. *Id.* at 459-60.

108. *Id.* at 460.

109. *See* David & Brierley, *supra* note 29, at 85.

The influence of the German scheme did not stop in Europe. The Civil Code of Brazil clearly reflects the influence of both the German Civil Code and German scholarship. A leading commentary on the Brazilian code is studded with references to Leibniz, Endemann, Kohler, Savigny, and Windscheid.[110] The Brazilian Civil Code itself consists of an elaborate general part divided into three books—persons, things, and juridical facts and acts. This last category especially reflects the imprint of the German Civil Code, which generalized the idea of an all-inclusive category of juridical acts.

In this century the Swiss Civil Code of 1912 and the Swiss Code of Obligations of 1881-1912 constituted the first significant variations on the German theme.[111] Although the Swiss legislators rejected the idea of a separate general part, their dual codification has five parts: Persons, family law, inheritance, things, and obligations, including provisions both civil and commercial.[112]

## VIII. Mid-Twentieth Century Civil Codes: Continental Innovations

### *Italian Civil Code*

After the Swiss Codes, the Italian *Codice Civile* of 1942 was the next major revision of this century.[113] Its innovative structure represented a major departure from both the French and the German codes, although in one respect it is more like the French.[114] Revisers of the Italian Civil Code considered and rejected an elaborate general part on the ground that it was suited to legal scholarship, not legislation.[115] However, the drafters included in their Civil Code substance formerly in the Code of Commerce of 1882. Thus, the Italian Civil Code of 1942 contained a distinct body of law responsive to a growing market economy.[116]

110. Código Civil dos Estados Unidos do Brasil 80-90 (C. Bevilaqua ed. 1975).
111. Zweigert & Dietrich, *supra* note 10, at 42.
112. *Id.*
113. *Id.* at 43.
114. Cappelletti, Merryman & Perillo, The Italian Legal System 222 (1967) [hereinafter cited as Cappelletti].
115. Codice Civile [C.C.] 5-1 (Italy).
116. Cappelletti, *supra* note 114, at 218-19.



The result of the Italian drafters' efforts was a code in six books. It opens with a short title, "Dispositions on the Law in General," consisting of thirty-one articles not considered technically part of the Code.[117] There follow four books in the traditional continental mode: Persons and the family, successions, property, and obligations. This last book, because it combines the civil and commercial rules on obligations, is much larger than its French and German counterparts.[118] The fifth book covers labor, company law, protection of the rights of professionals, and a variety of non-contractual commercial subjects such as trademarks, copyright, corporate finance, security regulations, and unfair competition.

The sixth book concerns "institutions of a prevalently instrumental character" which function to protect subjective rights.[119] It has been characterized as a grab-bag of topics such as proof, prescription, recordation, the enforcement of judgments, and the expiration of rights.[120] Although these provisions have traditionally appeared in civil codes,[121] they have not generally been relegated to a separate book. Instead, as in the Louisiana and French Civil Codes, they are interspersed among substantive articles.[122]

### *The Greek Civil Code (1940-1946)*

This code followed the structure of the German Civil Code, though it used less abstract language than its model.[123] Notably, the Greek legislators included in the general part rules on private international law and excluded general provisions on property.[124] Like the Swiss format, the Greek reflected a tendency to adapt a multiple-book structure to contemporary needs.

### *Developments in the Netherlands*

The Dutch are the most recent innovators on the continent. For over 140 years the Dutch draftsmen have not felt bound to

117. *Id.* at 229.
118. *Id.* at n.7.
119. *Id.* at 239.
120. *Id.*
121. *Cf.* La. Civ. Code arts. 3516-3555 (prescription).
122. *Id.* arts. 2232-2291 (proof).
123. Zweigert & Dietrich, *supra* note 10, at 43.
124. *Id.*

follow French developments in all particulars. Their attitude is understandable: their indigenous Roman-Dutch heritage dictated as early as 1838 the requirement of delivery for the transfer of property,[125] a significant deviation from the rule expressed in French Civil Code article 1583. The draft Dutch Civil Code of 1838 was inspired by Gaius' format through the *Code Napoleon*: it had a short preliminary chapter followed by four books—persons, goods, obligations, and actions.[126] The new Dutch revision is still underway, but its structure has been reasonably well established. Besides its traditional content, the new code will contain the substance of the present commercial code. The unification of commercial law and civil law also reflects the Roman-Dutch heritage in which these subjects were not treated separately.[127] Some private law presently in separate statutes will be included in the new revision. The result will be a nine-book format covering serially persons and family law (including matrimonial property), juristic persons (associations, corporations, and foundations), patrimony (containing provisions generally applicable to the law of property and rights in rem as well as obligations), successions, rights in rem, general provisions on the law of obligations, particular contracts, means of traffic and transport (including land, sea, inland waterways and air law), and industrial and intellectual property.[128]

The Dutch format has some striking features. While it rejects the idea of a separate general part that figures so prominently in the German model, the third book on patrimony incorporates a number of general provisions intended to apply by analogy to topics besides property whenever "the matter permits."[129] Both the Swiss and Italian codes have similar general provisions authorizing code-wide application, though such provisions appear under the heading of obligations. In a sense, the third book of the Dutch revision assumes the ordinarily comprehensive role played by the law of obligations. It has several note-

125. Hartkamp, *Civil Code Revision in the Netherlands: A Survey of Its System and Contents and Its Influence on Dutch Legal Practice*, 35 La. L. Rev. 1059, 1059 n.1 (1975) [hereinafter cited as Hartkamp].

126. H. Drion, *Introduction* to Book 6 of the Draft Civil Code of the Netherlands, *reprinted in Unofficial Translation of Book 6 of the Draft of a New Netherlands Civil Code*, 17 Neth. Int'l L. Rev. 225, 226 (1970).

127. Hartkamp, *supra* note 125, at 1061.

128. *Id.*

129. *Id.* at 1066 n.18.



worthy features. First, corporeals and incorporeals are considered equivalents and the rules on them are combined. Second, it generalizes institutions and doctrines traditionally associated with contracts and successions that relate also to the patrimony as a whole; this category includes the juristic act, good faith, consent, and the law of agency. Third, it has rules on fiduciary relations, an innovation that Louisiana might consider because of its burgeoning law on trusts. Finally, the third book has general provisions on actions including prescription, specific performance, and the effects of judgments.[130]

### *Non-Continental Innovations and Developments*

#### Israel

Like Louisiana and the Netherlands, Israel is revising its private law in a piecemeal fashion. Israel's private law has, on the whole, been derived from English common law and equity. Because Israel is at the confluence of several legal traditions, no single external system provided a model for the Israeli revisions. They were formulated as original products after comparative study of several legal systems including Jewish law.[131] The names of the individual laws suggest a variety of influences: The Agency Law (1965), Bailees Law (1967), Guarantee Law (1967), The Security Interest Law (1967), Sales Law (1968), Gift Law (1968), Transfer of Obligations Law (1969), Hire and Loan Law (1971), Contracts (Remedies for Breach of Contract) Law (1970), and Contracts (General Part) Law (1973).[132] These titles, along with others, will eventually be unified into a single comprehensive code.

#### Quebec

The Civil Code of the Province of Quebec of 1866 departed from the French scheme in minor ways; like the French Civil Code it had three books dedicated respectively to persons, things, and modes of acquisition as well as a fourth book on commercial law.[133] Both Quebec and Louisiana, as mixed juris-

130. *Id.* at 1065-67.

131. Shalev & Herman, *A Source Study of Israel's Contract Codifications*, 35 La. L. Rev. 1091, 1094 (1975).

132. *Id.* at 1094 & n.13.

133. *See generally* L. Saintonge-Poitevin, Civil Code of the Province of Quebec

dictions, reflect the interpenetration of common law and civil law influences; both seek to maintain a civil law heritage in a federation dominated by the common law. But there is an important difference between Quebec and Louisiana—the former has maintained the primacy of the French language, while the latter has not. For doctrinal development, this difference is crucial because the vast majority of Louisiana lawyers are cut off from original sources.

