PASCAL / BATIZA

THE LOUISIANA CIVIL CODE OF 1808: ITS ACTUAL SOURCES AND PRESENT RELEVANCE

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The Digest of the Civil Laws, generally known as the Civil Code of 1808,[1] is one of the most interesting and significant developments in the history of codification in the western hemisphere. The earliest[2] example of a code drafted from a variety of European sources, this code established, at least in part,[3] a civilian system of private law for Louisiana. The significance of the Code of 1808, however, is not merely historical.[4] Indeed, through the intermediate

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1 The full title is "A Digest of the Civil Laws now in force in the territory of Orleans with alterations and amendments adapted to its present system of government."

2 The year 1808 was one of great significance in the Spanish Empire in the western hemisphere, since Napoleon's invasion of Spain had dramatically raised the issue of local self-government. The most pressing need for the colonies that did achieve political independence during the early 1820's was to draft constitutions rather than civil codes so that, with a few earlier exceptions (Bolivia, 1831; Dominican Republic, 1845), civil codes in Latin America only began to appear in the second half of the nineteenth century. *See* P. Eder, *Introduction* to the Argentine Civil Code at xxi-xxxii (F. Joannini transl. 1917), which, although especially referring to Argentina, includes data of general application to other Latin American countries.

3 As a result of developments that began early in the Middle Ages, private law in most civil law countries is split into two, separately codified branches, civil law and commercial law. A trend to unify private law, at least the law of obligations and contracts, originated in Switzerland at the end of the nineteenth century but was followed in only a few countries.

The Louisiana Legislature requested Livingston, Derbigny, and Moreau Lislet to prepare a draft for a Code of Commerce, but failed to adopt it in 1824. Dart, *The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana*, 6 Tul. L. Rev. 83, 89 (1931) [hereinafter cited as *Influence of the Ancient Laws*]; *see* Tucker, *The Code and the Common Law in Louisiana*, 29 Tul. L. Rev. 739, 753 (1959). The subsequent adoption, however, of Uniform Acts, such as those on bills of lading, business corporations, and negotiable instruments, has made a commercial code unnecessary and has resulted in a unity of private law in Louisiana, an unusual situation for most civilian jurisdictions.

As for other branches of law in Louisiana, the law of evidence and civil procedure are predominantly based on the common law, as are constitutional and administrative law. Dart, *The Place of the Civil Law in Louisiana*, 4 Tul. L. Rev. 163, 170-71 (1930) [hereinafter cited as *Place of the Civil Law*]. Criminal law and criminal procedure are entirely common law. Hubert, *History of Louisiana Criminal Procedure*, 33 Tul. L. Rev. 739, 740 (1959); Tucker, *supra* at 753.

4 It has been said that "[i]n view of the relative fullness of the report of the Commissioners on the Louisiana Civil Code of 1825 and its numerous French source authorities, the significance of establishing the extent and the identity of French influence in 1808 may be more historical than practical." Dainow, *Moreau Lislet's Notes on the Sources of Louisiana Civil Code of 1808*, 19 La. L. Rev. 43, 51 (1958). The French source authorities that appear in the Projet of 1823, however, are not as numerous as may appear at first sight since they refer only to some of the additions made in 1825 and ignore the great bulk of provisions from the Code of 1808 incorporated into the new Code. Moreover, sources other than French, even though not as extensively used, are of great importance for a better understanding and knowledge of the Louisiana Civil Code. *See* Apps. B, C *infra*.

agency of the Civil Code of 1825,[5] many of its provisions, practically 50 percent,[6] still survive in the Revised Code of 1870 presently in force.

It has been stated that the Code of 1808 was the product of a chaotic state in the laws of Louisiana resulting from the successive French and Spanish regimes and the subsequent cession to the United States in 1803.[7] While it is not necessary to recount in detail here the legal background of Louisiana, it is convenient, in order to place the Code of 1808 in its proper historical perspective, to recall a few basic facts. Although Hernando de Soto was the first European to cross the Mississippi River and to explore, as early as 1542, near present-day Louisiana, settlement was exclusively a French enterprise. The expeditions of Father Marquette and Joliet in the seventeenth century, encouraged by the Governor of Canada, de Frontenac, and continued by Father Hannepin and de la Salle, resulted in a permanent settlement by Iberville in 1699.[8] French rule lasted about fifty years. It began in 1712, the year of the granting of the Crozat Charter,[9] and ended in 1762, the year of the cession to Spain, although O'Reilly did not take possession of the Colony on behalf of the Spanish Crown until 1769.[10] During this time, the legal system of Louisiana was based principally on the Custom of Paris[11] and various royal enactments such as the Ordinance of 1667[12] on civil procedure.[13] The succeeding Spanish regime lasted for about thirty years and replaced the French legal system with a simplified version of the system in force throughout the Spanish Empire. Based primarily[14] on the Compilation of the Laws

5 App. D *infra*.

6 *Id.*

7 Tucker, *Source Books of Louisiana Law*, 6 Tul. L. Rev. 280 (1932).

8 Schmidt, *History of the Jurisprudence of Louisiana*, 1 La. L.J. No. 1, 1, 4 (1841).

9 Loevy, *Louisiana and Her Laws*, in The Louisiana Book 1, 6 (M'Caleb ed. 1894); Wigmore, *Louisiana: The Story of its Legal System*, 1 So. L.Q. 1, 2 (1916). "Civil government began in Louisiana with the letters patent issued to Crozat, September 14, 1712 . . . ." Tucker, *supra* note 3, at 741.

10 L. Moreau Lislet and H. Carleton, *Preface* to The Laws of Las Siete Partidas which are still in force in the State of Louisiana at XIX (L. Moreau Lislet & H. Carleton transl. 1820).

11 Coutume de Paris (C. de Ferriere ed. 1788).

12 Ordonnance civile pour la réformation de la justice, *promulgated on* April 20, 1667.

13 Dart, *Introduction to the First Edition*, 1 Civil Code of the State of Louisiana, Revision of 1870, at iv (2d ed. 1945).

14 "Instructions as to the manner of instituting suits, civil and criminal, and of pronouncing judgments in general, in conformity to the laws of the

of Castile[15] and the Compilation of the Laws of Indies,[16] Spanish law in Louisiana was supplemented by other enactments, principally *las Siete Partidas*.[17] The Spanish period ended with the forced retrocession of the colony to France in 1800 and its subsequent transfer to the United States in 1803 as a result of the Louisiana Purchase.[18]

An Act of Congress in 1804 divided Louisiana into two territories, the lower portion of which was the Territory of Orleans, and gave a Legislative Council, acting jointly with the Governor, the authority to alter, modify, or repeal the laws then in force.[19] In reaction to Governor Claiborne's attempts to introduce the common law into the new territory, the Legislative Council early in 1806 proposed a rather curious legal system predominantly based on Roman, Spanish, and other civil law sources,[20] but it was pre-

Nueva Recopilacion de Castilla, and the Recopilacion de las Indias . . . ." *Ordinances and Instructions of Don Alexander O'Reilly*, 1 La. L.J. No. 2, 1, 27 (1841).

15 Recopilación de las Leyes de estos Reynos (1567) [hereinafter cited as Comp. of Castile].

16 Recopilación de Leyes de los Reynos de las Indias (1681).

17 Las Siete Partidas del Rey Don Alfonso el Sabio (G. Lopez ed. 1829) [hereinafter cited as Partidas].

18 Dart, *supra* note 13, at iv. There is much discrepancy concerning the exact duration of each of the French and Spanish periods. For instance, Dart states: "It is well at this point to recall that during the Colonial period of Louisiana the civil law of France had governed for seventy years and the civil law of Spain for thirty-four years." *Id.* at 86. The disagreement results from using a number of possible events as either the starting point or end for each period, that is, the settlement by Iberville (1699), Crozat's Charter (1712), or the founding of New Orleans (1718), on the one hand; on the other, the date of the Family Compact (1762), the actual taking of possession of Louisiana by O'Reilly (1769), the date of the Treaty of San Ildefonso whereby Spain retroceded Louisiana to France (1800), or the date of actual delivery to Laussat (1803).

19 *Influence of the Ancient Laws*, *supra* note 3, at 86-87.

20 The sources were described in "An Act declaring the laws which continue to be in force in the territory of Orleans, and authors which may be recurred to as authorities within the same." The act stated that, save for changes and modification already made by the legislature of the territory, for provisions in the Constitution of the United States, and for the two most important principles of the judiciary system of the common law, the writ of habeas corpus and trial by jury, the proposed legal system was to be based upon: the Roman Civil Code, as the foundation of Spanish law and not derogated by it, including the Institutes, Digest, and Code of Justinian, aided by commentators of the civil law, particularly Domat; Spanish laws, consisting of the Compilation of Castile, *Autos Acordados*, *las Siete Partidas*, the *Fuero Real*, the *Recopilación de Indias*, the Laws of Toro, and the ordinances, royal orders, and decrees enacted for Louisiana, the whole aided by the authority of commentators admitted in the courts. The Ordinance of Bilbao was to have full authority in matters of commerce, and, when not sufficiently explicit, Roman laws, Bewes' *Lex Mercatoria*, Park and Emerigon on insurance, the commentaries of Valin and other authors consulted in the United States, would apply. For the text of the act, see Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 Tul. L. Rev. 319, 323-26 (1942).

dictably defeated by the Governor's veto. In June, 1806, however, both the Legislative Council and the House of Representatives of the Territory of Orleans concurred in the appointment of James Brown and Louis Moreau Lislet to compile and prepare a civil code. The House further resolved ". . . that the two jurisconsults shall make the civil law by which the territory is now governed the ground work of said code."[21] The outcome of their efforts, less than two years later, was the Digest of the Civil Laws, approved by an Act of March 31, 1808.[22]

The mystery surrounding the actual sources of the Code of 1808 has intrigued legal scholars in Louisiana for many years.[23] The drafters of the Code left no indication whatsoever regarding the sources utilized in the preparation of their work; there was no *Exposition des Motifs* or any other document to reveal the true sources.[24] Although for many years, and until relatively recent times, scholars have generally agreed upon the basic French inspiration of the Code, as well as the presence of Spanish elements,[25] a considerable degree of uncertainty has necessarily prevailed as to its specific sources. In fact, a variety of assertions have been made that either the last *Projet* of the *Cambacérès* Code,[26] or the

21 Tucker, *supra* note 7, at 283. The "civil law" referred to in the resolution was the Spanish legal system adopted in 1769 because the retrocession to France in 1800 had not restored the French legal system. *Influence of the Ancient Laws*, *supra* note 3, at 86.

22 Tucker, *supra* note 7, at 282. "Although the compilers described their work as a digest of the laws in force, it actually was a complete civil code . . . ." Hood, *The History and Development of the Louisiana Civil Code*, 33 Tul. L. Rev. 7, 13 (1958).

23 *See, e.g.*, Tucker, *supra* note 7, at 283; K. Wallack, Research on Louisiana Law 47 n.1 (1958).

24 Dainow, *supra* note 4, at 43. The only exception, although unfortunately of very limited extent, is in the few indications included in the *Projet* of 1823 referring, for example, to *las Siete Partidas*, the Laws of Toro, and the Compilation of Castile. Additions et amendemens au Code Civil de l'Etat de la Louisiane, proposés en vertu de la résolution de la Legislature du 14 mars 1822, par les juristes, chargés de ce travail (1823) [hereinafter cited as Projet of 1823].

25 "This Digest, usually called the Civil Code of 1808 was built on a projet of the Napoleon Code, but embodied also many provisions of the Spanish law of Louisiana and it was otherwise and after a fashion a reflection of the legal experience of Louisiana previously recited in this paper." *Place of the Civil Law*, *supra* note 3, at 168-69. "Suffice it to say here, that there are many differences between the Code Napoleon and the Louisiana Code of 1808 due to the incorporation of the Spanish law in the Louisiana Code." Tucker, *supra* note 7, at 284. "[T]here are many differences between the Code Napoleon and the Louisiana Code of 1808, due largely to the fact that there were incorporated into the Louisiana Code a substantial number of Spanish laws, which had not been included in the French Code." Hood, *supra* note 22, at 14. "Not to be overlooked at this point is the fact that the Louisiana Civil Code of 1808 contained a substantial amount of laws incorporated directly from Spanish sources." Dainow, *The Louisiana Civil Law*, in Civil Code of Louisiana XXI (2d ed. J. Dainow 1961).

26 Troisième Projet de Code Civil, an IV (1796).

The Code Commissioners followed the last *Projet* of the Cambacérès

Projet of the French Civil Code,[27] or the French Code alone,[28] or both the French *Projet* and the Code,[29] were the models for the Louisiana Code. The finding, some years ago, of a copy of the Code of 1808 annotated in French, subsequently known as the "de la Vergne manuscript" or volume,[30] has given rise to a new school of thought that maintains the primacy of Spanish sources in the Code.[31]

Code in many particulars, but incorporated as well a part of the Spanish law that had become a rule of property in Louisiana. The general form of the Code was that of the last projet, and in philosophic plan it bore little resemblance to the Code Napoléon.

Dart, *The Louisiana Judicial System*, in 1 Louisiana Digest Annotated 20 (1917).

[27] Projet de Code Civil, présenté par la Commission Nommée par le gouvernement le 24 Thermidor an VIII (1800) [hereinafter cited as Projet de Code Civil].

Although the Napolcon Code was promulgated in 1804, no copy of it had as yet reached New Orleans: and the gentlemen, Moreau Lislet and Brown, availed themselves of the projet of that work, the arrangement of which they adopted, and *mutatis mutandis* literally transcribed a considerable portion of it.

F. Martin, 2 The History of Louisiana 29 (1829); *see*, Wigmore, *supra* note 9, at 12.

[28] Code Civil des Français, an XII (édition originale et seule officielle, 1804) [hereinafter cited as Code Civil des Français].

It requires a very critical examination to discover where the Digest differs from the French Code of 1804, but it may be accepted that the former is not a blind copy of the Code of France. The differences consist principally in suppressions and rearrangements, with additions that do not appear in the model.

Influence of the Ancient Laws, *supra* note 3, at 87. "The Civil Code prepared by Brown and Moreau Lislet, however, was not based on the Spanish Law, as the Legislature had directed, but was based instead on the then newly adopted French Code, the Code Napoleon." Hood, *supra* note 22, at 14.

[29] "[I]t was our general conclusion at the time of this work that the Louisiana jurists had available and actually used both the Projet and the final version of the French Civil Code." Dainow, *supra* note 25, at XXI.

[30] *See* Franklin, *An Important Document in the History of American, Roman and Civil Law: The de la Vergne Manuscript*, 33 Tul. L. Rev. 35 (1958): "In 1941 the writer said that the de la Vergne family possessed 'an unpublished manuscript in which Moreau-Lislet, gave, in detail, the exact legal sources for the various articles of the Louisiana Civil Code of 1808.'"

[31] Both documents [the de la Vergne volume and the volume owned by Louisiana State University] will facilitate research into the sources of Louisiana civil law and help demonstrate that the redactors of the Digest of 1808 did indeed consider it a digest of the Spanish laws then in force in Louisiana even though they cast it in the mold of the then new French *Code Civil*.

Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 with Marginal Source References in Moreau Lislet's Hand*, 26 La. L. Rev. 25, 26 (1965).

The annotations, therefore lend support to the conclusion that the *Digest* was indeed in substance primarily a digest of the Spanish laws in force in the Territory of Orleans in 1808, even though the formal source of many of its provisions was the French *Code Civil* or one of its projets, and tend to refute the popular notion that the *Digest* represents an acceptance of French law in what is now the State of Louisiana.

Hebert & Morgan, *Preface* to A Reprint of Moreau Lislet's Copy of a Digest of the Civil Laws now in Force in the Territory of Orleans (1968). In addition to the two interleaved copies of the annotated volume of the Digest (similar to the de la Vergne volume) mentioned in the Preface, there is a third copy kept

The basis of this theory is the handwritten *avant-propos* in that volume stating that there is ". . . on the side of the French text, and article by article, the citation of the principal laws of various codes from which the provisions of our local statute are drawn."[32] Despite this categorical assertion and the acceptance it has received,[33] the truth of the matter is that the de la Vergne volume is not primarily a compilation of sources, but one of concordances.[34] The numerous citations appearing on the 245 interleaves include relatively few references to actual sources[35] and generally fail to disclose the real origins of the Code of 1808.[36] A simple observation will suffice to de-

in the Rare Book Collection of the Tulane Law School Library. While the calligraphy of this copy cannot compare in neatness to that of the de la Vergne volume, the annotations on the interleaves are essentially the same.

[32] The writer's translation in the text differs only slightly from two other previous translations. *See* Dainow, *supra* note 4, at 44; Franklin, *supra* note 30, at 39.

[33] *See* note 31 *supra*.

[34] For a practical distinction between the two kinds of compilation, see App. A *infra*. The true nature of the de la Vergne manuscript is correctly reflected in the first and third paragraphs of the *avant-propos* stating that the purpose of the annotations is to make known the text of the civil (Roman) and Spanish laws having some relation to the laws of Louisiana and that, in citing such laws, references were not limited to those works containing similar provisions, but included as well those presenting either differences or exceptions to the same subjects or principles. The emphatic statement in the second paragraph, however, claiming that the citations on the side of the French text are to sources, makes reconciliation of the three paragraphs impossible.

[35] References to actual sources are found in the Act relating to apprentices and indented servants, the Black Code, the Act regulating the emancipation of slaves, and the Act concerning the celebration of marriages. See the interleaves opposite pages 37, 41, 43, and 25, respectively. And, because Pothier, the *Partidas*, *Febrero Adicionado*, and a few others, especially Domat, are the origins of a substantial number of provisions of the Code of 1808 and because annotations in the de la Vergne volume include citations of these works, the volume does include among its copious references some actual sources in this respect, too. But, a number of references to either Domat or Pothier are missing, despite the fact that they involve actual sources. For instance, the interleaf facing page 191 of the Code bearing the annotation concerning article 191 omits mention to Domat, the almost verbatim source of the article. *See* 1 J. Domat, Les Loix Civiles dans leur Ordre Naturel, Part. II, Liv. I, Sect. I, n. IV (389) (1777) [hereinafter cited as Domat]. In the interleaf opposite page 197 the sources for article 210 are given as Domat and Febrero, whereas the actual source is Pothier. 2 R. Pothier, *Traité des Successions*, Oeuvres Posthumes, Chap. IV, Art. II, § VII (190) (1778) [hereinafter cited as *Successions*].

[36] There is not one single reference to Blackstone under Title X of Book I on communities or corporations, despite the fact that of the 22 provisions comprising that title at least seven came from Blackstone's works. *See* App. C *infra*. Likewise, there is no reference to Blackstone under Title VI on master and servant, nor to the Custom of Paris. *Id.* The worst omission, of course, relates to both the French *Projet* and Code. The following observation is, therefore, not surprising:

Spanish authorities cited in that work [the de la Vergne manuscript] proved to be, at best, only obliquely related to a given article; often they are totally irrelevant. For the articles under consideration, only the citations to Domat were accurate with any consistency. Ironically, the

fine the nature of the de la Vergne volume: a compilation that does not contain a single reference either to the *Projet* of the year VIII (1800) or to the French Civil Code of 1804, failing thus to indicate (as will be shown below) the two most important constituent elements of the Code of 1808, cannot possibly qualify as a work of sources.[37]

In view of the foregoing and of the fact that no amount of additional speculation could in any way solve the problem of identifying the actual sources of the Code,[38] the only practical course to be pursued was to undertake an investigation independent of works previously considered sourcebooks.[39] The purpose of the present

absence of cited authority for an article proved a fairly consistent indication that the article was either an original work, or that its source was the common law.

Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat and the French Codes*, 44 Tul. L. Rev. 266, n.8 (1970). This latter opinion, however, is correct only in the three following situations: Chapter IV, Preliminary Title, Book I, on the application and construction of laws; Title VI, Book I, on master and servant; and Title X, Book I, on communities or corporations. The influence of the common law on the Code of 1808 is far more limited than suspected in the preceding observations. *See* App. C *infra*. On the other hand, a good illustration of Tucker's first observation concerning Spanish authorities cited in the de la Vergne manuscript is *Quarta Partida*, Lib. I, Tit. VI, Chap. III, Ley XXIII, which provides that slaves cannot marry without the consent of their masters. According to the handwritten reference on the interleaf between pages 40 and 41 of the Code, the source (for those who deem the volume a work of sources) would be "L.1.t.5.Part. 4." This provision in *Quarta Partida*, however, provides just the opposite, namely, that the marriage of slaves against the master's consent is valid. The actual direct source of the provision is found in article VII of the *Code Noir* of 1724. *See also* 3 R. Pothier, *Traité du Contrat de Mariage*, Traités de Droit Civil, Part. I, Chap. II, § III (133) (2d ed. 1781).

[37] The following question has been raised:

> Even if it should be confirmed that there is no mention whatsoever of the French Civil Code of 1804 or the French Projet of 1800, it would still be difficult to deny that they were used because there are so many of the 1808 code provisions which correspond verbatim or almost verbatim to either one or the other of these French texts. And if they were used, why were they not mentioned in these notes on the sources?

Dainow, *supra* note 4, at 51. One possible explanation for the preceding question (and not a very convincing one) is that the de la Vergne volume is an unfinished work, either as a book of sources or as a concordance. The problem with this, of course, is the categorical statement to the opposite effect in the *avant-propos*. *See* note 34 *supra*. On the other hand, much worse than the foregoing explanation would be to accuse Moreau Lislet (assuming, as is probably the case, that he was the author of the annotations) of trying to deceive the public in regard to the obvious main sources of the Code of 1808. But at least one noted contemporary, Martin, harbored this suspicion concerning the actual sources. *See* note 27 *supra*.

[38] A step in the right direction was taken by Tucker, *supra* note 36.

[39] The first stage in the investigation was to follow the two main trails of the French *Projet* and Code. After completion of that stage, it became clear that those two sources could not account for all of the provisions in the Code of 1808, since there were over 600 provisions left for identification. The substantial influence of Domat soon became apparent, as did that of Pothier. Subsequently, other sources, exerting less influence but still very significant, emerged, such as the Institutes, the Digest, *las Siete Partidas*, *Febrero*

article is to make known the results of the research that has ultimately led to the identification, from about a score of different sources, of the individual origins of 2,081 provisions of the 2,160 comprising the Code of 1808. This figure represents almost 97 percent of the Code's contents, leaving only 79 provisions whose sources have eluded specific identification, but for which there are, in most cases, satisfactory explanations.[40]

Briefly, the results revealed by the investigation are as follows:[41] the French *Projet* of the year VIII is the source of 807 provisions;[42] the French Civil Code of 1804 is the source of 709 provisions.[43] Thus, the French *Projet* and Code, combined, account for 1,516 provisions,[44] or about 70 percent of the Louisiana Code of 1808. Of the 709 provisions from the French Civil Code, however, 372, or more than 50 percent, were actually borrowed from the *Projet*. Domat contributed 175 provisions,[45] or 8 percent, Pothier 113,[46] or 5 percent, and eighteen can be traced either to Domat or

Adicionado, Blackstone, the Custom of Paris, and the others enumerated in the text.

[40] The sources for 79 provisions cannot be individually identified, because many are free adaptations from a variety of sources, principally from the French *Projet* and Code. The largest group of such provisions (18) refers to the administration of vacant estates and estates *ab intestato*, which very probably represents an attempt to codify local customary procedure using by analogy provisions from the French *Projet* and Code. The remaining provisions relate to absent persons (1.3.2; 1.3.12), marriage (1.4.6), separation (1.5.1), free servants (1.6.2), natural children (1.7.62), tutorship (1.8.14; 1.8.58; 1.8.59; 1.8.71), interdiction (1.9.111; 1.9.30), collation (3.1.199), the legal capacity of married women (3.5.30), and slaves (3.6.28; 3.6.89; 3.8.39). None of the unidentified provisions, however, involves a significant rule or principle, and a few do not contain rules at all. For instance, one provision reads as follows: "There are likewise several modes by which labor and personal services may be let out as will appear in another chapter." La. Civil Code of 1808, 3.7.5. Other unidentified provisions may have their sources in "ancient laws of the country," and "uses of the Territory" must be taken into account. *See, e.g.*, La. Civil Code of 1808, 1.5.1, 3.6.77.

[41] With a few exceptions, only the first direct source of the provision is given. For both the direct and indirect sources of each provision, see App. C *infra*.

[42] Of this number, 315 appear verbatim, 398 almost verbatim, while 65 are substantially influenced, and 29 partially influenced. In all instances where a provision in the French Civil Code has been borrowed in verbatim or almost verbatim form from the French *Projet*, thus making it impossible to determine which source the drafters of the Code of 1808 actually used, credit is given to the *Projet*, since it is the earlier of the two documents.

[43] A total of 293 are verbatim, 382 are almost verbatim, while 26 are substantially influenced, and eight partially influenced.

[44] There are about 35 provisions from both the *Projet* and Code that are not included in the figures given in the text since they appear together with other possible sources.

[45] Nine are verbatim, 98 almost verbatim, 60 substantially influenced, and eight partially influenced.

[46] Of these 113, 32 are almost verbatim, 74 substantially influenced, and seven partially influenced.

Pothier, or both. The Custom of Paris and the Ordinance of 1667[47] on civil procedure add to the French sources that account for about 85 percent of the Code of 1808.

