

## LOUISIANA CIVIL LAW: A LOST CAUSE?

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Members of the legal profession in Louisiana and in sister states, and comparativists in most parts of the world have long wondered about the state and direction of Louisiana law. For some, Louisiana has been, and still is, a civil law jurisdiction.<sup>1</sup> For others, Louisiana has ceased to be a civil law jurisdiction and has become either a common law jurisdiction<sup>2</sup> or a mixed jurisdiction<sup>3</sup> sharing the civilian tradition as well as the common law tradition.<sup>4</sup> The purpose of this paper is to determine the

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1. See Daggett, Dainow, Hébert, & McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 Tul. L. Rev. 12, 41 (1937) [hereinafter cited as Daggett]; Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 La. L. Rev. 727, 727 (1962); Tullis, *Louisiana's Legal System Reappraised*, 12 Tul. L. Rev. 113, 119 (1937). See generally Dart, *The Place of the Civil Law in Louisiana*, 4 Tul. L. Rev. 163 (1930); Fabre-Surveyer, *The Civil Law in Quebec and Louisiana*, 1 La. L. Rev. 649 (1939); Wigmore, *Louisiana: The Story of its Legal System*, 1 S.L.Q. 1 (1916).

2. See R. Pound, *The Spirit of the Common Law* 1-2 (1921); Crabités, *Louisiana Not a Civil Law State*, 9 Loy. L.J. 51, 51 (1928); Ireland, *Louisiana's Legal System Reappraised*, 11 Tul. L. Rev. 585, 596 (1937); Kocourek, *Sources of Law in the United States of North America and Their Relation to Each Other*, 18 A.B.A. J. 676, 679 (1932); Mignault, *L'Avenir de Notre Droit Civil*, 1 La Revue du Droit 56 (1923); Pound, *Taught Law*, 37 A.B.A. Rep. 975, 977 (1912); Pound, *The Influence of French Law in America*, 3 Ill. L. Rev. 354, 359 (1908); Reeves, *The Common Law State of Louisiana*, 2 Tul. Civ. L.F., No. 3, 1, 32 (1974).

3. The term *mixed jurisdiction* was coined by T.B. Smith to denote a country or state whose "Civilian or Romanistic foundations have been overlaid by Anglo-American jurisprudence." T. Smith, *Studies Critical and Comparative* ix (1962).

4. "Louisiana is a mixed jurisdiction. Our basically civilian tradition has been partly overlaid and replaced by Anglo-American common law." Tate, *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience*, in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 23 (J. Dainow ed. 1974) [hereinafter cited as Dainow]. See Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 La. L. Rev. 357 (1973); Baudoin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec*, in Dainow, *supra*, at 3; Dainow, *The Civil Code and the Common Law*, 51 Nw. U.L. Rev. 719, 728 (1957); Jolowicz, *The Civil Law in Louisiana*, 29 Tul. L. Rev. 491, 496 (1955); Rheinstein, *Common Law and Civil Law: An Elementary Comparison*, 22 Rev. Jur. U.P.R. 90, 91 (1952): "[T]he realm of Common Law has been extended over the entire continental United States, with the sole, but somewhat uncertain exception of Louisiana . . ." See generally Beutel, *The Place of Louisiana Jurisprudence in the Legal Science of America*, 4 Tul. L. Rev. 70 (1929); Smith, *The Preservation of the Civilian Tradition in Mixed Jurisdictions*, in *Civil Law*

present state of Louisiana civil law and to speculate briefly on its future.

An accurate description of the present state of Louisiana law requires a clear understanding of past developments. In turn, meaningful speculation as to the future presupposes a clear understanding of the present state of the law. This is so because the law of a living society is in a dynamic state: it is what it has been and what it will become. The law carries with it the genes of legal institutions that have faded away as well as those that will shape the legal institutions of the future.

Before looking into the past and speculating as to the future, it is important to define certain terms, such as "civil law," "civil law jurisdiction," and "civil law system." Definitions are necessary to resolve controversies concerning the nature, structure, and function of Louisiana law and the clarification of the writer's own position. One who asks the question whether the civil law of Louisiana is a lost cause impliedly asserts that Louisiana has, or at least had in the past, a "civil law." Indeed, the question is a "propositional form."<sup>5</sup>

### DEFINITION OF TERMS

The meaning of the term "civil law" has not been the same in all historical periods. In the framework of early and classical Roman law, *jus civile* consisted of the enacted or customary law governing the relations of Roman citizens among themselves; it was contrasted to Praetorian law, public law, the law of nations, and natural law.<sup>6</sup> In the middle ages and up to the "Era of Reception,"<sup>7</sup> the term "civil law" referred mostly to the Justinian compilation and the accumulated doctrine of the glossators and commentators; it was contrasted to Canon law, the law merchant, and the local law of a state or country.<sup>8</sup>

in the Modern World 3 (A. Yiannopoulos ed. 1965).

5. See Cohen, *What is a Question?*, 39 *Monist* 350, 350-51, 353-54, 359-63 (1929), reprinted in M. Cohen & F. Cohen, *Readings in Jurisprudence and Legal Philosophy* 480 (1979).

6. See Institutes Gai. 1.1.

7. The "Era of Reception" is that period during which Roman ideas and rules first penetrated the legal life in various countries. See A. Yiannopoulos, *Louisiana Civil Law System* § 14 (1977).