Finding the Quebec Code of 1866 out of date, contemporary Quebec legislators sought to restore to the Code its primary function: "[g]overning relations between citizens in accordance with the norms, concepts, and techniques of our time."[134] To accomplish this task, a radical change in drafting techniques was required. According to Professor Crépeau, "the task of revision could not be approached in the same spirit as that which guided the first codification. In comparison with what was done a little more than a century ago, it seemed to us that the situation called for a complete reversal in the objectives to be achieved."[135] The question of the irrelevance of the Code of 1866 was addressed vigorously.

> The obsolescence of the Civil Code required that priority be given to reforming the institutions of the Civil Law, and that there be undertaken, in the light of experience and of comparative law, a systematic examination of the entire Code, with a view to removing the traces of a vanished past and to bring the law into harmony with contemporary reality.[136]

The avowed goal of the Quebec drafters was achieved in part by adopting a nine-book structure. By restricting each major institution to a separate book, the drafters sought to make it more clearly visible and amendable. The Quebec drafters believed that in the long run expansion to nine books would help extend the life of the Code. The nine books of the draft Quebec Civil Code are: persons, family, succession, property, obligations, evidence, prescription, publication of rights, and private international law. The Quebec scheme deserves the careful consideration of Louisiana's drafters because, as already noted, the two

(1967).

134. 1 P. Crépeau, *Foreword* to Report on the Quebec Civil Code at xxvii (1977).

135. *Id.*

136. *Id.*



jurisdictions share historical characteristics and there are already close ties among their law faculties.

### Seychelles

The recently enacted code of the Seychelles is instructive because it has maintained the tripartite structure and internal order of the French Civil Code. When the Seychelles drafters deviated from the French model, they used the French technique of subdivision of articles, discussed in the next section of this paper. Additional sections were inserted where new substance was deemed necessary and there were no corresponding articles in the current French Civil Code.[137] Notably, the Seychelles Code retained the traditional tripartite structure for the sake of tradition, not logic. The value of tradition should not be underestimated in a mixed jurisdiction like Louisiana, where extraneous influences will interpenetrate with local ones. The Seychelles drafters also made interesting use of the German tradition. There was apparently no barrier to using the more logical divisions of the German Civil Code of 1900.[138] Though a full-fledged general part was not enacted, the preliminary title of the French Civil Code was expanded and infused with important ideas borrowed from the German code. Article 2 of the Seychelles Civil Code, like German Civil Code article 138, refers to rules of public policy. Article 3 of the Seychelles document concerns capacity of persons, a topic treated in detail in the general part of the German code.[139]

### Ethiopia

The Ethiopian Civil Code of 1960 is a major development in recent civilian codification. The work of the renowned French jurist, René David, it reflects advanced continental legal thought[140] and shows that it is possible to adapt the law to the particular needs of a developing nation in the twentieth century.[141] The Ethiopian Code also makes a particularly persuasive

137. Chloros, *supra* note 13, at 6-7.

138. *Id.* at 7.

139. Bürgerliches Gesetzbuch [BGB] arts. 104-115 (W. Ger.).

140. David, *Sources of the Ethiopian Civil Code*, 4 J. of Ethiopian L. 341 (1967) [hereinafter cited as *Sources*].

141. *Id.* at 343-44. *See also* David, *La Refonte du Code Civil dans les Etats Africains*, 1962 Annales Africaines 160, 160 [hereinafter cited as *Refonte*].

case for increasing the number of books in the Louisiana Civil Code.

The Ethiopian decision to have a code in the civilian tradition was to an extent dictated by the consciousness of Ethiopia's historical relationship to the Romano-Germanic family. This relationship developed basically from the *Fetha Negast* (Justice of the Kings).[142] Received into Ethiopian law around 1650, the *Fetha Negast* was the Ethiopian ideal in law, even though Ethiopian conduct and customs did not strictly conform to it.[143] It was a translation from Arabic into Ge'ez (the liturgical language of the Coptic church) of the *Nomacanon* of As Safi ibn al Assal.[144] This document of the Roman Byzantine legal tradition contained both canon law and civil law precepts.[145]

About the *Fetha Negast*, the drafters of the Ethiopian Civil Code have said:

> Whatever the differences between the rules contained in this collection and the solutions applied in practice, it remains no less true that the *Fetha Negast* has been constantly considered in Ethiopia as the model, crowned with a character nearly sacred, to which it would have been desirable to conform.[146]

To an outsider, the Ethiopian Civil Code appears to belong to the continental family. Its divisions and conceptual framework reflect the imprint of Romanist scholarship. Technically, however, it does not constitute a reception of a particular national law. It synthesizes venerable local laws, such as the *Fetha Negast*,[147] and provisions of a variety of codes including those of

142. *See* Emperor Hailie Selassie I, *Preface* to Ethiopian Civil Code, at v-vii (1960). *See also Refonte*, *supra* note 141, at 162-63.

143. *Sources*, *supra* note 140, at 343. In the European experience the role of an ideal body of law was fulfilled variously by Roman law or natural law; the notion of an ideal law persisted well into the nineteenth century in European thought. Such a law was taught and expounded with little attention to the law applied in the courts. *Id.*

144. *Id.* at 342-43. Vanderlinden, *An Introduction to the Sources of Ethiopian Law from the 13th to the 20th Century*, 3 J. of Ethiopian L. 227, 250 (1966) [hereinafter cited as Vanderlinden]. The Arab *Nomocanon* was written in the thirteenth century in Arabic by the Egyptian Christian canonist, As Safi ibn al Assal, and was translated into Ge'ez between the fourteenth and the first half of the sixteenth century.

145. Vanderlinden, *supra* note 144, at 250. There is controversy over the respective influences of Byzantine and Muslim law on the *Nomocanon*. *Id.*

146. David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 Tul. L. Rev. 187, 192 (1963) [hereinafter cited as *Considerations*].

147. *See* text at notes 143-45 *supra*.



France, Switzerland, Greece, Italy, and Egypt.[148] The simplicity and conciseness of the code articles indicate a preference for French drafting technique, and their brevity reminds the reader of the new Quebec draft. According to Professor David:

> The Ethiopian Civil Code is an original creation, based on comparative law, in which rules have been selectively adopted from various foreign legal systems, supplemented, and organized in a manner that is unique in some respects. Thus, we have a synthesis, put together with an effort to be comprehensive, rather than a reception. In these areas, the Ethiopian Civil Code could best be viewed as a possible *uniform European law*, rather than a reproduction of some particular national law.[149]

In principle, the general plan of the Ethiopian Civil Code reflects Swiss inspiration allowing for differences of pure form. It has a five-book structure, but differs substantively from the Swiss legislation.[150] The first three books contain many rules of Ethiopian provenance; the last two, largely products of comparative legal method, contain material deemed necessary for modernization.[151] The first book on persons is followed by a second regulating the family and successions. These two books consolidate what the Swiss codes present in three books,[152] but their substance represents an adaptation to local needs. The third book "Of Goods," corresponds to the Swiss Civil Code's fourth book, "Of Real Rights."[153] It contains much of the customary Ethiopian property law in addition to two modern titles, Registers of Immovable Property, and Literary and Artistic Property.[154] The first three books reflect the imprint of the *Fetha Negast*,[155] while the substance of the last two books is decidedly western.[156] Taken together, the five books consolidate many top-

148. *Sources*, *supra* note 140, at 347.

149. *Id.* at 346 (emphasis added).

150. David, *Le Code Civil Ethiopien de 1960*, 26 Zeitschrift für ausländisches und internationales Privatrecht [ZAIP] 668, 670 (1961) [hereinafter cited as *Structures*, so called after its first subdivision]. For a discussion of the Swiss Codes, see text at notes 111-12 *supra*.

151. *Sources*, *supra* note 140, at 345-46.

152. *Structures*, *supra* note 150, at 670.

153. *Id.*

154. *Sources*, *supra* note 140, at 346.

155. *Id.* at 345.