The remaining provisions are distributed as follows:[48] *las Siete Partidas* can be recognized in 67 provisions, *Febrero Adicionado*[49] in 52, the Institutes in 27, Blackstone[50] in 25, the Digest in 16, the *Curia Philipica*[51] in 16, the Act of April 6, 1807,[52] concerning marriages in 16, and the Compilation of Castile[53] in 14. The old *Code Noir*,[54] the Black Code,[55] Gaius' Institutes, Justinian's Novel LIII, the Act of 1806[56] on apprentices and indented servants, the *Fuero Real*,[57] the third *Cambacérès Projet*,[58] the Ordinances of Bilbao,[59] the Ordinance of 1804[60] on intestate estates, the Act on emancipation of slaves,[61] and the Act of 1805[62] regulating the practice of the Superior Court in civil causes account for the balance.

In order better to appreciate the nature of this investigation and of criteria used to evaluate the degree of influence various sources had on the Code of 1808, some explanations are necessary. Except in a few instances, only the direct source is given, since identification of remote or indirect sources is beyond the scope of the investigation.[63] Provisions from the French *Projet* and Code

[47] The Custom of Paris is the source of nine articles, and the Ordinance of 1667 of six.

[48] The accuracy of some of the figures given in the text for these sources is not as precise as that of the French sources because of the difference in language and the number of instances where several possible sources may account for one single provision. Moreover, there are considerable similarities between some French and Spanish legal principles owing to the common heritage of Roman law and even some Germanic customs. See R. David, Les Grandès Systèmes de Droit Contemporains 29-30 (1966).

[49] 1, 3 J. Febrero, Febrero Adicionado ó Libreria de Escribanos (5th ed. 1806, 1808).

[50] 1 W. Blackstone, Commentaries (9th ed. 1783).

[51] 2 J. de Hevia Bolanos, Curia Philipica (1797).

[52] La. Acts 1807, ch. XVII.

[53] Comp. of Castile, *supra* note 15.

[54] Le Code noir, ou Edit du roy, servant de Réglement pour le gouvernement & l'administration de la justice, police, discipline & le commerce des esclaves nègres, de la province ou Colonie de la Louisiane, donné à Versailles au mois de mars, 1724 (Impremerie royale, 1727) [hereinafter cited as Code Noir].

[55] La. Acts 1806, Ch. XXXIII.

[56] *Id.* ch. XI.

[57] El Fuero Real de España, *found in* Los Codigos Españoles 353 (2d ed. A. de San Martin 1872).

[58] Troisième Projet de Code Civil, an IV (1796).

[59] Ordenanzas de Bilbao (M. de Burgos ed. 1819).

[60] La. Acts 1804, Ordinance of Sept. 7, 1804.

[61] La. Acts 1807, ch. X.

[62] La. Acts 1805, ch. XXVI.

[63] Another area of interest also outside the scope of this article is tracing the identities and similarities between the French *Projet* and Code and the *Jacqueminot Projet*, the three *Cambacérès Projets*, Domat, Pothier, Roman law, and French customary law. A good example of similarity is the concept of representation in the law of succession as a "fiction of the law."

[64] Aside from the intrinsic evidence in the Code demonstrating the inaccuracy of the translation we have the direct evidence of Moreau Lislet on the subject. He said: "We have nothing to do with the imperfections of the translation of the Code—the French text, in which it is known that work was drawn up, leaves no doubt."
Tucker, *supra* note 7, at 285.

[65] Because the Louisiana Codes were originally drafted in French, then translated into English, a judicial rule of construction has developed, establishing the authority of the French text if it conflicts with the English. Where the article was taken verbatim from Blackstone, however, a comparison of English text with source often indicates a similarity too precise to admit re-translation. The English text of article 1.6.12 is exactly that of Blackstone, whereas the French text of the same article differs from both the English text and Blackstone.
Tucker, *supra* note 36, at 294-95.

often have their sources in Domat or Pothier; in turn, statements in the works of both writers can be traced either to Roman law or French customary law, showing thus the full genealogy of a rule or principle. This differs somewhat from the order of development of the Spanish sources where *las Siete Partidas* and the Compilation of Castile antedate the commentaries by Hevia Bolanos (*Curia Philipica*) and Febrero (*Febrero Adicionado*). The *Partidas*, however, reflect the influence both of the Roman law of the Glossators and Spanish customary law.

The various degrees of resemblance observed are in four different categories: verbatim (v.), almost verbatim (a.v.), substantially influenced (s.i.), and partially influenced (p.i.). This classification, though not revealing all possible nuances in the degrees of influence, provides a fairly accurate basis for appraisal. The word "verbatim" is used literally, and even a change of one word results in considering a provision only "almost verbatim." But differences in spelling and punctuation are overlooked. The "almost verbatim" category includes by necessity some relatively wide variations, ranging from a difference of one word to several, provided that the language in the provision is almost identical to the language in the source. In a number of cases a further qualification was made by adding the words "in part." The interpretations in the last two categories, "substantially" and "partially" influenced, while necessarily more subjective, are kept within strict limits. The various types of illustrations given below will clarify these classifications.

Because the Code of 1808 was originally drafted in French and then translated into English[64] and because identity or substantial identity of wording is necessary to classify a source as "verbatim" or "almost verbatim," only the French and Louisiana sources can be either "verbatim" or "almost verbatim." The only exception is represented by direct borrowings from Blackstone[65] (mostly "almost

verbatim," never "verbatim") that were then translated into French. All other sources, whether in Spanish or Latin, had to come under either of the two remaining categories, "substantially" or "partially" influenced, since only their concepts and not their language were adopted.

The following quotations from the French *Projet* and Code, Domat, Pothier, and the Custom of Paris, illustrate instances of almost verbatim borrowings. The English version is from the Code of 1808.

Civil Code: (1808): *La loi ordonne, elle permet, elle défend, elle annonce des récompenses et des peines.—Elle dispose en général, non sur des cas rares ou singuliers, mais sur ce qui se passe en général, dans le cours ordinaire des choses.*[66]

(Civil Code (1808): It orders and permits and forbids;—it announces rewards and punishments;—its provisions generally relate, not to solitary or singular cases, but to what passes in the ordinary course of affairs.)[68]

French Projet (Year VIII): *Elle ordonne, elle permet, elle défend; elle annonce des récompenses et des peines.*

Elle ne statue point sur des faits individuels; elle est présumée disposer, non sur des cas rares ou singuliers, mais sur ce qui se passe dans le cours ordinaire des choses. . . .[67]

Civil Code (1808): *La promulgation faite par le Gouverneur, sera réputée connue dans la Paroisse où siégera le Gouvernement, trois jours après celui de la promulgation, et dans chacune des autres Paroisses, après l'expiration du même délai augmenté d'un jour par chaque quatre lieues entre la ville où la promulgation aura été faite, et le lieu des séances de la Cour de chaque Paroisse.*[69]

(Civil Code (1808): The promulgation made by the Governor shall be supposed to be known in the parish where the government shall be sitting, three days after the day of promulgation; and in every one of the other parishes, after the expiration of the said delay, with the addition of one day for every four leagues between the city in which the promulgation shall have been made, and the place where the court for every parish is held.)[71]

French Civil Code (1804): *La promulgation faite par le Premier Consul sera réputée connue dans le département où siégera le Gouvernement, un jour après celui de la promulgation; et dans chacun des autres départemens, après l'expiration du même délai, augmenté d'autant de jours qu'il y aura de fois dix myriamètres [environ vingt lieues anciennes] entre la ville où la promulgation en aura été faite, et le chef-lieu de chaque département.*[70]

[66] La. Civil Code of 1808, I.Prél.II.
[67] Projet de Code Civil, I.I.VII.
[68] La. Civil Code of 1808, 1.Prel.2.
[69] *Id.* I.Prél.VI.
[70] Code Civil des Français art. 1 (1804).
[71] La. Civil Code of 1808, 1.Prel.6.

Civil Code (1808): *Les fils et les filles de famille, sont les personnes qui sont sous la puissance paternelle; et les pères ou mères de famille, qu'on appelle aussi chefs de famille, sont les personnes qui ne sont pas sous cette puissance, soit qu'ils aient des enfans ou non, et soit qu'ils aient été dégagés de la puissance paternelle par l'émancipation ou par la mort du père.*[72]

Domat: *Les fils et les filles de familles sont les personnes qui sont sous la puissance paternelle; & les peres ou meres de famille que nous appelons aussi chefs de famille, sont les personnes qui ne sont pas sous cette puissance, soit qu'ils aient des enfans ou non, & soit qu'ils aient été dégagés de la puissance paternelle par une émancipation, ou par la mort naturelle, ou par la mort civile du pere.*[73]

(Civil Code (1808): The sons and daughters of a family are persons who are subject to the father's authority; and the fathers or mothers of family, who are called likewise heads of family, are persons who are not subject to the said authority, whether they have children of their own or not and whether they have been freed from the father's authority, by emancipation or by the death of the father.)[74]

Civil Code (1808): *Les communautés ou corporations sont des êtres intellectuels différens et distincts de toutes les personnes qui les composent.*[75]

Pothier: *Ces corps sont des êtres intelectuels, différens & distincts de toutes les Personnes qui les composent . . . .*[76]

(Civil Code (1808): Communities or corporations are intellectual beings different and distinct from all the persons who compose them.)[77]

Civil Code (1808): *Celui qui veut faire une cheminée ou âtre contre un mur mitoyen, doit faire un contre-mur de thuilots, ou autre chose suffisante de demi-pied d'épaisseur.*[78]

Custom of Paris: *Qui veut faire cheminées & âtres contre le mur mitoyen, doit faire contre-mur de thuilots, ou autre chose suffisante, de demi pied d'épaisseur.*[79]

(Civil Code (1808): He who wishes to build a chimney or hearth against a wall held in common, is bound to make a double wall of tiles or other proper materials six inches thick.)[80]

[72] *Id.* I.I.XVI.
[73] 1 Domat, Liv. Prél., Tit. II, Sect. II, n. V (14).
[74] La. Civil Code of 1808, 1.1.16.
[75] *Id.* I.X.X.
[76] 2 R. Pothier, *Traité des Personnes et des Choses*, Oeuvres Posthumes, Part. I, Tit. VII, *Des Communautés* (628) (1778).
[77] La. Civil Code of 1808, 1.10.10.
[78] *Id.* II.IV.XXXIX.
[79] Coutume de Paris art. CLXXXIX.
[80] La. Civil Code of 1808, 2.4.39.

The following "verbatim" and "almost verbatim" illustrations show the pedigree of a provision in the Code of 1808 that descended from either Domat or Pothier through the French *Projet* and Code.

Civil Code (1808): *La vente est parfaite, entre les parties, et la propriété est acquise de droit à l'acheteur, à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée, ni le prix payé.*[81]

(Civil Code (1808): The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although said object has not yet been delivered, nor the payment made.)[83]

French *Projet* (Year VIII): *Elle est accomplie dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée, ni le prix payé.*[82]

French Civil Code (1804): *Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.*[84]

Domat: *Les conventions s'accomplissent par le consentement mutuel donné & arrêté réciproquement. Ainsi la vente est accomplie par le seul consentement, quoique la marchandise ne soit pas delivrée, ni le prix payé.*[85]

[81] *Id.* III.VI.4. (The French text of the 1808 Code changes from Roman numerals for articles to Arabic numerals at III.I.1.

[82] Projet de Code Civil, III.XI.II.

[83] La. Civil Code of 1808, 3.6.4.

[84] Code Civil des Français art. 1583 (1804).

[85] 1 Domat, Part. I, Liv. I, Tit. I, Sect. I, n. VIII (20).

Civil Code (1808): *La représentation est une fiction de la loi, dont l'effet est de faire entrer les représentans dans la place, dans le degré et dans les droits du représenté.*[86]

(Civil Code (1808): Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the represented.)[90]

French *Projet* (Year VIII): *La représentation est une fiction de la loi, dont l'effet est de faire entrer les représentans dans la place, et dans le degré et dans les droits du représenté.*[87]

French Civil Code (1804): *La représentation est une fiction de la loi, dont l'effet est de faire entrer les représentans dans la place, dans le degré et dans les droits du représenté.*[88]

Pothier: *Le droit de representation, à l'effet de succéder, peut être défini; une fiction de la loi, par laquelle des enfans sont rapprochés & placés dans le degré de parenté qu'occupoit leur pere ou mere, lorsqu'il se trouvoit vacant, pour succéder au défunt en leur place, avec les autres enfans du défunt.*[89]

The following are illustrations of "almost verbatim" borrowings from Louisiana sources that, in a number of cases, may be related to French sources.

Civil Code (1808): *Les esclaves peuvent être poursuivis au nom du Gouvernement, pour la réparation publique des crimes et délits par eux commis, sans qu'il soit besoin de rendre leur maîtres parties, si ce n'est en cas de complicité.*[91]

(Civil Code (1808): Slaves may be prosecuted in the name of the government for crimes or offences by them committed without making their masters parties, unless the master shall be accessory to such crime or offence.)[93]

Black Code: *Et il est de plus décrété; Que les esclaves pourront être poursuivis criminellement, sans qu'il soit nécessaire de rendre leur maître partie, à moins qu'il ne soit complice . . . .*[92]

[86] La. Civil Code of 1808, III.I.18.

[87] Projet de Code Civil, III.I.XXXIII.

[88] Code Civil des Français art. 739 (1804).

[89] 2 R. Pothier, *Traité des Successions*, Oeuvres Posthumes, Chap. II, Sect. I, Art. I (41) (J. Guyot ed. 1778).

[90] La. Civil Code of 1808, 3.1.18.

[91] *Id.* I.VI.XIX.

[92] La. Acts 1806, ch. XXXIII, § XVII.

[93] La. Civil Code of 1808, 1.6.19.

Civil Code (1808): *Le mariage est un contrat qui, dans son origine, est destiné à durer jusqu'à la mort de l'une des parties contractantes, néanmoins ce contrat peut être dissous avant la mort de l'un ou de l'autre des époux, pour des causes déterminées par la loi.*[94]

(Civil Code (1808): Marriage is a contract intended in its origin, to indure until the death of one of the contracting parties; yet this contract may be dissolved before the decease of either of the married persons, for causes and by reasons determined by law.)[97]

Act of April 6, 1807: *Le Mariage est un contrat dont la durée est, dans l'intention des Epoux, celle de la vie de l'un d'eux.*

Ce contrat peut, néanmoins, être résolu avant la mort de l'un des Epoux, pour les causes et par les raisons déterminées par la Loi.[95]

French *Projet* (Year VIII)*: *Le mariage est un contrat dont la durée est, dans l'intention des époux, celle de la vie de l'un d'eux: ce contrat peut néanmoins être résolu avant la mort de l'un des époux, dans le cas ou pour les causes déterminés par la loi.*[96]

The following are illustrations of substantial influence from French sources.

Civil Code (1808): *Les individus ne peuvent, par des conventions particulières, déroger aux lois qui sont faites pour le maintien de l'ordre public ou des mœurs.*[98]

(Civil Code (1808): Individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order or good morals.)[100]

French *Projet* (Year VIII): *On ne peut, par des conventions, déroger aux lois qui apartiennent au droit public.*[99]

Civil Code (1808): *Les père et mère sont responsables des délits et* quasi *délits commis par leurs enfans de la manière et dans le cas prescrits au titre des* quasi *contrats et des* quasi *délits.*[101]

French Civil Code (1804): *Le père, et la mère après le décès du mari, sont responsables du dommage causé par leurs enfans mineurs habitant avec eux . . . .*[102]

94 *Id.* I.IV.III.
95 La. Acts 1807, ch. XVII, § IV.
96 Projet de Code Civil, I.V.III.
97 La. Civil Code of 1808, 1.4.3.
98 *Id.* I.Prél.XI.
99 Projet de Code Civil, Prél.IV.VII.
100 La. Civil Code of 1808, 1.Prél.11.
101 *Id.* I.VII.LVII.
102 Code Civil des Français art. 1384 (1804).

(Civil Code (1808): Fathers and mothers are answerable for the offences, or *quasi* offences, committed by their children in the cases prescribed under the title of the *quasi contracts and quasi crimes or offences.*)[103]

Civil Code (1808): *L'héritier soit testamentaire, ou légitime, ou irrégulier, qui craint d'accepter une succession, ou d'y renoncer avant d'avoir eu le tems d'en connaître les forces et les charges, peut n'accepter la succession que sous bénéfice d'inventaire.*[104]

(Civil Code (1808): The testamentary, or legal, or irregular heir, who is afraid to accept or renounce a succession, before having had the necessary time to be informed of its property and charges, may accept the succession with the benefit of an inventory.)[106]

Domat: *Tout héritier, soit testamentaire ou* ab intestat, *qui doute que l'hérédité soit avantageuse, et qui craint de s'y engager, peut auparavant demander qu'il soit fait un inventaire des biens & des titres & papiers de l'hérédité: & sans prendre le tems pour délibérer, faire sa déclaration qu'il se rend heritier par bénéfice d'inventaire.*[105]

Civil Code (1808): *Les fruits du gage, sont censés faire partie du gage, c'est-à-dire, qu'ils restent, ainsi que le gage, entre les mains du créancier, mais il ne peut se les approprier; il est tenu, au contraire, d'en rendre compte au débiteur, ou de les imputer sur ce qui peut lui être dû.*[107]

(Civil Code (1808): The fruits of the pledge are deemed to make a part of it and therefore they remain like the pledge in the hands of the creditor, but he cannot appropriate them to his own use and he is bound on the contrary to give an account of them to the debtor or to deduct them from what may be due to him.)[109]

Pothier: *Le créancier, à qui la chose a été donnée en nantissement, n'a que le droit de la détenir; il n'a pas le droit de s'en servir, ni, lorsque la chose est frugifere, d'en appliquer à son profit les fruits, mais il doit les percevoir en paiement & déduction de sa créance, & il en doit compter au débiteur . . . .*[108]

Civil Code (1808): *Il n'y aura plus d'autre manière de faire la preuve d'un fait par serment, soit du demandeur, soit du défendeur, que parce*

Ordinance of 1667: *Permettons aux Parties de se faire interroger en tout estat de Cause sur faits & articles*

103 La. Civil Code of 1808, 1.7.57.
104 *Id.* III.I.96.
105 1 Domat, Part. II, Liv. I, Tit. II, Sect. II, n. I (381).
106 La. Civil Code of 1808, 3.1.96.
107 *Id.* III.XVIII.15.
108 2 R. Pothier, *Traité du Contrat de Nantissement*, Traités de Droit Civil, Chap. II, Art. I, par. 23 (952) (2d ed. 1781).
109 La. Civil Code of 1808, 3.18.15.

qu'on appelle l'interrogatoire sur faits *et* articles.[110]

(Civil Code (1808): There shall no longer be any other manner of making proof of a fact by the oath either of the plaintiff or defendant, but by what is called the interrogatory *on facts* and *articles* (discovery).)[112]

pertinens, concernant seulement la matiere dont est question. . . .[111]

Civil Code (1808): *Celui qui édifie soit dessus ou dessous son sol contre un voisin, doit bâtir à plomb et sans saillie.*[113]

(Civil Code (1808): He who builds either above or below his soil adjoining the property of his neighbor, is bound to build in a perpendicular line.)[115]

Cambacérès *Projet*: *Le propriétaire du sol peut, en ligne droite, faire au-dessus et au-dessous tout ce qu'il lui plaît . . . .*[114]

The following are illustrations of partially influenced provisions.

Civil Code (1808): *Si, l'édifice construit à prix fait, périt, en tout ou en partie, par le vice de la construction, l'architecte, ou entrepreneur, en est responsable pendant dix ans, pour les maisons en briques, et pendant cinq ans, pour les maisons en bois ou colombage.*[116]

(Civil Code (1808): If a building which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, the said architect or undertaker shall bear the loss, if the building falls to ruin in the course of ten years if it be a stone or brick building and of five years if it be built in wood or with frames filled with bricks.)[118]

French *Projet* (Year VIII): *Si l'édifice donné à prix fait, périt par le vice du sol, l'architecte en est responsable, à moins qu'il ne prouve avoir fait au maître les représentations convenables pour le dissuader d'y bâtir.*[117]

110 *Id.* III.III.258.
111 Ordonnance civile pour la réformation de la justice, *promulgated on* April 20, 1667, Tit. X, Art. I.
112 La. Civil Code of 1808, 3.3.258.
113 La. Civil Code of 1808, II.IV.XXI.
114 Troisième Projet de Code Civil, an IV, art. 468 (1796).
115 La. Civil Code of 1808, 2.4.21.
116 *Id.* III.VIII.71.
117 Projet de Code Civil, III.XIII.CXXVIII.
118 La. Civil Code of 1808, 3.8.71.

Civil Code (1808): *Le domicile de chaque citoyen est dans la paroisse où il a son principal établissement.*[119]

(Civil Code (1808): The domicile of each citizen is in the parish wherein is situated his principal establishment.)[121]

French Civil Code (1804): *Le domicile de tout Français, quant a l'exercise de ses droits civils, est au lieu où il a son principal établissement.*[120]

Civil Code (1808): *Il y a trois sortes de successions; savoir: La succession testamentaire; La succession légitime; Et la succession irrégulière.*[122]

(Civil Code (1808): There are three sorts of successions: to wit. Testamentary successions; Legal successions; And, irregular successions.)[124]

Domat: *Il y a deux sortes de successions, de même que deux sortes d'héritiers, comme il a été dit dans l'article second. Celle qu'on appelle Légitime, ou* ab intestat, *que la Loi défere, & la Testamentaire.*[123]

Civil Code (1808): *Lorsque quelqu'un s'est engagé à en servir un autre pendant un tems fixé, moyennant une certaine somme d'argent une fois payée, cette convention équivalent à une vente, les obligations qui en résultent sont beaucoup plus etroites et plus rigoureuses que celles des personnes qui ne font que louer leurs services journaliers, moyennant de certains gages.*[125]

(Civil Code (1808): When a person has bound himself to serve another during a settled time, for a certain sum of money paid, such contract being equivalent to a sale, the engagement resulting therefrom, is much more strict and rigorous than that which is entered into by persons who merely let their daily services for certain wages.)[127]

Pothier: *Ce contrat (louage d'ouvrage) a aussi beaucoup d'analogie avec le contrat de vente. Justinien en ses* Institutes, au Tit. de loc. cond., *dit qu'on doute à l'égard de certain contrats, s'ils sont contrats de vente ou contrats de louage, & il donne cette regle pour les discerner: Lorsque c'est l'ouvrier qui fournit la matiere, c'est un contrat de vente; au contraire, lorsque que c'est moi qui fournis à l'ouvrier la matiere de l'ouvrage que je lui fais faire, le contrat est un contrat de louage.*[126]

119 *Id.* I.II.I.
120 Code Civil des Français art. 102 (1804).
121 La. Civil Code of 1808, 1.2.1.
122 *Id.* III.I.4.
123 1 Domat, Part. II, Liv. I, Tit. I, Sect. I, n. IV (347).
124 La. Civil Code of 1808, 3.1.4.
125 *Id.* I.VI.IV.
126 2 R. Pothier, *Traité du Contrat de Louage*, Traités de Droit Civil, Part. VII, Chap. I, Art. I, par. 394 (326) (2d ed. 1781).
127 La. Civil Code of 1808, 1.6.4.

The following are illustrations of substantial influence from Spanish law, originating under Roman law.

Civil Code (1808): In like manner, no master shall be compelled to sell his slave or slaves, but in one of two cases, to wit: . . . 2dly, when the master shall be convicted of cruel treatment of his slave and the judge shall deem proper to pronounce, besides the penalty established for such cases, that the slave shall be sold at public auction, in order to place him out of the reach of the power which his master has abused.[128]	*Las Siete Partidas: Otrosi decimos que si algunt home fuese tan cruel a sus siervos que los matase de fambre, ó los feriese mal ó les diese tan grant lacerio que lo non podiesen sofrir, que entonce se pueden quejar los siervos al juez, et él de su oficio debe pesquerir en verdad si es asi, et si lo fallare por verdad, débelos vender et dar el prescio dellos á su señor: et esto debe facer de manera que nunca puedan seer tornados en poder nin en señorio de aquel por cuya culpa fueron vendidos.*[129]	Institutes (Gaius): *Sed hoc tempore neque civibus Romanis, nec ullis aliis hominibus, qui sub imperio populi Romani sunt, licet supra modum et sine causa in servos suos saevire . . . sed et maior quoque asperitas dominorum per eiusdem principis constitutionem coercetur; nam consultus a quibusdam praesidibus provinciarum de his servis, qui ad fana deorum vel ad statuas principum confugiunt, praecepit ut si intolerabilis videatur dominorum saevitia cogantur servos suos vendere.*[130]
Civil Code (1808): When the wife has not brought any dowry, or when what she has brought as a dowry is but trifling with respect to the condition of the husband, if either the husband or wife die rich, leaving the survivor in necessitous circumstances, the latter has a right to take out of the succession of the deceased what is called the *marital portion*; that is the fourth of said succession in full property, if there be no children, and the same portion as a usufruct only when there are but three or a smaller number of children; and if there be more than three children, the surviving whether husband or wife, shall receive only a child's share in usufruct, and he is bound to include in this portion what has been left to him as a legacy by the husband or wife who died first.[131]	*Las Siete Partidas: Paganse los omes a las vegadas de algunas mugeres, de manera que casan con ellas sin dote, maguer sean pobres porende, guisada cosa, e derecha es, pues que las aman, e las honran en su vida, que non finquen desamparadas a su muerte. E por esta razon tuvieron por bien los Sabios antiguos, que si el marido non dexasse a tal muger, en que pudiesse bien e honestamente beuir, nin ella lo ouiesse de lo suyo, que pueda heredar fasta la quarta parte de los bienes del, maguer aya fijos: pero esta quarta parte non deue montar mas de cient libras de oro, quanto quier que sea grande la herencia del finado. Mas si tal muger como esta ouiesse de lo suyo con que pudiesse beuir honestament, non ha demanda ninguna en los bienes del finado, en razon desta quarta parte.*[132]	Novel: *De muliere inope indotata. Quoniam vero ad clementiam omnis a nobis aptata est lex, videmus autem quosdam cohoerentes mulieribus indotatis, deinde morientes et filios quidem ex lege vocatos ad paternam hereditatem, mulieres autem licet decies millies in statu legitimae conjugis manserint, attamen eo quod non sit facta neque dos neque antenuptialis donatio, nihil habere valentes, sed in novissima viventes inopia: propterea sancimus providentiam fieri etiam harum et in successione morientis, et hujusmodi uxorem cum filiis vocari, et sicut scripsimus legem volentem, si sine dote existentem uxorem vir dimiserit, quartam partem ejus substantiae habere mulierem, sive plures, sive minus filii fuerint. Si tamen legatum aliquod reliquerit ei vir minus quarta parta, compleri hoc: ut sicut laesas eas juvamus, si forte dimissae fuerint a viris indotatae consistentes: ita vel si perduraverint semper cum eis, eadem fruantur providentia, scilicet omnibus secundum instar illius nostrae constitutionis quae quartam decernit eis, etiam hic servandis similiter quidem in viris, similiter autem in mulieribus, communem namque etiam hanc super eis ponimus legem, sicut et praecedentem.*[133]

128 *Id.* 1.6.27.
129 Quarta Partida, Tit. XXI, Ley VI.
130 Institutes (Gaius) 1.53.

