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THE DEATH OF A CODE— THE BIRTH OF A DIGEST

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Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold . . . .[1]

I. INTRODUCTION

A. The Conventional View of the Revision: The Old Code Is Entirely Repealed

There is a conventional view in Louisiana that the continuous Revision of the Civil Code, in progress for several decades, has repealed all the old provisions of the Civil Code of 1870 that lie within the subject areas of the Revision.[2] Many scholars have

1. Yeats, *The Second Coming*, in SELECTED POEMS AND TWO PLAYS OF WILLIAM BUTLER YEATS 91 (M. Rosenthal ed. 1963).

2. There has been no true revision of the Louisiana Civil Code since its adoption in 1825. A technical revision took place in 1870, but this was simply a verbatim re-enactment of the Code of 1825. Those amendments added to the Code in the interim and the deletion of unconstitutional provisions dealing with the subject of slavery constituted the only real revisions.

Early in the twentieth century a more substantial revision was planned and a committee of three lawyers prepared a *projet*, but this revision did not receive the approval of the bar or the legislature. In the 1930s and 1940s, the legal literature recognized that the Civil Code was very old and anachronistic and that the need for general revision was pressing and long overdue. *See, e.g.*, Morrison, *The Need for a Revision of the Louisiana Civil Code*, 11 TUL. L. REV. 213 (1937). *See generally* Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 TUL. L. REV. 351 (1943) (arguing that written codes are both the modern trend and the remedy for unwieldy bodies of case law).

In 1948 the legislature entrusted the present Revision to the Louisiana State Law Institute. The Institute was instructed to prepare "comprehensive projects" for the revision of the Code of Practice and the Civil Code. *See* Act No. 335, 1948 La. Acts 810. The Institute, which was created by statute in 1938, is the official law revision commission, law reform agency, and legal research agency for the State of Louisiana. *See* LA. REV. STAT. ANN. §§ 24:201-208 (West 1975).

Pursuant to its mandate, the Institute first revised the Code of Practice and completed this task by 1960. The Revision of the Civil Code was apparently delayed until 1968 when the first preparatory work was begun. Some predicted that the project would take a minimum of ten years to complete, but this estimate was unrealistic. The first fruits of the Revision—the Property articles—were not realized until 1976 through 1979. Subsequently the titles concerning Matrimonial Regimes (1979), Partnership (1980), Successions (1981), Occupancy, Possession, and Prescription (1987), Natural and Juridical Persons (1987), Suretyship (1987), and Husband and Wife (1987) have been revised. Thus after twenty years, only 40% of the entire Civil Code of 1870 has been revised. *See* Table I, *infra* at part II. One commentator, noting that the Family Law Revision will require another six years to complete, has stated that "one 'baby' step at a time is an appropriate pace." Spaht, *Revision of the Law of Marriage: One Baby Step Forward*, 48 LA. L. REV. 1131, 1160 (1988).

3. *See generally* Adcock, *Obligations, Detrimental Reliance*, 45 LA. L. REV. 753 (1985); Bartke, *The Reform of the Community Property System of Louisiana—A Response to Its Critics*, 54 TUL. L. REV. 294 (1980); Tsai, *Obligations, Assumption of Obligations: Third Party No More*, 45 LA. L. REV. 819 (1985); Comment, *Artificial Accession to Immovables*, 55 TUL. L. REV. 145, 169 n.11 (1980). The leading Louisiana treatises on property and servitudes, in their pocket parts for 1987, generally used the word "repealed" to describe the status of the old Code articles. *See generally* A. YIANNOPOULOS, PROPERTY (2 LOUISIANA CIVIL LAW TREATISE Supp. 1987); A. YIANNOPOULOS, PERSONAL SERVITUDES (3 LOUISIANA CIVIL LAW TREATISE Supp. 1987); A. YIANNOPOULOS, PREDIAL SERVITUDES (4 LOUISIANA CIVIL LAW TREATISE Supp. 1987).

4. *See* LOUISIANA CIVIL CODE app. (R. Slovenko ed. 1988); LOUISIANA CIVIL CODE app. 2 (A. Yiannopoulos ed. 1988) [hereinafter A. YIANNOPOULOS, CODE].

5. Subject, of course, to the retroactivity provisions of LA. CIV. CODE ANN. art. 6 (West Supp. 1988).

asserted without discussion that the old provisions have been repealed.[3] Two leading editions of the Louisiana Civil Code currently provide an appendix of the "repealed" provisions of the 1870 Civil Code.[4] Such authorities convey the impression that the Revision has made a clean break from the past and a fresh start for the future. The conventional view, of course, recognizes that we are in a period of legal transition so that the 1870 provisions will continue to have some effect. Transactions entered into before the effective dates of particular revisions will be governed by the old law.[5] However, no one has admitted that

the old law will have prospective effect; that would be impossible, for the old law has been repealed. Thus far, no one has doubted the conventional view.

B. Correction of the Conventional View: The Repeal Is Partial

In my opinion, such a view is incorrect. It is based upon false assumptions about elementary principles of repeal applicable to a civil code, faulty analysis of what the legislature has in fact said when enacting the "piecemeal" Revision, and faulty appreciation of our own legal history, which on three prior occasions has witnessed serious crises and controversies in remarkably similar situations.[6]

The thesis of this Article may be stated very simply. First, the Revision is predominantly a revision without repeal. The old Code articles have not been superseded by the Revision because they have not been expressly repealed. Instead, about 85% of the articles undergoing revision have been simply amended and re-enacted, which means that these old Code articles have been kept alive provided that they are not contrary to or irreconcilable with the Revision.[7] The result is that two Codes coexist and govern the same subject matter concurrently. Moreover, the new Code's structure incorporates the jurisprudence of the old Code. The drafters have freely entwined the old jurisprudence around the new Code articles. In some instances they explicitly codified a judicial rule. On other, more controversial occasions, the drafters did not see fit to codify the case law but rather expected and suggested, through the detailed instructions in the official comments, that the jurisprudence be attached or bonded to the new articles as a rider. In order to integrate the case rider into the text, the shape of many texts was left purposefully elliptical and inchoate; the design of the text already anticipates an annotation or even the article's negation. In some articles the relationship between the text and the jurisprudence is one of rule/counterrule.

C. The Revision Transforms the Code into a Digest

What has emerged out of the Revision, then, is not a coherent self-contained "code" as defined in the French tradition.[8] That kind of code is dead. The Revision has spawned a digest in substance and structure. In this new digest, two layers of Code provisions are in force concurrently; there are also a wealth of the old Code's jurisprudence and a new set of Revision comments struggling to regulate the interplay between these rival sources. The roots of the problem begin with the legislature's failure to repeal the old Code, but they then run deeper. The revised Code now has the architecture of a digest. Its articles have been designed to synthesize with the pre-Revision jurisprudence and they presuppose the continued existence of the old Code.

In the context of codification, the word "digest" reflects several meanings that can be applied fairly to the Revision. In the common law, a digest is a book of summarized cases,[9] but by extension under Anglo-American conceptions of codification, it describes a restatement of the case law in statutory form.[10] The text of the "code" is viewed, for interpretive purposes, as a continuation of the prior law. Prior law is not repealed unless it is inconsistent with the code.[11] Professor C.J. Morrow appealed to this sense of the term when he warned against transforming Louisiana's Civil Code into a "glorified digest" in which the existing Code articles would be "merely a framework upon

6. *See infra* part III.

7. *See infra* Table I and notes 18-19, 34 and accompanying text.

8. For these criteria and characteristics, see *infra* note 90.

9. *I.e.*, "a collection made by some private author of the summarized facts and the decisions on them, contained in full in the reports." R. CLARKE, THE SCIENCE OF LAW AND LAWMAKING 96 (1898).

10. *See, e.g.*, S. AMOS, AN ENGLISH CODE 2-5 (1873); J. AUSTIN, LECTURES ON JURISPRUDENCE 641-704 (5th ed. 1885); M. LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA 185 (1924). Justice Willes stated: "A digest gathers and compiles what has been decided and ordained, and, among other relics, it will preserve the conflicts of common law and chancery and the rest . . . ." *Quoted in* Goodrich, *Restatement and Codification*, in DAVID DUDLEY FIELD CENTENARY ESSAYS, 1848-1948, at 262 n.14 (A. Reppy ed. 1949). In this sense, a digest conforms to Bergel's notion of *formal* codification, which he contrasts with *substantive* or true codification. *See generally* Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073 (1988).

11. *See* M. LANG, *supra* note 10, at 156-157, 181. Lang writes of the Georgia Code: "It is really more in the nature of a digest than a code. Each section is annotated with the decision or the statutory provision to which it relates. All questions not embraced or provided for in the code are to be decided and settled by existing laws." *Id.* at 150 n.3. Speaking generally of the American codes, he concludes: "As a consequence of the revisions which they have undergone, and the annotation of the sections with the decisions of the courts, so as to illustrate their proper meaning and application, these codes have become excellent digests of the law. For that in fact is what they really are." *Id.* at 185.

which to hang the jurisprudence."[12] To a substantial extent, the Revision now embodies these general characteristics, particularly in the entwined relationship between the new text and the old jurisprudence.[13]

In the civil law, the term "digest" may refer to a less scientific type of codification that preceded the modern European codes. It may connote a complete but disparate collection of materials—statutory, jurisprudential, and codal—consolidated in one enactment. A civil law digest does not break with past sources but simply summarizes and synthesizes them. Such were the general characteristics of Justinian's Digest, the first kind of code possessed by the Romans.[14] A civil law digest may also refer to a partial and incomplete form of codification that is supplemented by noncodified, pre-existing law and that does not break with legal antecedents. This was apparently the reason for bestowing this title upon Louisiana's 1808 Digest, for it was supplemented by an indeterminate amount of Spanish civil law.[15] The present Revision also merits the designation digest because it too is designed to be supplemented by outside sources (codified and jurisprudential), and because the overall ensemble does not have the internal coherence and completeness of a code.

The distinction between code and digest and the consequences entailed by this distinction are deeply etched in Louisiana's history. Louisiana has now returned to the historic quandary that it faced in 1817 in the famous case of *Cottin v. Cottin*,[16] and I expect that a similar crisis over sources will soon be upon us. The crisis will consist of our inability to state which law governs, which Code or Code articles are in effect, whether a prior Code article has been repealed by implication, which part

12. Morrow, *An Approach to the Revision of the Louisiana Civil Code*, 10 LA. L. REV. 59, 68 (1949).

13. I am only using the term digest as a shorthand expression, and I would not want to suggest that the Louisiana Civil Code has become a jurisprudential digest to the same thoroughgoing degree as the Codes of Georgia or California. As the text indicates, the resemblance has become "substantial," but the extent of the similarity is still quite relative.

14. The Digest of Justinian collected, abstracted, and systematized a highly disorganized and voluminous mass of materials—the juristic literature of the classical epoch. *See* II ENCICLOPEDIA JURIDICA ESPANOLA, "Digesto," at 203-13 (F. Seix ed. 1910).

15. This codification's full title was "Digest of the civil laws now in force in the territory of Orleans." Although its scientific organization was equivalent to that of a code, its open link to the surrounding Spanish sources and its own incompleteness suggested the propriety of entitling it a digest.

16. 5 Mart. (o.s.) 93 (La. 1817); *see infra* notes 61-63 and accompanying text.

of the pre-Revision jurisprudence retains its authoritativeness, and whether the intent of draftsmen expressed in official comments prevails over the letter of the enacted text. This confusion will strike at the heart of the Revision, whose aim was to simplify, modernize, and revitalize the civil law in Louisiana. More profoundly, the crisis will compel a general re-evaluation of the civil law in Louisiana. It will place in issue the transformed nature of our codification, the judge's increased role as creative rulemaker, the authority of the decided case when it is detached from a legislative base, and the existence of a Louisiana common law that supplements the enacted law.[17]

17. What I describe in the preceding paragraph as a crisis over sources could be clarified by using H.L.A. Hart's concept of the "rule of recognition," which he regards as the foundation of any legal system. According to Hart, this rule, which is often unstated, provides persons and officials with authoritative criteria for identifying primary rules of obligation. H. HART, THE CONCEPT OF LAW 97-119 (1961).

Expressed in Hart's terms, my statement that the Revision breeds complex and confused sources means that such confusion *would* result if Louisiana's traditional rule of recognition is consulted and applied to the Revision.