156. *Id.* at 346.

ics of substantive Swiss law that are divided between the Swiss Civil Code and the Code of Obligations.[157]

The Ethiopian Code is also notable for the absence of two features, a book on commercial law and a general part. Commercial law is regulated in the Ethiopian Code of Commerce, also promulgated in 1960.[158] Although the drafters had flirted with the idea of one code, both civil and commercial in scope, it was abandoned. The drafters maintained close contact and collaborated sufficiently to produce two documents without conflicting rules.[159]

The omission of a general part[160] is due partly to a need for simplicity and partly to the influence of the Swiss Civil Code,[161] which uses obligations as the part of general reference.[162] A general part appeared to be an unnecessary luxury and even a complication of a sophisticated legal profession. According to Professor David, who was familiar with the virtues and drawbacks of the Pandectist techniques for interpreting the German Civil Code,

> [w]e did not want to oblige the jurist, who must for example resolve a question about the rental of a dwelling house, to refer to a general part in addition to the three parts of the code that he already must consult; the book on obligations and contracts in general, general dispositions of the chapter on lease of an immovable, and general dispositions on the rental of residential houses. The general part of the code appeared to be a complication more than a simplification; this reason led us to renounce it.[163]

Having noted similarities between the Ethiopian Code and those of France and Switzerland, we should also take into account its departures from the continental tradition. A section on literary and artistic property has already been mentioned. The title on extracontractual responsibility and unjust enrichment regulates an ancient subject with a richness and nuance generally absent from the very succinct titles of most modern codes. Another stark contrast appears in the Ethiopian Code's regulation of delictual liability. Instead of the typical ten or fifteen articles on this topic, there are 135. After establishing a series of general rules, the drafter has detailed a series of specific cases. The particularism of this regulation of tort liability is more akin to the common law than to a traditional civil code. More than thirty years ago, Professor C.J. Morrow noted the generality with which civil codes regulate delicts: "The whole theory of the Civil Code articles on delictual responsibility rests upon the notion that this field requires a minimum of predictability in advance and a maximum of individualization of decision, and thus that only broad standards need be provided in the Code."[164]

The English institution of bailment has apparently inspired a title on "contracts relative to custody, the use and enjoyment of a thing."[165] Consequently, a set of general rules precedes the regulation of certain special contracts like lease, deposit, and *commodatum*. Finally, there is a special title on contracts relative to immovables because the regulation of "contracts of sale, undertakings, . . . and lease would gain clarity if we distinguished carefully the cases where these contracts affect an immovable from those affecting another asset."[166]

## IX. Recent Developments in France and Criticisms

Today the French Civil Code retains its tripartite structure. A code revision commission formed in 1945 flirted with, but abandoned, the idea of a general part which would have been placed in a preliminary book and coupled with a fourth book on legal transactions (*des actes et des faits juridiques*).[167] In 1964, a new revision program began. Its object was a systematic, piecemeal revision of the Code, not a total overhaul.[168] By means of this revision, the traditional structure has so far been preserved despite criticism of it.[169] One reason offered for retention of the structure is the possibility of saving the traditional, even legendary, article numbers to avoid disturbing the acquired habits of

157. *Structures*, *supra* note 150, at 670.
158. *Sources*, *supra* note 140, at 341.
159. *Considerations*, *supra* note 146, at 197.
160. *Structure*, *supra* note 150, at 670. *See also* David & Brierley, *supra* note 28, at 83-85; *Refonte*, *supra* note 141, at 165.
161. *Refonte*, *supra* note 141, at 165.
162. *Structure*, *supra* note 150, at 671.
163. *Id.* *See Refonte*, *supra* note 141, at 165.
164. *Approach*, *supra* note 5, at 486.
165. *Structure*, *supra* note 150, at 671.
166. *Id.* at 673.
167. Zweigert & Dietrich, *supra* note 10, at 41.
168. *Recent Revisions*, *supra* note 44, at 756-57.
169. *Id.* at 760.

the legal community. When gaps have opened because of the repeal of particular provisions, their numbers have been retained. When new material has been added, it has been subdivided so that the principal article numbers can be preserved. Thus, besides article 220, there are articles 220-1, 220-2, and the like.[170] Problems in citation might arise from this numbering technique; it is easy to confuse 2201 with 220-1. But the numbering technique gives the impression of stability despite substantive change. It is worth noting that Louisiana drafters have sometimes employed similar numbering techniques. Repealed articles of the Louisiana Civil Code remain in sequence. Article 916, concerning the usufruct of the surviving spouse, now has a companion article 916.1. Critics of this approach to numeration have argued that it is detrimental to the elegance of the Code and to facility of presentation, and it may induce belief in a hierarchy of texts that in fact does not exist. In practice, the numbering technique has thus far produced only minor difficulties.[171]

Maintenance of the tripartite structure, though based on reasons of convenience, seems to contravene two of the four principles of the traditional French approach to codification articulated by Professor Tunc. According to Tunc, a code should be complete in its field, generally applicable, logically arranged, and grounded in experience.[172] Perhaps the piecemeal, ad hoc numbering process is not grounded in experience. Certainly, it sacrifices logic of presentation. Assuming with Professor Tunc that logic brings clarity and justice,[173] one finds it hard to accept a limitation of institutions within arbitrary boundaries. To the claim that inner consistency is a badge of the French Civil Code, one may counter that the Code's plan "was neither seriously examined nor absolutely willed."[174] As Maleville wrote, "every division on these grand subjects is necessarily a bit arbitrary."[175] The inner consistency found by French and Louisiana lawyers may be due more to force of habit than to the current organization of the documents themselves.

There have been important critics of the tripartite division

170. *Id.* at 761.
171. *Id.* at 761-62.
172. *Grand Outline*, *supra* note 44, at 435. *See* text accompanying note 44 *supra*.
173. *Grand Outline*, *supra* note 44, at 441.
174. Ray, *supra* note 15, at 208.
175. Maleville, *supra* note 17, at 3.



of the French Civil Code. Planiol, for example, stressed the unity of private law: "Private law governs in principle all the acts of individuals in their private capacity. It should form a homogeneous and single unity. But in France and in most civilized states, it is at present divided into three sections. They are civil law, procedure, and commercial law."[176] Like Ray, Planiol regarded the tripartite division of the Code as artificial, even accidental.[177] Against the claims of legal scientists that a code needed a scientific order, Planiol argued that the desideratum was a division of subjects convenient for the profession.

> There is nothing scientific about the plan of the French Civil Code. In drafting modern codes, an effort has been made to bring about a more rational grouping of legal provisions. But it is well to avoid exaggerating what the scientific nature of a plan may play in the real value of a code.[178]

Planiol also disliked the tripartite division for its damage to Book Three: "The crowding together of so many heterogeneous subjects into one book is not very logical. In addition the division into books is useless. A single series of titles would be more simple and would permit of all additions which might become necessary."[179] This last remark is reminiscent of the Quebec drafters' rationale for their new nine-book structure. Contemporary civil codes, depending upon heritage and geography, may be located on a spectrum from the tripartite scheme all the way to Planiol's series of titles. If we locate the Seychelles Code on one end of the spectrum, the codes of Quebec and the Netherlands are near the other. Over time, Planiol's series probably would have been grouped and ordered in terms of function and purpose.

## X. Code Revision in Louisiana

Though the structure of the French Civil Code may have been accidental, Louisiana's unique history and geography suggest that any plan of the Louisiana Civil Code be "seriously examined and absolutely willed."[180] Codification in revolutionary

176. 1 M. Planiol, Traité élementaire de droit civil, no. 23 (6th ed. La. State L. Inst. trans. 1965).
177. *Id.* no. 26.
178. *Id.* no. 87.
179. *Id.*
180. *See* Ray, *supra* note 15, at 208.

France was the culmination of a centuries-long process of evolution. By contrast, Louisiana's code was a transplant, though there were indigenous Spanish and French influences. Unlike France in 1800, Louisiana in the 1980's cannot afford centuries of evolution; nor can accident haphazardly define the Code's structure. Whatever the details of a new blueprint, Louisiana's lawmakers must bear in mind that the state is a hybrid jurisdiction, vulnerable to the pressure of forty-nine sister states. Hence, modernization of the Civil Code, if it is eventually to be achieved, must be a conscious and courageous act of preservation.