The following are illustrations of substantially influenced borrowings from more autochthonous Spanish sources.

Civil Code (1808): At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless they satisfactorily prove which of said effects they brought in marriage or have been given them separately or they have respectively inherited.[134]	Compilation of Castile: *Como quier que el derecho diga, que todas las cosas que han marido, y muger, que todas se presume ser del marido, hasta que la muger muestre que son suyas, pero la costumbre guardada es en contrario que los bienes que han marido, y muger, que son de ambos por medio, salvo los que probare cada uno que son suyos apartadamente; y ansi mandamos que se guarde por ley.*[135]
Civil Code (1808): Illegitimate children who have been acknowledged by their father are called natural children, and those whose father is unknown are contra-distinguished by the appellation of bastards.[136]	Compilation of Castile: *Y porque no se pueda dudar quales son hijos naturales, ordenamos, y mandamos, que entonces se digan ser los hijos naturales, quando al tiempo que nacieren, ò fueran concebidos, sus padres podian casar con sus madres justamente sin dispensacion; con tanto que el padre lo reconozca por su hijo, puesto que no aya tenido la muger de quien lo huvo en su casa, ni sea una sola; ca concurriendo en el hijo las calidades susodichas, mandamos que sea hijo natural.*[137]

131 La. Civil Code of 1808, 3.5.55.
132 Sexta Partida, Tit. XIII, Ley VII.
133 Nov. LIII, c. VI, issued year 538.
134 La. Civil Code of 1808, 3.5.67.
135 Comp. of Castile, Lib. V, Tit. IX, Ley I.
136 La. Civil Code of 1808, 1.7.24.
137 Comp. of Castile, Lib. V, Tit. 8, Ley IX.

Civil Code (1808): It is not lawful to kill peacocks and pigeons belonging to any body, when they shall be feeding in the fields, unless they should commit depredations in said fields; it shall likewise be unlawful to set traps for the purpose of catching them, under the penalty of damages which shall be recoverable by the owner.[138]

Compilation of Castile: *Otrosi, mandamos, que no aya trampas en los Palomares, ni en casas particulares, ni de otra manera, ni añegazas, ni otros armadijos; y que las que estuvieren hechas, que se derriben, so pena, que el que lo tuviere, caya en pena de diez mil maravedis, y le derruequen las trampas, y pierdan los armadijos; y que ninguna persona sea ossada de vender palomas, sino fuere el dueño del Palomar, ò por su mandado, so pena de cien azotes. Y mandamos, que se guarde la ley del señor Rey Don Enrique, que habla en los Palomares, que es la siguiente: Mando, que persona, ni personas algunas, de qualquier estado, y condicion que sean, no hayan ossadia de tomar paloma, ò palomas algunas, ni les tiren con ballesta, ni con arco, ni con piedra, ni en otra manera, ni sean ossados de les armar con redes, ni lazos, ni con otra armanza alguna, una legua en rededor donde oviere palomar, ò palomares; y ordeno, y mando, contra aquel que lo contrario hiziere, que por el mismo hecho pierda la ballesta, y redes, y armanzas, y sea de la persona, ò personas que se la ballesta, y redes, y armanzas, y pague sesenta maravedis, la mitad para el dueño de las dichas palomas, y la otra mitad para el juez que lo sentenciare.*[139]

Civil Code (1808): The execution of a testament or codicil shall not be ordered until the decease of the testator has been sufficiently proved to the judge to whom the said testament or codicil is presented.[140]

Febrero Adicionado: Antes de su apertura (del testamento) ha de proveer (el Juez) auto mandando comparecer à su presencia los testigos instrumentales, los quales baxo de juramento que les recibirá . . . y despondrán de su fallecimiento por haberlo oido, ò visto cadaver, y no sabiendolo, pondrá el Escribano fé de él à continuacion del auto con expresion de haber conocido vivo al Testador, y estar al parecer muerto; y si no lo conoció, de que en su casa y vecindad le aseguraron que era el mismo sugeto, pues sin que por uno de estos medios se acredite su fallecimiento, no se debe abrir. . . .[141]

138 La. Civil Code of 1808, 3.20.7.
139 Comp. of Castile, Lib. VII, Tit. VIII, Ley VII.
140 La. Civil Code of 1808, 3.2.154.
141 1 Feb. Adic., Part. I, § XXI, par. 289 (172).

Civil Code (1808): Any one who has claimed the benefit of the cession of goods, cannot afterwards pray for a mere respite.[142]

Curia Philipica: No teniendo el deudor bienes suficientes para la paga de sus deudas, ántes de hacer cesion de bienes, y no despues, puede pedir á sus acreedores esperas por un plazo señalado. . . .[143]

The following are illustrations of "substantial influence" from the Institutes.

Civil Code (1808): By sea shore, we understand the space of land upon which the waters of the sea, are spread in the highest water, during the winter season.[144]

Institutes: *Est autem litus maris, quatenus hibernus fluctus maximus excurrit.*[145]

Civil Code (1808): When the whole of the usufruct has expired the thing which was subject to it returns to and becomes again incorporated with the property, and from that time the person who had only the bare property, begins to enter into a full and entire property of the thing.[146]

Institutes: *Cum autem finitus fuerit usus fructus, revertitur scilicet ad proprietatem et ex eo tempore nudae proprietatis dominus incipit plenam habere in re potestatem.*[147]

Civil Code (1808): Those who discover or who will find precious stones, pearls and other things of that kind on the sea shore, or other places where it is lawful for them to search for them and to take them, become masters of them.[148]

Institutes: *Item lapilli gemmae et cetera, quae in litore inveniuntur, iure naturali statim inventoris fiunt.*[149]

Lastly, the following are illustrations of "almost verbatim" borrowings from Blackstone, the largest and most unexpected influence from the common law in a civilian code.

Civil Code (1808): The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it.[150]

Blackstone: But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it.[151]

142 La. Civil Code of 1808, 3.16.8.
143 2 Curia Philipica, Part. II, § XXIV, n. 2 (163).
144 La. Civil Code of 1808, 2.1.4.
145 Inst. 2.1.3.
146 La. Civil Code of 1808, 2.3.62.
147 Inst. 2.4.4.
148 La. Civil Code of 1808, 3.20.9.
149 Inst. 2.1.18.
150 La. Civil Code of 1808, 1.Prel.18.
151 1 W. Blackstone, Commentaries 61.

Civil Code (1808): A master may justify an assault in defence of his servant and a servant in defence of his master; the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty for which he receives wages, to stand by and defend his master.[152]	Blackstone: A master likewise may justify an assault in defence of his servant: the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master.[153]
Civil Code (1808): Fathers and mothers may justify themselves in an action began against them, for assault and battery, if they have acted in defence of the persons of their children.[154]	Blackstone: A parent may also justify an assault and battery in defence of the persons of his children. . . .[155]
Civil Code (1808): In the same manner, a community or corporation cannot bring an action for assault and battery or for other like injuries; for a corporation can neither beat nor be beaten in its political capacity.[156]	Blackstone: It can neither maintain, or be made defendant to, an action of battery or such like personal injuries: for a corporation can neither beat nor be beaten, in its body politic.[157]

The foregoing illustrations are a few representative samples of some of the main sources for provisions in the Code of 1808 and their degree of resemblance, but an additional comment should be made concerning the not infrequent situation of a provision in the Code of 1808 that could have been taken from two or more different sources. As already pointed out, when one of the two sources is written in French, the problem is solved, or at least lessened, by a careful comparison of the wording; the same is true in the case of borrowings from Blackstone. When the wording is in Spanish or Latin, however, the problem may be more difficult to solve. It is sufficient to recall the example furnished by the *quarta marital* and other rules or principles that the *Partidas* and other Spanish enactments adopted from Roman law sources. An interesting case of this kind is provided by article 20 of the title of the Code of 1808 entitled "Of Father and Child." The bilingual versions of the article read as follows:

Civil Code (1808): When a widow is suspected to feign herself with child, in order to maintain herself in the possession of the estate of her husband, by the supposition of a pretended heir, the presumptive heir or heirs of the husband may obtain from the judge, an order that she may be examined by matrons appointed for that purpose, in order to discover whether she is with child or not, and if she is, to keep her under proper restraint till delivered.	Civil Code (1808): *Lorsqu'une veuve est suspecte de se dire enceinte pour se perpétuer dans la possession des biens de son mari, par la supposition d'un prétendu héritier, l'héritier ou les héritiers présomptifs du mari pourront obtenir un ordre du juge, pour faire examiner par des matrones nommées à cet effet, si elle est enceinte ou non, et si elle l'est, pour la faire tenir dans un état de contrainte jusqu'à ce qu'elle soit délivrée.*
And if the widow be, upon examination, found not pregnant, the presumptive heir or heirs of the husband shall be put into a provisional possession of the inheritance, upon their giving security to return the same, if the widow should be delivered of a child able to live, within the time prescribed by law, after the death of her husband.[158]	*Si la veuve, sur cet examen, n'est pas jugée enceinte, l'héritier ou les héritiers présomptifs de son mari, seront envoyés en possession provisoire de sa succession, en par eux donnant caution de la restituer, si la femme vient à accoucher d'un enfant viable, dans le tems compétent fixé par la loi, depuis la mort de son mari.*[159]

[152] La. Civil Code of 1808, 1.6.12.
[153] 1 W. Blackstone, Commentaries 429.
[154] La. Civil Code of 1808, 1.7.56.
[155] I W. Blackstone, Commentaries 450.
[156] La. Civil Code of 1808, 1.10.17.
[157] 1 W. Blackstone, Commentaries 476.

A search for the source of this article in the various French possible sources proved negative: neither the *Projet*, nor the Code, Domat, or Pothier, includes a similar provision. But *las Siete Partidas* expressly contemplates the same situation,[160] and the gloss by Gregorio Lopez indicates that the complicated procedure of examination and sequestration was adopted in its entirety from the Digest of Justinian.[161] Since the same procedure was, in substance, embodied in article 20 of the Code of 1808, this would seem, under normal and reasonable precautions, to be the end of the search for the article's source. A rather accidental perusal of Blackstone's Commentaries, however, revealed the following passage, the pertinent words of which are italicized:

> And this gives occasion to a proceeding at common law, *where a widow is suspected to feign herself with child, in order to produce a suppositious heir to the estate:* an attempt which the rigor of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death. In this case with us *the heir presumptive may have a writ* de ventre inspiciendo, *to examine whether she be with child, or not; and, if she be, to keep her under proper restraint, till delivered;* which is entirely conformable to the practice of the civil law: *but, if the widow be upon due examination found not pregnant, the presumptive heir shall be admitted to the inheritance,* though liable to lose it again, *on the birth of a child within forty weeks from the death of a husband.*[162]

It is quite clear that the English version of article 20 of the Code of 1808 is an almost verbatim in part reproduction of this passage of Blackstone. Nevertheless, Blackstone is silent about the procedure of the widow's examination that appears in article 20, while

[158] La. Civil Code of 1808, 1.7.20.
[159] *Id.* I.VII.XX.
[160] *See* Sexta Partida, Tit. VI, Ley XVII.
[161] Digest 25.4.10.
[162] 1 W. Blackstone, Commentaries 456.

both the Digest and the *Partidas* regulate this procedure in detail.[163] This situation illustrates not only that research in some areas of the Code of 1808 is beset with difficulties, but also that while the mystery surrounding most provisions in the Code is almost entirely dispelled by the present investigation, there is still some room for uncertainty and speculation on some articles. For instance, was article 20 a contribution of James Brown in his capacity as a common-law lawyer? Was Moreau Lislet sufficiently familiar with both the common law and Blackstone so as to make contributions from Brown unnecessary? Would a civilian like Moreau Lislet, however knowledgeable of the common law, be likely to prefer a common law commentator over civilian sources? Actually, there is evidence to the effect that the first two questions were answered by Moreau Lislet himself, the former in the negative, and the latter in the affirmative.[164]

While the impact of the French *Projet*, Code and writers on the Code of 1808 is clearly overwhelming, the variety of sources used in drafting the Code gives it a cosmopolitan and distinctive flavor that differentiates it from either of its two principal models. Moreover, regarding the status of women and illegitimate children, investigation of paternity (limited to white and free children), and spendthrifts, the Code shows a strikingly liberal and egalitarian approach for its time, even though it regulated slavery as a legal institution. Spanish law, as well as the inclusion of a substantial number of definitions, gives the Code a somewhat didactic character, possibly to fulfill a local need, and although even the organization or, in the

[163] The Digest entrusts the examination to five free women (*quinque mulieres liberae*), and the *Partidas* to "five good women of free condition." Digest 25.4.10; 2 Las Siete Partidas 1024 (L. Moreau Lislet & H. Carleton transl. 1820). In any event, the method of examination and article 20, itself, did not fare well in Louisiana—it was suppressed in the Projet of 1823. The drafters explained that the provision unnecessarily offended concepts of decency because the fact of pregnancy could be established satisfactorily by ordinary methods of proof.

[164] The report, dated February 13, 1823, submitted to the Senate and House of Representatives of the State of Louisiana by Livingston, Moreau Lislet, and Derbigny, in referring to the Digest of 1808, contains the following statement:

> Sufficient time was not given for an accurate examination of the existing law in its various sources. No decisions had then been reported to throw light on their operation, and *the unaided exertions of one person* were not sufficient for the completion of the task.

E. Livingston, L. Moreau Lislet, & P. Derbigny, Report on the Civil Code 11 (1823) (emphasis added). As to the question of a civilian preferring a common law author over civil law sources, it must be concluded that in the situation referred to in the text (as well as in a few other cases in the Code of 1808) such choice was made. It is quite clear that Moreau Lislet was familiar with both the common law and Blackstone. *See* Franklin, *Libraries of Edward Livingston and Moreau Lislet*, 15 Tul. L. Rev. 401, 405 (1941).

civilian terminology, structure of the Code is of French origin,[165] in some instances the drafters departed from the main models altogether and sought other sources. This can be observed in provisions relating to master and servant, communities or corporations, successions, respite, and arbitration. The surprising presence of Blackstone in a civilian code, particularly in matters of interpretation of law,[166] which had been discussed at length by Domat, was perhaps a concession that had to be made to the common law. There are some other influences from the common law, such as the abolishment of adoption, protection of children by their parents, and proof of wills.[167]

There are many other comments that the Code of 1808 inspires; however, since the main purpose of the present article relates to other aspects of the Code, only the following brief remarks will be added. The Spanish system of community of acquets or gains (*sociedad de gananciás*) that appears in the Code, rather than being opposed to the French system of *communauté*, supplements it. The unorthodox concept of codicil, a kind of less formal testament, that was adopted by the Code broke with a long established tradition of many centuries, but was then abolished by the *Projet* of 1823. The basically consensual system regarding sales accepted by the French *Projet* and Code, inherited from Domat and Pothier,[168]

[165] Although the structures of the French *Projet* and Civil Code are substantially similar, there are occasional differences. For instance, the *Livre Préliminaire* in the *Projet* becomes *Titre Préliminaire* in the Code. Title II of the Code, on donations *inter vivos* and testaments, immediately follows the title on successions, whereas in the *Projet* Title II deals with contracts and conventional obligations, donations *inter vivos* and testaments becoming the contents of Title IX. There is also a special title in the *Projet* relating to seizure of property and judicial sales that does not exist in the Code.

[166] The following point has been raised: "What role, if any, should sources enjoy in codal interpretation? If sources may be employed in interpretation, what will be the effect of referring to common law sources to interpret code articles in a civil law system?" Tucker, *supra* note 36, at 293. The same writer answers as follows:

> Perhaps the strongest admonition against codal interpretation by source reference comes from an examination of the articles of the Louisiana Code on interpretation of laws, which were themselves drawn from Blackstone. If we must interpret the rules for codal interpretation in terms of the common law system from which they came, the sequence of possibilities presented become vicious.

Id. at 295. Although this argument is a valid one in many instances, the danger in the particular case of the Code of 1808 is somewhat exaggerated, in that provisions borrowed from Blackstone (articles 14-18) are rather limited in scope and, therefore, ineffective vehicles for bringing the common law into the code.

[167] Although courts of probate were established by the Act of 1805, most of the provisions in the Code regarding the opening and proof of wills came from *Febrero Adicionado*.

[168] *See* Projet de Code Civil, III.XI.II; Code Civil des Français art. 1583 (1804); 1 Domat, Liv. I, Tit. II, Sect. I, n. II (34); 1 R. Pothier, *Traité des Obligations*, Traités de Droit Civil, Part. I, Sect. I (463) (2d ed. 1781).

was abandoned by the Code of 1808 in favor of the Spanish system of requiring a formal deed in the case of immovables.[169] Another departure from the main models is the provision that immovable estates may be prescribed after thirty years possession, although possessed without any title and "knavishly," which probably conformed to local usage.[170] Finally, the Code of 1808 included numerous provisions that are essentially procedural in nature concerning absent persons, administration of vacant estates, opening and proof of wills, tenders of payment and consignments, proof by oath,[171] respite, and compromises or arbitration.

The Civil Code of 1808 remained in force for less than twenty years, and, from the very beginning, there was a feeling that it was insufficient.[172] This feeling, shared even by the Code's drafters,[173] explains a famous Louisiana Supreme Court decision[174] some years later and ultimately led to the amendments and additions submitted in 1823 that became an integral part of the Code of 1825. It has been stated that the Code of 1808 was the "frame" for the Code of 1825:

> They [the compilers of the Projet] took the Digest of 1808 as a frame upon which to build the new code; they retained many of its articles, suggested alterations in the verbiage of other articles, suppressed parts and substituted therefor new matter resulting from the legislative and judicial activity of the intervening years. . . .[175]

Despite the preceding recognition, the true extent of the influence of the Code has not been fully realized. Except for about 333 provisions that were discarded, the Code of 1808, as a whole, was incorporated in verbatim or almost verbatim form into the Code of 1825.[176] The Revised Code of 1870 is recognized as being the same as the Code of 1825, save for the suppression of provisions relating to slavery and the incorporation of subsequent acts passed by the Legislature.[177] All other additional suppressions considered, about three-fourths of the provisions of the Code of 1808 survive in the Code of 1870, accounting for 1668 provisions,[178] or almost 47 percent, of that code.

The Code of 1808, as a code, was short-lived, but the greater part of its provisions has become a significant part of the Louisiana legal system for the last one hundred and sixty-three years through the successive Codes of 1825 and 1870. Those provisions now are forever linked to the survival of the civil law heritage in Louisiana.

[169] Tercera Partida, Tit. XVIII, Ley XVI.

[170] La. Civil Code of 1808, 3.20.66.

[171] The drafters of the *Projet* of 1823, in explaining the suppression of proof by oath (*serment*), indicated that it would become a part of the Code of procedure. *See* Projet of 1823, *supra* note 24, at 291.

[172] In practice, the work was used as an incomplete digest of existing statutes, which still retained; and their exceptions and modifications were held to affect several clauses, by which former principles were absolutely stated. Thus, the people found a decoy in what was held out as a beacon.
Martin, *supra* note 27, at 291.

[173] But it is easy to perceive, that a work of that nature, however excellent it may be, can only contain general rules and abstract maxims, still leaving many points doubtful in the application of the law; hence the necessity of going back to the original source, in order to obtain new and additional light.
Id. at xxii. Similar statements were made in the 1823 report to the legislature by Livingston, Moreau Lislet, and Derbigny. Livingston, *supra* note 164. They recognized, however, that "[t]he idea of forming a body of laws, which shall provide for every case that may arise, is chimerical . . . ." *Id.* at 4.

[174] Cottin v. Cottin, 5 Mart. (o.s.) 93, 94 (La. 1817), where the Supreme Court held that Spanish 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."

[175] *Influence of the Ancient Laws*, *supra* note 3, at 89.

[176] In fact, 1827 provisions in all were incorporated into the Code of 1825: 1068 verbatim, 564 almost verbatim, 136 substantially influenced, and 59 partially influenced. The large number of new provisions added explain why, despite suppressions made, the new Code contained 3,522 articles as compared to the 2,160 of the Code of 1808. Like the Civil Code of 1808, the Code of 1825 was printed in both French and English. The Revised Code of 1870 was printed only in English.

[177] *See* Tucker, *supra* note 7, at 294.

[178] The degree of influence in the 1668 provisions is: 1198 verbatim, 448 almost verbatim, 9 substantially influenced, 13 partially influenced.

APPENDIX A

TABLE OF SOURCES OF THE CIVIL CODE OF 1808

Explanatory Note

Appendix C is a table of sources, not a concordance. A concordance is intended to show provisions of two or more codes or statutes which are related, but which may or may not include actual sources. For instance, in the case of provisions dealing with master and servant (La. Civil Code of 1808, 1.6.1-14) a concordance to the French Civil Code would show blank spaces for the simple reason that the French Code does not regulate the relations of master and servant. A table of sources, however, would show citations to the Institutes, Digest, Blackstone, the Code Noir, and the Black Code, the origins of 1808 Code's provisions. Similarly, a concordance to quasi contracts and quasi offenses (La. Civil Code of 1808, 3.4.1-22) would refer to French Code arts. 1370-1386. A table of sources of the quasi contract and quasi offenses provisions refer to French Projet, Liv. III, Tit. III, Arts. I-XXI and the pertinent provisions of the Digest and Black Code.

Symbols and Abbreviations

Symbols

v.: verbatim

a.v.: almost verbatim

a.v.sh.vers.: almost verbatim shortened version

s.i.: substantially influenced

p.i.: partially influenced

*: an asterisk indicates that the provision thus marked was not a direct source.

Codes and Statutes

Code Noir: Le Code Noir; ou Edit du roy, servant de Réglement pour le gouvernement & l'administration de la justice, police, discipline & le commerce des esclave nègres, de la province ou Colonie de la Louisiane, donné a Versailles au mois de mars, 1724 (Impremerie royale, 1727).

Comp. of Castile: Recopilación de las Leyes de estos Reynos (1567).

Custom of Paris: Coutume de Paris, *found in* 1 C. Ferriere, Commentaire sur la Coutume de la Prévoté et Vicomté de Paris (1788).

French Civil Code: Code Civil des Français, an XII (édition originale et seule officielle, 1804).

French Projet: Projet de Code Civil, présenté par la Commission nommée par le gouvernement le 24 Thermidor, an VIII (1800).

Fuero Real: El Fuero Real de España, *found in* Los Códigos Españoles 353 (2d ed. A. de San Martín 1872).

La. Acts 1804, Ordinance of Sept. 7, 1804: Ordinance on intestate estates, Sept. 7, 1804.

La. Acts 1805, ch. XXVI: An Act Regulating the practice of the Superior Court, in civil causes, April 10, 1805.

La. Acts 1806, ch. XI: An Act for the regulation of the rights and duties of apprentices and indented servants, May 21, 1806.

La. Acts 1806, ch. XXXIII: An Act prescribing the rules and conduct to be observed with respect to Negroes and other slaves of this Territory, June 7, 1806 [Black Code].

La. Acts 1807, ch. X: An Act to regulate the conditions and forms of the emancipation of slaves, March 9, 1807.

La. Acts 1807, ch. XVII: An Act concerning the celebration of marriages, April 6, 1807.

Nov.: Novel LIII, C.VI, issued year 538.

Ordinances of Bilbao: Ordenanzas de Bilbao (M. de Burgos ed. 1819).

Ordinance of 1667: Ordonnance civile pour la réformation de la justice, promulgated on April 20, 1667.

Ordinance of 1673: Ordonnance de Mars 1673 [commonly known as *Code Savàry*].

Siete Partidas: Las Siete Partidas del Rey Don Alfonso el Sabio (G. López ed. 1829).

Third Cambacérès Projet: Troisième Projet de Code Civil, an IV (1796).

Commentaries

Blackstone: 1 W. Blackstone, Commentaries (9th ed. 1783).