8. See R. Schlesinger, *Comparative Law* 218-19 (3d ed. 1970).

In modern times, the term "civil law" refers broadly to legal systems which, especially in their methodology and terminology, were shaped decisively by Roman law scholars from the middle ages to the nineteenth century.<sup>9</sup> A state or country having such a legal system is called a "civil law jurisdiction." Thus, France, Germany, Italy, and Greece are civil law jurisdictions. The legal systems of these countries, including all branches of private and public law, were shaped decisively by Romanist scholars in universities prior to the enactment of "national" codes.<sup>10</sup>

In civil law jurisdictions, however, the term "civil law" is used narrowly to designate the sum total of rules governing certain basic relations of private individuals among themselves, or between citizens and the state in its capacity as a private person.<sup>11</sup> For the purpose of this discussion, such a body of law will be termed a "civil law system." Thus, in civil law countries "civil law" is ordinarily understood to be the law governing persons, family, property, obligations, and successions. Public law, and several branches of private law, such as commercial law, labor, and mineral law, are not considered to be a part of the civil law prevailing in a civil law country.<sup>12</sup>

Civil law is frequently contrasted with common law. Like the term "civil law," "common law" has different meanings.<sup>13</sup> In comparison with civil law, however, common law is frequently taken to mean the legal system that was developed by royal courts in England and that, as modified, prevails in parts of the British Commonwealth and in the United States.<sup>14</sup> Scholars have endeavored to identify the criteria to distinguish between "civil law" and "common law," relying on such ideas as direct derivation from Roman law, codification, the binding force of precedents, technique of reasoning, and even underlying legal philosophy.<sup>15</sup> None of these has proven acceptable, however, and

9. See Rheinstein, *supra* note 4, at 94.

10. See Schlesinger, *supra* note 8, at 224, 234, 249; Rheinstein, *supra* note 4, at 92.

11. See Daggett, *supra* note 1, at 13.

12. *But see* Schlesinger, *supra* note 8, at 245 n.22: "'Civil law' may be defined as comprising the whole area of substantive private law which remains if one excludes commercial law."

13. See, e.g., N. Healy & D. Sharpe, *Admiralty* 131-34 (1974).

14. See Schlesinger, *supra* note 8, at 239-51; Rheinstein, *supra* note 4, at 91.

15. See Parker, *The Criteria of the Civil Law*, 7 *The Jurist* 140, 152 (1947); Pringsheim, *The Inner Relationship between English and Roman Law*, 5 *Cambridge L.J.* 347 (1935).

certain modern comparativists stressing differences in legal technique and methodology, the relative position of the judge and legislator, and the nature of the judicial process, have concluded that the difference between civil law and common law is largely a matter of "style."<sup>16</sup>

In any event, one is justified in asserting that Louisiana has had a "civil law" of her own, as this term is understood in civil law jurisdictions: a body of private law governing the basic relations of citizens from birth to death which was shaped decisively by Romanist scholars from the middle ages to the nineteenth century.<sup>17</sup> This assertion, however, does not answer the question whether Louisiana has ever been, or still is, a "civil law jurisdiction." Nor does this assertion determine the classification of Louisiana law as a whole in light of its nature, structure, and function.

#### LOUISIANA AS A CIVIL LAW JURISDICTION: THE GREAT DEBATE

During the nineteenth century, eminent Louisiana jurists and comparativists from other parts of the world considered Louisiana a civil law jurisdiction.<sup>18</sup> This notion, however, began to be challenged in the early twentieth century. On the occasion of the centenary of the Louisiana Supreme Court, Charles Payne Fenner, Professor of Civil Law at Tulane University, asserted that "our jurisprudence is to a very large extent based, and confessedly based, upon the common law."<sup>19</sup> Fifteen years later, Judge Pierre Crabités declared that Louisiana was not a civil law state:

A Louisiana lawyer is no more of a civilian than a modern French police dog is wolf. . . . It would be unfair to the great canine sleuth to call him a wolf. It is unjust to the barrister . . . to say that he is a civilian.

. . . .

16. See R. David, *Major Legal Systems in the World Today* 19, 23, 74, 285 (J. Brierley trans. 2d ed. 1978); R. David & G. Grassman, *Einführung in die grossen Rechtssysteme der Gegenwart* 18, 20 (1966); Schlesinger, *supra* note 8, at 251; Zweigert, *Zur Lehre von den Rechtskreisen*, *Twentieth Century Comparative and Conflicts Law—Legal Essays in Honor of Hessel E. Yntema* 42 (1961).

17. See note 9 *supra*.

18. See H. Maine, *Village-Communities in the East and West* 360-61 (1889). See also note 1 *supra*.

19. Fenner, *The Jurisprudence of the Supreme Court of Louisiana*, in *The Celebration of the Centenary of the Supreme Court of Louisiana*, 133 *La. lxi, lxx* (1913).

It is, therefore, inaccurate for us to proclaim that Louisiana is a great civil law state. It is not. It may have been before the Civil War. We have been caught in the American maelstrom. The only salvage that remains is a Louisiana incrustation which has in it something of the Civil Law, and something of the Common Law, but which after all is an *uncatalogued creation*, but a viable institution because it typifies the composite genius of the soul of the true Louisianian.<sup>20</sup>

For almost ten years no one paid much attention to the exhortations of Judge Crabités. In the summer of 1937, however, Gordon Ireland, Professor of Law at Louisiana State University, started the Great Debate by undertaking to prove Judge Crabités right. In an essay that was destined to become controversial,<sup>21</sup> Ireland pointed to several factors to demonstrate that Louisiana was not a civil law state: The custom of citing cases in judicial decisions rather than governing articles of the Civil Code; the adherence of courts to the doctrine of *stare decisis* and to the common law of equity; the adoption by the legislature of most Uniform Acts; the unchecked influx of the common law of torts; and the fact that more than three out of four courses taught in Louisiana law schools dealt with common law subjects. On the basis of these assertions, the author concluded:

[I]t must be admitted that *Louisiana is today a common law State . . .* [T]he Civil Code . . . is now after all only a legislative statute to be construed and applied when there is no local decision in point . . .