According to Professor Batiza, the Civil Code is one of the most interesting and significant developments in the history of codification in the western hemisphere. Louisiana's Civil Code is a monument, but it is under seige.

It has been from the outset. The sheer weight of the common law influence exerted by forty-nine sister jurisdictions, and by a federal system operating both above and within the state; the effect of historical factors that served simultaneously to cut off the flow of doctrinal nourishment from the continent and to replace it with the legal literature of the Anglo-American common law; the continuing tendency of Louisiana courts to misinterpret, misapply, or simply ignore the substantive provisions of the Civil Code; the rapid expansion of the dominion of public and private law independent of the Code; the routine extrusion of common law legislation by state lawmakers insensitive to both civilian drafting techniques and the basic nature and function of the Code itself; the predominance of research tools produced by publishers geared to common law rather than civil law methodology; the tendency of state law schools to rely on the casebook method of instruction even in civil law courses; all these factors have exerted—and continue to exert—a corrosive pressure upon the core of civilianism in Louisiana law. The effects of this pressure must always be borne in mind if the consensus reflected in the legislative mandate for revision is to be given its effect. It is preservation, then, that code revision must seek to achieve—preservation of the basic civilian character of the state's private law.

### *Structural Objectives of Code Revision*

Implicit in the very concept of a civil code is the notion that



it is intended to endure, to be, "a frame of reference moving in time."[181] To identify preservation of civilian tradition as a primary objective of recodification in Louisiana is to do no more than emphasize that fundamental characteristic of the artifact itself. For, as the French learned two centuries ago, a civil code is more than a collection of legal rules. It is at once the product and the embodiment of the civilian perspective, the *style* that is the heritage of the civil law. The code cannot survive the erosion of civil law tradition without ceasing to be a civil code, because the artifact and the heritage it embodies are inseparable. The vulnerability of one is the vulnerability of both. The internal arrangement of the Code must seek to maximize its resistance to the erosive forces which have made Louisiana the hybrid jurisdiction that it is today, and which continue to exert pressure toward conformity with the common law jurisdictions that surround us. Thus, while it is still too early to develop a full scale blueprint for code revision, we may nevertheless discover in the factors which have tended to erode the civil law tradition in this state the rudimentary contours of a new design—the particular objectives from which a new structure might be deduced.

The preservationist goals of code revision and the history of common law encroachment in Louisiana combine to suggest the basic criteria for structural revision: the logical arrangement of the civil code should seek to achieve methodological stability, pedagogical soundness, and practical utility.

### Methodological Stability

There can be little doubt that methodology lies at the very heart of the civilian tradition. No other issue has so absorbed the attention of scholars debating the proper characterization of Louisiana's legal system. The role of the judge, the place of the case, the definitional tug-of-war between decisional precedent as *stare decisis* or *jurisprudence constante* have all figured prominently in the various "position papers" characterizing Louisiana's legal system as Anglo-American,[182] civilian,[183] or mixed.[184]

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181. Herman, *Legislative Management of History: Notes on the Philosophical Foundations of the Civil Code*, 53 Tul. L. Rev. 380, 385 (1979) [hereinafter cited as *Philosophical Foundations*].

182. *E.g.*, Crabités, *Louisiana Not a Civil Law State*, 9 Loy. L.J. 51 (1928); Ireland, *Louisiana's Legal System Reappraised*, 11 Tul. L. Rev. 585 (1937). *See also* Reeves, *The Common Law State of Louisiana*, 2 Tul. Civ. L.F., Issue III (1974) [hereinafter cited as

History would indicate that the importance given to methodological questions is not misplaced. The fate of the Field codes[185] in the western states teaches us that; under the influence of common law techniques of statutory interpretation, those codes have become little more than "glorified statutes," interpreted and applied in ways that have completely nullified the effect of codification.[186] The importance attached to methodological issues by Louisiana's legal literature indicates for academic circles that such issues are pivotal to the broader question of Louisiana's identity as something other than a common law jurisdiction. The forces that neutralized the codes of California, Montana, and the Dakotas nag at the Louisiana Civil Code, and it is seldom, if ever, seriously doubted that the same fate awaits it.[187]

Structure in codification is "the intellectual mechanism that permits one to find his way through the code."[188] The point here is that the Code remains a civil code only to the extent that the pathways thus illuminated are essentially civilian in character. Code structure must encourage reliance upon civilian methodology, establishing substantive and spatial relationships within

*Common Law State*].

183. *E.g.*, Daggett, Dainow, Hebert & McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 Tul. L. Rev. 12, 41 (1937) [hereinafter cited as *Reappraisal Appraised*]; Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 La. L. Rev. 357, 357 (1973) [hereinafter cited as *Civilian Renaissance*].

184. *E.g.*, Tate, *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience*, in The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions 23 (J. Dainow ed. 1974) [hereinafter cited as *Judge's Role*]; Tate, *Civilian Methodology in Louisiana*, 44 Tul. L. Rev. 673 (1970) [hereinafter cited as *Civilian Methodology*].

185. This reference is to the code prepared for the state of New York in 1865 by David Dudley Field. A codification of common law principles, it was adopted by four western states: California, North Dakota, South Dakota, and Montana. Jolowicz, *The Civil Law in Louisiana*, 29 Tul. L. Rev. 491, 499-500 (1955); Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation* (pt. 1), 17 Tul. L. Rev. 351, 402-03 (1943) [hereinafter cited as *Louisiana Blueprint*]. Although it embodied common law rather than civil law substantive rules, the code nevertheless called for civilian interpretive techniques. *See* Jolowicz, *supra*, at 499-500.

186. *Louisiana Blueprint*, *supra* note 185, at 403. *See* Jolowicz, *supra* note 185, at 500.

187. There are, of course, some optimists, most notably Albert Tate and Mack E. Barham, two leading civilians who recently left the Louisiana Supreme Court. *See Civilian Renaissance*, *supra* note 183 (Barham); *Judge's Role*, *supra* note 184 (Tate). These jurists do not question the existence or effect of the pervasive common law influence that has been at work in Louisiana since the first Code was enacted. They simply argue that the emergence of our hybridism is not the deathknell of our civilian heritage.

188. *Structure*, *supra* note 11, at 697.



and between its institutions, and among its divisions, subdivisions, and units, that to the greatest extent possible force the intellect into civilian modes of thought.[189] This is not a call for a rigid legislative crackdown on the courts,[190] but a simple recognition of the obvious: The way the code is organized determines how it is *used* and colors our approach, our perspective, in thinking of the law. That is what we mean by a "logical" arrangement. That is why we demand it in a code.

What this suggests is an arrangement keyed to the problem-solving techniques traditionally utilized in the civil law.[191] This arrangement involves both judicial technique and legislative style. To the civilian, the code is central and controlling. The civil law judge turns always to the code, seeking first to identify and interpret the controlling provisions. He invokes an elaborate interpretive machinery in this process, bending it to the search for the true significance of one relevant text.[192] Though prior decisions are relevant and influential in this process, they are not allowed to encrust the code and thereby insulate the decision-makers from the *authoritative* conceptualization of the law.[193]

189. *See id.* at 700-01. *See, e.g.*, Morrison, *The Need for a Revision of the Louisiana Civil Code*, 11 Tul. L. Rev. 213, 234 (1937) [hereinafter cited as *Need for Revision*]: "Plan is not important for itself, but its purpose should be to organize the materials of the law according to basic directives into a systematic pattern designed to indicate institutional interrelations, and thus impart unity, clarity and homogeneity to the document." (Footnotes omitted). This is also Professor Morrow's point in *Approach*, *supra* note 5, at 487-88.

190. *See Need for Revision*, *supra* note 189, at 237: "The purpose of a code is to announce legislatively legal rules and principles, to establish legal institutions and to sanction, regulate and delimit the sphere of juridical activity . . . ."