Curia Phil.: 2 J. de Hevia Bolaños, Curia Philipica (1797).

Dig.: Digest

Domat: J. Domat, Les Loix Civiles dans leur Ordre Naturel (1777).

Feb. Adic.: 1, 3 J. Febrero, Febrero Adicionado ó Librería de Escribanos (5th ed. 1806, 1808).

Inst.: Institutes

Inst. (G): Institutes (Gaius)

Pothier: *Choses*: 2 R. Pothier, *Traité des Personnes et des Choses*, Oeuvres Posthumes (J. Guyot ed. 1778).

Communauté: 3 R. Pothier, *Traité de la Communauté*, Traités de Droit Civil (2d ed. 1781).

Donations Entre-Vifs: 2 R. Pothier, *Traité des Donations Entre-Vifs*, Oeuvres Posthumes (J. Guyot ed. 1778).

Hypotheque: 1 R. Pothier, *Traité de l'Hypotheque*, Oeuvres Posthumes (J. Guyot ed. 1777).

Louage: 2 R. Pothier, *Traité du Contrat de Louage*, Traités de Droit Civil (2d ed. 1781).

Mariage: 3 R. Pothier, *Traité du Contrat de Mariage*, Traités de Droit Civil (2d ed. 1781).

Nantissement: 2 R. Pothier, *Traité du Contrat de Nantissement*, Traités de Droit Civil (2d ed. 1781).

Obligations: 1 R. Pothier, *Traité des Obligations*, Traités de Droit Civil (2d ed. 1781).

Possession: 4 R. Pothier, *Traité de la Possession*, Traités de Droit Civil (2d ed. 1781).

Prescription: 4 R. Pothier, *Traité de la Prescription qui résult de la Possession*, Traités de Droit Civil (2d ed. 1781).

Procédure Civile: 3 R. Pothier, *Traité de la Procédure Civile*, Oeuvres Posthumes (1809).

Propriété: 4 R. Pothier, *Traité du Droit de Domaine de Propriété*, Traités de Droit Civil (2d ed. 1781).

Successions: 2 R. Pothier, *Traité des Successions*, Oeuvres Posthumes (J. Guyot ed. 1778).

Testamens: 2 R. Pothier, *Traité des Donations Testamentaries*, Oeuvres Posthumes (J. Guyot ed. 1778).

Vente: 1 R. Pothier, *Traité du Contrat de Vente*, Traités de Droit Civil (2d ed. 1781).

APPENDIX B

CIVIL CODE OF 1808, SUMMARY OF SOURCES BY TITLES

(For abbreviations and symbols see Appendix A)

PRELIMINARY TITLE (24 provisions)	French Projet: 17 (2 v.; 12 a.v.; 3 s.i.) Blackstone: 4 a.v. French Code: 2 (1 a.v.; 1 s.i.) Domat and/or Blackstone: 1 p.i.
BOOK I	
TITLE I: *Persons* (19 provisions)	Domat: 19 (2 v.; 15 a.v.; 2 s.i.)
TITLE II: *Domicil* (8 provisions)	French Code: 8 (1 v.; 5 a.v.; 2 p.i.)
TITLE III: *Absent Persons* (32 provisions)	French Code: 22 (6 v.; 16 a.v.) Domat: 3 (1 a.v.; 2 s.i.) Siete Partidas: 2 (1 s.i.; 1 p.i.) French Projet: 1 p.i. Ordinance of 1667 and/or Domat and/or Pothier: 1 s.i. Unidentified provisions: 3
TITLE IV: *Husband and Wife* (31 provisions)	La. Acts 1807, ch. XVII: 15 (7 v.; 7 a.v.; 1 s.i.) French Code: 11 (5 v.; 6 a.v.) French Projet: 3 (1 a.v.; 2 s.i.) Pothier and/or La. Acts 1807, ch. XVII: 1 s.i. Unidentified provisions: 1
TITLE V: *Separation from Bed and Board* (20 provisions)	French Projet: 16 (13 a.v.; 3 p.i.) French Code: 4 a.v.
TITLE VI: *Master and Servant* (27 provisions)	Blackstone: 8 (4 a.v.; 3 s.i.; 1 p.i.) La. Acts 1806, ch. XI: 3 (1 a.v.; 2 s.i.) La. Acts 1806, ch. XXXIII: 3 (1 a.v.; 2 s.i.) Digest: 1 s.i. Institutes and/or Partidas: 2 s.i.

	Digest and/or Code Noir: 1 s.i. Domat and/or Pothier: 1 s.i. Digest and/or La. Acts 1806, ch. XXXIII: 1 s.i. Code Noir and/or Pothier: 1 s.i. Institutes and/or La. Acts 1806, ch. XI: 1 s.i. Digest and/or Code Noir and/or La. Acts 1806, ch. XXXIII: 1 s.i. Institutes (G) and/or Digest and/or Code Noir: 1 s.i. Institutes (G) and/or Partidas and/or La. Acts 1806, ch. XI: 1 s.i. Unidentified provisions: 2
TITLE VII: *Father and Child* (66 provisions)	French Code: 22 (4 v.; 14 a.v.; 2 s.i.; 2 p.i.) French Projet: 18 (3 v.; 6 a.v.; 6 s.i.; 3 p.i.) Partidas: 3 (2 s.i.; 1 p.i.) Compilation of Castile: 2 s.i. Pothier: 2 (1 s.i.; 1 p.i.) Blackstone: 3 (1 a.v.; 2 s.i.) Domat: 1 s.i. French Projet and/or Blackstone: 1 s.i. Partidas and/or Pothier: 3 (2 s.i.; 1 p.i.) Pothier and/or French Code: 2 s.i. French Code and/or La. Acts 1807, ch. XVII: 2 (1 v.; 1 a.v.) Partidas and/or La. Acts 1805, ch. XXVI: 1 s.i. Domat and/or Pothier: 1 s.i. Partidas and/or Compilation of Castile: 1 s.i. Partidas and/or French Projet and/or French Code: 1 s.i. Partidas and/or Domat and/or Pothier and/or French Projet: 1 s.i. Unidentified provisions: 2
TITLE VIII: *Minors* (97 provisions)	French Projet: 41 (5 v.; 26 a.v.; 5 s.i.; 5 p.i.) French Code: 28 (2 v.; 22 a.v.; 4 s.i.) Pothier: 6 s.i.

THE WATER LORDS, The Ralph Nader Study Group Report on Industry and Environmental Crisis in Savannah, Georgia. Directed by James M. Fallows. New York: Grossman. 1971. Pp. xxi, 294. $7.95.

WAGE AND SALARY CONTROLS: THE KOREAN EXPERIENCE. Chicago: Commerce Clearing House, Inc. 1971. Pp. 271. Paperback $4.50.

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LOUISIANA CIVIL CODE OF 1808†

TOURNAMENT OF SCHOLARS OVER THE SOURCES OF THE CIVIL CODE OF 1808

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Though American lawyers and teachers of law often affect, for reasons best known to themselves, to care little for literature and civilized writing, we may still suppose there are a few among them who remember the heroic adventures of Ivanhoe and the challenge he hurled, on behalf of the Jewish maiden Rebecca, to the Knight Templar Bois-Guilbert in the tiltyard of the Order at the castle of Templestowe.

The tournaments of old and the days of chivalry are gone to be sure, and he should be bold who would assert the jousts of legal scholars, on remote points of history, can be compared to the tilts of *preux-chevaliers* in days long past. An age which looks upon professional sports, especially if brutal, as laudable manifestations of modern civilization can hardly be expected to look upon clashes of words between scholars as reputable forms of daring and virility.

Nevertheless, there is something to be said on behalf of scholars. At least their enterprises are not commercial and they are in this respect disinterested though they be passionate about their discoveries and theories. For like the knights of old, they take umbrage at any remark which seems slightly to challenge their merit and in defense of their honor will rush to combat in the lists of academe, there to slay their opponent in the name of principle and dedication to the truth.

† The following three articles concerning the Louisiana Civil Code of 1808 were prompted by the conclusions published in Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4 (1971).

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In the pages of this issue of the *Review*, Professor Pascal[1] and Professor Batiza[2] are crossing scholarly lances with a vigor, to say the least, difficult to equal. If words and printer's ink could maim, we would witness no doubt a scene as bloody as any in feudal tourneys where, we might note in passing, the antagonists were permitted to use lance, mace, and battle-axe, but not the dagger, since the object of the game was downing rather than killing.

It is not for me to say which of our two distinguished champions had better cause to take offense at what the other wrote, and unfortunately we cannot count any more on the judgment that, formerly, God was reputed to disclose in trial by combat and visited indeed upon the Templar Bois-Guilbert. But I do wish the tilt of our scholars had been more imbued with the courteous and generous spirit displayed in the tournaments between the knights of old.

Words and Dominoes

Literary allusions can be pushed just so far, and, since they are in poor repute in the legal profession in any case, it is time to fling away the romantic veil we have drawn over the controversy between Professor Batiza and Professor Pascal. The terms of the dispute are clear. The one says the sources of the Louisiana Civil Code of 1808 are essentially French. The other claims they are primarily Spanish. By an ironic twist, Professor Rodolfo Batiza, whose mother tongue and legal training are in the Spanish cast, has espoused the French side of the controversy while Professor Pascal, who to my knowledge has no connection with Spain, is the champion of the Spanish side. It is fortunate. At least neither can be accused of reflecting in his views a prejudice born out of unconscious allegiance to ancestry.

Unfortunately, neither of our champions is likely to subscribe to my characterization of the contest. Both are extremely learned. Steeped as they are in the legal history of Louisiana, both would no doubt with disdain pronounce my statement of the issue simplistic at best and inaccurate to boot. It takes indeed the temerity of ignorance to put it as I do. For "Civil Code" is a fighting term to Professor Pascal who contends its proper name is "The Digest of 1808,"[3] while Professor Batiza maintains the Digest was referred to as the "Code" both before and after its inception.[4] In addition,

[1] Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1972) [hereinafter cited as *Reply*].
[2] Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 Tul. L. Rev. 628 (1972) [hereinafter cited as *Rejoinder*].
[3] *Reply* at 604 n.4.
[4] *Rejoinder* at 629-30.

each uses the term "source" in a different sense.[5] Like Alice in Wonderland, each will permit the word to mean only what he wishes it to mean, and any transgression of his will is likely to be punished instantly by a verbal flaying I do not wish to incur.

Unwilling as I am to risk yet the ire of the one or the other, and intent indeed upon presenting the issue as fairly as possible, I suggest a device. Let us suppose we had before us a legal text, whether called a code or a digest, but not just any book such as a treatise of the law. Let it be, whatever we call it, a legislative enactment telling the citizenry what consequences will attach to their acts in civil matters, so long, of course, as they have lawyers at their elbows to decipher it and collect good money for their services. And let us assume finally it were bruited about that this book of the law was not at all an original creation, but rather had its source "elsewhere" and possibly, which is worse, had a foreign origin.

Now it would be the natural instinct of scholars to track down the rumor. Quite possibly, one of them might come across, after much arduous labor, a text, drafted in the same language but at an earlier date, of which all the provisions were identical, the words exactly the same, and the grammatical arrangement not one iota out of place. In short, a lucky scholar finds the one document is a carbon copy of the other. I should think he could say he had found the "source" of his own text, and I should suppose all his colleagues in the field would readily agree. Even if the find were to be in a different language, yet it were clear the earlier document had been literally translated and the variations in the order of the words or occasional substitutions of different terms were due only to the impossibility of finding exact equivalents, our scholar would still have found his source.

In order to underscore the point, let us take a more specific flight of fancy and imagine the leaders of one of the new states which have come into the world of late should have taken it into their minds to adopt the United States Constitution for their own —as the expression goes—lock, stock, and barrel. No one has, of course, a not entirely surprising fact when you think of it since, despite the virtues the Constitution has for us at home, the leaders of a new country, especially in Africa, are bound to be suspicious of a document which, though dedicated to the freedom of man, countenanced first slavery and later segregation. In any case, the "source" of the constitution in the newly born state would be, without if's or but's, our own, and professors of constitutional law would

[5] *Compare Reply* at 605-07 *with Rejoinder* at 631-39.

surely be embarassed if one of their brethren were to assert the source was really the Magna Carta or some other English text, on the theory that our Constitution merely states in American terms fundamental rights known in England long before its enactment.

Lest some believe we are being too fanciful, let them read and compare in the pages of this review the lines of argument followed by Professor Batiza and Professor Pascal, the first holding articles of French law literally copied into our Code to be its sources,[6] and the second maintaining these articles simply happen to be statements in French of rules of Spanish law.[7] Skeptical readers will then realize the "model" I am setting here is not as remote from reality as they might think. Moreover, they should know there are cases of wholesale importation in the life of the law. It is well known the condominium has come into the continental United States by the simple device of taking from Puerto Rico its statutory enactment on the subject. It is also said someone drafted for Liechtenstein a beautiful law on trusts, though no one there quite knows what to do with it. And I could supply other illustrations.

Of course, it is true the copying of a previous enactment, or its translation, is seldom across the board. Many of its provisions may be adopted, or just a few. The literal lifting from the source may be of some articles or sections in one part, rather than of the part as a whole. And even within a given article or section, only a portion may be taken while the balance is changed. Why the draftsmen should proceed thus, we cannot tell unless they leave us some record, official or not, of what transpired in their discussions or was in their minds in choosing to do this or that. One thing is certain, though. As lawyers we do not assume they were proceeding out of sheer whim. In fact, we assume precisely the contrary. Should they adopt some words instead of others, this article as it was but not that one, a portion of the original and not the whole, then we say they intended the change, had a purpose and willed it be so. Lawsuits are fought every day on the assumption the choice of words in an enactment was deliberate and binds lawyers and courts alike.

Thus, if the draftsmen chose to copy literally in the Louisiana Code some articles from the French Civil Code[8] or its *Avant Projet*,[9] we do not say they intended to incorporate all the other articles in the French documents. If they chose to select and translate verbatim or almost verbatim certain provisions of Spanish law, we do not say they really meant to adopt French law. Nor would we say, if the drafters copied some provisions of English law, they really wanted to express rules of Italian law or German law. And finally, when we find an article in our Code which was an original creation and has no exact counterpart in some other text, we do not go around claiming it was an accident or slip of the pen of the draftsmen. In short, we assume words have meaning and the draftsmen of an enactment are not simply playing dominoes in selecting them.

[6] *See* Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4, 13-14 (1971); *Rejoinder* at 631-39.

[7] *See Reply* at 605-07.

[8] Code Civil des Français, an XII (1804).

[9] Projet de Code Civil, présenté par la Commission nommée par le gouvernement de 24 Thermidor an VIII (1800).

It would be odd in fact to suppose it could be otherwise. There are scientists arguing that thinking in man gave life to the speech which distinguishes him from other animals, and there are some who contend the necessity for speech gave rise to organized thought. Whatever happened to the risen ape on the savannas of Africa millions of years ago, the undeniable result is a fusion of word and thought in the species which goes by the name of *homo sapiens* today. Lawyers, like the rest of humanity, have only words to convey concepts, principles, and rules, and there is no way to dispense with the ones if we are to have the others. Precisely because words are used for expressing thoughts, we cannot use them at random, in a jumble, but rather must place them in a certain order according to those dictates which are of grammar and produce revulsion in youngsters at school and even enlightened adults, including teachers of English, who should know better.

Nevertheless, Professor Pascal and others contend we must not be deceived by the literal reproduction in the Louisiana Code of articles from the French Code or its *Avant Projet*. French as the French words may be, they say, and properly disposed in sentences in the best of French grammar, they must be regarded as mere shells expressing in fact Spanish thoughts.[10] The theory is novel, to be sure, and philologists will be delighted with it, while the French jurists who drafted the Code Napoléon turn over in their graves. The theory is also implausible, especially since it is not supported by evidence, though in order to give it respectability its authors present it as if they were only honoring the old distinction between form and substance. This is to draw a red herring across the trail.

It is true words can have different meanings and their substantive content vary, so true in fact it is boring to hear it said. Indeed, one should always be on guard when an author begins by saying "this word or term is very difficult to define." While this kind of statement passes for legal learning in the best of circles, it is more often than not a portent of mediocrity, for there is no word to my

[10] *See Reply* at 607.

knowledge which is easy to define or always has the same meaning, and the point is universally understood. But those who speak thus are talking about the plasticity of words in a *given* language, and that has nothing to do with the argument here. The question before us is whether articles of the French Code of 1804, composed of French words assembled in impeccable French grammar, may properly be regarded as the source of articles in the Louisiana Civil Code of 1808 composed of the very same French words assembled in the very same grammatical order.

Professor Batiza answers yes and thereby, we are told, is guilty of an unforgivable sin. He had heard, as everyone else had, rumors suggesting our Civil Code of 1808 was copied literally in many instances from French legal texts. He set about checking what had been bandied about as a speculation for some 170 years, which was commendable at least. Surely it will be a wonder for future generations to discover the scholars of this State never before had gotten around to putting side by side, let us say, the French Civil Code of 1804, its *Avant Projet*, and the Louisiana Code of 1808, and determining whether there was any basis to the story. Three men with a passable knowledge of French and working as a team, each with one of the documents before him, could have disposed of the matter in a few weeks of hard work. My colleague Batiza, working entirely alone, took care of the matter by arduous labor and settled the issue.

Out of 2,160 articles in the Louisiana Civil Code of 1808, some 1,400 are taken verbatim, or almost verbatim, from the French Code of 1804 or its *Avant Projet* and more than 100 from other French texts.[11] My colleague's notion of "almost verbatim" is stringent since, as he indicates, even a change of one word results in demoting an article from "verbatim" to "almost verbatim."[12] Naturally, we must admit he might have made a mistake here or there. Indeed let us assume he did, though a gentleman of his integrity is not likely to falter too easily. Even so, he has established, and offered for verification to anyone inclined to doubt his word, a fact—about two thirds of the articles of our Civil Code are taken from the French Code or its *Avant Projet*—and the articles in the French documents are by any civilized standards of reasoning the "sources" of our law.

A prophet is often without honor at home, and it is no surprise some people should profess to find little value in the research of my colleague. I can readily forgive those among them who teach or practice taxation and jump with glee whenever the newspapers

[11] Batiza, *supra* note 6, at 11 & nn.42-44; *Rejoinder* at 631.

[12] Batiza, *supra* note 6, at 13.

report, as they did recently, there are still individuals around collecting millions of dollars and paying no income tax whatever. After all, the teacher or practitioner of taxation makes his living by playing for the benefit of rich folks in the jungle of words we call the Revenue Code, and, being used to words of such monetary value, he cannot be expected to regard with sympathy words in our Civil Code which are of historical value only.

Again I can readily forgive the kind of teacher or practitioner who takes the imperial view of the common law and, holding it out to be the only proper and decent system conceivable, is annoyed by scholars who devote their time and knowledge to the history of the civil law in this State. Like Governor Claiborne before them, our preachers of the infallibility and superiority of the common law, who hardly tolerate what the English people do with it today in their own country, naturally entertain, along with the "ugly American," the illusion all would be well in this world if everyone else shared their view, and condescendingly criticize any other legal system, though of course they know nothing about it.

It is difficult for me, however, to understand the vehemence of the assault of Professor Pascal on the findings of Professor Batiza. With all due respect, and without questioning in any way his freedom to say anything his scholarly sense of integrity demands, I submit he could have given a bit more praise to Professor Batiza for his devoted labor in the cause of the civil law. True my colleague from Tulane, with a touch of the Spanish temperament perhaps, is not at loss for sharp words in his rejoinder. Still I cannot help thinking the knights of old were always chivalrous even as they made ready to down their adversary or fight him to the death.

Mathematical and Historical Probabilities

The tournaments of feudal days were not always single encounters between two adversaries. General tournaments, in which all knights fought at once, were common, though more dangerous, since a knight, once free of his immediate antagonist, could lend his strength to his party and help outnumber someone from the other side. We must now turn the single combat between Professor Pascal and Professor Batiza into a "*mêlée*," as such general encounters were called, partly because it is obvious I am siding with my colleague from Tulane and partly because I must presently draw into the fray other friends and arguments.

The de la Vergne manuscript[13] is a text of the Civil Code of

[13] A Reprint of Moreau Lislet's Copy of a Digest of the Civil Laws now in

1808, with the French version on one side, its English translation on the other, and blank pages in between. On these pages, and on both sides of them in most instances, there are notes handwritten in ink. The calligraphy is beautiful. We are told in a preface to the reprint of the manuscript that the original belonged to Moreau Lislet himself, one of the two draftsmen of the Code, and assured the handwritten annotations are his.[14] Much of the rebirth of the controversy over the sources of the Civil Code of 1808 must be credited to the members of the de la Vergne family, owners of the celebrated manuscript, who kindly consented to have it reproduced and thus made available for general circulation among interested scholars.

Paul M. Hebert, Dean of the Louisiana State University Law School, and Cecil Morgan, my predecessor as Dean of the Tulane Law School, are the authors of the preface, and friends of mine. By this I do not mean to say I just shook their hands and began *prompto* calling them by their first name, which is all most people need these days to claim, rather spuriously, the friendship of somebody or other. Rather, I mean I have known both well enough and long enough properly to presume calling them friends of mine. And much the same I could say, though not quite as strongly, of some members of the de la Vergne family, without presuming, I trust, too much.

It so happens the two deans who are my friends take a position in the preface to the reprint of the manuscript with which I am bound to disagree. They say the handwritten annotations opposite the French texts are "to the actual sources of the texts themselves."[15] Since these annotations are predominantly to Spanish laws, they conclude the Louisiana Civil Code is "primarily a digest of the Spanish laws in force in the territory of Orleans in 1808."[16] But knowing it was already rumored about that some articles of the Louisiana Code were literal copies of articles in the French Code or its *Avant Projet*, my two friends attempted to dispel the contradiction. This they did by stating the Louisiana Code was "in substance primarily" a digest of the Spanish law theretofore in force in the territory.[17]

With all due respect and in friendship, not animosity, I submit the explanation is strained. The draftsmen of the French Code were intent upon preparing a national law to supersede the myriad

Force in the Territory of Orleans (1968) [hereinafter cited as de la Vergne Manuscript].

[14] Hebert & Morgan, *Preface* to de la Vergne Manuscript.

[15] *Id.*

[16] *Id.*

[17] *Id.*

of legal and differing customs which controlled each of the towns, cities, and provinces of France until then. It is peculiar at best to suggest the French draftsmen managed in some 1,400 articles to hit upon a formulation which happened to be precisely in accord with rules of Spanish law. It is hard to believe that, by some favorable design beyond our understanding, they just chanced to produce not only a code of French law, but also a ready-made "digest" of the Recompilation of the Indies, the Recompilation of Castille, *Las Siete Partidas*, and other sundry and lengthy Spanish texts they never consulted and could not indeed have been less concerned about. The theory, I say, strains credulity.

Obviously, Dean Hebert and Dean Morgan could not know at the time there were as many as 1,400 articles in the Louisiana Civil Code copied literally or about from the French Code or its *Avant Projet*. Neither could Professor Pascal, who shared the theory with them when the manuscript was first reprinted, and still expounds it today with even more vigor in his answer to the findings of Professor Batiza. Now, however, it is clear enough the mathematical odds are against the theory, which is to say it is highly improbable. It would be far more reasonable to suppose the French authors happened to formulate from time to time, and by accident, some articles which were close enough to the Spanish solutions. But certainly not in 1,400 cases, or even more if we include in the count the articles also lifted directly from treatises in French and other French documents.[18]

Professors on a law faculty were once regarded as a company of scholars and gentlemen, which simply meant they were learned and treated with respect the learning of their colleagues. Anyone in the teaching of law today must long wistfully for the days past if he is a romantic, and sneer in derision of the present condition of law faculties if he is a realist. Professors are still learned in the law, in many cases, but the gentlemanly behavior is gone. The very teacher who righteously preaches the most exacting standards of reasoning will readily seize upon a glib argument for the sole satisfaction of criticizing the work of a colleague, and this even when he has not read it and has no intention of doing so. The trick is performed every day in the faculty dining room.

A favorite method of attacking the work of Professor Batiza is to ask him: "Is it not possible that 1,400 rules in the French Code, and the *Avant Projet*, state 1,400 identical Spanish rules because the laws of the two countries were practically the same?" The question

[18] "Domat contributed 175 provisions, or 8 percent, Pothier 113, or 5 percent, and 18 can be traced either to Domat or Pothier, or both." Batiza, *supra* note 6, at 11-12.

is preceded, of course, by a few words intended to suggest it is asked in a spirit of humility. The satisfied smile which follows is the only indication of the slickness of the operation. All present, however, understand perfectly well the work of my colleague is being torn apart by the simple device of asking him to demonstrate the law of Spain and the law of France *were not the same*. Besides neatly reversing the burden of proof, which is clever enough, the question confronts any taker with the task of disproving a statement which is without warrant.

What can we do but cry in pain and be tempted to show, by sketching the development of the law in France and Spain, it is against the odds of history to say the laws of the two countries could contain some 1,400 identical rules. Yet the temptation to proceed with the sketch is dangerous, for it would take a few pages to make it accurate enough and we cannot presume too much of the patience of a law review reader in matters of history. Much better it is, then, simply to accept what Professor Pascal tells us of the state of the law in each of the two countries. Professor Pascal, a man of much learning, describes the two laws in lapidary terms. French law, he tells us, was "of Roman and Romanized Frankish, Burgundian and Visigothic elements," and thus, he continues, "often resembled the Spanish law of Roman and Romanized Visigothic origins."[19] What happened to other barbarian tribes, such as the Ostrogoths, or to the Norsemen who took Normandy as their domain, he does not say. But no matter. What is significant is his use in tandem of the words "Roman" or "Romanized" and their repetition.