The sun has risen on a new day in which Louisiana, however regretfully, should admit . . . I am proud of my history and sensible . . . but circumstances have at last proved too strong for me. I must now definitely say farewell to the traditions of my past, try to fall in step with my neighbors, and hope that they will eventually forget the difference of origins and admit my jurisprudence and my new precedents to as great weight in our common affairs as those of all the others of the family.<sup>22</sup>

An impartial observer would object to the validity of some of Ireland's assertions. It is not true that Louisiana courts ever

20. Crabités, *supra* note 2, at 52 (emphasis added).

21. Ireland, *Louisiana's Legal System Reappraised*, 11 Tul. L. Rev. 585 (1937).

22. *Id.* at 596-98.

adopted the common law of equity<sup>23</sup> that the common law of torts ever displaced fully the pertinent provisions of the Civil Code,<sup>24</sup> or that Louisiana courts ever adopted the doctrine of *stare decisis*.<sup>25</sup> Further, an impartial observer would object to the criteria Ireland used to distinguish between civil law and common law and to classify the Louisiana legal system within the orbit of the common law.<sup>26</sup> Indeed, such an observer would be inclined to regard Ireland's essay as a plea for realism in the choice of legislative policy for the state rather than as a valid description and classification of Louisiana's legal system. The central idea in the essay was that Louisiana law ought not to be different from that of the sister states. This idea, asserted in 1937, is today still debatable.

Ireland's essay was taken as a declaration of war by dedicated Louisiana civilians. The first reaction appeared in the same issue of the *Tulane Law Review*.<sup>27</sup> Disclaiming any intention to disagree with Professor Ireland's conclusions, Leonard Greenburg, research assistant at Louisiana State University Law School and member of the Louisiana Bar, pointed out that uniformity of private law, with the exception of commercial law, was not necessarily a desirable end. On the contrary, the author concluded, Louisiana had something important to offer its sister states, a methodology for the interpretation of statutes and codes.

23. See Daggett, *supra* note 1, at 29. See also *LeBlanc v. New Orleans*, 138 La. 243, 257-58, 70 So. 212, 217 (1915); Yiannopoulos, *supra* note 7, § 35.

24. The assertion that Louisiana adopted the common law of torts had some merit in 1937. See Dart, *supra* note 1, at 171. However, the situation is different today. See Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc.*, 34 La. L. Rev. 1, 27 (1973): "At least in the torts field, there seems to be emerging a new judicial philosophy, cast in the form of a modern civilianism determined to see the Civil Code through the eyes of the present." See also Barham, *Methodology of the Civil Law in Louisiana*, 50 Tul. L. Rev. 474, 480, 490 (1976).

25. "We have never adopted *stare decisis*, and whatever chances it had of creeping into our system have been reduced to the vanishing point by the passage of time." Tucker, *The Code and the Common Law in Louisiana*, 29 Tul. L. Rev. 739, 759 (1955). See Sanders, *The "Civil Law" in the Supreme Court of Louisiana*, 15 La. B.J. 15, 16 (1967); Tate, *supra* note 1, at 744; Martin, *Preface to 1 Mart. (O.S.) iii-iv* (1811); cf. Comment, *Stare Decisis in Louisiana*, 7 Tul. L. Rev. 100 (1932) (*stare decisis* has been adopted in Louisiana, but not in the traditional common law sense).

26. See text at notes 15-16 *supra*.

27. See Greenburg, *Must Louisiana Resign to the Common Law?*, 11 Tul. L. Rev. 598 (1937).

Stare  
decisis

In the next issue of the *Tulane Law Review*, R.L. Tullis, Dean Emeritus of the Louisiana State University Law School, denounced Professor Ireland as a missionary from a common law jurisdiction. While admitting "some soul of truth" in the article, Tullis proceeded to refute both arguments and conclusions.<sup>28</sup> In the same year, Professors Daggett, Dainow, Hebert, and McMahon published the now famous essay, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*.<sup>29</sup> In a scholarly, point by point refutation of the Ireland arguments and conclusion, the authors concluded: "Professor Ireland's 'common law State' of Louisiana has this in common with Rousseau's state of nature—both exist only in the imagination of their respective authors."<sup>30</sup>

The echo of the Great Debate persisted. Although the reappraisal did not convince the world that Louisiana was a civil law jurisdiction, it did lead to a renaissance of the civilian tradition in Louisiana.<sup>31</sup> The torch of the civil law was carried for a generation after the reappraisal under the leadership of a forceful personality, Dean Paul M. Hebert of the L.S.U. Law School.<sup>32</sup> For the other side, in 1974, Abbott J. Reeves proclaimed the success of the Ireland heresy over the official ideology or, perhaps, hypocrisy.<sup>33</sup>

Now that all the original protagonists of the Great Debate are gone, one may be tempted to ask with a new innocence whether Gordon Ireland was right after all: whether Louisiana was a common law jurisdiction in 1937, whether the situation is different today, and whether Louisiana should join the Union. An attempt to furnish well-documented answers to these questions would require volumes. The following assertions are in the nature of articles of faith—and should be taken as such.

Louisiana, as a French or Spanish colony, was as much a civil law jurisdiction as the mother country.<sup>34</sup> However, after the Purchase, Louisiana has never been a civil law jurisdiction like

28. Tullis, *supra* note 1, at 113.

29. Daggett, *supra* note 1.

30. *Id.* at 41.

31. See generally Barham, *supra* note 4.

32. See Pascal, *Recollections of Paul Macarius Hebert*, 23 Loy. L. Rev. 309 (1977); Sarpy, *Paul Macarius Hebert*, 23 Loy. L. Rev. 307 (1977).

33. Reeves, *supra* note 2, *passim*.

34. See Groner, *Louisiana Law: Its Development in the First Quarter Century of American Rule*, 8 La. L. Rev. 350 (1948).

France, Spain, Italy, Germany, or Greece, for a variety of reasons. First, since the time of the Purchase, Louisiana has been a part of the Union, subject to the provisions of the Federal Constitution and the preemptive force of federal law, statutory and non-statutory.<sup>35</sup> Second, only a *part of the private law* of the State of Louisiana was, prior to 1812, and is still today, based on the "civil law"; that is, a system of law shaped by Romanist scholars in continental universities from the middle ages to the nineteenth century. This part has been contained in the Civil Codes of 1808, 1825, and 1870, and is to be contrasted with another part of Louisiana law, ever growing, that has no civilian origin.<sup>36</sup>

In the first quarter century after the Purchase, most Louisiana law was contained in the Civil Code. Public law was relatively undeveloped, and the only branch of private law that was not a part of the civil law was commercial law.<sup>37</sup> In more than a century and a half, however, the domain of the Louisiana Civil Code has been significantly diminished by the proliferation of state legislation and the development of many branches of public and private law that are not essentially different from the law prevailing in sister states.