What rule of recognition applies under the Civil Code? The criteria in question are *hierarchical* (the ranking and sanctioning of sources), *intertemporal* (principles of repeal and overruling, and the prospective and retroactive effect of laws), and *spatial* (the territorial application of law). Some of these criteria are found in the Preliminary Title of the Civil Code. *See* LA. CIV. CODE ANN. arts. 1, 3, 8, 9, 22, & 23 (comp. ed. West 1973) (*see* revised articles 1-3, 6, 8, 22 & 23 (West Supp. 1988)). Thus old article 1 ("Law is a solemn expression of legislative will.") establishes the principle of legislative supremacy: legislation is hierarchically superior to other sources of law, including custom, which is a secondary source sanctioned by old article 3, and the jurisprudence, which is not explicitly sanctioned other than in the "unprovided case" under old article 21. Nevertheless, the jurisprudence has been more broadly accepted as a legal source under an unstated aspect of the rule of recognition. *See* 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); Tate, *The "New" Judicial Solution: Occasions for and Limits to Judicial Creativity*, 54 TUL. L. REV. 877 (1980). Thus, it is accepted that Louisiana courts establish precedents, make interstitial law, and import certain common-law doctrines, provided that this jurisprudence only supplements and does not contradict the Civil Code. Because this judicial power was extended on an exceptional basis and somewhat in the face of the theory of old article 1, Louisiana courts are not thought to be as free as their common law counterparts to develop and create the private law.

The Revision calls into play the hierarchical and intertemporal criteria of the Civil Code. The nonrepeal of the 1870 Civil Code provisions means, according to old articles 22 and 23, that earlier Code provisions are of equal validity with later legislation, provided that they are consistent with it. *See infra* notes 33-34 and accompanying text. (A similar proposition would seem to govern the status of the earlier jurisprudence: it remains valid and extant provided that it is consistent with later legislation. Any inconsistency should be, in effect, a legislative overruling of the jurisprudence.) Judged by these criteria, the Revision has created a complex set of sources and any attempt to accomplish repeal of consistent Code articles or preserve inconsistent jurisprudence through the comments (*see infra* notes 104-105 and accompanying text) would violate the rule of recognition described

D. *The Plan of This Article*

This Article is organized into four parts. First, it analyzes the legislation that enacted the Revision. Second, it summarizes the principles of repeal that apply to the Revision of the Code. Third, it reviews three episodes of Louisiana history in which the principles of repeal have been previously interpreted and applied. Finally, the Article examines the Code's structural transformation and the consequences that this entails.

II. THE PARTIAL REPEAL: AN ANALYSIS OF THE ENACTING LEGISLATION

An analysis of the enacting legislation is shown in Table I below. This Table presents the Revision from 1976 to 1988 by subject matter in chronological order. It records in the left-hand column the act or acts of the legislature that enacted the revised articles and disposed of the articles of the 1870 Code. The second column states the general subject matter with which the enacting legislation was concerned, and provides a list of the affected 1870 Code articles. The third column tabulates the number of prior articles that have been expressly repealed by the legislation shown in the first column. In contrast, the fourth column tabulates the number of prior articles that have been "amended and re-enacted" by the legislation. The fifth column gives the number of prior articles that have been redesignated.

above. This conclusion cannot be avoided, intellectually, by arguing that the rule of recognition has been modified *tacitly*, for no direct evidence of a text or pronouncement sustains that proposition, nor did the mandate of the revisors extend so far.

TABLE I

The revision as of 1987, in chronological order and by subject matter, indicating the disposition of the 1870 Code articles.

Revision Legislation	Subject Matter and 1870 Code Arts. Concerned	No. of Code Arts. Expressly Repealed	No. of Code Arts. Amended & Re-enacted	No. of Code Arts. Redesignated
Act No. 103, 1976 La. Acts 321 Act No. 169, 1977 La. Acts 612 Act No. 170, 1977 La. Acts 629 Act No. 514, 1977 La. Acts 1309 Act No. 728, 1978 La. Acts 1900 Act No. 180, 1979 La. Acts 430	PROPERTY: Arts. 448-869, 1862, 2314, 3507, 3508	51	376	—
Act No. 709, 1979 La. Acts 1857	MATRIMONIAL REGIMES: Arts. 2325-2437 and arts. 131, 150, 416, 909, 1006, 1644, 1751, 1786, 1787, 2446, 3108, 3215, 3319, 3333, 3338, 3339, 3340, 3349, 3369(6), 3524, 3535, 3555	135	—	—
Act No. 150, 1980 La. Acts 346	PARTNERSHIP: Arts. 2801-2890 and arts. 1103, 1138-1145, 3151	10	90	—
Act No. 919, 1981 La. Acts 2066	SUCCESSIONS: Arts. 870-933 and art. 3556(8)	—	64	—
Act No. 187, 1982 La. Acts 518 Act No. 173, 1983 La. Acts 429	OCCUPANCY, POSSESSION, and PRESCRIPTION: Arts. 3412-3555 and art. 1846(3)	37	108	2
Act No. 331, 1984 La. Acts 718	OBLIGATIONS: Arts. 1756-2291	1	514	22
Act No. 124, 1987 La. Acts 404	PRELIMINARY TITLE: Arts. 1-23	—	21	2
Act No. 125, 1987 La. Acts 412	PERSONS: Arts. 24-37	1	13	—

Revision Legislation	Subject Matter and 1870 Code Arts. Concerned	No. of Code Arts. Expressly Repealed	No. of Code Arts. Amended & Re-enacted	No. of Code Arts. Redesignated
Act No. 409, 1987 La. Acts 985	SURETYSHIP: Arts. 3035-3070	—	34	2
Act No. 886, 1987 La. Acts 2409	MARRIAGE: Arts. 86-136	—	51	—
TOTALS:	236 arts. REPEALED 1271 arts. AMENDED & RE-ENACTED 28 arts. REDESIGNATED			

Table I shows that only 236 prior articles (15% of the total) have been expressly repealed by the enacting legislation. The remaining 1271 articles (85% of the total), rather than having been expressly repealed, have been simply "amended and re-enacted" by the revised articles. Accordingly, they are subject to the principle of implied repeal and will continue in force unless their content is irreconcilable with the new articles. Furthermore, about one-half of the enacting statutes specifically call for an implied repeal analysis of the prior articles by stating: "All laws or parts of laws in conflict with this Act are repealed."[18] It follows conversely that when the prior articles are not in conflict with "this Act," they *remain* in force.[19] This, I submit, will be true for the bulk of the amended and reenacted articles.

A. *The Source of The Problem—The Use of Three Disparate Formulas*

Table I clearly demonstrates that the legislature follows no single unified approach in the disposition of the Code articles of 1870. Rather, three distinct approaches exist: a pure amend

18. The following statutes contain this or similar language: Act No. 103 § 3, 1976 La. Acts 321; Act No. 169 § 4, 1977 La. Acts 612; Act No. 170 § 3, 1977 La. Acts 629; Act No. 728 § 3, 1978 La. Acts 1900; Act No. 150 § 3, 1980 La. Acts 346; Act No. 919 § 8, 1981 La. Acts 2066; Act No. 187 § 5, 1982 La. Acts 518.

19. It is sometimes asserted that a general repealing clause is in legal contemplation a nullity since it adds nothing that the law would not provide in its absence. Sutherland notes, however, that the inclusion of a general repealing clause may have serious import: "*If its inclusion is more than mere mechanical verbiage, it is more often a detriment than an aid to the establishment of a repeal, for such clause is construed as an express limitation of the repeal to inconsistent acts.*" 1A N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 23.08, at 329 (4th ed. 1985) (footnotes omitted).

and re-enact formula, a pure express repeal formula, and a mixture of these two formulas. Under the first approach, the legislature declares that all the articles within a given subject matter are amended and re-enacted. None are repealed. The Successions Revision, which left the status of Code articles 870 through 933 to be determined by an implied repeal analysis, exemplifies this approach. Under the second approach, the legislature expressly repeals all prior Code articles on point. The Matrimonial Regimes Revision illustrates this approach: 135 articles were repealed, while none were amended and re-enacted. Under the third approach, the legislature amends and re-enacts a majority of the old Code articles but intersperses a substantial number of express repeals. This approach was followed in the Property Revision (376 re-enactments, 51 repeals) and the Occupancy, Possession, and Prescription Revision (108 re-enactments, 37 repeals).

B. *Confusion over "Revised" and "Repealed by Implication"*

Some of the enacting statutes declare that the 1870 articles are "revised" in addition to being amended and re-enacted. Table I does not tabulate how often the expression "revised" was employed, and I am not sure whether, or why, this fine verbal distinction should make a difference. Nevertheless, the editors of West Publishing Company (West), perhaps out of an abundance of caution rather than insight, have produced a Table (Table II below) in which this nuance is noted.[20] Since Table II is an article by article dispositional summary, the full variety of approaches stands out in relief, as a running sample will illustrate.[21]

20. This Table is entitled "Articles Amended, Repealed, Renumbered, Revised and Added 1974-1986," and it is appended to the 1988 cumulative annual pocket part to the compiled edition of the Civil Code, 17 LA. CIV. CODE ANN. at 53 (comp. ed. West Supp. 1988).

21. *Id.* at 55.

TABLE II

Civ. Code Art.	Acts	Effect
499 to 518	1979, No. 180 § 1	Revised
518	1984, No. 331 § 2	Amended
519	1979, No. 180 § 1	Revised
520	1979, No. 180 § 1	Revised
	1981, No. 125 § 1	Repealed
521 to 532	1979, No. 180 § 1	Revised
533 to 542	1976, No. 103 § 1	Revised
543	1976, No. 103 § 1	Revised
	1983, No. 535 § 1	Amended

In one particular section, the West Table also indicates purported instances of articles "repealed by implication."[22] The occasions noted (covering 221 articles) fall exclusively within the Obligations Revision.

TABLE III

Civ. Code Art.	Acts	Effect
2058 to 2250	1984, No. 331 § 1	Repealed by implication
2271 to 2279	1984, No. 331 § 1	Repealed by implication
2280	1984, No. 331 § 1	Repealed by implication
2282 to 2285	1984, No. 331 § 1	Repealed by implication
2287 to 2291	1984, No. 331 § 1	Repealed by implication

The basis of this analysis is not explained, and the list of implied repeals is certainly erroneous.[23] Nevertheless, for present purposes, the attempt at this analysis is more significant than its accuracy. The designation "repealed by implication" is not the result of specific language in the enacting legislation. Consequently, it reflects the editors' belief that amended and re-

22. *Id.* at 58.

23. For example, the claim that articles 2058-2260 (203 consecutive articles) have been impliedly repealed is clearly preposterous. It is equally difficult to believe that all instances of implied repeals would be confined to the Obligations articles.

enacted articles are not *expressly* repealed by virtue of that language. They are subject, upon analysis and in certain cases, to repeal by implication.[24]

C. *The Problem of the Untouched Provisions*

Although I said earlier that 85% of the old articles subject to revision were "amended and re-enacted," in reality a high percentage of the articles included in this figure received no *direct* amendment and were not literally re-enacted. Their subject matter was neither expressly repealed nor expressly amended; it simply was omitted from the new texts. Thus, although a broad topic like the formation of contracts or vices of consent may have received new treatment, the Revision accomplished this result without including or reworking many relevant pre-existing articles related to that topic.

Untouched articles should be contrasted with articles actively amended. In the latter situation, the legislature operates upon and modifies an existing text, and some vestige, fragment, or structural element of the original text usually remains despite the amendment.[25] With an untouched provision, however, the old article has no counterpart in the Revision. For instance, many old provisions on Error were not actively amended and re-enacted. Article 1830, which deals with a particular rule about erroneous compromises, is an example. One searches in vain among the revised articles on Error for any provision restating such a rule. The attempted search results in a blank or gap, just as it does with twenty-three other Error provisions. Table IV below, which is an excerpt from a table in the Yiannopoulos edition of the 1988 Civil Code, provides a bird's-eye view of this phenomenon:[26]

24. In many cases the West editors have erroneously designated certain articles as repealed when the article was amended and re-enacted, and is not substantively contrary to the revised article. *See, e.g.*, the alleged "repeal" of articles 910-914 according to West's Table 1, *id.* at 56.