The effect is mesmeric for those who, on account of an odd psychology, are intent upon attacking the work of Professor Batiza on any pretext, and is all they need joyously to conclude the law in Spain and the law in France were the same. Professor Pascal, of course, does not make this mistake. As we might expect from a scholar with distinguished credentials, he only says that one law "often" resembled the other.[20] How often was often he leaves us to guess. Still try as might those who wish to distort his statement, they are chosing a weak base upon which to build a big case. For they must show the resemblance between the law in France and the law in Spain was so pervasive, the two had in common at least 1,400 rules which were identical and hence could be presented indifferently as French rules in Spanish dress or Spanish rules in French garb.

Should this be true, then there must have been a large reservoir

[19] *Reply* at 605.
[20] *Id.*

of identical rules in the two laws, at least several thousands of them. For the draftsmen of the Code Napoléon, who were choosy, would otherwise have had a hard time coming up in their handiwork with some 1,400 rules of hermaphroditic character. It follows the argument is not really one of resemblance between the law of France and the law of Spain; it is practically an argument of "identity" on a very large scale. Scholars well versed in the civil law, including of course Professor Pascal, will blush upon hearing such nonsense is blurted about. And they will be embarrassed, no doubt, to read there are some who would distort the legal history of France and Spain for the sole purpose of proving there are some 1,400 articles in our Code which masquerade as French, but are really Spanish. As for me, I can only point out the risk of distortion is the fruit of any attempt at packing too much history in a few words. "Roman or Romanized" are terms accurate enough but, unless explained some, are ready-made for misuse at the hands of irresponsible souls who are looking for scholarly mischief.

The discovery of the de la Vergne manuscript was a blessing for the little world of civil law history in Louisiana. No one has found yet the record of the cogitations which led Moreau Lislet and James Brown to pick some 1,400 articles from the French Code and its *Avant Projet* and include them, verbatim or almost verbatim, in the Louisiana Code of 1808. Perhaps the elusive record, if it ever existed, lies still in some dusty attic or, cruel as the supposition may be, perhaps was destroyed long ago by some indifferent person who did not realize its value. Whatever the case, the manuscript seemed to offer at long last some means of establishing the origins of the Code, and this by way of handwritten citations, as precise as any bar none, merely waiting to be used by scholars dedicated to learning and truth. But there was no embarrassing and headlong rush to do the job. Perhaps some preacher of the doctrine of Spanish rules in French dress has already checked systematically the texts cited and verified that most of our Code is in fact Spanish law disguised in French garb. If so, the public at large has yet to hear about it.

It came to pass in 1965 that Professor Pascal, in his own library at Louisiana State University, came across a copy of the de la Vergne manuscript. He affirmed straightaway the discovery would "facilitate research into the sources of Louisiana civil law and help demonstrate that the redactors of the Digest of 1808 did indeed consider it a digest of the Spanish laws then in force in Louisiana even though they cast it in the mold of the then new French *Code Civil*."[21]

[21] Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of*

Sad to say, his prophecy was not realized, or at least did not take the turn he wanted it to take. He, with the deans my friends, were wedded in advance to baptizing the sources of the Civil Code as Spanish and hence were committed not to admit some 1,400 of its articles could be taken verbatim or almost verbatim from the French Code or its *Avant Projet*. Come what may, they knew in their hearts the sacred truth had been revealed to them and would prevail somehow, should an infidel, like Professor Batiza, dare turn up with heretical evidence.

Certainly we must respect the convictions of those who have appointed themselves prophets of the theory of Spanish law wrapped up in French clothing. But I wonder whether the theory does not reflect, after all, the ancient penchant of men to reconcile the facts of experience with preconceived truth. It is an old temptation, in which medieval scholars indulged fully and the philosophers too who, in the eighteenth century, claimed to speak only in the name of the goddess Reason. For all I know, I might be guilty myself once in a while of being lured into the sin, though I like to think I have been able by some happy chance to avoid it as a rule. At all events, I propose now to seek and discover what is the revealed truth possessed by the critics of Professor Batiza which leads them, unconsciously of course, to formulate a theory entirely at odds with the probabilities of mathematics and those of history.

Truth Revealed

The revealed truth is to be discovered in the *Avant-Propos* of the de la Vergne manuscript. There the draftsman indicates he is placing next to the French version of the Code of 1808, and article by article, "the citation to the principal laws of the various codes from which the dispositions of our *local statute* are drawn."[22] The secret path to the revealed truth lies in the words "local statute," as I shall now explain for the benefit of both the faithful and the unbelievers.

As becomes those possessed of supreme verities, the prophets of the Spanish theory of the Code offer us, by way of gospel, a syllogism. It runs: *one*, the citations in the manuscript are to sources; *two*, these citations are mostly to Spanish texts; *ergo*, the sources are essentially Spanish. Yet anyone nosy enough to read the *Avant-Propos*, which is in French, will be disappointed, for he will find nothing there stating in express terms "the citations are to the

1808 with Marginal Source References in Moreau Lislet's Hand, 26 La. L. Rev. 25, 26 (1965).

[22] The original French text reads "*la citation des principales loix des divers codes, d'ou tout tirées les dispositions de notre* statut local." *Avant-Propos* to de la Vergne Manuscript at para. 2 (emphasis added).

sources." I asked myself where and how the prophets got their premise. And I must say, with all due deference for the distinguished personalities involved, they came to their premise in a questionable way.

First, they looked at the *Avant-Propos* and, having stared a moment at the French term "*statut local*," translated it in English as "local statute." Next they gave an interpretation of their translation and accomplished the task by substituting for the term "local statute" the words "Digest of 1808," or the words "Civil Code." By these rapid and admirable moves, the *Avant-Propos* underwent a stunning metamorphosis. Before, we had only some bland words; now we have a scripture. No longer does the *Avant-Propos* say the citations are "to the principal laws from which the dispositions of our *local statute* are drawn." Rather it reads as if it said the citations are "to the principal laws from which our *Digest* (*or Civil Code*) is drawn." Thus revealed truth in shining splendor is born, for by now the text tells us indeed that the citations are to the sources of the Digest, or Code, of 1808.

At the risk of sounding ornery, I am bound to say we have been handed by way of revealed truth an erroneous *interpretation* of a bad *translation*. All I have to offer in support of my view, I admit, is a fair knowledge of the French language and some familiarity with the canons of interpretation of texts. Meager a baggage as it is when measured against the learning of the distinguished professor and deans I oppose, I can only beg them to engage with me in a close reading of the *Avant-Propos*.

Let us assume, in a spirit of generosity, Moreau Lislet was making ready in 1814 to reveal, for all to see, the *sources* of the Civil Code he had drafted in 1808. If such was his purpose, we could quite reasonably expect him so to indicate in the title of his work. Thus we could expect the heading of his book to read something like this: "Laws of the State of Louisiana, with notes indicating their *sources* in the civil and Spanish laws." That is not what he said, however! His title is "Laws of the State of Louisiana, with notes referring to the civil and Spanish laws *which have some relation* to them." Some querulous grammarian might be tempted to raise a question about the French words "*qui y ont rapport*," and argue they should be translated as "which relate to them." I should then be forced to call upon a dictionary and point out the ordinary meaning of the verb "relate," when used in its intransitive form, is precisely "to have some relation to."

True, the title of a work may not be conclusive evidence of its contents. Still, there can be no question the first paragraph of the

Avant-Propos is right in line with the title. In plain words it states: "The purpose of this work is to make known by notes written on blank pages attached to the Digest, what are the texts of the civil and Spanish law *which have some relation to it.*" Then the third paragraph carries out again the same idea, for it reads: "We do not limit ourselves in citing the laws *which have some relation to the various articles in the Digest* to putting down only those which contain similar dispositions, but we have added those which, on the same subject, offer differences in what they provide or contain exceptions to the general principle they state."

So, amazingly enough, it turns out the title of the work, the first paragraph of the *Avant-Propos*, and its third paragraph are all to the same effect. The author clearly sets out to provide citations to civil laws and Spanish laws *which have some relation to the provisions in the Digest.* And these citations, he specifically says, may be to civil laws and Spanish laws containing dispositions *similar* to those in the Digest, or to civil laws and Spanish laws containing provisions *differing* from those in the Digest, or to civil laws and Spanish laws containing *exceptions* to a general principle elsewhere announced. In these propositions, I can find nowhere an intention of citing to the sources of the Digest. Rather, by the necessary import of the words, the declared intent of the draftsman is to provide a system of cross-reference to the civil laws and the Spanish laws.

The business of interpretation and construction of texts is somewhat dreary, as I am paid to know. Still we must go on and turn to the second paragraph of the *Avant-Propos.* In its opening sentence, the author tells us how he will carry out his announced purpose which, as stated in the first paragraph, is furnishing citations to the civil and Spanish laws having *some relation* to the Digest. "*A cet effet,*" that is, to that end, he begins, "one will find next to the English text a general list of all the titles of Roman and Spanish laws which have *some relation* to the matters dealt with in each chapter of the Digest." So far, so good. He then goes on, "and next to the French text and article by article, [one will find] the citation to the principal laws of the various codes, from which are drawn the dispositions of our '*statut local.*'" Thus we now come to the Waterloo of the issue.

Why should a draftsman, whose aptitude with the French language is superb, write "*statut local*" in lieu of "*digeste,*" if "*digeste*" is what he meant to say? And why contend he really meant to say "*digeste*" by using the term "*statut local,*" when the interpretation thus tendered renders the second sentence of the second paragraph entirely inconsistent with the title, the first paragraph, the first sentence of the second paragraph, and the whole of the third?

Throughout, the draftsman has declared his intention to provide a system of cross-references to the civil and Spanish laws which *have some relation* to the provisions in the Digest. There is no excuse for forcing upon the words "*statut local*" both a translation and an interpretation which make a mockery of the clearly expressed intent of the draftsman.

The error, I maintain, stems from translating "*statut*" as "statute." It may be somewhat difficult for those trained in the language of the common law to look at a word which looks like "statute," and realize the term has another meaning in the French language. Still, anyone familiar enough with French law should now recall the term also has the meaning of condition or status, as in "*statut personel.*" In context, it means the author is providing citations to civil and Spanish laws which formerly supplied the rules governing our local "condition" or "status" or "state of affairs." I grant "*statut*" is not easy to translate. Still in the context of the French words surrounding it, the term presents no particular difficulty, except for those who are blindly determined to make it read "Digest" or "Civil Code."

Raised eyebrows at this juncture I can perceive already. I am perfectly aware it will take more than an ordinary translation, and an ordinary application of canons of interpretation, to convince those who have vested a lifetime interest in refusing to abide by the evidence. So let us make a detour, though reluctantly since it takes us away from the matter of our immediate concern, and take a look at the Act of May 31, 1808,[23] the very act which put the Digest, or Code, in effect. It has a clause of repeal which abrogates whatever in the ancient civil law of the territory, or in the "*statut territorial,*" might be inconsistent with the Digest.[24] Should we give in again to the temptation of translating the French word "*statut*" as "statute," we fashion for ourselves a puzzle, for what could this statute be?

We know there had been quite a few statutes enacted previously in the territory, yet our knowledge does not solve the riddle, for the clause of repeal speaks of a "*statut territorial,*" in the singular, and not of all the statutes previously enacted. We may speculate the words "*statut territorial*" refer to a statute enacted by the federal government to regulate the administration of the Territory until it should become a state. But then the repealing clause would be made to say "any and all provisions in the federal statute which regulates this territory are repealed if they are inconsistent with the dispositions of this Digest." It is a pretty tall order to suggest the Digest

[23] La. Acts 1808, ch. XXIX ("An Act Providing for the promulgation of the Digest of the Civil Laws now in force in the territory of Orleans").
[24] *Id.* § 2.

presumed to override a federal law and one, at that, in the nature of a charter for the Territory.

There is something awry here, to be sure, and even they must admit it who cling tenaciously to translating "*statut*" as "statute." Why not, then, give the word "*statut*" the meaning it often has in French law? If we do, the clause of repeal makes sense, at least in its French version. For in context, "*statut territorial*" indicates that the clause covers not only the ancient civil law in general, but also those legal rules that formerly regulated the local "condition" or "status" or "state of affairs" in Louisiana. All of which simply shows there is no reason to insist upon translating "*statut*" as "statute."

How refreshed the reader may be by our incursion into the Act of May 31, 1808, I cannot tell and dare not guess. In any case, it is time to consider again the *Avant-Propos* in the de la Vergne manuscript and decide on the proper interpretation of the magic words "*statut local*" in its second paragraph. For, as we know, Professor Pascal and the deans my friends pin on these two little words an original theory according to which Moreau Lislet quietly managed to inform the initiates he was giving them the sources of the Digest. While upon the same words, I pin only the simple belief that Moreau Lislet knew what he was doing in writing the *Avant-Propos* and should not be treated as an erratic or devious draftsman.

Of course, my distinguished opponents do not really say such horrible things about the draftsman of the *Avant-Propos*. But there is no elegant escape from the implication of their interpretation. According to their view, Moreau Lislet simply weakened before the end of the second paragraph in his resolution, repeatedly expressed before, to give us annotations to civil and Spanish laws *having some relation to the Digest*. Then, by some slip of the pen, he set about telling us precisely from where, in the civil and Spanish laws, the provisions in the Digest were drawn. Or—take your choice—he decided upon sneaking into the second paragraph the words "*statut local*" in order surreptitiously to disclose the sources of the Digest, but without coming right out and saying so.

With all due respect, I must say my opponents have a bear by the tail. By their interpretation, they have bound themselves to the proposition that each and every one of the annotations by Moreau Lislet is to the "actual sources" of the Digest. Hence each should lead straight as an arrow to the text from which the articles of the Digest are drawn. In case after case, however, as Professor Batiza discovered early in his research, the annotations are not to the sources and could not be for a simple though implacable reason:

the rule of Spanish-Roman law cited happens to be exactly contrary to what Moreau Lislet put in the Digest or at least different from it. On this rock alone, the glamorous theory of Spanish rules in French disguise must flounder.

No doubt I shall be deemed a simple mind, deprived of the blessing of revealed truth, for saying I believe what Moreau Lislet tells us in the title of the *Avant-Propos*, its first paragraph, the opening of the second and the whole of the third. So be it. The tortured path to the mystical revelation of Spanish sources in French dress is not for me. When the draftsman tells me he is putting on the blank pages across from the English text the titles of the civil and Spanish laws *which have some relation* to the provisions of the Digest, I accept his statement as true. And when he tells me, practically in the same breath, he is putting on the blank pages across from the French text, and "article by article," those provisions of civil and Spanish law which formerly applied in the Territory and governed "the local state of affairs," I find it perfectly natural and consistent.

In 1814, some six years after the Civil Code, or Digest, went into effect, there must have been quite a few lawyers around who felt at sea in trying to determine what had been repealed and what had not, what had been changed and what had remained, of the law previously in force in the Territory. The compilation of a cross-index would help them determine the extent to which the new provisions of the Digest, massively taken from French texts as it were, superseded the provisions of civil and Spanish law formerly in effect in the Territory. And since Moreau Lislet indicates such was his intention, there is no earthly reason to stand on our heads and, by pretending he set about doing something else, impair the scholarly value of the manuscript he eventually bequeathed upon the de la Vergne family.

While we have not found yet a record of Moreau Lislet's reasons for resorting wholesale to the French Code and other French texts, we certainly should not assume he entertained some evil motive in doing so. It is argued he was directed to use only Spanish-Roman law. The argument turns out, on analysis, to be again a translation or interpretation which is highly questionable. The "civil law" is what Moreau Lislet was told to use as "the ground work" of the Code.[25] Professor Pascal reads the words "civil law" to mean "Spanish-Roman law,"[26] and no doubt has on hand, once more, some brilliant and learned theory to explain his forced and constrained

[25] La. Acts 1806, Resolution of June 7, 1806.
[26] *Reply* at 605-07.

construction of a term understood everywhere else as not being limited to "Spanish-Roman law" but including indeed French law. There is no need to carry on and say anything further.

ENVOI

It is not wise to build castles in Spain and, should they be built, it would be preferable to give them a firm foundation.

Professor Batiza, unlike the man from La Mancha, is not pursuing an impossible dream and will continue to find the actual sources of our law.

Professor Pascal, with even more dedication than before, will continue to seek the Holy Grail of Spanish sources in the Code of 1808.

To both, I render "hommage," with a feudal flourish, for I believe they are, deep in their souls, like the knights of olden times.

SOURCES OF THE DIGEST OF 1808: A REPLY TO PROFESSOR BATIZA

ROBERT A. PASCAL*

In 1968 the Law Schools of the Louisiana State and Tulane Universities, motivated by the desire to stimulate scholarly investigation into the history and sources of Louisiana civil law, availed themselves of the opportunity kindly offered them by the widow and heirs of the late Charles de la Vergne to publish a limited edition of *The de la Vergne Volume*[1]—a certain copy of *A Digest of the Civil Laws Now in Force in the Territory of Orleans (1808)* bearing the name of Louis Moreau Lislet, one of its redactors, and containing on interleaves citations believed to be Moreau's and alleged in the work itself to be references to "the principal laws of various codes from which the provisions of our local statute are drawn."[2] The publication of *The de la Vergne*

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Two volumes similar to *The de la Vergne Volume*, but incomplete, are in the possession of the Law Library of Loyola University, New Orleans. Professor Batiza notes that the Tulane Law School Library possesses a third similar volume. Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4, 8 n.31 (1971) [hereinafter cited as Batiza]. Its existence was previously unknown to this writer, who searched the Loyola Library only and not Tulane's on the assumption that had Tulane possessed such a work Professor Franklin would have mentioned it in his publi-

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Volume provoked immediate interest among many concerned with the origins of Louisiana civil law. The present writer, one of those involved personally in the efforts leading to its publication, happily opined that Moreau's notes would substantiate his long-held thesis: *the Digest of 1808, though written largely in words copied from, adapted from, or suggested by French language texts, was intended to, and does for the most part, reflect the substance of the Spanish law in force in Louisiana in 1808.*[3]

Now an article by Professor Rodolfo Batiza, complete with appendices indicative of detailed comparisons of the texts of the Digest with the texts of other works extant in 1806-08,[4] challenges the writer's thesis and also questions the "source reference" character of the Moreau notes in *The de la Vergne Volume*. Thus even under ordinary circumstances it would be the writer's academic duty to respond publicly to Professor Batiza. The circumstances, however, are far from ordinary. The editors of the *Tulane Law Review* considered Professor Batiza's work so impressive as to warrant its publication in a *special issue* with which they reaffirm that prestigious *Review's* dedication to civil law and codification,[5] and the foreword by the distinguished present dean of the Tulane Law School declares that Professor Batiza "has solved the mystery, now a century and half long, of the sources of the Digest . . . proving beyond reasonable doubt the French origin of 85 percent of the articles drafted by Moreau Lislet and James Brown."[6] Thus Professor Batiza's work should receive more than the usual notice and, its theme being of capital importance even today for the appreciation, construction, and application of Louisiana civil law,[7] it should be discussed not simply publicly, but in

cations on *The de la Vergne Volume*. No doubt this was an oversight on Professor Franklin's part, for certainly he must have been as interested in it as he has been in *The de la Vergne Volume*.

[3] *See* Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 with Marginal Source References in Moreau Lislet's Hand*, 26 La. L. Rev. 25 (1965), *reprinted in* 7 La. Hist. 249 (1966); Pascal, *Book Note*, 30 La. L. Rev. 746 (1970). *See also* Pascal, *Louisiana Succession Law and the Illegitimate: Thoughts Prompted by Labine v. Vincent*, 46 Tul. L. Rev. 167, 175 n.66 (1971). In addition, the writer has proclaimed this thesis for some years in unpublished correspondence, discussions, and occasional public lectures, and from the academic chair.

[4] Batiza, *supra* note 2. Professor Batiza's reference is actually to the Digest of 1808. No doubt he used the term "Civil Code of 1808" in the title to his work because it has been customary to refer to the Digest as such and thus the term would be more communicative to potential readers. This writer, however, will use "Digest" exclusively.

[5] Board of Student Editors, *Introduction to the Issue*, 46 Tul. L. Rev. 1 (1971).

[6] Sweeney, *Foreword*, 46 Tul. L. Rev. 2 (1971).

[7] The writer considers it quite evident from the *Preliminary Report of the Code Commissioners* (Feb. 13, 1823), *reprinted in* 1 La. Legal Archives LXXXV

the same *Review* in which it appeared. The writer is grateful to the Board of Student Editors of the *Tulane Law Review* for recognizing this and consenting to publish his observations.[8]

THE WRITER'S THESIS

The writer's thesis may be stated simply. The Spanish law (including Roman law and doctrine as supplementary *derecho comun* or "common right") was in force in Louisiana in 1806[9] when Moreau Lislet and James Brown were commissioned to prepare a "civil code" and directed "to make the civil law by which the territory [of Orleans] is now governed the ground work of said Code."[10] The Spanish-Roman law then in force, however, did not exist in modern codified form,[11] or even in a form that would facilitate an original drafting of a Spanish-Roman oriented civil code.[12] The necessity of rendering the "code" in French and English made this task even more difficult. French law, being of Roman and Romanized Frankish, Burgundian, and Visigothic elements, often resembled the Spanish law of Roman and Romanized Visigothic origins. The French *Code Civil* completed in 1804 was a valuable model of form. It provided both an admirable organizational plan and, possibly more importantly, a fund of civil law texts already in the French language. Moreover, the projets

(1937), and the Project of the Civil Code of 1825, [*Proposed*] *Additions and Amendments to the Civil Code of the State of Louisiana*, (Mar. 14, 1822), *reprinted in* 1 La. Legal Archives 1 (1937), that the Civil Code of 1825 (of which the present Civil Code is only a revision) retained most of the Spanish substance of the Digest of 1808.

[8] In some respects foreshadowing Professor Batiza's work is an article, Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes*, 44 Tul. L. Rev. 266 (1970). Many of the observations made in this article will apply both to Professor Batiza's and to Mr. Tucker's works, for they seem to proceed on the same basic assumptions and to reach similar conclusions in similar ways. Professor Batiza, at least, considers Mr. Tucker's article to do so. *See* Batiza at 10 n.38.

[9] Professor Batiza admits this. *See* Batiza at 5-7. *See also Preliminary Report*, *supra* note 7, at LXXXIX-XC. There it is noted that, although Spanish law had at times forbidden resort to Roman law in courts, it had also ordered Roman law taught in all universities and that "the body of the Civil [Roman] Law was, in point of fact, always applied in cases where the Spanish Statutes and Customs were silent . . . not as the Common Law, but as a System which they considered obligatory on the conscience of the Judge whenever it was not contradicted by positive local Law."

[10] La. Acts 1806, at 214. The French text of the Resolution reads *base* where "ground work" is in the English.

[11] The projet of the first Spanish Civil Code was not drafted until 1851, and the Spanish Civil Code itself was not enacted until 1889.

[12] The difficulty involved in ascertaining the content of the Spanish law in this era was one of the reasons why the Legislative Assembly of the Territory of Orleans sought to clarify by legislative act what legislation and which authors were to be consulted (Batiza at 6 n.20, quotes the Act) and, these in themselves not being easy to consult, why a "civil code" or "digest" of them was ordered by the territorial legislature in 1806. *See* Batiza at 7.

of the French *Code Civil*, especially the *Projet de la Commission du Gouvernement* of 1800, contained French language provisions descriptive of some of the purer Roman and Roman-Visigothic inspired institutions and rules of southern France, and these were much more similar in substance to the Spanish-Roman law than the institutions and rules of the *Code Civil* itself. The texts of this *Projet*, therefore, would be especially useful in the effort to draft an integrated and reasonably complete "code" that would have as its "ground work" the Spanish-Roman civil law in force. The commissioners, or redactors, acted as intelligent and practical men. Without in any way violating their mandate to draft a "civil code" based on Spanish-Roman civil laws in force, they used, wherever they could, the French *Code Civil*, its projets, and other French language works, the texts of which contained or could be modified to express provisions reflective of the Spanish-Roman substantive law in force. Where, on the other hand, French language texts could not be copied or adapted to this end, they used other texts that could, or they drafted provisions that would serve the purpose.

The thesis expounded above is not self-evident. It does conform, however, to the mandate given Moreau and Brown by the Territorial Assembly and to what logically could be expected to be their *modus operandi*. Proof or disproof of their having made the Spanish-Roman laws the "ground work" of the Digest, nevertheless, must appear from a comparison of the *substance* of the law in the Digest—the spirit and import of its institutions, principles, and rules—with the *substance* of the Spanish-Roman law in effect in 1808. If this substance is predominantly Spanish-Roman, then it does not matter that it is expressed in terms French and English rather than Spanish and Latin, or that the specific terms employed often were inspired by, adapted from, or even copied from texts on French or other systems of law. The Digest would remain what it was supposed to be and did purport to be, a digest of the Spanish-Roman "civil laws in force" in 1808.