Third, the Louisiana Civil Code was destined from the beginning to be interpreted and applied by common law judges rather than by civilian jurists.<sup>38</sup> All the justices of the Superior Court of the Territory of Orleans (1804-1813)—John Bartow Prevost of New York, William Sprigg of Ohio, George Matthews, Jr. of Georgia, Joshua Lewis of Kentucky, and Francois-Xavier Martin of North Carolina—were trained in the common law tra-

35. See G. Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* 128 (1975).

36. See Tucker, *supra* note 25, at 750; cf. Schmidt, *The Supreme Court and its Decisions*, 1 La. L.J., No. 4, 132 (1841): "The jurisprudence of Louisiana is a mixture of the Roman, French and Spanish law, tintured with no inconsiderable portion of the common law of England, as understood and expounded in the sister States of the Union, especially in criminal and commercial matters. These different elements of law are however blended in so confused a manner, that it is often extremely difficult to trace the lines of demarcation, or to determine, what the law is on any given subject."

37. The Louisiana legislature wisely refrained from adopting a proposed Commercial Code in 1825, on the premise that the commercial laws of Louisiana should not be different from those of the sister states.

38. See Dart, *The History of the Supreme Court of Louisiana*, in *Celebration of the Centenary*, *supra* note 18, at xxx; Fisher, *The Louisiana Supreme Court, 1812-1846: Strangers in a Strange Land*, 1 Tul. Civ. L.F., No. 4 (1973).

dition. Only Martin, though a non-civilian, was impressed with civilian thought; he, for example, had translated into English and printed in his own shop Pothier's treatise on obligations. The situation was only slightly different when the Louisiana Supreme Court was established by the 1812 Constitution. The first justices were George Matthews, Jr., Dominick A. Hall, an Englishman, and Pierre Derbigny, of French birth. Hall, however, was replaced by Martin in 1815. Thus, from the beginning, the Louisiana judicial system was modelled on the system prevailing in sister states, and had nothing in common with the organization and administration of justice in European countries. The same was true of the organization of all other branches of government. The Louisiana Constitution of 1812, like the constitutions that replaced it, was an all-American document characterized by only two peculiarities: The conspicuous absence of a bill of rights and a unique provision, still with us today, forbidding adoption of a foreign system of law by general reference.<sup>39</sup> The latter prohibition was obviously meant to preserve the integrity of the Civil Code.

Fourth, the very existence and function of civil law depends on an academic tradition for the training of members of the legal profession in universities and for the orderly exposition of the law in doctrinal treatises and dissertations.<sup>40</sup> This academic tradition was weak in nineteenth century Louisiana. There was no opportunity for formal legal education in Louisiana until 1844.<sup>41</sup> In that year, Gustavus Schmidt established in New Orleans the Louisiana Law School, a private institution, which, in 1847, became the Law Department of the University of Louisiana. The impact of this department was very limited. There were four professors, all part-time, none of whom were civilians. Later, however, one of the four was replaced by Christian Roselius, the first Professor of Civil Law in Louisiana. Classes were supposed to last for six months but rarely did. Graduates were few: the first graduating class had 16 members. The school closed in 1862

39. Dart, *supra* note 1, at 168. See La. Const. art. 3, § 15(B); La. Const. of 1921, art. 3, § 18; La. Const. of 1913, art. 33; La. Const. of 1898, art. 33; La. Const. of 1879, art. 31; La. Const. of 1852, art. 117; La. Const. of 1812, art. IV, § 11.

40. See Tucker, *supra* note 25, at 753-55; Rheinstein, *supra* note 4, at 94, 101.

41. The "Louisiana Law School," directed by Gustavus Schmidt, opened in 1844 with a small class of students. 1847 La. Acts, No. 49, established the University of Louisiana, including a Law Department.

because of the war and did not reopen until 1865. After the Tulane gift in 1882, the University of Louisiana Law Department became the Tulane University School of Law<sup>42</sup> but the first full time law Professor was not appointed until 1906; during this same period, the Louisiana State University Law School was opened in Baton Rouge.<sup>43</sup>

Although the development of law schools was slow, Louisiana nevertheless claimed several great jurists. Edward Livingston, greeted as "the first legal genius of modern times,"<sup>44</sup> was one of the drafters of the Louisiana Civil Code. He was also the sole author of a Penal Code and a Code of Criminal Procedure, both of which were too advanced for their time to be adopted by the Louisiana legislature. Moreover, in 1841 and 1842 Gustavus Schmidt published two volumes of the Louisiana Law Journal, the first comparative law journal in the world. He also published in 1851 *The Civil Law of Spain and Mexico*, described as "one of the first treatises of comparative law."<sup>45</sup> There were also monographs by Livermore,<sup>46</sup> Howe,<sup>47</sup> Cross,<sup>48</sup> Denis,<sup>49</sup> and Eyma.<sup>50</sup>

The works of these scholars were later accompanied by the development of law reviews. The first modern law review, the *Southern Law Quarterly*, was a product of the Tulane Law School faculty and appeared in 1916; after three volumes, it was renamed the *Tulane Law Review* in 1929. In addition, the *Loyola Law Review* appeared in 1920, the *Louisiana Law Review* in 1938, and the *Southern Law Review* in 1976. Although the civil law was analyzed in the law reviews,<sup>51</sup> the first system-

42. See Lang, *History of the Law School*, 1 Tul. Law Rep. 1 (1965).

43. See Hebert, *Historical Sketch of the Louisiana State University Law School*, in *The Sesquicentennial Anniversary of the Supreme Court of the State of Louisiana*, 245 La. 1, 137 (1963).

44. Maine, *supra* note 18, at 360; see C. Hunt, *Life of Edward Livingston* (1864).

45. Letter from Professor R. Rodiere to Louis Victor de la Vergne (Sept. 20, 1968).

46. S. Livermore, *Dissertations on the Questions which Arise from the Contrariety of the Positive Law of Different States and Nations* (1828).