25. Civil Code article 273 (1870), which was amended in 1960, is an example of an active amendment. The 1960 amendment shortened the article and eliminated the language shown in brackets. "In every tutorship there shall be an undertutor [whom it shall be the duty of the judge to appoint at the time the letters of tutorship are certified for the tutor]." LA. CIV. CODE ANN. art. 273 (West 1952 & Supp. 1988).

26. A. YIANNOPOULOS, CODE, *supra* note 4, Table 1, at 877.

TABLE IV

Prior Art. No.	1984 Revision Art. No.
1820	—
1821	—
1822	—
1823	1949, 2034
1824	—
1825	1949
1826	1949
1827	—
1828	—
1829	—
1830	—
1831	—
1832	—
1833	—
1834	—
1835	—
1836	—
1837	—
1838	—
1839	—
1840	—
1841	—
1842	—
1843	—
1844	—
1845	—
1846	—

Since the prior articles in the left-hand column were not expressly amended, they turn up as mere blanks in the right-hand column. Hundreds of prior articles fall into this same category. An estimated 19% of the Property articles and 44% of the Obligations articles were untouched by the Revisions.

D. An Indecipherable Policy at Work

The preceding analysis brings to light a number of characteristics about the enacting legislation: the use of three distinct enacting formulas, the complicating effects of interweaving the word "revised" with general repeal clauses in these formulas, and the large number of untouched articles. This leaves many questions unanswered about the Revision. For instance, no overall policy can be suggested for the variety and diversity of the legislature's approaches. It is not clear why one method was used for the Matrimonial Regimes articles (all repealed), a second method for the Property articles (some titles repealed, others re-enacted), and a third method for the Successions articles (all amended and re-enacted).[27] There is a random or aleatory quality to this diversity, perhaps reflecting only the individual preferences of the various Law Institute reporters, a lack of attention to the legal differences between repeal and re-enactment, or even the failure to understand the legal differences between the revision of statutes and the revision of the Civil Code. In addition, there is no explanation why certain articles were expressly repealed, yet many untouched or deleted articles were said to be amended and re-enacted. Was it assumed that an article could be repealed by not re-enacting it? Whatever the cause of this confusing picture, the Revision legislation must be taken at face value and interpreted according to the appropriate principles. Today, after twelve years of sustained effort, nearly one-half of the Civil Code of 1870 has been revised, yet only 15% of the old Code articles in point have been expressly repealed. The other 85% still lives as good law unless a certain percentage of them cannot stand side by side with the new articles. This conclusion rests upon the principles discussed in the next Section.

III. THE LAW OF REPEAL—THE CIVIL CODE PRINCIPLES

It is a commonplace that a civil code enjoys a more exalted status than an ordinary statute. The higher dignity accorded to a code is traditional in the civil law world. This respect is due originally to the special qualities of the legislation—its relative permanence, imposing structure, and inner coherence. Statutes may be ad hoc, scattered, and temporary, but the civil code in our tradition has attained something close to the stature enjoyed by a constitution or a Magna Carta in the common-law world.[28]

27. It must be noted, however, that the Matrimonial Regimes Revision was ultimately drafted by a legislative subcommittee and not by the Louisiana State Law Institute. Separate authorship and perhaps the supposed unconstitutionality of certain provisions of the 1870 Code, particularly the Head and Master rule, may contribute to explaining the use of express repeals. The background is discussed fully in Spaht, *Background of Matrimonial Regimes Revision*, 39 LA. L. REV. 323 (1979). Balanced against this explanation, however, is that a policy of pure repeal was also pursued in the Property Revision on two separate occasions (Act No. 169, 1977 La. Acts 612; Act No. 170, 1977 La. Acts 629, 630), and there were no unusual circumstances accounting for the use of express repeals.

28. Certain Italian writers, however, have emphasized the decline in prestige suffered by civil codes. They argue that the importance of constitutions and the number of special laws juxtaposed with or superimposed upon the civil code have diminished its authority. The code is now only one of the civil laws, not the civil law. They refer to this phenomenon of the code's decline as the process of decodification (*decodificazione*). The decodification

One way that a civil code manifests its special stature is in the procedures to be followed for its alteration, amendment, or repeal. As with a constitution, these procedures can be more restrictive than those applied to the alteration of an ordinary statute. A code's repeal procedures, however, are not limitations upon the power of the legislature, for surely the legislature may revoke or revise the procedures if it chooses to, without a special majority.[29] Instead, a code's procedures serve as limitations upon the judicial power to construe the legislature's intent to alter or amend the code. While these procedures remain in effect, they determine how to interpret the legislature's expressed intent. Such a restriction is justified by the desire to preserve the code from inadvertent tampering or mistaken judicial assessments of the legislature's intent.

A. *The Principles of the Civil Code*

The Louisiana Digest of 1808 was perhaps the first codification in modern history to include in its Preliminary Title the principles that were to govern its own repeal. Parallel provisions

theorists argue that codification is now an outmoded form of legislation. *See* N. IRTI, L'ETÀ DELLA DECODIFICAZIONE (1979); *cf.* Sacco, *La Codification, Forme Dépassée de Législation?*, in XIEME CONGRÉS INTERNATIONAL DE DROIT COMPARÉ, *Rapports Italiens* 65-81 (Caracas 1982).

29. The Louisiana Constitution of 1974, however, contains two prohibitions—the title-body clause and the general reference clause—that impose limitations upon the power of the legislature. LA. CONST. art. 3, §§ 15(A) & (B). The title-body clause states: "Every bill, except the general appropriation bill and bills for the enactment, rearrangement, codification, or revision of a system of laws, shall be confined to one object." *Id.* § 15(A). By express exception, this clause has no application to the Revision of the Civil Code. The primary object of the prohibition is to give fair notice to both the legislature and the public of the scope of the legislation in question. Comment, *The Title-Body Clause and the Proposed Statutory Revision*, 8 LA. L. REV. 113, 114 (1947).

A second prohibition is found in the general reference clause, which states: "A bill enacting, amending, or reviving [sic] a law shall set forth completely the provisions of the law enacted, amended, or revived [sic]. No system or code of laws shall be adopted by general reference to it." *Id.* § 15(B). The reason for requiring that the bill must set forth "completely" the provisions of the law enacted, amended, or revised is to prevent a so-called blind amendment that is capable of deceiving the legislature and the public. Louisiana was the first state in the Union to adopt this sort of restriction in its Constitution of 1845. C. JONES, STATUTE LAW MAKING IN THE UNITED STATES 176 (1912); Note, *Legislation—Constitutionality of Amendment by Implication*, 4 LA. L. REV. 444, 445 (1942). The Revision's enacting legislation clearly complies with the restriction. The purpose of the prohibition in the second sentence is directed against the adoption of foreign systems or codes of laws, including the common law and equity systems established in other states. *See* Davenport v. Hardy, 349 So. 2d 858, 861-62 (La. 1977); Le Blanc v. City of New Orleans, 70 So. 212, 217 (La. 1915). It does not prohibit adopting by reference laws already in effect in Louisiana. *Id.* Again, this prohibition has no application to the Revision of our own Civil Code.

of this kind cannot be found in the *Code Napoléon*.[30] The verbatim source of the Digest's provisions was the *Projet* of the Year VIII.[31] In the recodification of 1825, the Digest's provisions were re-enacted without modification as articles 22 and 23 of the Code.[32] These provisions were retained in the Code of 1870 and were in effect during the Revision.

The important point is that, unlike the common law and certain civil-law jurisdictions such as France, the Louisiana Civil Code's principles of repeal are based on legislation. These principles do not originate in doctrine, jurisprudence, or ancient principles, and they would not *necessarily* apply to the amendment or repeal of an ordinary statute or to regulate a comprehensive revision of ordinary statutes. They are the exclusive criteria to be used by the judiciary in deciding the extent to which the Code of 1870 has been repealed by the Revision legislation.

Let us examine these principles as stated in articles 22 and 23 of the 1870 Code:[33]

> Art. 22. Laws may be repealed either entirely or partially, by other laws.
>
> Art. 23. The repeal is either express or implied: It is express, when it is literally declared by a subsequent law; It is implied, when the new law contains provisions contrary to, or irreconcilable with those of the former law.[34]

These articles are written against the background of the ancient

30. Although the French Civil Code contains no provisions on the subject, French writers recognize that the principles of express and tacit repeal have descended from Roman law texts, and that article 7 of the law of Ventose 30, Year XII, which repealed in entirety all the old law in existence at the time of the promulgation of the Code, is a remarkable example of an express repeal. 1 M. PLANIOL, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL, Pt. I, Nos. 226-230 (La. St. L. Inst. trans. 1959). Various codes throughout the world, however, now routinely provide repeal principles in their Preliminary Titles. *See, e.g.*, CODIGO CIVIL art. 9 (Mex. 1928); CODIGO CIVIL arts. 52, 53 (Chile 1855); CODIGO CIVIL art. 2(1) (Spain 1889).

31. *See* II P. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 8 (1827 & photo. reprint 1968).

32. These Code provisions did not appear in the *Projet* submitted by the official redactors but were apparently restored in the legislature itself. Then, in order to avoid any recurrence of the *Cottin* problem, see *infra* note 63 and accompanying text, under the 1825 Code, a separate Code article declared an express repeal of the prior laws. LA. CIV. CODE art. 3521 (Morgan ed. 1854).

33. Articles 22 and 23 of the 1870 Code were in force through January 1, 1988, until their re-enactment by Act No. 124, 1987 La. Acts 404. The articles have been collapsed into a single provision that now appears as article 8. LA. CIV. CODE ANN. art. 8 (West Supp. 1988).

34. LA. CIV. CODE ANN. arts. 22, 23 (comp. ed. West 1973). The Code's principle of

principles that legislation remains in force until it is repealed,[35] and that repeal is never presumed.[36] Article 23's distinction between express and implied repeal is the distinction between a formal and substantive declaration of repeal. An express repeal occurs only in a certain form—a literal declaration of repeal. The implied repeal, however, arises only in the event of a substantive conflict—the content of the later provision is irreconcilable with that of the prior provision. When a prior law is expressly repealed, it ceases to exist regardless of whether it substantively conflicts with the repealing law. Where there is substantive conflict, but no express declaration of repeal, the prior law will be repealed by implication.[37]

B. The Principles Applied to the Code Revision

Given the binary scheme of repeal in the Louisiana Code, what effect does such a system have upon the present Revision? As Table I shows, about 15% of the 1870 Code articles were expressly repealed and these articles have undoubtedly ceased to have effect.

However, the other 85% of the articles were merely amended and re-enacted. This language does not constitute an express repeal under the Code because the word "repeal" or some equivalent (for example, "abrogate," "annul," "destroy")

implied repeal is also restated in LA. REV. STAT. ANN. 24:176 (West Supp. 1988) (emphasis added):

> A. Unless otherwise specifically provided therein, all laws or parts of laws *in conflict* with a provision of a law subsequently enacted by the legislature are repealed by the law subsequently enacted.
>
> B. This Section shall apply to . . . the *Civil Code* of the state of Louisiana . . . .

35. *See* F. SUAREZ, DE LEGIBUS 48 (L. Pereña, P. Suñer, V. Abril, C. Villanueva & E. Elorduy eds. 1972) ("la ley perdure [sic] mientras no se derogue o se modifique su objeto").

36. This principle was expressed in article I, title VI of the French *Projet* of the Year VIII: "Les lois ne devant pointe être changées, modifiées ou abrogées sans de grandes considérations, leur abrogation ne se présume pas." PROJET DE CODE CIVIL livre préliminaire tit. VI, art. 1 (1801). The drafters of the Louisiana Digest of 1808 may have thought it was too obvious a proposition to require incorporation.

37. The distinction also suggests a different role for the judge. An express repeal identifies the law targeted for repeal and leaves no judicial discretion about the identification of that law and its actual repeal. The judge may not seek out the motive and purpose of the legislature in passing the law. Gray v. De Bretton, 184 So. 390, 393 (La. Ct. App. 1st Cir. 1938). An implied repeal, however, requires considerable interpretation since the identification of a law repealed in fact cannot be established without judging the substantive effect that a later law may have upon an unspecified number of earlier laws. This analysis may involve inquiry into the history and purpose of the new law to determine whether its provisions are contrary to the old law. *Id.*

must be literally declared. To claim that to amend and re-enact means to repeal the old law would require putting words in the legislature's mouth. The Code concept of an express repeal requires that the legislature pronounce the repeal and leaves no room for the judiciary to infer a repeal that has not been pronounced.