Proof of the Digest's conformity to the substance of the Spanish-Roman laws in force in 1808 also would explain the failure of Moreau's notes in *The de la Vergne Volume* to contain a single reference to the French *Code Civil* or its projets. The notes taken collectively, those opposite the French text of the Digest and those opposite its English text, are, as the *avant-propos* or foreword states, references to the "Civil [Roman] Laws and Spanish laws which have some relation" to the Digest articles.[13] Those opposite

[13] *Avant-Propos* to The de la Vergne Volume at para. 1. The translation used here and in subsequent quotations is that of Dainow, *supra* note 2, at 44-45, but the words in brackets have been added by this writer for clarification.

the French text are to "the principal laws . . . from which [the substance of] the various provisions of our local statute were drawn,"[14] not to the laws or writings from which were borrowed the phrases used to express that content. Those opposite the English text, on the other hand, as the *avant-propos* states clearly, give "a general list of the Roman and Spanish laws which relate to the matters treated in each chapter of the Digest," whether "similar" or "present[ing] differences or . . . contain[ing] exceptions to the general principle."[15] Louisiana law was Spanish-Roman. It was not French. The notes were to the Spanish and Roman civil laws that were to be made the "ground work" of the Digest. The fact that words and phrases were borrowed from French and English legislation and writings in order to express in the French and English languages Digest provisions that would reflect the content of the Spanish-Roman civil law in force was, and is, irrelevant; and, therefore, so was the citation of those word and phrase "sources."

Professor Batiza's Work and Conclusions

Professor Batiza, noting that the Digest of 1808 was prepared in French and then translated into English, classifies the Digest's articles as having French "sources" to the extent the words and phrases used in their French texts can be identified in French legislation and other French language writings. Had Professor Batiza pretended to no more than a philological exercise—and made it clear he intended no more—there could have been no objection to his work, no cause for misunderstanding, and no reason for this reply. But Professor Batiza hardly can be accused of having intended no more than that, for then he would not have considered his findings sufficient basis to challenge a thesis that admits the Digest was written largely in words suggested by, adapted from, and often even copied from French legal texts, but contends, nevertheless, that the *substance* of its institutions, principles, and rules is predominantly Spanish-Roman. On the contrary, Professor Batiza must be understood to assume implicitly that an article is to be classified as having its substantive source in French law to the degree its specific phraseology can be traced to borrowings from French legal writings, even though the substance of the rule expressed by the article conforms to the Spanish-Roman

[14] *Avant-Propos* to The de la Vergne Volume at para. 2 (again, the words in brackets have been added by the writer for clarification).

[15] *Id.* Professor Batiza disputes this construction of the *avant-propos*' characterization of the notes opposite the French text of the Digest. *See* Batiza at 9 n.34.

law in force in 1808. This assumption simply cannot be accepted as a valid basis for classifying as substantively French the provisions of a legal document that was supposed to reflect, and indeed did purport to reflect, at least basically, the Spanish-Roman civil law in force in 1808. Thus Professor Batiza, employing a methodology vitiated by its unwarranted implicit assumption, logically enough arrived at the unwarranted conclusions central to his whole work:

> Despite [the *avant-propos'*] categorical assertion and the acceptance it has received,[16] the truth of the matter is that the de la Vergne Volume is not primarily a compilation of sources, but one of concordances. *The numerous citations appearing on the 245 interleaves include relatively few references to actual sources and generally fail to disclose the real origins of the Code of 1808.* A simple observation will suffice to define the nature of the de la Vergne Volume: *a compilation that does not contain a single reference either to the* Projet *of the year VIII (1800) or the French Civil Code of 1804, failing thus to indicate . . . the two most important constituent elements of the Code of 1808, cannot possibly qualify as a work of sources.*[17]

In order to test the thesis that the Digest of 1808 is what it was supposed to be and pretended to be, Professor Batiza should have sought to determine the degree to which the substance of its institutions, principles, and rules corresponds to the substance of the Spanish-Roman civil laws in force in 1808. To the extent he would have ascertained such substantive conformity, he could have ignored as irrelevant the Digest articles' simultaneous substantive conformity with laws in other systems and also their being phrased in language borrowed or inspired by the legislation or writings of other systems. In performing this task he could have begun by ascertaining the degree to which the notes in *The de la Vergne Volume,* which purport to be citations to laws "from which the provisions of our local statute are drawn," are in fact references to laws expressive of the substantive content of the rules contained in the Digest. But he did not employ this method. Thus he lost two wonderful opportunities. He failed to demonstrate that Moreau and Brown had succeeded magnificently in borrowing phraseology from French legal writings to prepare, in the French language and in civil code form, all as directed by the Territorial Assembly, a statement of law so closely based on the Spanish-Roman civil laws in force that it could be entitled a "Digest" of those laws, and he failed to verify the validity of the Moreau notes in *The de la Vergne Volume* as references to the sources of the *substance* of the rules of the Digest.

[16] Professor Batiza here cites the words of this writer in his works cited in note 2 *supra* and also those of Dean Hebert and then Dean Morgan of the Louisiana State and Tulane University Law Schools in their *Preface* to the L.S.U. and Tulane "Reprint" of *The de la Vergne Volume. See* Batiza at 9 n.33.

[17] Batiza at 9-10 (emphasis added).

Demonstration of the Analysis

It will not do, however, to state the results of an analysis of Professor Batiza's work without demonstrating the accuracy of that analysis. The following documentation, therefore, is regrettably necessary.

First, Professor Batiza's own explanations of his classification of "sources" testify to his preoccupation with word origins rather than the similarity of the substance of the articles with that of the Spanish-Roman civil laws in force in 1808:

> The various degrees of resemblance observed are in four different categories: verbatim (v.), almost verbatim (a.v.), substantially influenced (s.i.), and partially influenced (p.i.). This classification, though not revealing all possible nuances in the degrees of influence, provides a fairly accurate basis for appraisal. *The word "verbatim" is used literally, and even a change of one word results in considering a provision only "almost verbatim." But differences in spelling and punctuation are overlooked.* The "almost verbatim" category includes by necessity some relatively wide variations, ranging from a difference of one word to several, *provided that the language in the provision is almost identical to the language in the source.* In a number of cases a further qualification was made by adding the words "in part." The interpretations in the last two categories, "substantially" and "partially" influenced, while necessarily more subjective, are kept within strict limits.
>
> *Because the Code of 1808 was originally drafted in French and then translated into English and because identity or substantial identity of wording is necessary to classify a source as "verbatim" or "almost verbatim," only the French and Louisiana sources can be either "verbatim" or "almost verbatim."* The only exception is represented by direct borrowings from Blackstone (mostly "almost verbatim," never "verbatim") that were then translated into French. *All other sources, whether in Spanish or Latin, had to come under either of the two remaining categories, "substantially" or "partially" influenced, since only their concepts and not their language were adopted.*[18]

"Since *only their concepts* and *not their language* were adopted"!

The following passages attest rather positively both Professor Batiza's failure to focus his investigation on the similarities of substance between the articles of the Digest and the Spanish-

[18] *Id.* at 13-14 (emphasis added).

Roman civil laws in force and his assumption that an article should be classed as French in substance to the extent its verbal formulation was borrowed from French legal documents:

> [*A*]*n additional comment should be made concerning the not infrequent situation of a provision in the Code of 1808 that could have been taken from two or more different sources. As already pointed out, when one of the two sources is written in French, the problem is solved, or at least lessened, by a careful comparison of the wording;* the same is true in the case of borrowings from Blackstone. *When the wording is in Spanish or Latin, however, the problem may be more difficult to solve.*[19]

Consistently,

> [*t*]*he accuracy of some of the figures given in the text for these* [*non-French*] *sources is not as precise as that of the French sources because of the difference in language and the number of instances where several possible sources may account for one single provision.* Moreover, there are considerable similarities between some French and Spanish legal principles owing to the common heritage of Roman law and even some Germanic customs.[20]

And again,

> [*e*]*xcept in a few instances, only the direct source is given, since identification of remote or indirect sources is beyond the scope of the investigation.* Provisions from the French *Projet* and Code often have their sources in Domat or Pothier; in turn, statements in the works of both writers can be traced either to Roman law or French customary law, showing thus the full genealogy of a rule or principle. This differs somewhat from the order of development of the Spanish sources where *las Siete Partidas* and the Compilation of Castile antedate the commentaries by Hevia Bolanos (*Curia Philipica*) and Febrero (*Febrero Adicionado*). The *Partidas*, however, reflect the influence both of the Roman law of the Glossators and Spanish customary law.[21]

Perhaps the passage in Professor Batiza's article more indicative than any other of his assumption that an article of the Digest must be considered French or English because its words were borrowed from French or English legal texts, even though they serve to express a rule of the Spanish-Roman law in force in 1808, is that discussing Digest (1808) 1.7.20, on the physical examination of a widow claiming pregnancy. After quoting the English and French texts of the article, Professor Batiza continues:

[19] *Id.* at 26 (emphasis added).

[20] *Id.* at 12 n.48 (emphasis added). By the last sentence quoted it is evident Professor Batiza would like to claim at least *possible* French "sources" even for provisions he has been able to trace only to non-French texts.

[21] *Id.* at 12-13 (emphasis added).

> A search for the source of this article in the various French possible sources proved negative: neither the *Projet*, nor the Code, Domat, or Pothier, includes a similar provision. But *las Siete Partidas* expressly contemplates the same situation, and the gloss by Gregorio Lopez indicates that the complicated procedure of examination and sequestration was adopted in its entirety from the Digest of Justinian. Since the same procedure was, in substance, embodied in article 20 of the Code of 1808, this would seem, under normal and reasonable precautions, to be the end of the search for the article's source. A rather accidental perusal of Blackstone's Commentaries, however, revealed the following passage . . . [quotation from 1 W. Blackstone, Commentaries 456 (9th ed. 1783) omitted].
>
> It is quite clear that the English version of article 20 of the Code of 1808 is an almost verbatim in part reproduction of this passage of Blackstone. Nevertheless, Blackstone is silent about the procedure of the widow's examination that appears in article 20, while both the Digest and the *Partidas* regulate this procedure in detail. This situation illustrates not only that research in some areas of the Code of 1808 is beset with difficulties, but also that while the mystery surrounding most provisions in the Code is almost entirely dispelled by the present investigation, there is still some room for uncertainty and speculation on some articles. For instance, was article 20 a contribution of James Brown in his capacity as a common-law lawyer? Was Moreau Lislet sufficiently familiar with both the common law and Blackstone so as to make contributions from Brown unnecessary? Would a civilian like Moreau Lislet, however knowledgeable of the common law, be likely to prefer a common law commentator over civilian sources?[22]

Professor Batiza, it is submitted, finds difficulties where none exist. The rule is Spanish, derived from the Roman. There was no preference of "a common law commentator over civilian sources," only a convenient use of Blackstone's description of essentially the same rule, itself also derived from the Roman law, to facilitate the drafting of English and French language texts of a Digest article intended to express the substance of the Spanish rule itself.

Random Examinations of Professor Batiza's Illustrations

Professor Batiza furnishes several pages of illustrations of the applications of his classification scheme.[23] In these pages he quotes certain Digest articles and the texts of the various "sources" from which he considers those particular articles to have been taken "verbatim" or "almost verbatim," or by which they were "sub-

[22] *Id.* at 27-28.

[23] *Id.* at 14-28.

stantially influenced" or "partially influenced."[24] Perusal of even these samples not only provides additional confirmation of the observations made above, but also reveals some instances of classification that may be questioned even within the framework of Professor Batiza's avowed method.

Digest (1808) Prél.11 is classified as "substantially influenced" by French *Projet*, Prél.4.7 (1800).[25] Yet, not only do the two differ in substance, but there exists a French *Code Civil* article, not quoted or referred to by Professor Batiza, that would have to be classified as an "almost verbatim" counterpart of the Digest article. The three texts, only the first two of which are quoted by Professor Batiza, are given below with the critical words of substantive import italicized and translated by the writer:

> *Projet*, Prél.4.7 (1800): On ne peut, par des conventions, déroger aux lois qui appartiennent au *droit public* [public law].
>
> Digest (1808) Prél.11: Les individus ne peuvent, par des conventions particuliéres, déroger aux lois qui sont faites pour le maintien de l'ordre public ou des moeurs [public order or morals].
>
> French *Code Civil* art. 6 (1804): On ne peut déroger, par des conventions particuliéres, aux lois qui interessent l'ordre public et les bonnes moeurs [public order and good morals].

Certainly, all three texts vary somewhat in verbiage, but it is submitted that the latter two resemble each other more and are practically identical in meaning,[26] whereas the first is different in substance from the latter two, "public law" being much less inclusive than "public order." Probably the initial error is to be attributed to someone assisting Professor Batiza in his extremely time consuming effort; but Professor Batiza hardly could have failed to note the substantive content difference between Digest (1808) Prél.11 and *Projet*, Prél.4.7 (1800) when selecting this particular example of his classifications for purpose of illustration. The content of the rule, besides, is hardly exclusively French. It is contained in *Las Siete Partidas* 5.11.28 (for contracts) and 6.9.32 (for testaments) and in Domat liv. prél. 1.2.28 (for both), all cited in the Moreau notes in *The de la Vergne Volume. Las Siete Partidas* 5.11.28 is in part as follows in the Moreau Lislet and Carleton translation: "We also say that every contract made contrary to

[24] *Id.* at 13-28.

[25] *Id.* at 18.

[26] The English text of Digest (1808) Prel.11 reads "good morals," not simply "morals," perhaps indicating that the absence of the word *bonnes* from the French text of the article was the result of unintentional error.

law or good morals . . . ought not to be observed."[27] The rule is very Roman and very Spanish, even though it is also very French. Indeed, in its very essence it is, of necessity, a rule of every legal system. It would be difficult to envision a legal system in which all laws were suppletive. The illustration, therefore, serves warning that Professor Batiza's classifications, and, therefore, the statistics compiled therefrom, may not be reliable indices of the derivation of either the substantive content or the words of the Digest's articles.

The second illustration of "substantial influence from French sources" is the alleged similarity of Digest (1808) 1.7.57 and French *Code Civil* article 1384.[28] The texts are quoted below with a translation of the latter article supplied by the writer:

> Digest (1808) 1.7.57: *Les père et mère sont responsables des délits et* quasi *délits commits par leurs enfants de la manière et dans les cas prescrits au titre des* quasi *contrats et des* quasi *délits.*
>
> French *Code Civil* art. 1384 (1804) (in part): *Le père, et la mère après le décès du mari, sont responsable du dommage causé par leur enfants mineurs habitant avec eux . . . .*
>
> Digest (1808) 1.7.57: Fathers and mothers are answerable, for the offences, or *quasi* offences, committed by their children in the cases prescribed under the title of the *quasi* contracts and *quasi* crimes or offences.
>
> French *Code Civil* article 1384 (1804) (in part): The father, and the mother after decease of the husband, are responsible for the damage caused by their minor children living with them . . . .

In the writer's opinion, the similarity of phraseology is *at best* "partial," not "substantial." More serious, however, is the fact that Digest (1808) 1.7.57 is merely a cross reference to the dispositive provision on the subject, Digest (1808) 3.4.20 (in part), which itself is classified in Professor Batiza's Appendix C as "almost verbatim" with *Projet* art. 20 (1800) and, but only to a lesser extent, with French *Code Civil* art. 1384 (1804).[29] Tracing the word source of a nondispositive article to a French *Projet* or *Code Civil* dispositive article is not objectionable as a philological exercise; but, when a statistical count of article classifications is used to arrive at a determination of the "sources" of the Digest as

[27] 2 The Laws of Las Siete Partidas, Which Are Still in Force in the State of Louisiana 5.11.28 (L. Moreau Lislet & H. Carleton transl. 1820).

[28] Batiza at 18-19.

[29] *Id.* at 103.

a whole, such classifications as that of Digest (1808) 1.7.57 help give an impression not warranted by the substance of the law.

The illustrations of "substantial influence from French sources" also evidence the great latitude Professor Batiza exercised in placing articles in this category. This fact may not be apparent, however, to those who do not attempt to compare the French texts of the Digest article and its allegedly "substantially influencing source," for Professor Batiza, while quoting the English text of the Digest article, does not provide a translation of the alleged source. Some of the sample illustrations, therefore, will be given below using the English texts of the Digest articles and the present writer's purposely very literal translations, or transliterations, of the alleged sources so that the English language reader will be in a better position to pass on the degree of "substantial influence" present:

> Digest (1808) 3.1.96: The testamentary, or legal, or irregular heir, who is afraid to accept or renounce a succession, before having the necessary time to be informed of its property and charges, may accept the succession with the benefit of an inventory.[30]

> Domat 2.1.2.2.1:[31] Every heir, whether testamentary or intestate, who doubts that the inheritance be advantageous, and who fears to obligate himself [by accepting it], may beforehand petition that an inventory be made of the things and titles and papers of the inheritance: and without taking the time to deliberate, make his declaration that he renders himself heir with benefit of inventory.[32]

Again,

> Digest 3.18.15: The fruits of the pledge are deemed to make a part of it and therefore they remain like the pledge in the hands of the creditors, but he may not appropriate them to his own use and he is bound on the contrary to give an account of them . . . from what may be due to him.[33]

> Pothier, *Traité du Contrat de Nantissement*, 2.1.23: The creditor, to whom the thing has been given in pledge, has only the right to detain it; he has not the right to use it, or, when the thing bears fruit, to apply the fruits to his profit, but he must take them in payment and reduction of his credit, and he must account to the debtor . . . .[34]

[30] *Id.* at 19.

[31] All references in this reply to Domat are to *Les Loix Civiles dans Leur Ordre Naturel* (The Civil [Roman] Laws in Their Natural Order) in terms of the part, book, title, section, and paragraph numbers, in that order.

[32] Batiza at 19.

[33] *Id.*

[34] *Id.*

The two above quoted "substantially influencing" word sources of Digest articles are certainly on the same subject matter, but it is submitted that similar passages of substantially the same content might have been found in writings in any language on almost any Roman-oriented legal system. The Spanish is no exception. The Moreau notes in *The de la Vergne Volume*, besides citing Domat for Digest (1808) 3.1.96 and Pothier for Digest (1808) 3.18.15, also cite *Las Siete Partidas* provisions for each article and Febrero as well for the first. All give the same substance, but none is cited by Professor Batiza, presumably in conformity with his announced practice of referring only to what he regards the "primary source," that is to say, that passage in the French language most consistent in phraseology with the French text of the Digest article.

It will be instructive to quote the Febrero passage cited in the Moreau notes in *The de la Vergne Volume* as a source of Digest (1808) 3.1.96:

> Febrero 2.1.1.1.39:[35] It is the practice, in order to avoid delays and prejudices, for the heir to accept the inheritance with benefit of inventory: with this legal precaution there is no need to fear, or to waste time deliberating whether to accept or renounce the inheritance, or to incur the obligation to pay debts or legacies *ultra vires haereditarias* . . . . [Writer's translation.]

Indeed, part of the remaining portion of Febrero 2.1.1.1.39 apparently is the verbal as well as substantive source of Digest (1808) 3.1.104, which Professor Batiza, without mentioning Febrero, classifies as partially influenced by French *Code Civil* article 803.[36] The three texts are quoted below:

> Febrero 2.1.1.1.39: [T]he reason is that [acceptance with benefit of inventory] places the heir in the same state as if he had accepted, and he is considered in possession of the inheritance, [but] more as heir for administration of the inheritance than as heir [proper]. [Writer's translation.]

> Digest (1808) 3.1.104: Although the heir who accepts with the benefit of inventory, be really the lawful heir and true successor of the deceased, the effect however of the benefit of inventory is to make him appear in the eyes of the credi-

[35] The writer has used throughout the (unnumbered) 1789-90 edition of Febrero, *Libreria de Escrebanos*. Professor Batiza used the fifth edition, 1806-1808. The references in *The de la Vergne Volume* (see *explications* following the *avant-propos*) are to the third edition, date not given. The chapter divisions at times vary between the third and the 1789-90 editions, on the one hand, and the fifth on the other; and apparently there are at least paragraph number variations between the 1789-90 edition (which is not the first, however) and the third edition cited in *The de la Vergne Volume*.

[36] Batiza at 77.

tors and legatees of the succession, rather as administrator of the estate, than as the true heir and proprietor of it.

The heir under such benefit can therefore do all acts of administration, even those the object of which is the liquidation of the estate.

French *Code Civil* art. 803 (1804): The beneficiary heir is charged with administering the assets of the succession .... [Writer's translation; remainder irrelevant.]

There is no need, however, and certainly no attempt is made here, to deny substantial *verbal* borrowings from the works of Domat and Pothier, but this has its explanation. It will be recalled that the *avant-propos* in *The de la Vergne Volume* notes that Domat is cited as a *convenient reference to the Roman law cited and quoted by Domat*, and it may be observed that Pothier's treatise probably was regarded as one on a French law subject based substantially on the same Roman law that formed the subsidiary *derecho comun* of the Spanish law. Indeed, it would be difficult to understand how Moreau himself had come to list citations to Pothier at all, unless he considered the passages cited to reflect the substance of the law as it was appreciated to be in Spain as well as in France, for his *avant-propos* in *The de la Vergne Volume* speaks only of Roman and Spanish law references and yet, in the list of authors mentioned in his "*explication*" of citations immediately following the *avant-propos*, he includes Pothier. It is not too much to assume that Moreau and Brown borrowed from these "sources" as French language formulations suitable for expressing the Spanish-Roman law in force, not as sources of a French law they wished to emulate. Professor Batiza's classification of such "sources" as French, therefore, can be misleading.

Samplings from Appendix C

Appendix C[37] contains Professor Batiza's classifications. It is quite understandably in the form of a table of citations. It would have been most unreasonable to expect the appendix to quote the various cited laws and writings. Volumes would have been required. Yet this necessary failure of quotation renders it impossible for the average reader to determine the content of the references, for few have the "sources" readily available to them. The writer, therefore, decided to test a few samples of the classifications even if he could not test the whole work.

Digest 3.5.63-85 (Community of Gains)[38]

The writer chose to begin his sampling of Appendix C with these particular articles for two reasons. The first was his intense

[37] *Id.* at 45-134.
[38] *Id.* at 105-07.

interest in the particular subject matter. The second reason, however, was more cogent. If there is any institution of the Digest that usually has been recognized as basically Spanish in substance, it is the community of gains; and yet Professor Batiza remarks in the body of his article that "[t]he Spanish system of community of acquets or gains (*sociedad de ganancia*[*le*]*s*) that appears in the Code [Digest], rather than being opposed to the French system of *communauté*, supplements it."[39]

The classifications of the 23 articles are as follows: three articles (3.5.67, 69, 70) classified as "substantially influenced" by Spanish "sources" only; three articles (3.5.64, 72, 85) listed as "substantially influenced" by Pothier and Spanish works; four articles (3.5.63, 65, 66, 68) deemed "substantially influenced" by Pothier, the *Coutume de Paris*, and Spanish works; two articles (3.5.71, 73) considered "substantially influenced" by Pothier and the *Coutume de Paris;* and eleven articles (3.5.74-84) classified as "verbatim" or "almost verbatim" borrowings from the French *Code Civil* or *Projet*. Thus Professor Batiza's classifications of the 23 articles presumably would yield the following figures: thirteen articles, or 56.6 percent, derived from or "substantially influenced" by French sources only; seven articles, or 30.4 percent, "substantially influenced" by French and Spanish "sources"; and three articles, or thirteen percent, "substantially influenced" by Spanish "sources" only.

Not only do such statistics help explain how Professor Batiza classified the Digest's articles as 85 percent French, but presumably it is in the light of such statistics that Professor Batiza was able to conclude that the "Spanish community of . . . gains . . . rather than being opposed to the French system of *communauté*, supplements it." Such, at least, must be the writer's conclusions, for some of the references to Pothier (*Traité de la Communauté*) and to the *Coutume de Paris* are to provisions that enable one to perceive very readily the radical difference between the French *communauté* and the community described in the cited Spanish texts and in the Digest's articles considered substantively rather than in terms of word and phrase origins. The English text of Digest (1808) 3.5.64 together with the writer's transliterations of the Pothier passage and two of the three *Recopilación de Castilla* provisions cited as "sources" by Professor Batiza will suffice to illustrate this:

Digest (1808) 3.5.64: This partnership [*société*] or community of gains consists of the profits [*fruits*] of all the effects of which the husband has the administration and enjoyment; of the produce of the reciprocal labor and industry of both husband and wife; and of the estates [*biens*, or

[39] *Id.* at 29.

things] which they may acquire during the marriage either by donations made jointly to them both, or by purchase, or in any similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to and not the person who made the purchase.

Pothier, *Traité de la Communauté*, 24: Article 220 of the Custom of Paris tells us of what things the active mass of the legal community is composed. It is phrased in these terms: "a man and woman joined together in marriage are common in [all] movable things, and [in those] immovables acquired as *conquêts* during the said marriage."[40]

Recopilación de Castilla 5.9.2: Every thing which the husband and wife gain [*ganaren*] or purchase while together, they shall have by halves; and if there be a donation by the king or another, and it is given to both, the husband and wife shall have it. If it is given to one, only that one to whom it is given shall have it.[41]

Recopilación de Castilla 5.9.4 (in part): Although the husband may have more than the wife, or the wife more than the husband, the fruits [of their assets] shall be common to both.[42]

It is something of a mystery, too, why Professor Batiza did not list Febrero 1.1.22.1[43] as a source, for the similarity of substance as well as expression (if not of idiom!) with Digest (1808) 3.5.64 is rather clear. The writer's transliteration follows:

Febrero 1.1.22.1 (in part): The things which husband and wife acquire and multiply during marriage [and] while living together are divided by halves between them, even if it be by donation of the king or another, or if they purchase them, whether in the name of one of them or of both, for attention is paid only to the time of acquisition, and not to the person in whose name they appear to be purchased.