191. For a detailed summary of the civilian method by a civilian purist, see *Louisiana Blueprint*, *supra* note 185, at 548-56. This description is excerpted and quoted in *Civilian Methodology*, *supra* note 184, at 674-76.

192. *Louisiana Blueprint*, *supra* note 185, at 549. Morrow sketches the interpretive process as follows:

> Regard will be had to the language of the text and the sense it conveys, the influence of other articles, considerations of textual arrangement of the Code as unit, historical factors, the clarifying effect of the *motifs* on obscure passages, and the allowable areas within which the legislator has indicated that judicial distinction may be used in taking account of special factors. The whole import of the process is the ascertainment of the genuine significance of the Code text.

*Id.* (footnotes omitted). *See* David & de Vries, *supra* note 44, at 87-99. *See also* Comment, *Litigation Preclusion in Louisiana:* Welch v. Crown Zellerbach Corporation *and the Death of Collateral Estoppel*, 53 Tul. L. Rev. 875, 898 n.159 (1979).

193. *Louisiana Blueprint*, *supra* note 185, at 550-52. For an interesting discussion of stare decisis vis-à-vis civilian doctrine of *jurisprudence constante* in Louisiana, see

Where this search proves fruitless, the civilian judge nevertheless maintains his focus on the code. He reasons from the social and legal perspective embodied in the code, projecting the plasma[194] of the code's organic harmony onto a situation not precisely covered by the legislative scheme.[195] But the code remains the central point of departure for his analogy, and the ultimate goal of his interpretation remains the same: to find and properly apply the controlling legislative conceptualization.[196] Where the code provides no solution, either directly or by analogy, the judge faces the unprovided-for case.[197] Here his interpretive freedom expands, and *begins to approach* the full rule-making or conceptualizing power of the common law judge.[198] His freedom, even here, is never absolute, however; for the code delimits the extent of his discretion[199] and establishes the framework for his decision.[200] Furthermore, the resolution thus reached is prevented from becoming a true judicial conceptualization, a judge-made rule of law, by the absence of *stare decisis*. The judge-made rule, unable to reach into the future to bind judges in subsequent decisions, is little more than an *ad hoc* arbitration of a particular dispute.[201]

Implicit as corollaries to the foregoing methodology are certain elements of legislative style. As Professor Morrow noted, "Generalization is the soul of civilian codification."[202] To the civilian, the legal rule is designed to operate at an optimum level of abstraction. This level may be seen as a point of equilibrium between the broad generality of the ordering legal principle and the extreme particularity of the concrete resolution of an individual dispute.[203] A rule too general is over inclusive and cannot provide practical guidance or sufficient predictability; a rule too particular is too exclusive, and leads to rigidity, and obsolescence.[204] This point of equilibrium is not fixed. It varies according to the substantive content of the rule itself and to the position the rule occupies in the overall legislative scheme.[205] Thus, certain branches of the law which demand a high degree of predictability, such as successions, property, and prescription, would seem to demand a relatively low level of abstraction—and the pertinent legal rules, therefore, should be relatively detailed and particularized.[206] As we suggested in our discussion of the Ethiopian Code, other areas, such as the law of quasi-delicts, require individualized judicial resolutions based primarily upon factual variables. And as Professor Morrow showed, such areas



Reeves, *Common Law State*, *supra* note 182, at 11-19.

194. "Plasma" is Professor Baudouin's word: "A code is apparently complete in itself, but it is drafted in such a way that, in spite of its 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) (emphasis added) [hereinafter cited as *Influence*]. Mr. Justice Douglas might have said "penumbra" instead of "plasma." *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965). It is *perhaps* a significant difference. Certainly, it is provocative. Consider, for example, what the subtler distinctions between those words suggest about the differences between the civil law and common law perspectives on legislation.

195. *Louisiana Blueprint*, *supra* note 185, at 552:

> In the absence of a controlling Code text, the civilian judge by no means discards his Code. It is realized that properly drafted Codes have what the civilian calls "organic harmony," and contain within themselves a social and legal point of view consistently maintained throughout . . . . [T]he civilian *projects* and *extends* his legislative text . . . .

196. *Id.* at 552-54.

197. *Id.* at 554. *See id.* at 554-56. *See generally* Franklin, *Equity in Louisiana: The Role of Article 21*, 9 Tul. L. Rev. 485 (1935); Stone, *The So-Called Unprovided-for Case*, 53 Tul. L. Rev. 93 (1978).

198. *Louisiana Blueprint*, *supra* note 185, at 554.

199. *See, e.g.*, La. Civ. Code art. 21: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." *Compare id. with* Schweizerische Zivilgesetzbuch [ZGB], Code civil suisse [C.C.], Codice civile svizzero [Cod. civ.] art. 1 (quoted in Stone, *The So-Called Unprovided-for Case*, 53 Tul. L. Rev. 43, 103 (1978)):

> The Code applies to all legal questions for which it contains a provision in its terms or its exposition. If no command can be taken from the statute, then the judge shall pronounce in accordance with customary law, and failing that, according to the rule which he as a legislator would adopt. He should be guided therein by approved precept and tradition.

*See id.* at 103-04; Morrow, *Louisiana Blueprint*, *supra* note 185, at 554. For an interesting history and analysis of the jurisprudential application of article 1 of the Code civil suisse, see J. Mayda, Francois Gény and Modern Jurisprudence 31-64 (1978).

200. See the discussion of Francois Gény's methodology in *Louisiana Blueprint*, *supra* note 185, at 554-56. *Compare id. with* Mayda, *supra* note 199, at 1-29.

201. *Louisiana Blueprint*, *supra* note 185, at 555; *see* Mayda, *supra* note 199, at 28.

Judge Tate, in assessing Morrow's position, notes that Morrow's lament for the demise of civilian methodology in Louisiana was perhaps unduly pessimistic. Judicial technique in Louisiana differs, says Tate, "subtly but essentially" from that utilized in the common law, *Civilian Methodology*, *supra* note 184, at 677, and need not be seen as a retreat from the methodology outlined and advocated by Morrow. *Id.* at 679-80.

202. *Approach*, *supra* note 5, at 487.

203. David & Brierley, *supra* note 29, at 88-89.

204. *Id.*

205. *Id.* at 89; *Structure*, *supra* note 11, at 701-03; *Approach*, *supra* note 5, at 486, 488.

206. *Approach*, *supra* note 5, at 488. *See* David & Brierley, *supra* note 29, at 89.

demand a relatively high level of abstraction—and thus the pertinent legal rules should provide relatively broad guiding standards for the exercise of judicial discretion.[207] Similarly, the organizational scheme of the artifact as a whole establishes a clear logical interdependence among the institutions and provisions of the civil code. An important aspect of that interdependence is the rapport between the general and the particular.[208] The optimal level of abstraction for any given rule cannot be fixed without reference to its logical position *vis-à-vis* the provisions and institutions which precede and follow it. Thus, the logical relationship between "sales" and "conventional obligations" will demand that the former be relatively more particular, and the latter relatively more general.[209] These observations emphasize the fundamental point of this discussion: the close relationship between code structure and civilian methodology. The two are inseparable: when one is struck the other rings; when one erodes, the other must collapse. But by the same token, the logic of each informs the logic of the other, and by manipulating structure, we can reemphasize and strengthen the methodology upon which our civil law tradition depends.

Expressed in terms of methodological stability, the broad structural objectives of recodification are easily summarized. If the civil law method is to be preserved it must be as clearly delineated as possible. To a great extent, such a delineation might well be expressly embodied in a revised preliminary title[210] which sets forth the acceptable limits of judicial activity and the general framework for the interpretation. For Professor Franklin the current preliminary title is supremely important: it permits extension of code provisions, and sketches the organizational logic of the substantive rules which follow.[211] The number and

207. *Approach, supra* note 5, at 488. *See* David & Brierley, *supra* note 29, at 89.

208. *Structure, supra* note 11, at 702; *see id.* at 700-03.

209. *Id.* at 702.