Of course, according to the common-law authorities, the words "amend and re-enact" can be interpreted to produce a repeal of the old law as it stood before its amendment.[38] Such repeal, however, derives from implication or inference, for the legislature has not literally made that declaration. The common-law authorities recognize that such a repeal is not truly express because they categorize it under the rubric of repeal by implication.[39] The common-law judges do not conceal this inference in the language they employ: "The adoption of the amendatory statute is *in effect* a repeal of the act amended."[40]

The words "amend and re-enact" accomplish neither an express nor implied repeal under the Civil Code. In construing ordinary statutes, the Louisiana Supreme Court on occasion has attributed the same meaning to amend and re-enact that a common-law court would have given it.[41] The supreme court, however, has never applied and should not apply this doctrine to the Civil Code. On the contrary, it has ruled that this formula will not effectuate a *Code* repeal. When the legislature revised the Civil Code in 1870, it employed this formula in the enacting legislation. The legislature declared that the 1825 Code articles were amended and re-enacted, and what followed, save for certain deletions and additions, was an almost verbatim re-enactment of the old Code articles. The articles, however, were re-enacted solely in their English version, which unfortunately was a notoriously bad translation of the French original. The underlying French version was not re-enacted. Nevertheless, the courts have held repeatedly that this enactment did not repeal

38. SMITH'S COMMENTARY ON STATUTORY CONSTRUCTION, § 786, *cited in* State *ex rel.* Holmes v. Wiltz, 11 La. Ann. 439, 446 (1856) (Lea, J., dissenting); Bartlet v. King, 12 Mass. 537, 545-56 (1815).

39. *See* C. JONES, *supra* note 29, at 152-53.

40. Henry v. McKay, 164 Wash. 526, 529, 3 P.2d 145, 148 (1931) (emphasis added); C. JONES, *supra* note 29, at 153 (amendment is "a form of repeal").

41. *See* Flournoy v. Walker, 126 La. 489, 491, 52 So. 673, 674 (1910); State *ex rel.* Brittain v. Hayes, 143 La. 39, 42, 78 So. 143, 144 (1918); Bass v. Weber-King Mfg. Co., 11 La. App. 117, 119, 119 So. 774, 775 (La. Ct. App. 1st Cir.), *rev'd on other grounds*, 168 La. 651, 123 So. 112 (1929). *But see* State v. White, 49 La. Ann. 127, 21 So. 141 (1877).

the French version, and thus the French original could be used as a basis to correct mistaken translations into English.[42] This interpretation was essentially correct since there had been no literal declaration that the 1825 Code was repealed. A common-law court might have held that the amendment and re-enactment of the Code in English was in effect a repeal of the French version of the Code. But not so a Louisiana court. Perhaps without understanding precisely why, the common-law treatise writers acknowledge that Louisiana decisions form an exception to the rule.[43]

Since the words "amend and re-enact" cannot qualify as an express repeal of the prior articles, the only remaining possibility is that articles enacted in this way may be the subject of a repeal by implication. There is statutory language showing that the legislature intended no more than an implied repeal. The legislature inserted a general repealing clause in one-half of the enacting statutes. This clause ("All laws or parts of laws in conflict with this Act are repealed."[44]) forcibly limits the repeal to inconsistent provisions,[45] meaning, in positive terms, that all consistent prior articles remain in force.[46] Furthermore, as previously seen in Table III above, the West editors indicated 221 instances of implied repeal, thus at least recognizing that the prior Code articles should be subject to this reasoning. In addition, this analysis seems especially pertinent to the untouched articles since they were neither expressly repealed nor amended. If properly carried out, however, the analysis ultimately would reveal that the great bulk of the prior articles is consistent with the new articles and has not been repealed by implication.

C. *The Contrast with Statutory Revision*

The reader may question my submission that the revision of a civil code is a matter distinct from the revision of a general statute. In fact, the reader may believe that when a state comprehensively revises its laws and deletes certain statutes from the revision, it is logical to hold that any omitted statutes have been impliedly repealed, even though they may be substantively compatible with the included laws. The common-law authorities sometimes call such a view the doctrine of "intentional omission"[47] or, in Sutherland's words, "repeal by comprehensive revision."[48] This doctrine is a liberalized form of repeal by implication, which some states accept in the context of statutory revision.[49] Thus the reader may ask why this doctrine has no application to the Revision of the Code. Why are all omitted provisions of the 1870 Code, including the untouched provisions, not repealed by a general revision of the Civil Code? Five objections rule against this suggestion.[50]

First, any so-called doctrine of repeal by omission lies outside of the scheme establishing the rules for the Code's repeal. As we have seen, the Code recognizes a binary classification—express and implied repeals—and no third type based purely on omission is possible.[51] The Code defines a repeal by implication as a tacit repeal based upon conflicting content in the laws. Given this limitation, the omission of articles that do not conflict cannot qualify as a type of implied repeal.

Second, as we shall see in the next section, the doctrine runs diametrically counter to the historic decisions of the Louisiana

42. Shelp v. National Sur. Corp., 333 F.2d 431, 432-35 (5th Cir.), *cert. denied*, 379 U.S. 945 (1964) and authorities collected therein; Phelps v. Reinach, 38 La. Ann. 547, 551 (1886).

43. Thus, Chester Jones notes: "But a contrary view seems to be followed in Louisiana . . . ." C. JONES, *supra* note 29, at 157 n.2 (citing Miller v. Mercier, 3 Mart. (n.s.) 236 (La. 1825)).

44. *See supra* note 18 and accompanying text.

45. 1A N. SINGER, *supra* note 19, §§ 23.08, 23.13.

46. Such clauses are typically included in the "American codes" in order to preserve the existing laws. *See supra* note 11 and accompanying text.

47. Wheeler & Wheeler, *Statute Revision: Its Nature, Purpose and Method*, 16 TUL. L. REV. 165, 176 (1942); *see also* C. NUTTING & R. DICKERSON, LEGISLATION 350-68 (5th ed. 1978).

48. 1A N. SINGER, *supra* note 19, § 23.13; *see also* C. JONES, *supra* note 29, at 157.

49. Saunders explains this doctrine in the following terms:

> The rule that laws can be repealed by implication has been extended to this: Where there is revisory legislation, where the legislature takes up and deals with a subject matter, and presents what is intended to be a complete regulation of a limited subject of regulation, the Legislature is assumed from the very fact that it has established a complete regulation of a subject to have intended that all prior regulations of that subject matter shall be repealed.

E. SAUNDERS, LECTURES ON THE CIVIL CODE OF LOUISIANA 8 (1925).

50. I have already referred to some of these points in earlier sections of this Article, but at the risk of repeating myself, I feel that they must be restated here in order to provide a full answer.

51. An official proposal was once made to recognize repeals by omission in Louisiana, but it was not adopted by the Legislature. The Code revision *projet* of 1910 proposed altering the Code's binary structure by adding to article 23 a third form of repeal, called repeal by substitution. The *projet*'s article read in part as follows: "The repeal is either express, implied, *or by substitution*. . . . It is by substitution, when the new law covers the whole subject of the former law, and is intended to supplant it." THE REVISED CIVIL CODE OF THE STATE OF LOUISIANA, art. 23, at 4 (R. Milling, W. Hart & W. Potts, Comm'rs 1910) (emphasis in original).

Supreme Court. If the mere omission of a prior compatible law or article were a basis for the repeal of that law, the court could not have ruled as it did in the cases of *Cottin v. Cottin*,[52] *Reynolds v. Swain*,[53] and many others.[54] The common-law notion that "a revision repeals by implication the previous statutes on the subject even though there be no repugnancy"[55] has been thoroughly rejected in Louisiana.

Third, as seen in the Tables herein analyzing the Code Revision, the legislature has not adopted the technique of repeal by omission. The legislature's technique *vis à vis* the old Code is obviously active, not passive. The legislature has made pervasive use of general clauses and amend and re-enact language, and selective use of express repeals. The three distinct but affirmative approaches shown in Table I[56] demonstrate the falsity of the hypothesis that the legislature "intends" to repeal any article by negative implication. In an affirmative scheme of revision, omissions are not extinct black holes, but rather continuing sources of law.

Fourth, repeal by omission has never been practiced before by the Louisiana Legislature in the revision of any code, whether it be the Civil Code, the Criminal Code, the Code of Civil Procedure, or the Revised Statutes of 1950. The history of twentieth century revision in Louisiana is a history of express repeal. When the Criminal Code of 1942 was enacted, the legislature set forth a detailed list of all the criminal laws expressly repealed, listed certain laws expressly preserved in force, and concluded by generally retaining all other nonrepugnant criminal laws.[57] The identical pattern was followed when the Code of Civil Procedure was enacted in 1960. The legislature expressly repealed every article in the old Code of Practice, listed specific parts of the Revised Statutes to be preserved, and generally repealed all other laws "in conflict or inconsistent" with the new Code.[58] In the comprehensive statutory revision of 1950, the legislature expressly repealed all prior statutes, which were then exhaustively listed in a separate schedule.[59] In each of these twentieth-century codifications or revisions, the legislature dealt comprehensively with the status of all prior law in the active voice and left no scope for the operation of the doctrine of intentional omission.

52. 5 Mart. (o.s.) 93 (La. 1817); *see infra* notes 61-63 and accompanying text.

53. 13 La. 193 (1839).

54. For an historical account of these cases, see *infra* notes 66-67, 84-85 and accompanying text.

55. C. JONES, *supra* note 29, at 157 (footnote omitted).

56. *See supra* part II.

57. Act No. 43, §§ 2, 3, 4, 1942 La. Acts 147; *see* Schimpf v. Thomas, 204 La. 541, 549, 15 So. 2d 880, 882-83 (1943).

58. Act No. 15, § 5, 1960 La. Acts 748.

Fifth, even if the doctrine of repeal by omission were accorded a place in the field of code revision, it could not be easily applied to the current Code Revision because the piecemeal approach lacks the pre-emptive focus of an all encompassing statutory revision. The premise of the doctrine of omission is that the legislature intends to pre-empt earlier laws through complete revision enacted at a single stroke. This premise falters in the present case. The Property Revision, for example, was broken down into small blocks of articles, which were re-enacted by separate acts. The enacting legislation consisted of six separate Acts spread over a four-year period that revised *in toto* only 12% of the entire Code. The focus of each enactment encompassed a single Title within Book II. At this pace, revision of the entire Code would take about thirty-two years and could require over thirty separate enactments, assuming that no part became obsolete and required a second revision in the meantime. The process and pace of incremental revision are difficult to reconcile with the premises of repeal by *comprehensive* revision.

For these reasons I believe no case exists for the view that prior compatible articles have been repealed by the legislature.

IV. HISTORY COMES FULL CIRCLE—FOUR EPISODES OF THE RECURRING DRAMA

The present Revision has not created a novel controversy in Louisiana history. The Revision is only the fourth and latest episode in the vicissitudes of the codification process in this jurisdiction. Indeed, this history is largely self-repeating. The same controversy has occurred under the three previous codifications.

59. This schedule of repealed laws is found in 5 LA. REV. STAT. ANN. at 870 (West 1950). In contrast, statutory revision in the nineteenth century followed the strategy of express repeal through global reference. The Revised Statutes of 1855 were enacted subject to the following repeal: "[T]hat all laws contrary to the provisions of this Act, and *all laws on the same subject matter*, except what is contained in the Civil Code and Code of Practice, be repealed." Act of March 14, 1855, *quoted in* State *ex rel.* Holmes v. Wiltz, 11 La. Ann. 439, 440 (1856). Some other states have also made nonspecific global repeals of prior statutes. *See, e.g.*, Colorado's legislation "repealing all statutes of a general nature not included therein . . . ." *In re* Interrogatories, 127 Colo. 160, 162, 254 P.2d 853, 854 (1953); *see also* C. NUTTING & R. DICKERSON, *supra* note 47, at 356-58.

I do not wish to delve into this story in detail, but since the lessons of our past appear to have been ignored, it is important to understand what they are and why they are important once again.