Illustrations can be multiplied. Digest (1808) 3.5.65 (on debts to be paid from community funds) is listed as having Pothier, the *Coutume de Paris*, and Febrero as "sources"; but the rule cannot be that of the French *communauté* for it states that ante nuptual debts are to be paid out of the separate funds of the spouses and under the French *communauté* even ante nuptual debts become

[40] *Id.* at 106.

[41] *Id.*

[42] *Id.*

[43] The citation is to the 1789-90 edition; Professor Batiza used the 1806-08 edition. *See* note 35 *supra*. Professor Batiza, however, makes no reference to Febrero at all as a "source" of Digest (1808) 3.5.64. *See* Batiza at 106. The proper reference to the relevant passage in the 1806-08 edition would have been 1.2.1 (Part I, Cap. 2, n.1).

community debts.[44] Digest (1808) 3.5.66 is indicated to have its "sources" in Pothier, *Coutume de Paris*, the *Recopilación de Castilla*, and Febrero. The subject of all sources is the same. Here the Digest's words do resemble more the stronger language of the French texts, which deny the wife *any* right in the community assets until her husband dies, the Spanish denying her only their "use" until that time.[45] It may be that Moreau and Brown unintentionally accepted the stronger statement, for in 1825 this article was amended in a way that rendered it more consistent with the Spanish thought.[46] For Digest (1808) 3.5.68 Professor Batiza lists only Pothier and the *Coutume de Paris*, no Spanish sources. Yet the rule is as true for Spanish law as for French, having been stated clearly enough in *Fuero Real* 3.3.3 and repeated in *Recopilación de Castilla* 5.9.4. But enough, except to say that the rules of Digest (1808) 3.5.74-84, for which Professor Batiza indicates only French sources, do not go to the heart of either the French *communauté* or the Spanish community of gains and are compatible with both.[47] The institution reflected by Digest (1808) 3.5.63-85 is overwhelmingly distinctively Spanish in spirit, principle, and major rules. To say it "supplements" the French *communauté* is a severe distortion.

Perhaps the severity of the distortion warrants a more penetrating comparison of the elements of the two institutions. The French *communauté*, in general, is one of all movables, those owned by the spouses at marriage or acquired after marriage in any way whatsoever, even by succession or donation to one of them only, and of the immovables acquired after marriage with community assets. The Spanish community of gains, and, in general, that described in the Digest, is essentially a community of only those things realized after marriage in the form of the produce of the labor or industry of the spouses, the fruits of all their assets, and things movable and immovable acquired with such fruits or assets. Phrased another way, the French *communauté* is basically much more a kind of co-ownership than is the Spanish-Louisiana community. The

[44] Coutume de Paris art. 221. It may be noted that Professor Batiza cites article 222 as a "source" of Digest (1808) 3.5.65. That article, however, says no more than that the spouses may, before marriage, contract that (as between them, without affecting the rights of third persons under article 221) each spouse shall pay his or her ante nuptual debts (out of his or her funds contributed to the *communauté*). For a full explanation, see C. Ferriere, Nouveau Commentaire sur La Coutume de la Prévoté et Vicomté de Paris, art. 222 & commentary (Nou. ed. 1779).

[45] In fact, specific language on the nature of the wife's interest is found only in Febrero 1.1.22.245 (1789-90 ed.) and not in *Recopilación* 5.9.5.

[46] *See* La. Civil Code art. 2373 (1825); La. Civil Code art. 2404 (1870).

[47] The notes in *The de la Vergne Volume* cite only Spanish sources for Digest (1808) 3.5.63-71, 79, Spanish sources and Pothier for 3.5.72, 73, 83, 85, Pothier only for 3.5.74-75, and nothing for 3.5.76-78.

prime ingredient of the French regime described in Pothier and the *Coutume de Paris* is a special kind of full ownership in common of all movables however and whenever acquired; with exceptions unimportant here, immovables acquired after marriage enter the *communauté* only if actually or presumably acquired with such movables. Hence its common name, *communauté de meubles et de conquêts*. The prime element of the Spanish-Louisiana regime, on the other hand, is more a usufruct-like right of the spouses, enjoyed by them together over the industry and assets of them both; and the things they come to own in common are primarily the products and fruits (gains) of this common "usufruct" or enjoyment and the things acquired in exchange therefor; hence its name, community of gains. Corresponding to the differences of the regimes as to assets is a difference as to liabilities. The French *communauté* includes all liabilities except those obligations attached to separately owned immovables (*dettes immeubles*). The Spanish community of gains, and Louisiana's under the Digest, included only such debts as were incurred *lawfully* and in relation to a common concern of the spouses.[48]

There is, indeed, a similarity between the Spanish community of gains (and Louisiana's under the Digest) and a matrimonial regime of southern France, sometimes a legal regime before the *Code Civil* and often a conventional regime thereafter. But it is not mentioned in Pothier's *Traité de la Communauté* or elsewhere in his works on French law so far as the writer has been able to determine in a routine search. This French regime is known as *dowry with a community of acquêts added*.[49] The Spanish regime and that under the Digest were regimes of separation of property coupled with a mandatory community of gains, but sometimes an optional dowry was added. Professor Batiza might have found more support for his position in drawing an analogy between the Digest's regime (probably traceable to Roman law superimposed on Visigothic custom) and that of southern France just described (probably traceable to Visigothic customs superimposed on Roman law). But it is submitted that even this would not overcome the fact that Louisiana preserved essentially the Spanish community of gains with the aid of provisions in words often borrowed from, and sometimes copied from, French law books.

[48] An excellent survey of the Spanish community of gains in effect in Louisiana in 1803 is that of Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 La. L. Rev. 1 (1969).

[49] For a brief survey of the regime's history and character, see 3 M. Plainol, Traité Elémentaire de Droit Civil [Français], No. 1681 *et seq.* (11 ed. 1937).

Digest 3.20.75 (Acquisitive Prescription of Movables)

Astonished by Professor Batiza's characterization of the community of gains, the writer next sought to ascertain the classification Professor Batiza had given the article on the prescription of movables, for it too is well known to be different from the corresponding French *Code Civil* article on the subject. Once again, however, Professor Batiza showed his lesser regard for the substance of the law and the great latitude of his classification "substantially influenced":[50]

> Digest (1808) 3.20.75: *En matière de choses mobilières, si quelqu'un a possédé a juste titre, publiquement et notoirement, une chose mobilière pendant trois années successives, en la présence de celui qui pourrait prétendre y avoir droit, et qui étant residant dans le territoire, aurait pu le savoir, et n'en peut vraisemblablement prétendre cause d'ignorance, il acquiert la propriété de la chose, si ce n'est qu'elle eut été originairement volée ou dérobée.*
>
> French *Code Civil* art. 2279 (1804): *En fait de meubles, la possession vaut titre.*
>
> *Neamoins, celui qui a perdue ou auquel il a été volé une chose, peut la revendiquer pendant trois ans, a compter du jour de la perte ou du vol, contre celui dans les mains duquel il la trouve; sauf a celui-ci sons recours contre celui duquel il la tient.*

In English:

> Digest (1808) 3.20.75: If a man has had a public and notorious possession of a movable thing, during three years, in the presence of the person who claims the property of the thing, said person [,] being a resident within the territory, is presumed to have known the circumstances of the possession [,] and the property becomes vested in the possessor, unless the thing has been stolen.
>
> French *Code Civil* art. 2279 (1804): In relation to movables, possession is equivalent to title.
>
> Nevertheless he who has lost a thing or from whom it has been stolen may revendicate it, within three years of the day of the loss or theft, from anyone in whose hands it may be found; but the latter has recourse against him from whom he obtained it. [Writer's translation.]

French *Code Civil* article 2279, as Professor Lawson so nicely observed,[51] renders movables negotiable, giving the owner little protection in the market place. Digest (1808) 3.20.75 did no such

[50] Batiza at 133.

[51] F. Lawson, A Common Lawyer Looks at the Civil Law 176 (1953).

thing, but, on the contrary, gave even greater protection to the owner than the Spanish-Roman rule. It is difficult to see "substantial influence" from the French in this instance. *Las Siete Partidas* 3.29.9, cited in the Moreau notes in *The de la Vergne Volume*, but not by Professor Batiza, is certainly closer in substance than French *Code Civil* 2297. The Moreau Lislet and Carleton translation follows:

> When a man intends to acquire a movable thing by prescription, it is, in the first place, necessary, that he have possession of it, in good faith, and that he shall have acquired it by a just title: as by purchase, donation, exchange or the like. It is moreover necessary that he should believe that the person of whom he acquired it, was the owner of it, and had authority to alienate it. It is also necessary that he have possession of it, in person, or by another in his name, without interruption, during three years. He will then acquire the property in the thing; and though the owner may come afterwards and sue for it, he cannot be heard unless he can prove that it had been obtained from him by theft, robbery or violence.[52]

Digest 1.5.1-20 (Separation from Bed and Board)

These articles were selected for examination because it is well known that the Spanish law of marriage, like that of prerevolutionary French law, followed basically the canon law of marriage as promulgated by the Council of Trent, thus allowing separation for cause in the nature of fault, but never divorce; but that, on the other hand, revolutionary French law (and the *Projet* of 1800) substituted divorce for separation from bed and board, and the *Code Civil* made divorce the rule and separation from bed and board an option for essentially the same causes.

Here Professor Batiza's classifications are, on the whole, quite correct insofar as they show the very substantial borrowings of whole articles or substantial parts of articles from the French *Code Civil* and *Projet* of 1800, the main changes in language being in the substitution of the words "separation from bed and board" for "divorce." Yet the very fact that divorce was rejected by the redactors of the Digest belies the impression, which Professor Batiza's classification would create, that the *substance* of the post-revolutionary French law on the alteration of the marriage relation was accepted by the redactors. It is submitted that the Spanish-Roman or French characterization of the law in the Digest on this subject must be seen to depend much more on the first article in this title of the Digest, article 1.5.1, than on the borrowing of phraseology from the French *Code Civil* and *Projet*. The English

[52] 1 The Laws of Siete Partidas, *supra* note 27, at 3.29.9.

text of that Digest article states very simply: "Separation from bed and board as it formerly existed according to the laws of the country, shall take place for the following causes."

There are nuances, too, that cannot be apparent to the casual reader. Thus even the choice of language from the French *Projet* rather than the *Code Civil* may indicate a closer adherence to the thought of the canonical scheme in force in both Spain and prerevolutionary France. This is noticeable in the retention, in Digest (1808) 1.5.4, of the rule that "excesses, cruel treatment, or outrages" can be considered causes for separation only "if such ill treatment is of such a nature as to render their living together insupportable."[53] French *Code Civil* article 231 does not impose such a requirement, rendering the ill treatment of itself cause for divorce or separation. Another instance of a substantial difference between the Digest article and its "source" is that of the effect of the separation on "advantages" made by the partners to each other. Under Digest (1808) 1.5.18 *both* spouses lose the advantages made to them. Under French *Code Civil* articles 299-301 (Professor Batiza cites only article 301 and then as "partially influencing" Digest (1808) 1.5.18) only the spouse not at fault retains such advantages. This substantial difference, however, possibly is more original than Spanish, for under Spanish law only the spouse at fault lost advantages made in consideration of marriage.[54]

General Conclusions

The samplings of Professor Batiza's classifications made above by no means exhaust the examination of his enormous work,[55] but it is submitted that they do constitute sufficient evidence to substantiate the writer's critique of his methodology and the conclusions reached through its application.

Professor Batiza's work emerges finally as a work of concordances rather than an index of sources. It is not reliable as an index

[53] This is even now the principle of Codex Juris Canonici, canon 1131 (1917).

[54] *See* Pugh, *supra* note 43, at 35-36.

[55] The writer's experience, supplemented by information from some of his colleagues, leads him to affirm that many of the institutions and rules of the Digest of 1808 will prove to be Spanish-Roman, even if often in French dress, or French (especially precodification French) as well as Spanish-Roman. Particularly to be mentioned are the non-obligations areas of the law, such as filiation, paternal authority, minority with its divisions into impuberty and puberty and the corresponding tutorship of *impuberes* and curatorship of *puberes*, the rules of lesion applicable to minors, the division of things, riparian rights, and, in general, the law of succession. No effort will be made here to discuss these subjects or to examine Professor Batiza's classification of the articles on those subjects.

of sources of the substantive content of individual articles of the Digest for the "source" cited may be different in substantive content from the relevant Digest provision, and, even where the substance of the two is the same, Professor Batiza often ignores the fact that the rule may be Spanish-Roman as well as French if he can match the phraseology of the Digest's French text with that of a French language text. Nor are Professor Batiza's statistics reliable indices to the sources of the substantive content of the Digest as a whole. Professor Batiza's method does not permit him to take into account *either* that provisions not of Spanish-Roman origin may have been, and certainly often were, introduced because they were compatible with the basic Spanish-Roman orientation of the particular institution and supplemented its previous specification, *or* that the character of the law as a whole is determined more by provisions that evidence the *principle* on which the law is based than by those incidental rules that might apply equally well to institutions of very different orientations. Nor can it be said that Professor Batiza's work is adequate as a classification of the word and phrase origins of the Digest's articles independently of the latter's substantive content. If the "source" cited is a provision of the French *Code Civil* or *Projet* of 1800, the similarity of language most often will be there in fact, and it will be there frequently if the phrase source given is Domat or Pothier; but, as was shown in discussing the cited "sources" of the Digest provisions on the community of gains, the resemblance to the cited French language "source" may be slight and that to an uncited Spanish text very close. Finally, the fact that Professor Batiza will cite a nonliteral but substantive source of a Digest article, in instances in which he is unable to find a literal source, compels the conclusion that the concordances are of mixed character, sometimes literal and substantive, sometimes literal only, and sometimes substantive only.

An Affirmative Note

Professor Batiza's work has not been in vain. On the contrary, it is a start in the direction of ascertaining both the "literal" and the "substantive" sources of the Digest articles. But Professor Batiza should revise the table of sources—Appendix C—so as to include citations to possible Spanish-Roman substantive and literal sources even in those instances in which the Digest articles appear somewhat closer, literally or substantively, or both, to French or other non-Spanish or non-Roman texts. If so revised it would become possible for the user—if he has the cited texts available to him—to determine how faithfully the Digest's redactors adhered to the substance of the Spanish-Roman laws in force (regardless of the phraseology used to express that content) or departed from it.

The table, too, should be so organized as to indicate whether the cited source is "substantive only," "literal only," or both "substantive and literal."

There is, too, a fact that emerges conclusively from Professor Batiza's efforts. He has given concrete proof to the many doubters, though why anyone who had studied the three documents should have had a doubt is difficult to say, that the redactors of the Digest had both the French *Code Civil* and the *Projet* of 1800 in their hands. The articles on separation from bed and board, for example, are proof enough. The extent to which the Digest of 1808 is Spanish, French, other, or original, however, cannot be determined conclusively by the mere tracing of provisions to texts extant in 1803, when Louisiana was acquired by the Union, no matter how well this work is done. What is necessary is a study of the institutions, principles, and rules of the Spanish law of that time[56] so that they—as opposed to the legislation and doctrinal writing in which they were represented—can be compared and contrasted with those of the Digest. This task is not so simple. Spanish civil law had not achieved systematic statement in 1803, 1808, 1825, or even 1870. This was the cause of the need for a Digest in 1805. This was in part the reason for the desire of the redactors of the Civil Code of 1825 to replace the "ancient laws" with a civil code, the law of which would be supplemented, in instances in which it would be found to be silent, only with solutions based on "natural law and reason, or received usages."[57] But this is the Spanish law that must be rediscovered before it can be determined how much of it is preserved in the Digest of 1808 and the Civil Codes of 1825 and 1870.

A practical approach, however, might very well be to begin by attempting to determine how well the Digest reflects the substance of the law contained in the references cited in the Moreau notes in *The de la Vergne Volume*, now readily available in libraries and on

[56] For a work of this character, see Pugh, *supra* note 48. This inquiry into the Spanish community of gains in 1803 was undertaken at the writer's request when Mrs. Pugh was his research assistant. It is entirely her work, however, and it was too excellent to remain unpublished.

[57] *Preliminary Report*, *supra* note 7, at LXXXIII-XCIII. Thus the redactors proposed not only a repeal of the "ancient laws," but also a repeal of Digest (1808) Prél.3, recognizing custom as a source of law. The legislature apparently did not wish to adopt a principle of legislative positivism, however, for the article on custom remained, and remains even now, in the Civil Code. Moreover, article 3521 of the Civil Code of 1825 repealed the former laws "in every case, for which it has been especially provided in this Code," that is, for all cases for which provision had been made in this Code. La. Acts. 1828, No. 83, repealed all the "ancient laws," but the judiciary construed this to mean a repeal of the ancient statutory laws and not the principles of justice of the ancient laws. Reynolds v. Swain, 13 La. 193, 198 (1839). The Spanish-Roman influence lived on.

the open market.[58] If the references in other similar annotated volumes[59] of the Digest are different, of course these should be consulted by those who have access to them. In those instances in which the references are to Domat and Pothier or other non-Spanish sources, the more difficult task of ascertaining the degree to which these references actually reflect the law in force in Spain in 1803 will have to be undertaken. The work will be long, often tedious, and may require the coordinated efforts of many if it is to succeed at all.[60] And, before it can begin on any scale, the major Spanish works referred to by Moreau must be made available by new editions, and, indeed, in good translations, if the significance of it all is to be appreciated by more than those few who would have the linguistic capacity to use the originals. Of prime importance, in the writer's estimation, is the publication of translations of the *Recopilación de Castilla,* so far as its provisions relate to private laws, and Febrero's manuals on Testaments and Contracts and on Actions (*Juicios*), so much used in Louisiana during the Spanish period and very clearly used by the redactors of the Digest. These translations, together with a reprinting of Moreau Lislet and Carleton's 1820 translation of those portions of *Las Siete Partidas* then in force in Louisiana,[61] would provide enough material to make an appreciation of the Spanish character of our law possible.

The real importance of all this effort is not knowledge of the past for its own sake, but its relevance today for the understanding, construction, extension, and orderly amelioration of the Civil Code in force. It must not be assumed that the adoption of a new Code in 1825 worked any wholesale abandonment of our Spanish institutions and rules. Many were changed in particulars, but inspection of the Projet of the Civil Code of 1825,[62] actually styled "Additions and Amendments" to the Digest of 1808, and the report of its redactors to the legislature[63] evidence the basic assumption that the character and thrust of the Spanish-Roman laws were being retained unless better rules could be found or devised.[64] This, of course, is properly the subject of another article.

[58] *See* note 1 *supra.*

[59] The Loyola, Louisiana State, and Tulane Law Schools' annotated copies of the Digest of 1808 are mentioned in note 2 *supra.*

[60] The writer, and others, had hoped the joint publication of *The de la Vergne Volume* by the Louisiana State University and the Tulane University Schools of Law would be the beginning of inter-institutional cooperation in the effort to study the origins and structure of Louisiana civil law. Such cooperation can involve consultation without commitment to joint enterprise. Thus the writer regrets that Professor Batiza, who knew of the writer's involvement and interest in the subject, did not speak with him before settling upon his *modus operandi.* Much pain might have been spared to both of them, and reader confusion avoided.

[61] *See* note 27 *supra.*

[62] *Preliminary Report, supra* note 7, at XC:

> We shall draw largely from these sources but we would not from thence have it inferred that we think it our duty to innovate in any case where a change is not called for by some great inconvenience in the existing Law, either felt, or foreseen, or some inconsistency in the present system with the provisions of that which we mean to offer. When these cases occur we shall not be deterred by the fear of innovation from proposing such changes as in our opinion are necessary to render the plan consistent with itself, and with the unchangeable principles of justice, which we shall steadily keep in view. But we pledge ourselves that no new provisions shall be introduced of which we shall not scrupulously have examined the tenor, and carefully considered every consequence, that can occur to us; and in all cases they shall if possible be borrowed from some Code of which the operation is known, rather than from our own resources.
>
> Where however local causes or other considerations require the establishment of rules never before applied, it shall be our endeavor to frame them in accordance with the spirit of the Legislation on which they are to be engrafted and to impress on them a character that will entitle them to equal duration.

[63] *Preliminary Report, supra* note 7.

[64] An illustration of the 1825 attitude may be given. The present articles 117 and 118, on the effects of putative marriage, were not in the Digest of 1808. These articles, actually copies of French *Code Civil* articles 201 and 202, were introduced on the recommendation of the redactors of the Civil Code of 1825. The redactors' comments note that both provisions "are conformable" to *Las Siete Partidas* 4.13.1, but, although they fail to disclose that article 117 is taken from the French *Code Civil,* the comments state that the rule of article 118, not found in the Spanish law, nevertheless was "equitable" and was being "taken from the French Code." *See* Projet of Civil Code of 1825, *supra* note 7, at 10.

SOURCES OF THE CIVIL CODE OF 1808, FACTS AND SPECULATION: A REJOINDER

RODOLFO BATIZA*

The picture presented in Professor Robert A. Pascal's article "Sources of the Digest of 1808: A Reply to Professor Batiza"[1] conveys such a distorted image of the nature, method, and reliability of the present writer's work that it becomes necessary to rectify and clarify several points. Most of the arguments adduced by Professor Pascal, however, can be turned against his own conclusions, as will be seen throughout this article. The readers of the *Tulane Law Review* will then have a more accurate and balanced version on which to base their judgment. This article will consist of two main parts: the first will consider Professor Pascal's criticism of the writer's work; the second will discuss the central thesis submitted by Professor Pascal in his article.

PROFESSOR PASCAL'S CRITICISM

The Special Issue

Professor Pascal first questions the medium chosen for presenting the writer's work and shows considerable annoyance at the fact that the Board of Student Editors of the *Tulane Law Review* published the article in a special issue of the *Review*.[2] He expresses his feelings as follows:

> The editors of the *Tulane Law Review* considered Professor Batiza's work so impressive as to warrant its publication in a *special issue* with which they reaffirm that prestigious *Review's* dedication to civil law and codification . . . . Thus Professor Batiza's work should receive more than the usual notice . . . .[3]

In order to judge whether the decision by the Board of Student Editors was justifiable, it will be helpful to recall the state of uncertainty, confusion, and conflict that existed regarding the sources of the Civil Code of 1808 prior to publication of the writer's work. In addition to the diverse opinions cited in the previous article,[4] the following may serve to illustrate the confusion:

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1 Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1972) [hereinafter cited as *Reply*].

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

3 *Reply* at 604.

4 Batiza at 7-8.

> In preparing the Digest of 1808 there is no doubt that Moreau Lislet and Brown followed the first projet of the Napoleon Code. There are very many articles identical with articles of the Napoleon Code, from which the legend gathered strength, until it is customary now to say that the Digest of 1808 was a mere transcript of the first projet of the Napoleon Code. *I am not here called upon to point out the differences, but that work will be done some day and the legend will be destroyed . . . .*[5]

A more recent statement indicated:

> The Louisiana Civil Code of 1808 had no accompanying report concerning the sources which had been consulted and utilized by its redactors. The first published reference to the existence of such a record appeared in 1941. However, there was no description of it, nor was there any subsequent publication about it; and a few months ago [1958] it was stated that *"to this date we lack an authoritative study on the sources used by L. Moreau Lislet and James Brown for the preparation of the 1808 code." It will be some time before such an authoritative study can be prepared to fill this gap in the legal history of Louisiana's civil law.*[6]

And almost forty years ago, in referring to some of the conflicting opinions that had been expressed on this matter, the following hope was voiced:

> *This indicates an interesting subject for detailed investigation,* far beyond the scope of this article, *which it is hoped some day will be made for the literature and history of Louisiana law.*[7]

The preceding quotations contain repeated pleas for an investigation such as that undertaken by the writer, and these pleas, coupled with the previous state of confusion concerning the sources of the Civil Code of 1808, certainly explain and justify the decision of the Board of Student Editors of the *Tulane Law Review*.

Civil Code v. Digest

Professor Pascal further objects to the use of the term "Civil Code of 1808" in the title to the writer's article. He offers his own explanation:

> Professor Batiza's reference is actually to the Digest of 1808. No doubt he used the term "Civil Code of 1808" in the title to his work because it has been *customary* to refer to

5 Dart, *Forward* to E. Saunders, Lectures on the Civil Code of Louisiana at XXXV (A. Bonomo ed. 1925) (emphasis added).

6 Dainow, *Moreau Lislet's Notes on the Sources of Louisiana Civil Code of 1808*, 19 La. L. Rev. 43 (1958) (emphasis added).

7 Tucker, *Source Books of Louisiana Law*, 6 Tul. L. Rev. 280, 283-84 (1932) (emphasis added).

> the Digest as such and thus the term would be more communicative to potential readers. This writer, however, will use "Digest" exclusively.[8]

It is surprising that Professor Pascal, in making the foregoing statement, ignored the fact that not only as a matter of customary reference, but also as a matter of historical legislative record, the term "Civil Code," in both French and English, was consistently used in a number of early Louisiana resolutions and acts, beginning with the one dated June 7, 1806, whereby both the Legislative Council and the House of Representatives concurred in the appointment of James Brown and Louis Moreau Lislet "to compile and prepare, jointly a Civil Code for the use of this territory."[9] The Code of 1808, moreover, in scope, structure, and drafting technique, is an authentic civil code in the western tradition inaugurated by the *Code Civil des Français* in 1804, rather than a digest.[10] Here, Professor Pascal values form over substance, thus being inconsistent with an attitude he later professes to advocate.[11] In any event, it is possible that this point, apparently one of terminology only, might have some relation to the question of whether the commissioners complied with the instructions they had received in order "to make the civil law by which the territory is now governed the ground work of said code."[12]

"Philological" Research

A more substantial criticism, one closely connected with the basic problem of the sources of the code, is Professor Pascal's intimation that the writer's work amounts to little more than an exercise in philology.