210. The Preliminary title comprises articles 1 through 23 of the Louisiana Civil Code of 1870.

211. *Approach, supra* note 5, at 488-89. Professor Morrow stresses the importance of guiding judicial activity by legislative conceptualization:

> [B]y means of Codes the legislator was not binding judges to invariable action in all situations, but rather, by means of language and its arrangement, indicating allowable areas for individualization, areas within which judges are free to take account of special factors. . . . [T]he foremost problem of the legal order [is] accurate delimitation of those areas for the proper exercise of judicial discretion.



arrangement of books, and of the divisions and subdivisions within each book, could supplement the express provisions of the preliminary title by utilizing the general-to-particular arrangement implicit in civilian methodology, and by juxtaposing institutions and provisions in a manner designed to call attention to the logical interrelationships involved.[212] The redactor's art can be used to fix both the optimal level of abstraction in light of the substance and the logical positioning of the various provisions, and to determine the *kind* of interpretive discretion—factual or legal—that is to be left to the courts.[213]

### Pedagogical Soundness

Almost by reflex, civilians shy away from the suggestion that the civil code performs legitimate pedagogical functions. "The law *commands*," says L'Hospital in a traditional positivistic maxim, "it is not made to instruct, and it has no need of convincing."[214] The code is *legislation*, not doctrine, not a textbook on the civil law. That maxim emphasizes the fundamental division of labor between *legislation* and *doctrine* in the civil

*Louisiana Blueprint, supra* note 185, at 55-56 (footnotes omitted).

212. *See* text at notes 191-201 *supra*.

> [W]e are by no means saying that the code consists of a simple juxtaposition of institutions . . . . [T]he concept of "code" and the spirit that pervades it emerge to provide the intellectual mechanism . . . . This mechanism consists mainly in the methods of reasoning . . . and, secondarily in the notions of interdependence between the articles.
>
> The civil code is one and only one law; it is a whole built on "n" articles, each essential to the whole. "The civil code is a well ordered monument, whose design and outlooks have a meaning. Beyond this apparent arrangement, there exist implicit and changing coordinations, a deep life, hidden feelings and conceptions which are the true cement of the legal provisions."

*Structure, supra* note 11, at 700-03, *quoting* J. Ray, Essai sur la Structure Logique du Code Civil Francais (1926) (translation by Professor Levasseur). Both Morrow and Morrison strongly urged adoption of the German model's General Part. *Need for Revision, supra* note 189, at 234-35; *Approach, supra* note 5, at 487-88.

213. *See Approach, supra* note 5, at 488. It is suggested that the redactor can control the exercise of judicial discretion not only by express delimitations and the implicit framework established by the arrangement of provisions, but also by the very nature of the determinations he leaves to the judiciary. For instance, by incorporating a standard of "good faith" into a given provision, the redactor may thereby limit the interpretive discretion of the judge to the essentially factual question of whether good faith is present. By so doing, the redactor effectively immunizes the code provision against judicial amendment. *See, e.g.*, La. Civ. Code art. 520.

214. *Need for Revision, supra* note 189, at 241. *See id.* at 239-41; de la Morandière, *Preliminary Report of the Civil Code Reform Commission of France*, 16 La. L. Rev. 1, 25, 26-27 (J. Dainow trans. 1955).

law and reflects the fear that confusion of the two may weaken the primacy of legislation as a source of law.[215] But to concede that point is not necessarily to deny the code a legitimate role as an instrument of education—particularly in a mixed jurisdiction such as Louisiana. The inclusion of doctrinal materials in the Louisiana Civil Code has long been a source of complaint. But even the Old Guard purists could not agree on the extent to which such material should be excised. James Morrison, for instance, cited the whole of the Preliminary Title as objectionable.[216] Clarence Morrow, on the other hand, felt that title should be expanded and argued strongly for detailed doctrinal discussions in the *exposé des motifs* of the new revision.[217] As a practical matter, recognition of sound pedagogy as a major consideration in the structuring of the Revised Civil Code seems almost inevitable. As Professor Franklin has noted, the Code has always served as an instructional tool:

> It can be ventured that the draught of the Year VIII met colonial demands better than the *Code Civil Français* itself because the draught of the Year VIII was more pedagogic. The Louisiana Civil Code today has 3556 articles, as against 2281 of the *Code civil.* The difference in the length of the two codes was a difference, in no small way, between a code that was a code, and a code that was a code, a law school and doctrine all at once.[218]

The emergence of the major law schools of the state and the development of an ever-deepening pool of accessible doctrinal works have mitigated the need for so virtuoso a performance by the Civil Code, but the need has not been totally satisfied. The continuing vulnerability of the civil law tradition in Louisiana and the preservationist approach it demands of the recodification process are sufficient authority for such a proposition.[219]

215. *Need for Revision, supra* note 189, at 237.

216. *Id.* at 241.

217. *Approach, supra* note 5, at 484-89.

218. Franklin, *Some Observations on the Influence of French Law on the Early Civil Codes of Louisiana,* Le Droit Civil Francais-Livre-souvenir des Journées du droit civil francais 841 (Barreau de Montréal 1936).

219. Professor Louis Baudouin has made this point directly:

> It has been contended by Professor Morrison that the whole preliminary title of your Code was "[O]bjectionable as doctrinal, and was excluded from the French Civil Code for that reason . . . ." In so far as this statement expresses a measure of regret on the part of the eminent Professor, I do not share his regret on that very point. In all deference, I think that this statement in the preliminary title of your Code has, consciously or not, set up a barrier against the intrusion or attempted intrusion of any other legal system into Louisiana. This statement in your Code, in my humble opinion, has contributed to the maintaining of your entire Code by serving as a self-defense mechanism in a country which is surrounded by the Anglo-American common law world. There is no doubt that such a statement was not necessary in the French Code, due to the political unity of France, but it seems to me that it has its real impact on the whole fate of your codification.

*Influence, supra* note 194, at 24.



This is not to say that *doctrine* and *legislation* should be viewed as one and the same, or that the former should be included in the provisions of the code itself. On the contrary, much of the doctrinal material suggested by Professor Morrow,[220] should be relegated to the *exposé des motifs.* What we suggest is that the legitimate pedagogical functions of the code be recognized and taken into consideration during the revision process. This may involve no more than a recognition that the achievement of clarity in the logical arrangement of code provisions, the structuring of methodologically sound relationships among legal institutions, and the realization of the ultimate preservationist objectives of recodification all, to a great extent, are pedagogical in nature. To preserve, the code must teach—or, perhaps more accurately, it must augment—the process of civilian legal education.[221] The design and the order that are to inform the conceptualization of the private law of Louisiana should be approached with due consideration for both the educator's experience and his needs. Those who teach in the civil law curricula of the state's law schools have faced the problems of presenting the institutions of the Code in perspective, of emphasizing the subtle interrelationships that are the essence of the total tapestry. The order and number of books should reflect that experience.

## Practical Utility

Practical utility is undeniably a *sine qua non* of effective

220. *Approach, supra* note 5, at 484-89.

221. The central role of education in the preservation of civilian tradition in Louisiana seems obvious. In one of the most emotional statements of the preservationist position to be found in the legal literature of Louisiana, Abbott Reeves places the future of the civil law tradition wholly in the arms of education, calling for more rigorous law school curricula (required courses in civilian methodology and the French language), the establishment of a graduate school of civilian techniques for Louisiana judges, and the expansion of opportunities for academic doctrinal writing. *Common Law State, supra* note 182, at 20-33.

codification. This proposition is implicit in the concept of a civil code. The problem with the proposition is that it is so fundamental—and so broad—that it offers little real guidance to those who would seek to use it as a criterion for reordering the Civil Code. *Of course* the Code must work; the question is *how*?

At bottom, considerations of practical utility are inseparable from the methodological and pedagogical functions outlined in the preceding sections of this paper. Only the emphasis is different. By stressing practical utility as a structural objective of code revision, we remind ourselves that the code must ultimately function in what practitioners and law students are apt to call the "real world." Supercilious as that distinction might seem to many academicians, it nevertheless suggests the necessity for balancing the impulse toward civilian purity against the practical realities of the legal system as it currently exists. That awareness reflects the ever-present tension between the ideal and the real, between folklore and practice,[222] that for decades has haunted Louisiana's civilians like a recurrent nightmare. Much, if not most, of the attention that has been focused upon code revision, and the characterization of the state's legal system has involved, at bottom, an attempt to alleviate that tension. Over time, the contours of that debate have changed,[223] but its essential purpose remains the same: to locate for a mixed jurisdiction the point of equilibrium between the countervailing impulses toward re-establishing civilian purity and surrendering to the common law.