A. *Episode I: The Crisis of the First Digest*

Episode I (1817-1825) was the first crisis over legal sources. It concerned the standing of the 1808 Digest *vis à vis* the prior Spanish law. The Digest had no provision effecting a blanket repeal of the past Spanish jurisprudence. To the contrary, the Digest's enacting legislation repealed only the ancient civil laws that were inconsistent. It provided, "And be it further enacted, That whatever in the ancient civil laws of this territory . . . is contrary to the dispositions contained in the said digest, or irreconcileable [sic] with them, is hereby abrogated."[60] The question in *Cottin v. Cottin*[61] was whether the Digest's definition of an "abortive" child as a child "incapable" of living repealed by *implication* a Spanish provision that defined an abortive child as one who did not live at least twenty-four hours. Seeing no necessary conflict between the two ways of defining an abortive child, the court held that the twenty-four-hour test of Spanish law had not been repealed and that it would be applied. Justice Derbigny explained the principle of implied repeal:

> It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.[62]

The consequences of the *Cottin* ruling were staggering and complex: all Spanish law that was compatible would thus play the role of supplementing the 1808 legislation.[63] The old Spanish law was now regarded as "Louisiana's common law" because it remained the background that the new Digest partially displaced, but did not expressly repeal.[64] The 1808 codification was aptly entitled a Digest because it was an incomplete restatement of the prior law.

60. Act No. XXIX § 2, 1808 Acts of the Territory of Orleans 126.

61. 5 Mart. (o.s.) 93 (La. 1817).

62. *Id.* at 94.

63. Realizing that not all Spanish law was repealed by implication, the Louisiana Legislature next authorized Moreau-Lislet and Carleton to translate into English "such parts of the laws of the *Partidas* as are considered to have the force of law in this State . . . ." 1819 La. Acts 44, § 1.

The principle of implied repeal stated by the court was hardly novel. It had ancient roots in Justinian's Digest and could be found in Toullier.[65] Strangely, *Cottin* and its progeny made no reference to article 24 of the Louisiana Digest, which declared the same principle. The post-*Cottin* jurisprudence noted that "[s]ubsequent laws do not repeal former ones by containing different provisions; they must be contrary,"[66] and that an exception to a general rule was not repealed by enacting the general rule without the exception.[67] Episode I ended in 1825, but subsequent chapters in the story carried these principles to new historic situations.

B. *Episode II: The First Code and the Great Repeal*

Episode II (1825-1828) presented the controversy in a new setting: the question was whether the Code of 1825 had broken entirely with the past by repealing the 1808 Digest. Were there two "Codes" or only one? Was there any linkage between the two Codes and, by extension, between these Codes and Spanish law? A clean break seemed to be expressly dictated by the sweeping terms of a repealing provision found in Civil Code article 3521:

> From and after the promulgation of this code, the Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of

64. R. KILBOURNE, A HISTORY OF THE LOUISIANA CIVIL CODE 64 (1987).

65. "[P]osteriores leges ad priores pertinent, nisi contrariae sint." DIG. 1.3,28; 1 C. TOULLIER, LE DROIT CIVIL FRANÇAIS 122, 124 (4e ed. 1824).

66. Lacroix v. Coquet, 5 Mart. (n.s.) 527, 528 (1827).

67. "The re-enactment of a general provision contained in a former law, to which an exception was attached, does not repeal that exception; because the intention to repeal is never presumed, and both provisions may well stand together." Herman v. Sprigg, 3 Mart. (n.s.) 190, 199 (La. 1825). For further statements of this principle in the post-*Cottin* cases, see Chalmers v. White, 2 Mart. (n.s.) 315 (La. 1824); Fusilier v. Hennen, 12 Mart. (o.s.) 266 (La. 1822). In *De Armas' Case*, 10 Mart. (o.s.) 158, 172 (La. 1821), Justice Mathews formulated three principles of repeal:

> First, old laws are abrogated and repealed by those which are posterior, only when the latter are couched in negative terms, or are so clearly repugnant to the former, as to imply a negative. Second, a particular law is not repealed by a subsequent general law, unless there be such repugnancy between them, that they cannot both be complied with, under any circumstances. Thirdly, if many laws be made on the same subject, which are not repugnant in their provisions, they ought to be considered as one law and so construed.

> the Legislative Council, of the legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this code, and that they shall not be invoked as laws, even under the pretence that their provisions are not contrary or repugnant to those of this code.[68]

Since no comparable provision had been included in the 1808 Digest, article 3521 should have effectuated the legislature's clear intent to sever the 1825 Code from its antecedents. Indeed, the intent was unmistakable because the repealer had been written by the legislature and was not found in the original draft submitted by the redactors.[69] Nevertheless, the article could be read as not repealing all prior law, for it only applied in "every case, for which it has been *especially provided* in this code."[70] This left open the possibility of arguing that there were limits to the express repeal.[71] If a case arose in which there was no specially provided rule under the Code, recourse to a special rule under prior law, if one existed, could be made. On these lines, the two Codes were linked whenever gaps existed in the 1825 Code that could be filled by the earlier laws.

The Louisiana Supreme Court adopted this interpretation in *Cole's Widow v. His Executors*.[72] A couple was married in New York in 1810. Thereafter the husband moved to New Orleans, his wife remaining in New York. He lived in New Orleans until his death in 1827. While there, the husband acquired a piece of property that he willed to a brother. The wife disputed the bequest, claiming one-half ownership by virtue of an asserted regime of community property. The husband's executors, however, argued that because she had never come to Louisiana, no community of acquets and gains existed between the couple.

Article 2370 of the 1825 Code expressly covered only the case in which both spouses came to Louisiana. It stated that a

68. LA. CIV. CODE art. 3521 (Morgan ed. 1854).

69. R. KILBOURNE, *supra* note 64, at 133.

70. LA. CIV. CODE art. 3521 (Morgan ed. 1854).

71. Compare the difference between article 3521 and the repealing language used in promulgating the *Code Napoléon* by the law of Ventose 30, Year XII: "From the date when these laws come into force, the roman law, the ordinances, the general or local customs, the statutes, and the regulations cease to have general or particular force of law in the subject matter which is the object of the laws composing the present Code." Ventose 30, Year XII, *reprinted in* E. CARPENTIER, LES CINQ CODES 5 (1947). (Author's translation.) If the Louisiana legislature had been equally adept in drafting an air-tight global repeal, Episode III might have been avoided.

72. 7 Mart. (n.s.) 41 (La. 1828).

marriage contracted out of state between persons who afterwards come to live here is also subjected to the community with respect to property acquired after *their* arrival.[73] The article could be read to contemplate the arrival of two persons, failing which, the community would not exist and the testator's brother would inherit all. But the court refused to read by negative implication an intent to exclude the community when only one party established Louisiana domicile. The *fuero real* stated generally and not inconsistently that "every thing which the husband and wife acquire while together, shall be equally divided between them."[74] According to the Spanish writers, the residence of the parties in different places did not prevent the community from existing.

Justice Porter ruled in favor of the wife and the community, holding that the Spanish law rather than the Code article was dispositive.

> Now the case of one of the married couple moving into this state, is not specially provided for: the former law, therefore, in relation to it, is not repealed by this general provision [article 3521]. Whether, on the general rules of construction, the article already cited can be considered as abrogating a former law which, although different, is not contrary, little need be now said. The vast quantity of positive legislation which has been given to the people of Louisiana since the change of government, has called the attention of our courts repeatedly to this subject, and the principles which forbid such a conclusion have been again and again stated by this tribunal.[75]

The result and reasoning showed that a meticulous attention to the repeal language was one way of clinging to the past law.[76] This was unsatisfactory to the legislature. The Code, as interpreted, had suddenly been transformed into a digest—it was linked to the earlier Digest and, by extension, to an indeterminate quantity of unavailable sources in foreign languages. A clean break was more desirable than ever, and in 1828 the Great Repealing Statute was passed, which expressly abrogated the Civil Code of 1808 and "all the civil laws which were in force

73. LA. CIV. CODE art. 2370 (Morgan ed. 1854).

74. *Cole's Widow*, 7 Mart. (n.s.) at 45.

75. *Id.* at 46.

76. Professor Dainow characterized the interpretation as "sheer stubbornness and error." Yet he added, "However, this emphasized how deeply was rooted the tradition of the old civil law." Dainow, *Introductory Commentary to the Louisiana Civil Code*, in 1 LA. CIV. CODE ANN. at 11 (West 1952).

before the promulgation of the civil code lately promulgated."[77] The close of Episode II, therefore, was marked by a new departure in which the Code, which the judiciary had construed as a digest, finally became a code again. It turned out to be the original and exclusive source of law in the spheres that it covered. The historical lesson is important: a code in its true sense cannot be produced without an express repeal of *all* former law.

C. *Episode III: The Revision of 1870*

Episode III of this tale brings us to the "revised" Civil Code of 1870. The revision of the 1825 Code was necessitated by the abolition of slavery after the Civil War and by the desirability of incorporating a certain number of acts and amendments passed since 1825. It is widely recognized that, with a few exceptions, the revised Code reproduced verbatim the 1825 Code. As Professor Yiannopoulos correctly notes, the 1870 Revision was merely a "re-enactment" of the 1825 Code.[78] The committee established by the legislature in 1868 was charged only with the task of making a "limited" revision and "the legislature never intended to insulate the 1870 Code from its antecedents."[79] This view of the matter prevailed in the case of *Phelps v. Reinach*.[80] The Louisiana Supreme Court held that, although the 1870 Code was published solely in English, the French version of the 1825 Code was still the law and was controlling where an error of translation found its way into the later Code.[81] The court so little doubted the linkage between the Codes that it did not bother to explain the basis for its opinion. Had the matter received closer attention, however, the result was surely correct. The enacting legislation of the 1870 Code contained only the language of continuity, not repeal. It provided: "Be it enacted

77. Act No. 83 § 25, 1828 La. Acts 160; *see also* Act No. 40, 1828 La. Acts 66. Even then there continued to be some judicial doubt about whether all prior laws could be repealed in this fashion. *See* Reynolds v. Swain, 13 La. 193, 198 (1839).

78. Yiannopoulos, *The Civil Codes of Louisiana*, in A. YIANNOPOULOS, CODE, *supra* note 4, at XXVIII. As evidence of the continuity between the 1825 and 1870 Codes, see Edmond Peyroux's 1883 edition of the Revised Civil Code. His extensive annotations to the Louisiana jurisprudence and French and Spanish doctrinal materials would have been superfluous had the Revised Code broken cleanly from the past. LA. CIV. CODE (E. Peyroux ed. 1883).

79. Yiannopoulos, *supra* note 78, at XXIX.

80. 38 La. Ann. 547 (1886).

81. *Id.* at 551-52. The French word "reclusion" had been mistranslated as "seclusion" in the English version of Civil Code article 3027. The words carried entirely different connotations.

by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, That the Civil Code of the State of Louisiana be *amended and re-enacted* so as to read as follows, to wit . . . ."[82] By using this enacting formula and by reproducing the 1825 Code articles verbatim, there was no possibility of an express or implied repeal of the 1825 Code articles. It is also important to note that the Revised Code did not re-enact the repealer provision of the 1825 Code (article 3521) and did not add a new repealer of its own. Thus, the Revised Code of 1870 ventured no repeal of prior laws or codes.[83]

A long line of cases followed the view that the Code of 1825 was not superseded.[84] The lesson of these holdings seems to be that where the existing Civil Code is amended and re-enacted, and the re-enacted articles contain no express repeal of the earlier Code, no intent to repeal it will be inferred. The revised version will not be insulated from its predecessor.

D. *Episode IV: The Current Revision in the Circle of History*

Episode IV of this story brings us to the current Revision, which began nearly twenty years ago. Like Episode III, it too is the story of revision without repeal, and it too uses (generally, although not exclusively) an amending and re-enacting formula. However, it is no mere renumbering and replication of old provisions as occurred in 1870. This revision without repeal makes significant, sometimes radical, changes in substance and in expression. It presents, in substantive terms, a closer analogy to the far-reaching consequences at stake in Episodes I and II than those present in Episode III.

The present Revision could produce the chaotic position that the Louisiana legal system experienced after the decision in *Cottin v. Cottin*, which recognized that the ancient laws "must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them . . . ."[85]

82. Act No. 97, 1870 La. Acts 131 (emphasis added).

83. I assume, however, that the mere omission of old article 3521 (1825) still left that article in force, and that the legislature relied upon that provision and the 1828 Great Repealing Statute to serve as a cutoff from the ancient laws. *See supra* notes 67-68, 76 and accompanying text.