47. C. Howe, *Studies in the Civil Law* (1896).

48. K. Cross, *Successions* (1891); K. Cross, *Pleading in Courts of Ordinary Jurisdiction* (1885).

49. H. Denis, *Contract of Pledge* (1898).

50. L. Eyma, *Studies on the Civil Code of Louisiana* (1840) (a commentary on Articles 867 through 969 of the Civil Code of 1825).

51. For a summary of the development of Louisiana doctrine, see Tucker, *supra* note 25, at 733-55; Tucker, *Source Books of Louisiana Law* (pt. 1), 6 Tul. L. Rev. 280

atic treatise on Louisiana civil law did not appear until 1965.<sup>52</sup>

Although Louisiana *has not*, since the time of the Purchase, been a civil law jurisdiction, Louisiana *has had* a civil law system of its own.<sup>53</sup> This assertion is not based on the formal criterion of the existence of the Louisiana Civil Code, but rather on the empirical observation that the Louisiana Civil Code has been and still is ordering the relations of citizens in and out of court.

Throughout the nineteenth century the Civil Code was considered the fountainhead of Louisiana private law. The decisions of appellate courts, some of them monuments of juridical craftsmanship, were based directly on provisions of the Civil Code. Indeed, before and after the War Between the States, Louisiana decisions were often mini-treatises on civil law topics and to a large extent filled the lacuna left in the system by the absence of doctrinal treatises.<sup>54</sup> Thus, Louisiana civilian doctrine was found in law reports rather than treatises.

These scholarly opinions were written by highly respected jurists. Judge Martin, for example, was awarded an LL.D. degree by Harvard University in 1841 for his scholarship. Toward the end of the century, the Louisiana Law Reports began to include opinions by another great judge, perhaps the greatest ever, Oliver Otis Provosty.<sup>55</sup> His opinions were an offering to the literature of the civil law that remains unsurpassed.<sup>56</sup> If one were to collect in a single volume the landmark decisions of Louisiana jurisprudence, the voice of Justice Provosty would, most probably, dominate the field.

(1932).

52. See Yiannopoulos, *supra* note 7, § 36.

53. See Dart, *supra* note 1, at 177: "She [has] created her own system of Civil Law in a flexible Code . . ."

54. See Barham, *supra* note 24, at 478; Tate, *Civilian Methodology in Louisiana*, 44 Tul. L. Rev. 673, 679 (1970); Wigmore, *supra* note 1, at 9.

55. See *In Memoriam*, 156 La. xxix-xxxii (1924); Memorial Proceedings Had in the Supreme Court of Louisiana, Monday, Oct. 6, 1924, 40 Minute Book of the Supreme Court of Louisiana 1 (1924).

56. See, e.g., *Higgins Oil & Fuel Co. v. Guaranty Oil Ltd.*, 145 La. 233, 82 So. 206 (1919); *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915); *Louisiana & A. Ry. v. Winn Parish Lumber Co.*, 131 La. 288, 59 So. 403, 411 (1911) (separate opinion); *Female Orphan Society v. Y.M.C.A.*, 119 La. 278, 44 So. 15 (1907); *Voiers v. Atkins Bros.*, 112 La. 303, 36 So. 974 (1903).

But not even these fine scholars could singlehandedly turn the clock back. In Louisiana, there had always been a tension between the text of the Civil Code and the underlying social facts. This tension led to the development of a "free law" movement, a movement characterized by an open departure from the codified law.<sup>57</sup> Indeed, after 1916, and until the time of the Great Debate, the civil law of Louisiana was in retreat.<sup>58</sup> Reading the decisions of the 1920's and the 1930's, one has the feeling that the civil law was dead. Scholars still published articles in the *Tulane Law Review* dealing with the civilian heritage, but these articles dealt more with institutions of comparative law than with the living law of Louisiana.

The Great Debate was the catalyst for change. The Louisiana State Law Institute was organized and charged with the task of revising the Louisiana Civil Code.<sup>59</sup> Modern French treatises began to be translated into English.<sup>60</sup> The *Projet* of the Louisiana Civil Code of 1825 was published along with the Compiled Edition of the Civil Code,<sup>61</sup> and faculties began to emphasize civil law teaching and to encourage the development of civil law

57. In Europe, the same movement did not occur until fifty years later. See Franklin, *Equity in Louisiana: The Role of Article 21*, 9 Tul. L. Rev. 485 (1935).

58. See *id.* at 489: "[T]he Louisiana Civil Code is today hardly more than a symbol of nostalgia and sentiment." See also Jolowicz, *supra* note 4, at 496. The Civil Code is characterized as a mere "statute" to be interpreted and applied according to the common law rules of statutory construction in Revised Civil Code of Louisiana xxviii-xxx (2d ed. E. Saunders 1920).

59. See 1938 La. Acts, No. 166, § 4(f). The Charter of the Institute specifies its purposes, including the following: "To make available translation of Civil Law materials and commentaries and to provide by studies and other doctrinal writings, materials for the better understanding of the Civil Law of Louisiana and the philosophy upon which it is based." *Id.* The first project undertaken by the Institute "was conceived by the State in a desire to stimulate and broaden interest in its civil law, of which it is justly proud . . ." 1 La. Legal Archives x. See also Yiannopoulos, *The Civil Law Program of the Louisiana State Law Institute*, 12 La. B.J. 89 (1964); Yiannopoulos, *First Annual Meeting of the Civil Law Section of the Louisiana State Law Institute*, 12 Am. J. Comp. L. 629-32 (1963).

60. These translations include M. Planiol, *Traité élémentaire de droit civil* (12th ed. La. St. L. Inst. trans. 1965); F. Gény, *Méthode d'interprétation et sources en droit privé positif* (2d ed. La. St. L. Inst. trans. 1963); 1-5 C. Aubry & C. Rau, *Cours de droit civil français* (6th ed. La. St. L. Inst. trans. 1965, 1966, 1969, 1971, & 1972). Additional translations are under preparation. These works have already had an impact on Louisiana jurisprudence, assisting the courts in the interpretation of the Civil Code in the light of its intended meaning and with reference to French experience.