222. *See* J. Merryman, *supra* note 44, at 43-49. A discussion of the tension between folklore and practice in the civilian tradition appears in Herman, *Book Review*, 22 Loy. L. Rev. 417, 420-28 (1976) (The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions (J. Dainow ed. 1974)) [hereinafter cited as *Dainow Review*].

223. As has been noted, the positions originally staked out by the participants in the debate were somewhat extreme. Professor Ireland called upon Louisiana's legal scholars to face the cold and bitter fact that their invocations of civil law tradition represented little more than hollow chauvinism. Ireland, *Louisiana's Legal System Reappraised*, 11 Tul. L. Rev. 585 (1937). For a more recent expression of a similar position, see Fleming, *Book Review*, 26 Am. J. Comp. L. 673, 673 (1978) (F. Stone, Tort Doctrine (La. Civ. L. Treatise vol. 12, 1977)). Professor Morrow perhaps best exemplifies the contrary view, calling for civilian purity in Louisiana and, indeed, suggesting the exportation of civilianism to both the federal and state legal systems throughout the nation. *Louisiana Blueprint*, *supra* note 185, at 572. More recently, Abbott Reeves has advocated a revitalization of the civil law in Louisiana in terms suggesting his sympathy with the purists' position. *Common Law State*, *supra* note 182. Of late, however, the state legal system has been recognized more frequently as mixed rather than as purely civilian or Anglo-American. What remains of debate now has a finer focus: What is the appropriate balance between the civilian and Anglo-American concepts and techniques that now coexist and vie for supremacy in the mixed legal system of this state?



The designation of practical utility as a structural objective of recodification is thus meant to emphasize the role of code revision as a process of mediation between opposing impulses.[224] In that light, the revision process can be seen as requiring, at the threshhold, the resolution of fundamental questions of public policy. What is the appropriate balance between legislative and judicial power? What are the proper roles of legislation, jurisprudence, and doctrine as sources of law? What distinctions, if any, should be made between "code legislation" and "statutory legislation"? What, in essence, do we mean when we characterize Louisiana as a mixed jurisdiction? These questions, long debated in the legal literature of this state, have never been fully resolved as a matter of affirmative public policy. Now, however, they must be. Before we can achieve the basic preservationist objectives of code revision—including methodological stability and pedagogical soundness—we must know with fair precision just what it is we seek to preserve. This involves nothing less than the principled recharacterization of the legal system as a whole—a recharacterization that will provide substantive content to the term "mixed jurisdiction," and relieve the tension between folklore and practice that has long muddied the doctrinal waters of this state. While a full development of that recharacterization far exceeds the ambitions of this paper, it is at least possible to briefly sketch the general contours of the mediation process by which the threshhold questions of policy might be resolved.

The suggested resolution requires a continuing awareness of the unique characteristics of Louisiana as a mixed jurisdiction when viewed against the backdrop of the folkloric elements of the parent legal systems. Perhaps the most fruitful illustration of the appropriate perspective can be found in a brief examination of the doctrine of separation of powers as it might color the resolution of the basic policy questions identified above.

224. We might describe the original debate, *see* note 223 *supra*, as a polemic between those who would attack fact in the name of tradition and those who would attack tradition in the name of fact. The more recent consensus can thus be seen as an emerging polemic between those who would exalt *either* fact or tradition to the exclusion of the other, and those who would mediate between the two. *See Dainow Review*, *supra* note 222, at 420.

Civil law tradition embodies a doctrine of rigid separation of powers that reflects a profound historic distrust of the judiciary.[225] Central to that doctrine is the notion of legislative supremacy. Civilian dogma places the lawmaking power solely in the hands of the legislature, at its extreme denying even an interpretive function to the courts.[226] As a result, jurisprudence has no place in the hierarchy of recognized sources of law—a hierarchy in which legislation is supreme.[227]

The common law, by contrast, has no significant tradition of distrust of the judiciary, and thus places no particular emphasis on restricting the judicial function.[228] Quite to the contrary, judicial decisions have been the principal means by which the law is enunciated and developed.[229] Legislation, although clearly a source of law, is secondary in importance to jurisprudence.[230]

From this basic contrast flow other differences that profoundly influence civil law and common law perspectives. In civilian tradition, predictability in the law is a desideratum necessarily entrusted to the legislature.[231] As a result, legislation itself is perceived in a very particular way. Because it is the visible sign of predictability in the law, legislation has had to be what civilian folklore has made of it: a comprehensive schema, complete in its field, general in its application, logical in its arrangement.[232] (In short, it is a single structured artifact—a civil code.) In the common law system, however, predictability in the law has been a responsibility of the judiciary rather than the legislature. Thus, while the desire for predictability virtually precludes the notion of binding judicial precedent in the civil law tradition, that same desideratum of the common law demands it: precedent is the very soil from which predictability is mined,[233] and *stare decisis* is its visible sign. As a result, legislation is quite a

225. Merryman, *supra* note 44, at 16-17; *Dainow Review*, *supra* note 222, at 420.

226. 1 K. Zweigert & H. Kötz, An Introduction to Comparative Law 81 (T. Weir trans. 1977); Merryman, *supra* note 44, at 30; *Dainow Review*, *supra* note 222, at 420.

227. Merryman, *supra* note 44, at 25.

228. *Id.* at 16-17; *Dainow Review*, *supra* note 222, at 420.

229. David & Brierley, *supra* note 29, at 339.

230. *Id.*

231. *See* Merryman, *supra* note 44, at 50.

232. *Grand Outlines*, *supra* note 44, at 435. *See* Merryman, *supra* note 44, at 50.

233. C. Allen, Law in the Making 162 (7th ed. 1964): "In the one theory, antecedent decisions are helpful only as illustrations of a general proposition: in the other, they are the very soil from which the general proposition must be mined."



different animal in the common law. To the English lawyer's eye, legislation is *abnormal*. It is law, but it arises outside the usual developmental machineries of the legal system.[234] Indeed, it is law arising in derogation of the very process by which predictability is to be achieved—and therefore is not fully assimilated into the legal system until the judiciary has taken it up and *legitimated* it.[235]

Inevitably, the judicial and legislative methodologies deemed appropriate by the folklore of each tradition differ radically. Some of those differences have been touched upon previously.[236] As a matter of the typical methods of legal thought as a whole, Lord Cooper's summation serves well:

> A civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" . . . . The instinct of the civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*.[237]

What is important to note, in the context of the present inquiry, is that the particular differences between the approaches taken by legislators and judges to the drafting and interpretation of statutes in the two traditions are the logical correlatives of a fundamental difference between civil law and common law legis-

234. *Id.* at 456-57. *See also* T. Plucknett, Statutes and their Interpretation in the Fourteenth Century 133 (1922). This judicial attitude, associated with literalistic interpretation, has appeared in English cases for centuries. For example, Staunton, J., construing a statute in the fourteenth century said, "a statute does not restrain the common law outside the words of the statute."

235. *Id.*

236. *See* text at notes 225-35 *supra*. *See also* text at notes 182-213 *supra*.