84. Jurgens v. Ittman, 47 La. Ann. 367, 16 So. 952 (1895); Commercial Germania Trust Serv. & Sav. Bank v. White, 145 La. 54, 81 So. 753 (1919); Straus v. City of New Orleans, 168 La. 1035, 118 So. 125 (1928); Sample v. Whitaker, 172 La. 722, 135 So. 38 (1931); Shelp v. National Sur. Corp., 333 F.2d 431 (5th Cir. 1964).

85. 5 Mart. (o.s.) 93, 94 (La. 1817).

Our current position is also analogous to the historic situation after the 1825 Code's enactment when the supreme court held, despite a strongly worded repeal of prior sources, that the 1808 Digest continued in force to the extent that it was not expressly modified, suppressed, or superseded by new provisions.[86]

On the basis of our own historical example, it seems logical to assume that a new crisis over sources is on the horizon and may soon arrive. If it should come, the crisis could be heralded by a *Cottin*-type decision by the Louisiana Supreme Court in which an article of the 1870 Code is given effect, thereby exploding the conventional belief that the old Code has been entirely repealed. At that point, perhaps some legal historian will suggest that another Great Repealing Statute, similar to the statute of 1828, should be considered immediately by the Legislature. A complete repeal of the 1870 Code, or the revised parts of it, should be declared so that the structural integrity of the new Code can be preserved. On the other hand, perhaps a legal pragmatist will reply that a general repeal would not be advisable. Instead a study should be undertaken promptly to determine which articles of the 1870 Code have survived an implied repeal.[87] Indeed, Episode IV may start with a case and simply end with some such study, because it might soon be discovered that a general repeal of the 1870 Code would wreak havoc on the Revision. Unlike the Code of 1825, which was in fact "an all-inclusive piece of legislation, intended to break definitively with the past,"[88] our recently revised Code is really not designed to be a fresh start and, as drafted, does not possess the characteristics of a self-contained code. It may not be possible to repeal the past articles and thereby amputate the existing jurisprudence without destroying in large part the very architecture of the Revision.

Moreover, even if the foregoing analysis of the principles of repeal were incorrect, and if I were wrong to think that the 1870 Code is still in force in places where it has been revised, I would still maintain that the new Code is a digest that is compromised by the structural role accorded to the old Code's jurisprudence.

86. Flower v. Griffith, 6 Mart. (n.s.) 89 (La. 1827); *see also* Reynolds v. Swain, 13 La. 193 (1839). The remarkable history of these decisions is traced in R. KILBOURNE, *supra* note 64, at 65-75.

87. With much the same purpose that Moreau-Lislet and Carleton conducted a similar task in 1819. *See supra* note 63.

88. Yiannopoulos, *supra* note 76, at XXVI.

Retention of the prior Code and jurisprudence may be embarrassing to old-school purists, but it is indispensable to *this* Revision. The reasons for this assessment are set forth in the following Section, in which some of the consequences of revision without repeal are explored in more concrete fashion.

V. ASSESSING THE CONSEQUENCES OF REVISION

It is not my object nor within my competence to provide a sketch of all the consequences that flow from the present Revision. In this part of the Article, I have in mind merely to touch on two consequences that seem truly momentous, although self-evident: (A) The Revision in its present form has fundamentally altered the nature of Louisiana's civil law system; and (B) Revision without repeal has frustrated the purpose of modernizing and clarifying Louisiana law.

A. A Fundamental Alteration of the Nature of Louisiana Law

The Revision marks the death of a code and the birth of a digest. As Professor Yiannopoulos explains, "Civil codes are conceived as comprehensive enactments, designed to be complete within their area of application, and intended to break with the past."[89] By these criteria the Revision is not a true, self-contained code[90] because it is structurally compromised by the concurrent existence of the old Code and by heavy reliance upon that Code's jurisprudence. The ensemble forms an intricate net-

89. *Id.* at XXIV.

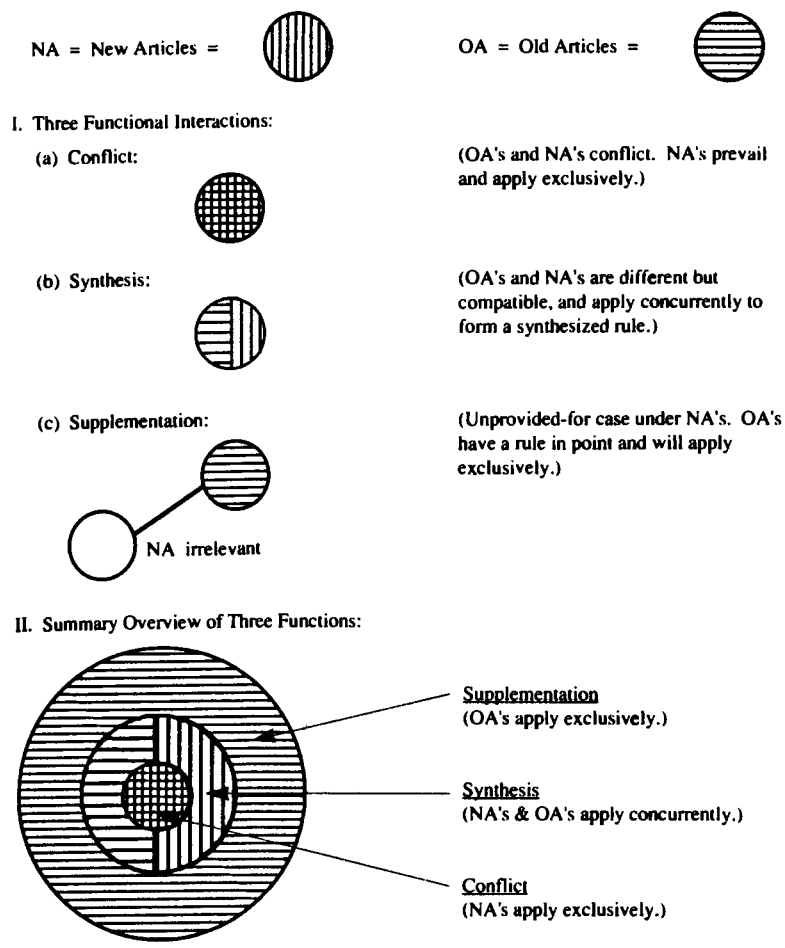
90. The French tradition generally requires that (a) a code should be complete in its field, (b) it should lay down general (not overly detailed) rules, and (c) it should arrange the rules logically. Tunc, *The Grand Outlines of the Code*, in THE CODE NAPOLEON AND THE COMMON-LAW WORLD, *supra* note 28, at 19, 23-29. Angelo Sereni stresses, as an aspect of the completeness criterion, the notion of self-sufficiency. "[W]ithin its four corners an answer could and should be found to each question." Sereni, *The Code and the Case Law*, in THE CODE NAPOLEON AND THE COMMON-LAW WORLD, *supra*, at 59. Jean-Louis Baudouin lists internal coherence (the absence of inner contradictions) and simplification as being essential to a code. *Réflexions sur la codification comme mode d'expression de la règle du droit*, in UNIFICATION AND COMPARATIVE LAW IN THEORY AND PRACTICE 17 (Kluwer Law & Tax. Publishers 1984).

The criteria for defining a code in the French and Louisiana tradition may be somewhat different than those in other civil law traditions. Jacques Vanderlinden's study of codifications in Western Europe from the thirteenth to nineteenth centuries concludes that only three broad traits underlie the notion "code": (a) by its *form*, a code is an ensemble of rules—it is the unification of many parts in a whole; (b) by its *content*, this ensemble must be an important part of the law; (c) by its *effect*, a code must permit a better understanding of the law. *See generally* J. VANDERLINDEN, LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIIIÈME AU XIXÈME SIÈCLE (1967).

work of exclusive and concurrent spheres. The two sets of provisions and their interpretation interrelate in three ways: they may conflict, they may synthesize, or they may supplement one another. The new articles establish an exclusive sphere only when they contradict the old articles or cases; the old articles or cases, however, establish their exclusivity when they go beyond the new articles and provide supplementary rules; in all other situations, the codes converge to form a sphere of synthesized rules.[91]

This new digest is neither logically complete nor harmoni-

91. The interface of the new and old articles (and their jurisprudential interpretation) seems to be as follows:



ously organized. The unprovided-for case can no longer be resolved by recourse to interior analogies or to the notion of equity under revised article 4 (formerly article 21 of the 1870 Code). The extrinsic sources have hegemony over interior analogies. Many future gaps will be closed (before they open) by the supplementary rules provided by extrinsic sources. This design flaw cannot necessarily be cured by global repeal of these external sources, for the problem runs deeper. The new legislation has been deliberately drafted in asymmetrical form, with predesigned gaps that are *supposed* to be filled by recourse to the old Code's jurisprudence. The official comments to the articles explicitly instruct and advise us to fill the gaps with the prior jurisprudence.[92] The drafters of the Revision were profoundly ambivalent about cutting the Revision off from the work of the courts over the past 150 years. This ambivalence is understandable in view of the hybrid nature of Louisiana law, in which the sovereignty of the Code reigned concurrently with a modified system of precedent. The drafters' ultimate decision was to attach the Revision selectively to the jurisprudence (often by reference only, via the comments to the sections), thus producing a type of codification whereby (arguably) the *jurisprudence constante* of the past is transformed into the *jurisprudence permanente* of the future.[93] The role of the pre-Revision jurisprudence as a primary source of law has been structurally recognized, formalized, and entrenched.

This new structural role for the old jurisprudence not only produces a digest but may raise, in the process, serious doubts about the legitimacy of using old cases as a gap-filling source of law. If, as I have shown, the old Code continues concurrently in force with the new, then the pre-Revision jurisprudence, viewed as a derivative and secondary source of law, has as much legitimacy or authority for the future as it possessed in the past.

92. The old jurisprudence has been selectively attached to the revised Code through the various bonding techniques employed by the official comments. *See infra* note 108, particularly the fifth and sixth techniques which relate specifically to gap-filling.

93. Clarence Morrow sternly warned in 1949 that this path might be taken by the revisors and that it would produce a digest instead of a code:

> A tremendous temptation will be felt to "restate" a great deal of this [jurisprudence], and thus turn the Revised Code into a glorified digest, in which the existing Code articles will become merely a framework upon which to hang the jurisprudence. If this approach should be taken, in my opinion, it would be far better not to undertake the revision project at all.

Morrow, *supra* note 12, at 68.

Those, however, who hypothesize (contrary to my argument) that the Revision has accomplished a broad repeal must confront a serious legitimacy issue—namely to explain how the old jurisprudence governs while the Code that gave it life rests in its grave. The conventional view on repeal assumes, erroneously, that the pre-Revision jurisprudence can exist as the detached limbs of a defunct Code. It assumes that case rulings can be amputated from one Code and attached to the next. To envision this grafting process is enough to cast doubt upon the hypothesis of broad repeal, for such a process supposes the existence of a living Louisiana common law severed from any legislative base; that is, a distinct mass of praetorian rules whose existence is irreconcilable with the Revision's own declaration that "[t]he sources of law are legislation and custom."[94] Many may desire this result and applaud the "realism" behind it; however, I am speaking not of results but of legitimacy. Even if the Revision well reflects the system that we want, it is an unavowed abandonment of the system to which we aspired.

B. An Unsuccessful Modernization and Clarification of Louisiana Law

The birth of the new digest means that the goals of the Revision have been jeopardized, perhaps totally lost. I am assuming that the Revision's goals are, in general, to modernize and clarify the law while remaining consistent and faithful to the concept of a civil code in the French tradition.[95] Not only has that tradition been broken, but the noble efforts to modernize and clarify the law and innovate new solutions have been largely dissipated or defeated. Instead the transformation from code to digest has greatly increased the complexity, uncertainty, and inelegance of our law. An increased number of parts interrelates

94. LA. CIV. CODE ANN. art. 1 (West Supp. 1988).

95. The mandate of the Louisiana State Law Institute is contained in Act No. 335 § 1, 1948 La. Acts 810. Section 1 provides: "That the Louisiana State Law Institute is instructed to prepare comprehensive projects for the revision of the Civil Code of Louisiana and for the revision of the Code of Practice of Louisiana." *Id.* This is not necessarily a wide mandate. Much will depend upon the meaning of the word "revision" and the context in which it is used. Revision does not ordinarily connote the authority to alter the nature or content of the Civil Code in a fundamental way. The *Oxford Dictionary* recognizes the meaning of this word in its legal context: " '—revise: read or look over or re-examine or reconsider and correct, improve, or amend (literary matter, printer's proofs, law, constitution, etc.)' " THE CONCISE OXFORD DICTIONARY 893 (7th ed. 1982), *quoted in* Larsen, *Statute Revision and Consolidation: History, Process and Problems*, 19 OTTAWA L. REV. 321, 331 (1987).

with the whole in a complex network that is anything but codal. The official comments, which the legislature has expressly refused to enact, function as indispensable roadmaps to this network. They play an expanded, instrumentalist role in the digest—picking and choosing between rival sources of law, announcing when old Code articles have been abandoned, and declaring when prior jurisprudence has been retained. Under the methodology of a digest, one cannot know the "Code" without reading the comments, and then one must read the sources that the comments say to read.