61. See *Projet* of the Civil Code of 1825, reprinted in 1 La. Legal Archives (1937); *Projet* of the Code of Practice of 1825, reprinted in 2 Archives, *supra*; Compiled Edition of the Civil Codes of Louisiana, 3 Archives, *supra*, (1940).

doctrine. In 1967, Chief Justice Sanders admonished lawyers to brief cases in light of the civilian authorities.<sup>62</sup> Learned opinions were authored by Justices Sanders, Tate, Barham, and Summers, to mention only those who have since left the bench. This led Justice Barham and others to herald the renaissance of the civilian tradition in Louisiana.<sup>63</sup>

#### THE PRESENT

One may wonder whether the heralded renaissance of the Louisiana civilian tradition is real. In fact, Louisiana is no more a civil law *jurisdiction* today than it was in 1937, although it is settled that we have not accepted the doctrine of *stare decisis*, that we have not adopted the common law of equity or torts, and that we tend to apply deductive rather than inductive reasoning in the process of deciding cases.<sup>64</sup> But the question remains whether Louisiana today has a better defined *civil law system* than it did in 1937. To answer this question one should look to the Civil Code, legislation outside the Civil Code, jurisprudence, and legal doctrine.

The Civil Code is in disarray. The Code survived the nineteenth century and the first half of the twentieth century without significant change,<sup>65</sup> but in recent decades repeals and amendments proliferated. More than three hundred articles were repealed or amended in 1960 alone when the Louisiana Code of Civil Procedure was enacted.<sup>66</sup> In the fields of family law, persons, and successions, one may be justified in asserting

62. Sanders, *The "Civil Law" in the Supreme Court of Louisiana*, 15 La. B.J. 15, 18 (1967).

63. See Barham, *supra* note 4. See also Jolowicz, *supra* note 4, at 503; Tate, *supra* note 1.

64. See text at notes 22-24 *supra*. See also Pascal & Tête, *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Law in General: The Obligatory Force of Decisions*, 31 La. L. Rev. 185 (1971); Tate, *supra* note 54, at 679; Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 Tul. L. Rev. 537 (1943); cf. Perrot, *The Judge: The Extent and Limit of his Role in Civil Matters*, 50 Tul. L. Rev. 495 (1976) (discussion of the role of the judge in France).

65. Until the middle of the 20th century, the reverence of the legislature for the Civil Code was so great that statutes often repealed articles of the Civil Code *sub silentio* rather than expressly. See Jolowicz, *supra* note 4, at 498. It was "harder to amend the code in the legislature than to pass a resolution contemplating an amendment to the State Constitution." Dagget, *Comments on the Civil Code—Ancillaries*, appearing in La. Rev. Stat. Ann. tit. 9, at 3 (West 1950).

66. See La. Civ. Code, Table 5 (A. Yiannopoulos ed. 1980).

that the symmetry and cohesion of the Civil Code has been destroyed by repeals, amendments, and new provisions forming part of the Code of Civil Procedure. In the fields of obligations and special contracts, the provisions of the Civil Code retain, for the most part, their 1870 pristine form but are largely out of touch with the realities of contemporary life. Only three fields of law, property, partnership, and matrimonial regimes, have been recodified in the civilian style and substance. In addition, Title 9 of the Louisiana Revised Statutes has become the dumping place of legislation considered to be ancillary to the Civil Code. Such legislation frequently conflicts with the rules, principles, and policies of the Civil Code, which must be regarded as impliedly repealed.<sup>67</sup>

Revision of the Civil Code by the Louisiana State Law Institute continues in most fields, including obligations, successions, leases, and family law,<sup>68</sup> but one may be pessimistic as to the result. Even if revision in these fields is completed, Louisiana would probably come to have a series of mini-codes or glorified statutes rather than an integrated Civil Code with inner consistency in form and substance. 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 gauntlet of the Louisiana State Law Institute and the vagaries of an ever changing Council membership.

Although the Civil Code is losing its character, Louisiana appellate court decisions continue to exemplify the best of the civilian tradition.<sup>69</sup> To be sure, Louisiana decisions have nothing

67. E.g., La. Civ. Code art. 1421(3), seemingly accords to the creditors of a succession an action for the separation of the patrimony of the deceased from that of the heir. However, the action for separation of patrimony was abolished by 1960 La. Acts, No. 30, § 2, which repealed articles 1444 through 1464 of the Civil Code. Today, creditors of a succession may have a privilege under La. Rev. Stat. Ann. §§ 9:5011-5016 (West Pamph. 1980). Further, several articles of the Civil Code still refer to the defunct institution of family meeting. See, e.g., La. Civ. Code arts. 82, 423, 1344.

68. See, e.g., S. Litvinoff, *Obligations* § 4 (La. Civ. L. Treatise vol. 6, 1969).

69. See, e.g., *Illinois Central Gulf Ry. v. International Harvester Co.*, 368 So. 2d 1009 (La. 1979); *Oil Purchasers, Inc. v. Keuling*, 334 So. 2d 420 (La. 1976); *Meador v. Toyota of Jefferson, Inc.*, 332 So. 2d 443 (La. 1976); *Loscher v. Parr*, 324 So. 2d 441 (La. 1975); *Sliman v. McBee*, 311 So. 2d 248 (La. 1975); *Placid Oil Co. v. Taylor*, 306 So. 2d

in common with the style of French decisions, but this is an advantage rather than a detriment.<sup>70</sup> The abstract logic of the French decisions and their dry style need not be imitated. Ordinarily, Louisiana judges state issues and facts and proceed to a discussion of pertinent Civil Code provisions in the light of their historical derivation, intended meaning, and jurisprudential interpretation. Doctrinal sources are freely used and relied upon. Then, a conclusion is reached and the court decrees the appropriate relief. In the process, perennial institutions of civil law are frequently re-examined in light of contemporary conditions; traditional civilian principles are re-explored to provide the rule of decision.<sup>71</sup> Thus, the civil law of Louisiana—and not merely the Civil Code—is given new life. Landmark Louisiana decisions deserve study by civilians in other parts of the world because they show the way for modernization of the civil law.