237. Cooper, *The Common Law and the Civil Law—A Scot's View*, 63 Harv. L. Rev. 468, 470 (1950). *See also* Pound, *What Is the Common Law?*, in The Future of the Common Law 3, 18 (1937):

> For behind the characteristic doctrines and ideas and techniques of the common-law lawyer there is a significant frame of mind. It is a frame of mind which habitually looks at things in the concrete, not in the abstract . . . . It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition forumlated universally . . . . It is the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas.

lation *per se*. As Portalis noted, it is the fundamental task of civilian legislation to establish general principles of law, *"féconds en consequences,"* from which particular applications might be deduced.[238] Thus, the civilian model presents the now familiar division of labor between the judge and the legislator: "There is a legislative skill as well as a judicial skill, and the two are quite distinct. The skill of the legislator is to discover the principles in each area which most conduce to the common weal; the skill of the judge is to put these principles into action . . . ."[239] As has been noted, however, common law tradition presents quite a different model.[240] During formative periods, the general principles of law are drawn inductively from the existing decisional law, not deductively from legislation.[241] Thus, the division of labor between the common law judge and legislator is almost the converse of that embodied in the civil law tradition.[242]

Not surprisingly, therefore, the judicial approach to statutory construction in the two traditions differs significantly. The Anglo-American mind has traditionally viewed legislation as *ad hoc* enactments designed to alleviate a particular social or economic mischief.[243] Anglo-American empiricism, in combination with a conception of the decisional common law as a seamless web, inevitably reacts with suspicion to such enactments—the common law judge begins to sense that legislation is itself a kind of mischief, a nagging disturbance of "the lovely harmony of the Common Law."[244] Thus, rules of statutory interpretation evolve that reflect the judges' conviction that the mischief of legislative interference should be confined within a narrow compass[245] and statutes in derogation of the common law (as indeed nearly all

238. Portalis, *Discours Préliminaire*, in Fenet, *supra* note 14, at 470.

239. Portalis, *Discours Préliminaire*, in Fenet, *supra* note 14, at 475, translated by T. Weir in Zweigert & Kötz, *supra* note 226, at 83. *See* the translation by S. Herman in *Code Portalis*, *supra* note 9, at 772.

240. *See* notes 229-35 *supra* and accompanying text.

241. Zweigert & Kötz, *supra* note 226, at 266-67; *see* note 237 *supra* and accompanying text.

242. This is at the least suggested in Zweigert & Kötz, *supra* note 226, at 82. *See also* Zweigert & Puttfarken, *Statutory Interpretation—Civilian Style*, 44 Tul. L. Rev. 704, 708-09 (1970) [hereinafter cited as *Civilian Interpretation*].

243. Zweigert & Kötz, *supra* note 226, at 268-69.

244. *Id.* at 269: "The judges saw statutes as being an evil, a necessary evil, no doubt, which disturbed the lovely harmony of the Common Law . . . ."

245. F. Pollock, Essays in Jurisprudence and Ethics 85 (1882).



statutes are[246]) are strictly construed and limited to only the particular situations they are *unquestionably* designed to address.[247] This is so even in the face of the most comprehensive of legislative schemes. If the particular facts before the court do not fall within the unquestionable coverage of the legislation, the judge will turn away from it, back to the general principles of the common law.[248] He has no fear of the legislative gap, the unprovided-for case. He *relishes* it. For he is working with a safety net; when he falls through the superstructure of the legislative scheme, he lands safely in the seamless web of the common law.

Civil law tradition presents a model that is diametrically opposed to the description above. To the civilian judge, a body of law is by definition legislative in character; he is in real partnership with the legislator, his function complementary rather than antagonistic.[249] Unlike his brother in the common law, his impulse is to avoid the legislative gap. His methodology[250] reflects his view of legislation as the fountainhead of predictability in law: no matter how much he engages in judicial lawmaking, he does it for the sake of the integrity of the legislation and the legislation is always his ultimate justification. For the civilian judge, there is no safety net. There is only the superstructure of the legislative scheme—the legislation, its *animus*, the plasma of the civil code—and beyond that, void.

The correlative to these vastly differing judicial approaches to legislation in the two traditions is an equally divergent approach to legislative drafting. Common law legislation, designed (as we have noted) to address specific ills, and subject to the "vigilant skepticism" of the common law judge, is necessarily characterized by extreme particularity and prolixity.[251] Civilian

246. *See* notes 233-35 *supra* and accompanying text.

247. Zweigert & Kötz, *supra* note 226, at 269.

248. *Id.*

249. *Id. See* text at note 239 *supra*.

250. *See* notes 192-201 *supra* and accompanying text.

251. *E.g.*, Zweigert & Kötz, *supra* note 226, at 270:

> Continental observers are struck by the pedantic and prolix detail in which [common law] statutes deal with the simplest matters, obviously so as to make it more difficult for the judges to get round them: where a continental legislator would be satisfied with a single comprehensive notion, the English legislator, simply in order to bind the judges, will use *five* specific terms, without adding anything to the meaning.

legislation, on the other hand, imbued with the codifiers' perspective, subject to interpretive techniques developed for the construction of civil codes—techniques, that tend to expand rather than restrict the scope of its application[252]—is characterized by abstraction and compression.[253]

In their respective traditions, civil law and common law legislators, like civil law and common law judges, perform quite different functions. Those functions are only roughly comparable. As Zweigert and Puttfarken have suggested, the differences in those functions may well exceed the similarities:

> A code is . . . "a general act intended as a unified coverage of its subject matter"; its common law counterpart would not be any single statute but rather the whole body of case authority pertaining to the entire field of law which in a civil law system is covered by a code. The proper object of comparison for the civil law methods of code interpretation is not the common law system of statutory interpretation but rather the methods of legal reasoning from precedents, the techniques of case law, the ways of distinguishing cases, of determining holdings and dicta, of ascertaining the *ratio decidendi* of previous cases, and thus finally distilling the rule of law . . . .[254]

Against this backdrop of folklore elements the legal system of Louisiana must be viewed, and ultimately defined, if a principled structural revision is to be achieved. As a practical matter, judicial and legislative methodologies in Louisiana oscillate between the poles embodied in the civil law and common law ideals. Legislation ranges from the most abstract and generalized of code provisions to the most casuistic and prolix of statutory enactments. Legislators function both as the guardians of predictability, and as derogators from the "common law." Judges invoke both Portalis and Williston. The dominant image of the legal system is the schizophrenic, not the hybrid.

Neither methodological stability nor pedagogical soundness can be achieved without the prior resolution of the fundamental policy questions that exemplify that schizophrenia. The invocation of practical utility as a structural objective of code revision is intended to warn against a facile and fundamentally chauvinistic adoption of either tradition's ideal. Purity is not necessarily responsive to the ultimate preservationist objectives of the revision effort. A code must be grounded in experience. In Louisiana, that experience is neither purely civilian nor purely Anglo-American. The rigid separation of powers doctrine that informs the civilian ideal has never had currency in Louisiana. Yet there is in our tradition a civilian impulse against the common law ideal, and toward systematic legislation, codification, and its implicit methodologies.

Code revision demands, at the outset, a principled recharacterization of the legal system of the state. That recharacterization will, in all likelihood, entail describing a system that is truly mixed—a hybrid that embodies aspects of both parent traditions. Whatever description emerges, the new code must embody a workable resolution of the basic policy questions that are still unanswered in this state. At a minimum, it must implicitly describe the legislative and judicial functions, delimiting the rule-making powers of each in light of the *mixité* of the Louisiana experience. It must implicitly balance the relative legitimacy and strength of legislation, jurisprudence, and doctrine as sources of law in a mixed jurisdiction. It must contain, as part of its implicit doctrinal foundation, a clear sense of the differences between "code" and "statutory" legislation and the relative position of each as sources of law, as subjects of judicial interpretation, and as products and objects of legislative action.

This process of mediation is a first necessary step in the process of recodification. As T.B. Smith has put it: "We must make sure not only of where we wish to go, but also of where in fact we stand."[255]

252. *Civilian Interpretation*, *supra* note 242, at 706-08.

253. *E.g.*, David & de Vries, *supra* note 44, at 81-84. This is true even of what we have termed "statutory" (*i.e.*, non-codal) legislation in the civil law, that is directed toward specific ills. *Id.*; *Civilian Interpretation*, *supra* note 242, at 708.

254. *Civilian Interpretation*, *supra* note 242, at 708-09 (footnotes omitted).

255. T.B. Smith, *The Preservation of the Civilian Tradition in Mixed Jurisdictions*, in Civil Law in the Modern World 3, 25 (A. Yiannopoulos ed. 1965).