1. The Streamlining That Lengthens the Law

The old Code of 1870 contained much doctrinal material that made it longer than it should be.[96] In almost all parts of the Revision, an attempt has been made to be more concise and to excise examples, definitions, and extraneous material. Generally, the revised articles appear to be about one-third shorter than the old Code articles. The Obligations Revision, for example, took 535 articles of the 1870 Code (articles 1756-2291) and re-enacted them as 301 revised articles (new articles 1756-2057). This is not really the streamlining that it appears to be. The Obligations Revision expressly repealed only one old Code article. Consequently the length of the *combined* Code articles has been increased by about 300 articles. Little or none of the extraneous material has been truly deleted. It is axiomatic that the new law cannot shorten or streamline the old law without repealing it.

The revision of the Error articles shows in microcosm the futility of the Revision's endeavor to streamline the Code. The 1870 Error provisions comprise twenty-seven articles (articles 1820-1846), which have been collapsed into five new articles that are extremely well drafted and thoughtful.[97] The drafters eliminated the old definitions of an error of fact and an error of law and excised all of the doctrinal material in the text involving

96. Mitchell Franklin phrased this point succinctly: "The difference in the length of the two codes [Code Napoléon and the Louisiana Civil Code] 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." Franklin, *Some Observations on the Influence of French Law on the Early Civil Codes of Louisiana*, in LE DROIT CIVIL FRANÇAIS-LIVRE-SOUVENIR DES JOURNÉES DU DROIT CIVIL FRANÇAIS 841 (1936), *quoted in* Herman & Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987, 1042 (1980).

97. *See* LA. CIV. CODE ANN. arts. 1948-1952 (West Supp. 1988).

mistakes generated by forged documents, unknown compromises, destroyed property, life insurance, eminent architects, false heirs, and ingots of silver. Nevertheless, all of this doctrine remains on the books as a kind of shadow code to the present Code. If a new case arises that falls within the ambit of the eminent architect example of old article 1837, or within the example of a gift in contemplation of marriage under old article 1827, the court must give effect to the precise rule in the shadow code because there is nothing manifestly contradictory in the revised law.[98] In addition, the court must give effect to the more precise textual illustration even if the more abstract rule of the Revision could arguably point in another direction. Law students and practitioners must continue to study this old material not simply with the conventional view that there may be transitional contracts that were entered into before the effective date of the Obligations Revision. The Error articles of 1870 will be law both during and after the transition. Furthermore, because the 1870 Error provisions are still by and large good law, the jurisprudence decided under these articles will remain authoritative. The bench and bar with good reason may regard the new articles as automatically annotated before they have ever been interpreted or applied in a case. Accordingly, the reverse of streamlining has occurred. The revised Error articles are not the exclusive source of law. The revised Code, like a giant iceberg, simply hides its mass from view.

2. The Innovations Thwarted by the Supplementary Rules

The Revision contains many striking innovations, including some that have been borrowed from other systems, some that have been invented, and others that have long been suggested by critics.[99] Yet how successful will the revised Code be in implementing its innovations if the weight of the past has not been lifted? If the new principle, rule, or distinction cannot claim an exclusive sphere of application in the future, can the innovations of the Revision achieve their goal?

The new provision on putting in default is perhaps a good example of an ill-fated innovation. The new provision may be described as an attempt to narrow the scope and clarify the content of this cloudy concept. The innovation is to be found in revised article 1989: "Damages for delay in the performance of an obligation are owed from the time the obligor is put in default. Other damages are owed from the time the obligor has failed to perform."[100] It is clear, and even the comments acknowledge, that this provision represents a new rule in Louisiana.[101] The obligee must put the obligor in default when he seeks moratory damages, but not when he seeks compensatory damages. The concept is a good one, but does it work? Does this article mean that *every* claim for moratory damage must be preceded by a putting in default? Suppose that an obligor has denounced his obligation in writing and has even rendered himself incapable of performing it. Such acts would certainly qualify as an "active" breach of contract under unrepealed Code article 1932 (1870), which declares: "When there is an active violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the debtor in default, in order to entitle him to his action."[102] The active/passive distinction of Civil Code article 1932 does not conflict with the moratory/compensatory innovation of the Revision. The two may be read together so that a putting in default for moratory damages is generally required in order to recover moratory damages, but not if an active breach of contract has occurred. Is this a narrower scope for putting in default than the redactors had intended? If we believe the comments to revised article 1989, the answer is certainly yes. Comment (f) states: "The distinction between active and passive breach has been abandoned. . . . There is no need for that distinction in this revision, where the usefulness of putting in default is confined to marking a starting point for delay-damages."[103]

Note well what happens to the attempted innovation. An unrepealed provision glosses the innovation, but the unenacted

98. If one wanted to envision what "became" of the old Code articles on Error, Table IV, *supra* note 26 and accompaying text, provides a graphic idea: old articles that have been neither incorporated nor repealed turn up as mere blanks in the right-hand column of the Table. These blanks are perhaps a fitting description of their penumbral existence after the Revision.

99. Some of the most noteworthy innovations include the doctrine of *la possession vaut titre*, LA. CIV. CODE ANN. arts. 517-530 (West Supp. 1988), which replaced the bona fide purchase doctrine employed by the courts; the new emphasis on specific performance as a contractual remedy, *id.* arts. 1986-1988; and the virtual elimination of the sterile controversy over potestative conditions, *id.* art. 1770.

100. *Id.* art. 1989 (West 1987).
101. *Id.* comment (a).
102. *Id.* art. 1932 (comp. ed. West 1973).
103. *Id.* art. 1989 comment (f) (West 1987).

comment tells us to "abandon" the old provision because there is "no need" for it. Yet I must assume that this is impossible or illegitimate under a rational code system. Indeed, I must assume that the old Code article has some operative effect and may be urged upon the court by an obligee in a case in which the obligor has actively breached his obligation. What the redactors seek to do, and what is wholly inadmissible in a codified system, is to pit the comments against the old Code, and to elevate the former over the latter. At some point, the question needs to be: How high can the comments be raised by their own bootstraps?[104] Less theoretically, however, the question is: How can the courts afford to ignore the comments, when they reflect the redactors' intent? Here courts will face an almost perfectly balanced dilemma. If they observe the principles of repeal and apply the old Code, then they must disregard the precatory remarks of the comments. Thus, courts may experience the eerie feeling that they are applying the letter of the law contrary to the intent of the comment writers, although this intent, in a political context, is a more articulate and reliable guide than the blurry intent of the legislature. On the other hand, if they follow the comments and disregard the old law, they disrespect the principles of repeal and the theory behind all codification—the supremacy of written law.

3. The Comments as Instruments of Repeal and Codifiers of Jurisprudence

In a Revision without repeal, the Comments are forced to play an expanded, almost "magical" role. They must do more than explain the mechanics of the new provision, or state the underlying theory or intent behind the provision, or issue that often inaccurate assurance that the new article "does not change the law." The comments to this Revision are forced to arrogate to themselves the power to eliminate the provisions of the 1870 Code that are unnecessary and the power to indicate which line of jurisprudence is eliminated, preserved, or still "relevant." Comments possessing such powers should be regarded as magic

104. I am echoing Honnold's remark about the official comments to the Uniform Commercial Code: "Perhaps we face here an engineering problem: How high can the comments lift themselves by their own boot-straps?" J. HONNOLD, SALES AND SALES FINANCING 18 n.2 (2d ed. 1962). *See generally* Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 599.

wands.[105] They defy every law in the juridical universe.

A glance at almost any title of the Revision will show that the Code now abounds with comments pretending to be instruments of repeal. Let us take the comment to revised article 1965 as an example. The article reads: "A contract may be annulled on grounds of lesion only in those cases provided by law."[106] This article innocuously begs the question of what are the cases "provided by law." But the comment to the article does not beg the question. With a wave of the wand, it declares that thirty-one Code articles are "eliminated."[107] Evidently the drafters

105. I am not making critical remarks about the propriety of providing commentary to a civil code. *See* Zengel, *Civil Code Revision in Louisiana*, 54 TUL. L. REV. 942, 960 (1980) ("The revised code should not be a textbook."). The technique has been used before in Louisiana and elsewhere, and it can be helpful. In Louisiana, it was previously used in the Criminal Code of 1942, the Code of Civil Procedure of 1960, the Trust Code of 1964, and the Mineral Code of 1974. In the Draft Civil Code of Quebec, there are two volumes of commentary written by the redactors. I am prepared to accept the realism in the justification for comments once offered by Henry George McMahon:

> The inclusion of the redactors' comments in the code itself is a departure from traditional civilian redaction techniques, and was adopted over the objections of a few of the old-school civilians in Louisiana. This system was first employed by the Louisiana State Law Institute, as an experiment, in the *projet* of the Louisiana Criminal Code of 1942. The official comments in the latter have proved so helpful to the courts and practicing lawyers of the state that there was a strong professional demand for the employment of this technique in the *projet* of the new procedural code. Judicial precedent plays a more important role in Louisiana than in any other civilian jurisdiction, and the consideration of the prior jurisprudence was deemed helpful in all cases. The citation of prior cases was absolutely necessary in those instances where the jurisprudential rule was being reversed legislatively.

McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1, 18-19 (1960) (citation omitted).

I am, however, making critical remarks about a new form of *instrumentalist* comment never before employed, which sometimes establishes a counterrule or interpretive gloss. See *infra* note 108 and accompanying text. If the code is matter, this type of comment is anti-matter.

106. LA. CIV. CODE ANN. art. 1965 (West 1987).

107. The text of the comment is as follows:

> (a) This Article summarizes the content of C.C. Arts. 1860, 1861, and 1863 (1870). It does not change the law. It eliminates the duplication of treatment of lesion in C.C. Arts. 1860-1880 and 2589-2600 (1870).
>
> (b) Under this Article, a contract may be invalidated on grounds of lesion only in the cases provided by law and according to the proportions that in such cases the law specifies for the values of the parties' performances. Thus, lesion may be invoked in sale, exchange, and partition. See C.C. Arts. 2589-2600, 2664-2666, and 1398 (1870).
>
> (c) Civil Code Article 1870 (1870) has been eliminated because it contains a formula which is no longer practical. Civil Code Articles 1864-1868 (1870) have been eliminated because they are unnecessary, as indicated in C.C. Art. 1866 (1870). See also revised C.C. Art. 1922 (Rev.1984), supra, and accompanying

desired to reduce the scope of lesion on a large scale. Since the question-begging article does not dictate and cannot accomplish this result, only the comment's ipse dixit could have that effect. In revision without repeal, we are witnessing the illegitimate birth of an extraordinary technique—repeal by comment.

Aside from being instruments of repeal, the comments also function as codifiers of the old jurisprudence. The old jurisprudence is attached to the new Code *through* the comments, and codification by comment refers to a series of techniques by which the comments carry out this bonding process.[108] If comments can function in this way, a jurisprudential rule does not have to be incorporated or restated in the text of the Code itself. The cases can be "referentially" codified and thereby attain codal status without textual form. The drafters have apparently gambled that the courts will not question the legitimacy of this unusual means of bonding the jurisprudence to the texts.