This is not to say that all is well with Louisiana jurisprudence. There are judges who have limited knowledge of the civil law and its processes and who still are likely to turn to common law sources for an easy solution. Thus, at times, Louisiana decisions are reported that might have been rendered in Alabama or Mississippi. For example, certain Louisiana judges still think of nuisance rather than an abuse of the right of ownership under articles 667 through 669 of the Civil Code,<sup>72</sup> conversion rather than fault under article 2315,<sup>73</sup> and actions to remove clouds from title rather than petitory and possessory actions.<sup>74</sup> It has been aptly stated that Louisiana jurisprudence has a "double personality" and is "in a state of disordered consciousness leading two lives. At times it functions under one legal system with amnesia in the other."<sup>75</sup>

Moreover, Louisiana still does not have what every ad-

664 (La. 1975); *Cortes v. Fleming*, 307 So. 2d 611 (La. 1974); *Coleman v. Bossier City*, 305 So. 2d 444 (La. 1974); *Holland v. Buckley*, 305 So. 2d 113 (La. 1974); *Spiller v. Herpel*, 357 So. 2d 572 (La. App. 1st Cir. 1978).

70. See *Baudoin*, *supra* note 4, at 15.

71. See *Barham*, *supra* note 24, at 487-93.

72. Compare *Guillot v. Town of Lutchet*, 373 So. 2d 1385 (La. App. 4th Cir. 1979) with *Hero Lands Co. v. Texaco, Inc.*, 310 So. 2d 93 (La. 1975).

73. Compare *Lincecum v. Smith*, 287 So. 2d 625 (La. App. 3d Cir. 1973), *aff'd*, 290 So. 2d 1904 (La. 1974) with *McVay v. McVay*, 318 So. 2d 660 (La. App. 3d Cir. 1975).

74. Compare *Harrison v. Alomhro*, 341 So. 2d 1165 (La. App. 1st Cir. 1976) with *Papworth v. Truxton Corp.*, 357 So. 2d 1198 (La. App. 4th Cir. 1978).

75. *Reeves*, *supra* note 2, at 34.

vanced civil law jurisdiction has, a commentary on the entire Civil Code. The practitioner and the judge have at their disposal a few treatises and monographs, an abundance of leading articles, comments, and casenotes published in law reviews, and a series of French doctrinal works whose translations were sponsored by the Louisiana State Law Institute. But the Louisiana Civil Law Treatise series, intended to cover the entire field of the civil law, is incomplete and the prospect of completion remains dim. Louisiana scholars seem to be tired of fighting what has the appearance of a rear guard battle. Our era is not a romantic one: a Louisiana legal scholar may not be expected to be like Rhett Butler who decided to fight the Civil War after Atlanta was on fire and the war was all but lost.

Is, then, Louisiana civil law a lost cause? Before reaching a conclusion, one must consider several factors. First, the Louisiana Civil Code, though losing its cohesion, is still the law ordering the basic relations of citizens in and out of court. It is taken seriously by the legal profession in the state and by out of state counsel who are routinely expected to employ Louisiana counsel for matters governed by Louisiana law. Second, the principles established in the Civil Code continue to control in the interpretation and application of specialized codes, such as the Mineral Code<sup>76</sup> and the Trust Code.<sup>77</sup> Moreover, the principles of the Civil Code are often applied in the interpretation and application of provisions of uniform laws, commercial law, and even public law, including tax legislation.<sup>78</sup> Third, civilian methodology, including deductive process and analogy, continues to be applied routinely;<sup>79</sup> jury trials are rare, and appellate courts are empowered by the Constitution to review facts.<sup>80</sup> Reliance on doctrine is predominant; and solutions reached in civil law jurisdictions, especially France, are always pertinent and frequently

76. The Louisiana Mineral Code appears in La. Rev. Stat. Ann. §§ 31:1-214 (West 1974).

77. The Louisiana Trust Code appears in La. Rev. Stat. Ann. §§ 9:1724-2371 (West 1964). See *Reynolds v. Reynolds*, No. 63,936 (Nov. 1, 1979; rehearing, Sept. 3, 1980); *St. Charles Land Trust Co. v. St. Amant*, 253 La. 243, 217 So. 2d 385 (1969).

78. See, e.g., *Exxon Corp. v. Traigle*, 353 So. 2d 314 (La. App. 1st Cir. 1977); *American Sign & Indicator Corp. v. City of Lake Charles*, 320 So. 2d 234 (La. App. 3d Cir. 1975).

79. See notes 68 & 70 *supra*.

80. See La. Const. art. 5, § 5 (C). See also, *Dart*, *supra* note 1, at 174.

See *Barham*, *supra* note 24, at 487-93.

DEDUCTIVE

persuasive.<sup>81</sup> Thus, the Louisiana legal profession, like Molière's hero, speaks and breathes civil law without always being conscious of the fact.

One must also realize that Louisiana enjoys a greater awareness of comparative law than any other state in the Union.<sup>82</sup> Louisiana law schools offer a wealth of comparative law courses and many standard courses in the curriculum are taught comparatively. Faculties in Louisiana law schools include scholars from many parts of the world who do not regard themselves as outsiders though they speak with foreign accents. As in 1937, three-fourths of the courses taught in any Louisiana law school may be indistinguishable from similar courses taught elsewhere in the United States; but these courses are taught frequently by persons well-versed in both the civil law and the common law tradition, with an awareness of the strong as well as the weak points of each. Moreover, the basic civil law courses are taught in Louisiana law schools as a law in action rather than as a law in the books. Louisiana law professors may be doing an even better job than their counterparts on the continent because they have the advantages of American legal education and hence have the ability to combine the lecture with the case method of instruction.<sup>83</sup>

Finally, Louisiana is, in contrast with most of her sister states, a state of codified laws. Thus, it is easier for the practitioner and the judge to find precedents in annotated editions of the various codes rather than to comb the research digests. This, by the force of circumstances, strengthens reliance on legislation. The starting point of study in Louisiana, as in all civil law jurisdictions, is legislation.<sup>84</sup>

81. See note 68 *supra*. For the continuity of tradition, see Merick, *The Laws of Louisiana and Their Sources*, 29 Am. L. Reg. 1, 6 (2d series 1890): "[C]ommentators on the French Code, as well as decisions of the court of cassation, have exercised great influence on controversies arising under our own code."

82. See Oppenheim, *The Importance of Comparative Property Law to Louisiana Lawyers*, 2 La. B.J. 243 (1955).

83. For the effect of an improved legal education in the state on civil law and procedure, see McMahon, *The Proposed Louisiana Code of Practice: A Synthesis of Anglo-American and Continental Civil Procedures*, 14 La. L. Rev. 36, 37 (1953).

84. Instruments of research on jurisprudence are also available to Louisiana lawyers. See Tate, *supra* note 54, at 679. See also Jolowicz, *supra* note 4, at 501. Nevertheless, research normally starts with the annotated editions of the Louisiana Civil Code, the Code of Civil Procedure, the Revised Statutes, and the Constitution.

In light of the foregoing, one may be justified in asserting that the civil law has neither ceased to exist in Louisiana nor has it begun to fade away. There is still a big difference between the law of Louisiana, because of its civil law component, and the law of her sister states. Basically, the private law in the fields covered by the Civil Code remains civilian despite certain common law encroachments.<sup>85</sup> Admittedly, in other fields, the difference is either less pronounced or nonexistent.

#### THE FUTURE

There is no crystal ball to predict the future of Louisiana law and of its civil law component. There is certainly a danger "that the civil law may completely lose its identity and be replaced gradually by common law."<sup>86</sup> However, the danger is remote. Past experience in mixed jurisdictions suggests that civilian principles and institutions are sufficiently resilient and adaptable to changed social, political, and economic conditions. Old laws, like old soldiers, never die; they just fade away.

The Louisiana civil law, not merely the Civil Code, may be expected to survive for a long time as a legal form or style, and to continue to exercise a beneficial influence on the law of sister states.<sup>87</sup> Indeed, civilian codification techniques and civilian methods of interpretation are ideally suited to adoption by legal systems that have become, or are in the process of becoming, statutory.<sup>88</sup> Moreover, these techniques and methods, because of heavy reliance on formal logic, are suited as well to modern research technology, including the use of computers.

For a long time, the law of Louisiana has been an "uncatalogued creation";<sup>89</sup> neither common nor civil, it is an example of American law with a civil law and a common law component. The system, as a whole, has been as good as the lawyers, judges, and law professors who have served it. With the improvement of legal education in the state and nation, it may be expected that

85. See Pope, *How Real is the Difference Today Between the Law of Louisiana and that of the Other Forty-Seven States?*, 17 Geo. Wash. L. Rev. 186, 196 (1949).

86. Baudoin, *supra* note 4, at 16.

87. See Barham, *supra* note 24, at 482 & n.52; Tucker, *supra* note 25, at 762.

88. See, e.g., Richert & Richert, *The Impact of the Civil Code of Louisiana upon the Civil Code of Quebec of 1866*, 8 Revue Juridique Thémis 501-20 (1973).

89. See note 20 *supra*.

the system itself will further improve and that the role of doctrine will be enhanced.<sup>90</sup>

In the folds of Louisiana law, there has always been a niche for the civil law. Louisiana has been, and most probably will continue to be, a mixed jurisdiction. This is a blessing rather than a handicap,<sup>91</sup> because Louisiana has a choice in the course of her future legal development and in the pursuit of justice for all her citizens. Not necessarily at the expense of certainty, Louisiana has always enjoyed, and will continue to enjoy, flexibility in the administration of civil justice.

This does not mean that Louisiana has a better legal system than her sister states, but that her system is marked with certain peculiarities and idiosyncracies conditioned by the past. Hopefully, one will be able to conclude in the year 2004, as Howe did one hundred years earlier, that "the great principles of Right between man and man are much the same in all parts of the Louisiana Purchase."<sup>92</sup>

## CONSTITUTIONAL DEREGULATION: NOTES TOWARD A PUBLIC, PUBLIC LAW

JERRY L. MASHAW\*

*The struggle to maintain, to deepen, or to alienate the force of a legal text is called interpretation.*

—Mitchell Franklin\*\*

### I

Suppose some group of merchants decided to seek state legislation protecting itself from competition. Because such protection could not be sought openly, the group developed a strategy that involved the presentation of its substantive case in terms of the group's need for protection from even more powerful economic interests outside the state. This request for protection was, of course, not to be presented as self-interested, but rather as essential to the continuation of the group's current service to the consuming public. Suppose further that the strategy were successful. Legislation was passed which in fact provided substantial protection from competition, but in a statutory form arguably (albeit mediately) related to the interests of the consuming public. Would such a statute violate the U.S. Constitution?

The cynical among you will by now be laughing, not up your sleeves, but openly. "Suppose?" you will say. "What do you mean 'suppose'? That is state regulatory legislation as I know it. And you know darn well that so far as the federal courts are concerned it's constitutional. The Supreme Court has said so often and loudly, ever since 1937. 'Substantive due process' is dead where 'economic' issues are concerned."

And, indeed, it is. I have done nothing in my little hypothetical but describe an imaginary legislative scenario that we

90. See Tate, *supra* note 1, at 742.

91. See Baudoin, *supra* note 4, at 16, asserting that mixed jurisdictions are "privileged." See also Stone, *The Reception of Law in Louisiana*, in *Legal Thought in the United States of America Under Contemporary Pressures* 147 (J. Hazard & W. Wagner eds. 1970): "If the law of Louisiana be termed a hybrid or mixed system, it is well to recall that many of the most important advances in science, religion, literature and law have come about through cross-fertilization."

92. Howe, *Law in the Louisiana Purchase*, 14 *Yale L.J.* 77, 81 (1904).

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\*\* Franklin, *The Ninth Amendment as Civil Law Method and its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 *Tul. L. Rev.* 487, 501 (1966).