The Louisiana Supreme Court has already shown a receptive, unquestioning attitude in construing one of the important prescription articles. Article 3467 declares that "[p]rescription runs against all persons unless exception is established by legislation."[109] The doctrine of *contra non valentem*, however, is not established by legislation and therefore it should not qualify as an exception to the rule that "prescription runs against all persons." Yet the supreme court recently decided that the legislature did not abolish the doctrine of *contra non valentem* in

comments. Civil Code Article 1867 (1870) has been eliminated because it reflects a policy that is no longer valid. Civil Code Articles 1872-1875 (1870) have been eliminated because they are unnecessary.

Id. comments (a), (b), & (c).

108. There seem to be six ways that the comments attempt to bond the jurisprudence to the new Code. A particular citation to a case may have one or more of the following purposes:

(1) to illustrate the scope of a concept or rule; *e.g.*, LA. CIV. CODE ANN. art. 3492 comment (b) (West Supp. 1988);

(2) to show the continuity between the old source article and the new provision; *e.g.*, *id.* art. 2006 comment (West 1987);

(3) to indicate that a jurisprudential ruling is the source for a new article; *e.g.*, *id.* art. 1918 comment (b); *id.* art. 1939 comment;

(4) to reject or overrule a line of cases; *e.g.*, *id.* art. 1924 comment (b); *id.* art. 1827 comment (f);

(5) to establish an interpretive gloss on the new text; *e.g.*, *id.* art. 1930 comment (b); *id.* art. 1927 comment (b); and

(6) to establish a counterrule or exception at variance with the text; *e.g.*, *id.* art. 1837 comment (b); *id.* art. 1847 comment (d); *id.* art. 3492 comment (a) (West Supp. 1988).

109. *Id.* art. 3467 (West Supp. 1988).

enacting article 3467. The court remarked that "the revision comments to La.C.C. Art. 3467 note that the courts have resorted to the doctrine of *contra non valentem* in exceptional cases and that 'this jurisprudence continues to be relevant' after the 1982 revisions."[110] Clearly this comment can only mean that *contra non valentem* is retained regardless of what the Code says.[111] But if that jurisprudential rule should be retained, would it not have been the correct procedure to draft the Code article accordingly?[112] In retaining the jurisprudence blessed by the comments, the supreme court has begun to repeat the phrase: "*The new article codifies the prevailing jurisprudence.*"[113] There is nothing strange if a new Code article sets forth a rule that codifies the prevailing jurisprudence, but there is something very strange if the new article has not done that and the comment alone is the basis of the codification. Is it possible to have codification by comment in a civil law system? Can jurisprudence counter to the Code be entrenched in this manner?[114]

Thus far the courts have not been disturbed by the question.

110. St. Charles Parish School Bd. v. GAF Corp., 512 So. 2d 1165, 1168 n.4 (La. 1987).

111. One writer has called this "a confusing situation" because the doctrine is not established by legislation and "technically should not suspend the running of prescription." Comment, *Prescription and Peremption—The 1982 Revision of the Louisiana Civil Code*, 58 TUL. L. REV. 593, 614 (1983).

112. Apparently an earlier draft of article 3467 carried a second paragraph which read: "Liberative prescription is exceptionally suspended when the filing or prosecution of a suit is prevented by the fraud of the creditor or is made impossible by extraordinary circumstances totally beyond the control of the plaintiff, and the accrual of prescription would result in obvious injustice." LOUISIANA STATE LAW INSTITUTE, REVISION OF THE CIVIL CODE OF 1870, BOOK III, TITLE XXIV (NEW), Doc. No. 1-29-2, art. 3467 (Council Meeting, Feb. 19, 1982), *quoted in* Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 LA. L. REV. 69, 139 n.109 (1983). Professor Symeonides noted that the "council of the Louisiana State Law Institute chose to eliminate that paragraph and to insert instead a similar statement in the comments. . . . Although the legislative intent is thus stated clearly, there remains the analytical problem that comments are not part of the law." *Id.*

113. *See, e.g.*, Phillips v. Parker, 483 So. 2d 972, 977 (La. 1986) (emphasis in original).

114. This rule/counterrule methodology is not an isolated phenomenon. Compare the following texts and comments: LA. CIV. CODE ANN. art. 1847 (West Supp. 1988) (parol evidence *inadmissible* to prove a promise to pay a prescribed debt) *with id.* art. 1847 comment (d) (parol evidence *admissible* under a jurisprudential exception); *id.* art. 3492 (one year prescription for delictual actions, commencing from the day injury or damage is sustained) *and id.* comment (a) (exception under Louisiana jurisprudence—notably the discovery rule—"continues to be relevant"). This last counterrule is backed by legions of cases. *See, e.g.*, Cox v. De Soto Crude Oil Purchasing Corp., 55 F. Supp. 467, 473 (W.D. La. 1944); McGuire v. Monroe Scrap Material Co., 189 La. 573, 579-80, 180 So. 413, 415 (1938); Aiken v. E. Sondheimer Co., 165 La. 299, 302-03, 115 So. 495, 496 (1928); Liles v.

The Fifth Circuit Court of Appeal of Louisiana ruled recently that the Code's requirement that an act under private signature must be signed by both parties is satisfied when the act is signed by one party alone.[115] The court did not and could not reason that the text of article 1837 permitted a single signature. That article states "An act under private signature need not be written by the parties, but must be signed by *them*."[116] The court ignored the pluralized words of the article and focused instead upon comment (b), which begins, "This Article is not intended to change the jurisprudential rule that an act under private signature is valid even though signed by one party alone . . . ."[117] I have no criticism to make about the merits of a single-signature rule, but if a single-signature rule is a good rule, why was the text drafted to suggest clearly the necessity of multiple signatures? A single-signature rule was not a difficult rule to draft. Should the courts permit single signatures by virtue of what the redactors "intend" in their comments?

The courts may not be particularly interested in pursuing the legitimacy questions surrounding referentially codified jurisprudential rules, but these questions remain and are important. They reflect the essence of a digest methodology.

VI. CONCLUSION

In this Article, I have argued that the present Revision of the Civil Code is a crucial turning point in the development of Louisiana's legal system. The penumbral existence of the old Code and the structural design of the new digest mark the twilight of the tradition to which we aspired.[118] This results from the peculiar nature of the ongoing Revision. First, it is a Revision in which, generally speaking, the old Code has not been legislatively repealed. That Code and its jurisprudence still interrelate with the new Code, sometimes producing contradictions, more often producing a synthesis of rules, and other times producing supplementary rules. The price of the Revision's refusal to break with the past is high—the civil law has become more complex and more uncertain than it was before the Revision. The Code is no longer a self-contained entity; rather, it uses the jurisprudence of its predecessor to fill gaps and even to provide counterrules. Second, the revised Code has been drafted in a manner that, at the very least, *supposes* the existence of the old Code. It is structured to synthesize with the derivative product of that Code—its jurisprudence. Even if, contrary to my argument, the old Code were considered technically abolished, its existence will be supposed, for the old jurisprudence does not exist *in vacuo*. Without the old Code as its base, the jurisprudence would be an orphan without a home.

In this Article I have only recorded the death of the Code; I certainly have not conducted an inquest into the cause of its death. An epitaph will take time to write and cannot be written properly until many questions are answered. Was death caused by oversight, by blunder, or with premeditated intent? Was it perhaps due to the process of Revision itself—the difficulty, in a piecemeal approach, of formulating and maintaining a coherent vision of the objectives of the Revision or the difficulty, for nonelected drafters, of summoning the political will necessary to make hard choices?[119] Was the patient simply lost through dis-

Barnhart, 152 La. 419, 431, 93 So. 490, 494 (1922); Perrin v. Rodriguez, 153 So. 555, 556 (La. Ct. App. Orl. 1934).

115. Milliman v. Peterman, 519 So. 2d 238, 241-42 (La. Ct. App. 5th Cir.), *writ denied*, 520 So. 2d 752 (La. 1988).

116. LA. CIV. CODE ANN. art. 1837 (West Supp. 1988) (emphasis added).

117. *Id.* comment (b).

118. I am aware that Louisiana is a mixed or hybrid jurisdiction and that for many practitioners and judges, the practice of law and the business of the courts may proceed as usual without being unduly affected by the theoretical questions addressed here. Perhaps they will also grant, however, that if the *aspirations* of Louisiana law have changed, as they have, this will produce a new reality with which they must be concerned.

119. Thirty years ago Clarence Morrow made two observations about code reform that are still valid. Morrow, *Current Prospects for Revision of the Louisiana Civil Code*, 33 TUL. L. REV. 143 (1958). First, he was not sure that a majority of the bench and bar wanted a revision of the Civil Code. Second, he found no agreement about the type of document that should be produced. He foresaw that the council of the Louisiana State Law Institute would have difficulty in deciding what type of code it wanted. "If it merely appoints a group of draftsmen or 'reporters' and asks them to begin the 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 146. He also understood that revision of the Code is an exercise of strong political will. He knew that without Bonaparte there would not have been a *Code Napoléon* and without strong leadership our own efforts might be doomed. He concluded pessimistically, "I think we shrink from the difficulty of the task and the bitter controversy which must inevitably accompany it. . . . Given the peculiar local circumstances, it may well be beyond the limits of human endeavor." *Id.* at 149. For a discussion of hard choices, political willpower, and codification, see G. CORNU, DROIT CIVIL 104, No. 280 (1988):

> Dans cette oeuvre, Bonaparte a été la volonté. Une loi est un acte de volonté. Le Code Civil, Bonaparte l'a voulu dans son existence et ses grandes lignes. On a pu dire que, sans Bonaparte, le Code civil n'aurait pu conserver ce qu'il nous a transmis de la Révolution française.

See generally also Nicholson, *Codification of Scots Law: A Way Ahead or a Blind Alley?*, 1987 STATUTE L. REV. 173.

organized surgery and too many surgeons?[120] On the other hand, was this death and rebirth a natural compromise to which Louisiana, as a hybrid jurisdiction, was inevitably headed? Was it a natural evolution of the opposing civil law and common law tendencies in the state? Is a digest a more realistic expression of the system that we have and know than the Livingstonian conception that we revered but imperfectly followed? And there are other questions. Will the profession recognize the crisis or perceive the shift of paradigm? Should Revision of this kind be continued any further? Should corrective measures be taken to resuscitate the Code?

To bury the Code without examining such questions would cast dishonor upon the law and ourselves.

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120. Professor Yiannopoulos has criticized the piecemeal approach:

> There is minimal coordination of projects and each revision is bound to reflect the style and predilection of the individual reporter. Conflicts of policies, and at times of rules, are bound to occur. These dangers are inherent in any such piecemeal revision undertaken by a host of academicians and practitioners whose work has to pass through the guantlet [sic] of the Louisiana State Law Institute and the vagaries of an ever changing Council membership.

Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 TUL. L. REV. 830, 843 (1980).

Another author has criticized the absence of a master plan:

> The Civil Law Section apparently has not undertaken the reexamination and evaluation of basic principles that were to be its first tasks; nor has the Institute produced an outline of the new code. . . . There seems now to be a lack of enthusiasm within the Institute for the time-consuming job of abstract code planning, and an impatience to get on with the job of writing code articles.

Zengel, *supra* note 105, at 947.

On the question of individual style and preferences of the reporters, the differences are particularly glaring in terms of the use of comparative law as sources for new articles, as well as in the degree to which old jurisprudence is synthesized. Thus, where new ideas have been introduced, the Property articles are heavily reliant upon Greek and German sources (*e.g.*, arts. 544, 553, 641-645, 670, 688, 693), while the Obligations articles favor sources from Italy and Quebec (*e.g.*, arts. 1767-1823 in general), but also use the codes of Argentina (*e.g.*, arts. 1815, 1844, 1977), Austria (*e.g.*, arts. 1944, 1946), France (*e.g.*, art. 1833), Germany (*e.g.*, arts. 1823, 1944), Greece (*e.g.*, arts. 1818, 1823), Ethiopia (*e.g.*, arts. 1809, 1810, 1812), Israel (*e.g.*, art. 1779), and Switzerland (*e.g.*, arts. 1947, 1950-52), as well as the RESTATEMENT (SECOND) OF CONTRACTS (arts. 1770, 1787, 1803, 1967), and the U.C.C. (*e.g.*, art. 1783). It is safe to say that not even Professor Batiza may be capable of tracing the new sources of our Obligations law.

As for the jurisprudence, the reporter for Matrimonial Regimes managed to draft 101 articles without mentioning a case name in the comments to the articles. The Reporter for Obligations, however, cited cases in about 50% of the comments, averaging about 1.5 cites per article.