> Professor Batiza, noting that the Digest of 1808 was prepared in French and then translated into English, *classifies the Digest's articles as having French "sources" to the extent the words and phrases used in their French texts can be identified in French legislation and other French language writings.* Had Professor Batiza *pretended to no more than a philological exercise—and made it clear he intended no more*—there could have been no objection to his work, no cause for misunderstanding, and no reason for this reply.[13]

[8] *Reply* at 604 n.4 (emphasis added).

[9] *See* resolution adopted June 7, 1806, La. Acts 1806, at 214-18; Act of April 14, 1807 ("to fix the compensation to be allowed to the two jurisconsults appointed to prepare a *civil code* for the use of the territory of Orleans"), La. Acts 1807, Chap. XXXI, at 191-92 (emphasis added).

[10] "A *code* is to be distinguished from a *digest*. Digests of statutes consist of a collection of existing statutes, while a code is promulgated as one new law covering the whole field of jurisprudence." Black's Law Dictionary 323 (4th ed. 1951).

[11] *Reply* at 605-07.

[12] *See* pp. 649-50 *infra*.

It should be recalled that the published results of the writer's research revealed for the first time most of the *actual* sources from which Moreau Lislet[14] had copied, either in whole or in part, the provisions comprising the Code of 1808. The writer was able to identify, of a total of 2,160 provisions, the individual sources of 2,081 as follows: the French *Projet* of the year VIII (1800) had been the source of 807 provisions (315 literally reproduced, 398 almost literally); the French Civil Code had been the source of 709 provisions (293 literally reproduced, 382 almost literally); Domat's work had been the source of 175 provisions (9 literally reproduced, 98 almost literally); Pothier's work had been the source of 113 provisions (32 almost literally reproduced); the Custom of Paris had been the source of nine provisions (3 almost literally reproduced); and the Ordinance of 1667 on civil procedure had been the source of six substantially reproduced provisions.[15] The sources for the balance of 245 provisions were as follows: *Las Siete Partidas*, 67 provisions; *Febrero Adicionado*, 52; the Institutes of Justinian, 27; Blackstone, 25; the Digest, 16; the *Curia Philipica*, 16; the Louisiana Act of April 6, 1807, on marriages, 16; and the *Recopilación de Castilla*, 14.[16] The remaining provisions were borrowed from the following sources: the old *Code Noir*, the Black Code, Justinian's Novel LIII, the Louisiana Act of 1806 on apprentices and indented servants, the *Fuero Real*, the third *Cambacérès Projet*, the *Ordenanzas de Bilbao*, the Ordinance of 1804 on intestate estates, the Louisiana Act on emancipation of slaves, and the Act of 1805 regulating the practice of the Supreme Court.[17]

For the purpose of facilitating appreciation of the nature of the research, a clear distinction was made between "direct" and "indirect" or "remote" sources and a classification was devised to show the degree to which Moreau Lislet had copied provisions: verbatim (v.), almost verbatim (a.v.), substantially influenced (s.i.), and partially influenced (p.i.).[18] In a number of cases a further qualification was made by adding the words "in part." This classification of degrees of influence, "though not revealing all possible nuances, provides a fairly accurate basis for appraisal."[19]

[13] *Reply* at 607 (emphasis added).

[14] Batiza at 45-134 (Appendix C).

[15] *Id.* at 11-12.

[16] *Id.* at 12.

[17] *Id.*

[18] *Id.* at 13.

[19] *Id.*

Obviously, only a direct comparison between the source and the borrowed provision can show the degree of resemblance, and a number of illustrations were provided in the article for such comparison.[20] Thus, it is readily apparent that only after the actual direct source had been isolated and identified were the four classification categories applied to determine the degree to which that source influenced the code article. Either because of complete misunderstanding by Professor Pascal, or simply as a device to further discredit the writer's findings, Professor Pascal's statements have brought utter confusion regarding "direct" sources and also regarding what he calls "word," "phrases," and "verbal" sources, as opposed to "substance" sources. Examining some illustrations and references given by the writer of "substantial" influence from French sources, Professor Pascal observes:

> The two above quoted *"substantially influencing" word sources* of Digest articles are certainly on the same subject matter, but it is submitted that *similar passages of substantially the same content* might have been found in writings in any language on almost any Roman-oriented legal system. The Spanish is no exception.[21]

Criticizing the writer for not citing *Las Siete Partidas* and Febrero as sources for Civil Code of 1808, 3.1.96, Professor Pascal then states:

> All give the same *substance*, but none is cited by Professor Batiza, presumably in conformity with his announced practice of referring only to what he regards *the "primary source," that is to say, that passage in the French language most consistent in phraseology with the French text of the Digest article.*[22]

The preceding quotations clearly illustrate Professor Pascal's confusion concerning what the writer termed a "direct" source and a "verbatim" or "almost verbatim" influence. In regard to the former, the writer had stated:

> Except in a few instances, only the *direct source* is given, since identification of *remote or indirect sources* is beyond the scope of the investigation. Provisions from the French *Projet* and Code *often have their sources in Domat or Pothier;* in turn, statements in the works of both writers *can be traced either to Roman law or French customary law,* showing thus the full genealogy of a rule or principle.[23]

The following illustration, where the "direct" and "indirect" sources can easily be observed, as well as the "verbatim" and "almost verbatim" adoption of language, *together with the "substance" therein embodied,* provides an example of what the writer had in mind:

Civil Code (1808): *Les conventions obligent, non-seulement, à ce qui y est exprimé, mais encore à toutes les suites que l'equité, l'usage, ou la loi, donnent à l'obligation, d'après sa nature.*[24]	French Civil Code (1804): *Les conventions obligent, non-seulement, à ce qui y est exprimé, mais encore à toutes les suites que équité, usage, ou la loi, donnent à l'obligation d'après sa nature.*[25]	French *Projet* (Year VIII): *Les conventions obligent, non-seulment, à ce qui y est exprimé, mais encore à toutes les suites que l'equité, l'usage ou la loi, donnent à l'obligation d'après sa nature.*[26]	Domat: *Les conventions obligent, non-seulement, à ce qui y est exprimé, mais encore à tout ce que demande la nature de la convention, & à toutes les suites que l'equité, les loix & l'usage donnent à l'obligation où l'on est entré . . . .*[27]
(Civil Code (1808): Contracts oblige to the performance not only of what is expressly stipulated, but also to the performance of all things which, from equity, usage or law are incidental to the obligation, according to its nature.)[28]			Domat gives the following sources: *Alter alteri obligatur, de eo quod alterum alteri, ex bono & aequo praestare oportet. L.2, § ult.ff. de obl. & act. Ea quae sunt moris & consuetudinis in bonae fidei judiciis debent venire. L.31, § .20, ff de aed. ed. l. 17, § 1, ff. de aquâ & aq. pl.* (According to the modern form of citation: Digest 44.7.2.3; 21.1.31. 20; 39.3.17.1.)[29]

In the preceding illustration either the French Code or the *Projet* (since the language in both is identical) was the "direct" and

[20] *Id.* at 14-27.
[21] *Reply* at 615 (emphasis added).
[22] *Id.* (emphasis added).
[23] Batiza at 12-13 (emphasis added).
[24] La. Civil Code of 1808, III.III.35.
[25] Code Civil des Français art. 1135 (1804).
[26] Projet de Code Civil, III.II.XXXIII (1800).
[27] 1 Domat, Les Loix Civiles dans leur Ordre Naturel, Liv. I, Tit. I, Sect. III, n. I (24) (1777) [hereinafter cited as Domat].
[28] La. Civil Code of 1808, 3.3.35.
[29] Domat, Liv. I, Tit. I, Sect. III, n. I, note *a* (24).

"verbatim" source of the Code of 1808, while Domat is the "indirect" or "remote" source, and the Digest of Justinian the original source of the provision. The following illustration will provide further proof of the writer's statement:

Civil Code (1808): *La femme n'est pas réputée marchande publique, si elle ne fait que détailler les marchandises du commerce de son mari, mais seulement quant elle fait un commerce séparé.*[30]	French Civil Code (1804): *Elle [la femme] n'est pas réputée marchande publique, si elle ne fait que détailler les marchandises du commerce de son mari; mais seulement quand elle fait un commerce séparé.*[31]	French *Projet* (Year VIII): *Elle [la femme] n'est pas réputée marchande publique, si elle ne fait que débiter les marchandises dont son mari se mêle; mais seulement quand elle fait un commerce séparé, et autre que celui de son mari.*[32]	Pothier: *L'article 235 [Coutume de Paris] explique ce que la Coutume entend par marchande publique. Il y est dit: "La femme n'est réputée marchande publique, pour débiter les marchandises dont son mari se mêle; mais elle est réputée marchande publique, quand elle fait marchandise séparée, & autre que celle de son mari."*[33]
(Civil Code (1808): She [the wife] is not considered as a public merchant, whilst she retails only the effects of her husband's commerce, but when she carries on a separate trade.)[34]			

In the foregoing illustration, the French Code was the "direct" and "almost verbatim" source of the Code of 1808, while the *Projet*, Pothier, and the Custom of Paris were the "indirect" or "remote" sources in increasing degrees of remoteness. In regard to the problem of identifying "verbatim" or "almost verbatim" sources, as contrasted with "substantial" or "partial" influence from other sources, the writer had clearly explained the method of identification:

> Because the Code of 1808 was originally drafted in French and then translated into English and because *identity or substantial identity of wording* is necessary to classify a source as "verbatim" or "almost verbatim," *only the French and Louisiana sources can be either "verbatim" or "almost verbatim." The only exception is represented by direct borrowings from Blackstone* (mostly "almost verbatim," never "verbatim") that were then translated into French. *All other sources, whether in Spanish or Latin,* had to come under either of the two remaining categories, *"substantially" or "partially" influenced, since only their concepts and not their language were adopted.*[35]

[30] La. Civil Code of 1808, I.IV.XXV.
[31] Code Civil des Français art. 220 (1804).
[32] Projet de Code Civil, I.V.LXVIII (1800).
[33] 3 R. Pothier, *Traité de la Puissance du Mari*, Traités de Droit Civil, Part. I, Sect. II, § 11, n. 20 (462) (2d ed. 1781).
[34] La. Civil Code of 1808, 1.4.25.

The following illustrations will show the writer's intention in the preceding quotation:

Civil Code (1808): *La loi ne considérant le mariage que comme un contrat civil, elle sanctionne, comme valide, tout mariage, lorsque les parties au moment ou elles ont contracté:* 1° *Voulaient contracter;* 2° *Pouvaient contracter;* et 3° *Ont contracté, conformément aux formes et solemnités prescrites par la loi.*[36]	La. Acts 1807: *Attendu que la Loi ne considère le Mariage que comme un contrat civil, elle sanctionne, comme valide, tout Mariage, lorsque les parties, au moment où elles ont contracté:* 1° *Voulaient contracter;* 2° *Pouvaient contracter;* 3° *Ont contracté, conformément aux formes et aux solemnités prescrites par la Loi.*[37]
(Civil Code (1808): As the law considers marriage in no other view than that of a civil contract, it sanctions all those marriages where the parties, at the time of making them, were, 1stly, Willing to contract; 2dly, Able to contract; and 3dly, Did contract pursuant to to the forms and solemnities prescribed by law.)[38]	
Civil Code (1808): *Celui qui veut faire un four, une forge, ou un fourneau contre le mur mitoyen, doit laisser un demi-pied de vide et intervalle entre ledit mur et celui de son four, forge ou fourneau et ce dernier mur doit être d'un pied d'épaisseur.*[39]	Custom of Paris: *Qui veut faire forge, four & fourneau contre le mur mitoyen, doit laisser demi-pied de vuide & intervalle entre deux du mur, de four ou forge; & doit être ledit mur d'un pied d'épaisseur.*[40]
(Civil Code (1808): He who wishes to build an oven, a forge, or a furnace against the wall held in common, is bound to leave half a foot interval and vacancy betwixt said wall and that of his oven, forge or furnace, and this last wall must be one foot thick.)[41]	

[35] Batiza at 13-14 (emphasis added).
[36] La. Civil Code of 1808, I.IV.IV.
[37] An Act concerning the celebration of marriages, April 6, 1807, La. Acts 1807, ch. XVII, § V.
[38] La. Civil Code of 1808, 1.4.4.
[39] *Id.* II.IV.XL.
[40] Coutume de Paris art. CXC, *found in* 1 C. Ferriere, Commentaire sur la Coutume de la Prévoté et Vicomté de Paris (1788).
[41] La. Civil Code of 1808, 2.4.40.

Civil Code (1808): Terms of art or technical terms and phrases, are to be interpreted according to their received meaning and acceptation with the learned in each art, trade and profession.[42]	Blackstone: Again; terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science.[43]

The writer had also explained, in referring to provisions whose sources he had traced to *Las Siete Partidas, Febrero Adicionado,* the Institutes, the Digest, the *Curia Philipica,* and the Compilation of Castile, among others, that

> [t]he accuracy of some of the figures given in the text for these sources is not as precise as that of the French sources *because of the difference in language and the number of instances where several possible sources may account for one single provision.* Moreover, *there are considerable similarities between some French and Spanish legal principles owing to the heritage of Roman law and even some Germanic customs.*[44]

Civil Code (1808): *Il y a trois ordres d'héritiers légitimes; savoir: Les enfans et descendans légitimes; Les pères et mères et autres descendans légitimes; et les collatéraux.*[45]	French *Projet* (Year VIII): *Il y a trois espèces de successions pour les parens: la succession qui échoit aux descendans, celle qui échoit aux ascendans, et celle á laquelle sont appelés les parens collatéraux.*[46]	French Civil Code (1804): *Les successions sont deferées aux enfans et descendans du défunt, á ses ascendans et á ses parens collatéraux dans l'ordre et suivant les règles ci-après déterminés.*[47]	Domat: *Il y a trois ordres de successions légitimes, selon trois ordres de personnes que les Loix y appellent. Le premier est celui des enfans & autres descendans; le second, des peres & meres & autres ascendans; & le troisieme, des freres & soeurs, & des autres proches qu'on appelle collatéraux . . . .*[48]	*Las Siete Partidas: Tres grados, e liñas son de los descendientes, assi como de parentesco. E la una es de los fijos, e de los nietos, e de los que descienden por la liña derecha. La otra es de los ascendientes, assi commo el padre, o el auuelo, e los otros que suben por ella. La tercera es de los de traviesso assi como los hermanos, e los tios, e los que*
(Civil Code (1808): There are three classes of legal heirs, to wit: The children and other lawful descendants. The fathers and mothers and other lawful ascendants. And the collateral kindred.)[50]	(French *Projet* (Year VIII): There are three kinds of successions for the relatives: the succession which belongs to descendants; that which belongs to ascendants, and that where collateral relatives are called.)[51]	(French Civil Code (1804): Successions are granted to the children and descendants of the deceased, to his ascendants, and to his collateral relatives, in accordance with the order and rules hereinafter set forth.)[52]	(Domat: There are three orders of legitimate successions according to three orders of persons which the Laws designate. The first is that of children and other descendants; the second that of fathers and mothers and other ascendants; and the third that of brothers, sisters and other relatives, which are called collaterals.)[53]	*nascen dellos . . . .*[49] (*Las Siete Partidas*: There are three lines of relationship. The first is that of the descendants, as the children and grandchildren, and those who descend in the direct line. The second is that of the ascendants, as the father and grandfather and other ascendants. The third is the collateral line, as the brothers and uncles, and those who are born to them.)[54]

[42] *Id.* 1808, 1.Prel.15.
[43] 1 W. Blackstone, Commentaries 60 (9th ed. 1783).
[44] Batiza at 12 n.48 (emphasis added).
[45] La. Civil Code of 1808, III.I.11.
[46] Projet de Code Civil, III.I.XXVI (1800).
[47] Code Civil des Français art. 731 (1804).
[48] Domat, Part. II, Préf., n. IV (339).

In the preceding illustration, since the principle or concept involved is the same in the French *Projet* and the Code, Domat, and *Las Siete Partidas,* and since the language does not provide a definite clue as to the specific source, it is impossible to identify the individual source and therefore all four were included in Appendix C of the writer's article.

When, however, the language provides a definite clue, identification of the individual source offers no difficulty, as shown in the following illustration:

Civil Code (1808): *Nul ne peut être constraint de céder sa propriété,*	French Civil Code (1804): *Nul ne peut être constraint de céder*	French *Projet* (Year VIII): *Nul ne peut être constraint de céder sa*

[49] Sexta Partida, Tit. XIII, Ley II.
[50] La. Civil Code of 1808, 3.1.11.
[51] Writer's translation.
[52] Writer's translation.
[53] Writer's translation.
[54] 2 The Laws of Las Siete Partidas Which are Still in Force in the State of Louisiana 1098 (L. Moreau Lislet & H. Carleton transl. 1820) (Partida Sixth, Tit. XIII, Law 2).

si ce n'est pour cause d'utilité publique et moyennant une juste et préalable indemnité.[55]	*sa propriété, si ce n'est pour cause d'utilité publique, et moyennant une juste et préalable indemnité.*[56]	*proprieté, si ce n'est pour cause d'utilité publique et moyennant une juste indemnité.*[57]
(Civil Code (1808): No one can be compelled to part with his property, unless by reason of public utility and on consideration of an equitable and previous indemnification.)[58]		

In the preceding illustration, the addition of the two words "*et préalable*" at the end of the French Code article, allows the rather simple observation, based on the language alone, that the Code, not the *Projet*, was the "direct" and "verbatim" source of the provision in the Louisiana Civil Code, although the concept or principle is the same in all three provisions.

In view of the foregoing illustrations, what the writer means by "direct" and "indirect" sources, "verbatim" or "almost verbatim" borrowings, and "substantial" influence should be quite clear. These illustrations, and many others of the same or similar kind, should expose the value of Professor Pascal's opinion that the writer's work is merely an exercise in philology. The language of provisions, which of necessity embodies concepts or principles, will in most cases lead to the *actual* source, as is so clearly evident in the foregoing illustrations, as well as in the borrowing from Blackstone concerning the *soi-disant* pregnant widow[59] that Professor Pascal so easily dismissed.[60] Unless the distinctions of the various categories of sources are carefully kept in mind, needless confusion will follow, as proved by Professor Pascal's misunderstanding. The following conclusion is reached by Professor Pascal:

> On the contrary, Professor Batiza must be understood to assume implicitly that an article is to be classified as having its *substantive source* in French law to the degree its specific phraseology can be traced to borrowings from French legal writings, *even though the substance* of the rule expressed by the article conforms to the Spanish-Roman law in force in 1808.[61]

The foregoing assumption by Professor Pascal is without any

[55] La. Civil Code of 1808, II.II.II.
[56] Code Civil des Français art. 545 (1804).
[57] Projet de Code Civil, II.II.II (1800).
[58] La. Civil Code of 1808, 2.2.2.
[59] Batiza at 27.
[60] *Reply* at 610-11.
[61] *Id.* at 607-08 (emphasis added).

basis whatsoever. The writer will state his position on this point categorically by simply rephrasing the above quotation as follows: an article is to be classified as having its "verbatim" or "almost verbatim" sources in French law to the degree its specific phraseology can be traced to borrowings from French legal writings showing either "verbatim" or "almost verbatim" language. The fact that the *substance* of the rule expressed may conform to the Spanish-Roman law in force in 1808 is entirely irrelevant, merely proving what the writer had already pointed out himself: "[T]here are considerable similarities between some French and Spanish legal principles owing to the common heritage of Roman law and even some Germanic customs."[62] Professor Pascal then concludes:

> Finally, the fact that Professor Batiza will cite a *nonliteral but substantive* source of a Digest article, in instances in which he is unable to find a *literal source,* compels the conclusion that the concordances are of a mixed character, *sometimes literal and substantive, sometimes literal only, and sometimes substantive only.*[63]

Again, needless confusion. Every "literal" ("verbatim") source is necessarily "substantive." Professor Pascal's insistence on an alleged dichotomy of "verbal," "word," or "phrase" sources versus "substance" sources is unwarranted. The writer devised a fourfold classification in order to reflect in a general way the drafting technique employed by Moreau Lislet in preparing the Code of 1808. In most instances Moreau Lislet copied provisions in "verbatim" or "almost verbatim" form mainly from French sources, the *Projet*, the Civil Code, Domat, Pothier, and the Custom of Paris; in a number of instances he adopted concepts or principles from either French, Spanish, Roman or other sources; in other instances he adopted only in part rules or provisions from a number of sources; and in many cases he drafted his own provisions to give expression to local usage and practice.

Some "Random Examinations"

We come now to a number of specific examples discussed by Professor Pascal, termed "random examinations," where he attempts to show concrete proof of inaccuracies in the writer's work. With only one main exception, this part of Professor Pascal's article shows some interesting illustrations of misunderstanding and distortion. The writer will be brief in discussing the "random examinations," the prolixity of which necessitated practically half of Professor Pascal's article.

[62] Batiza at 12 n.48; *see* pp. 636-37 *supra.*
[63] *Reply* at 624 (emphasis added).

Civil Code of 1808, Prél.11:[64] Professor Pascal did not have to belabor his point at such length. This is, in all probability, the only instance in the writer's whole work involving an error of omission of the kind pointed out by Professor Pascal. The writer regrets the oversight of article 6 of the French Civil Code and is glad to acknowledge it. He also expresses appreciation to Professor Pascal for discovering the omission. In the writer's opinion, this is the single, most important, scholarly contribution in Professor Pascal's article. The writer will therefore make the necessary corrections in his work. Two corrections will be necessary in Appendix B:[65] "French Projet: 16 (2 v.; 11 a.v.; 3 s.i.)" and "French Code: 3(2 a.v.; 1 s.i.)." Another correction will be made in Appendix C[66] where the source of article XI will be given as "almost verbatim (a.v.)" from article 8 of the French Code and an asterisk placed after article VII of the French *Projet* to indicate that it was not the "direct" source. The writer appreciates, but declines, Professor Pascal's kind suggestion that the initial error was committed by "someone assisting Professor Batiza in his extremely time consuming effort . . . ."[67] The writer conducted the entire research without any assistance and therefore assumes full personal responsibility for the whole work.

Civil Code of 1808, 1.7.57:[68] There is no need to follow Professor Pascal's subtle distinction here. It will suffice to recall that in this particular instance Professor Pascal shows great confusion about similarity in phraseology being "partial" or "substantial" instead of "verbatim" or "almost verbatim." In this instance, the writer was obviously referring to the "substantial" influence in the principles involved regarding parental liability for the offenses or *quasi* offenses committed by their children.

Civil Code of 1808, 3.1.96:[69] Professor Pascal's main complaint is that neither *Las Siete Partidas* nor Febrero were mentioned as possible sources of this article. The use of English translations by Professor Pascal obscures the fact that there are significant similarities in the French texts. This is another instance where identity of concepts exists under both French and Spanish possible sources, but coincidences in wording made the writer choose the French source. The reader may judge:

Civil Code (1808): L'héritier soit testamentaire, ou légitime, *ou irrégulier, qui craint d'accepter une succession, ou d'y renoncer avant* d'avoir eu le tems *d'en connaitre les forces et les charges, peut n'accepter la succession que sous* bénéfice d'inventaire.[70]	Domat: Tout héritier, soit testamentaire, ou ab intestat, *qui doute que l'hérédité soit avantageuse,* & qui craint de s'y engager, *peut auparavant demander qu'il soit fait un inventaire des biens & des titres & papiers de l'hérédité*: & sans prendre le tems *pour délibérer, faire sa déclaration qu'il se rend héritier par* bénéfice d'inventaire. *Et par cette voie il ne sera tenu* des dettes & des charges *de l'hérédité, qu'autant que les biens pourront y suffire, sans que les siens y soient engagés.*[71]

Civil Code of 1808, 3.5.63-85:[72] In discussing these provisions, Professor Pascal presumes to teach the writer the proper use of legal terminology in the writer's native language by correcting the legal term "*sociedad de ganancia*[*lc*]*s*."[73] Professor Pascal failed to realize that use of the word *ganancias* was deliberate. Use of *gananciales* in referring to a legal text that first appeared in the *Fuero Real* (c. 1255)[74] and that was confirmed in the *Leyes de Toro* (1505)[75] would have been an unpardonable anachronism. The term "*gananciales*" became officially recognized in Spanish late in the 18th century.[76]

The following quotation is another example of the distortion in Professor Pascal's article:

> Not only do such statistics help explain how Professor Batiza classified the Digest's articles as 85 percent French, but presumably it is in the light of such statistics that Professor Batiza was able to conclude that the "Spanish community of . . . gains . . . rather than being opposed to the French system of *communauté*, supplements it."[77]

What the writer actually wrote was

> [the] Spanish system of community of acquets or gains (*sociedad de ganancias*) that appears in the Code, rather than being opposed to the French system of *communauté*, supplements it.[78]

64 *Id.* at 612-13.
65 Batiza at 36.
66 *Id.* at 45.
67 *Reply* at 612.
68 *Id.* at 613-14.
69 *Id.* at 614-15.

70 La. Civil Code of 1808, III.I.96 (emphasis added).
71 1 Domat, Part II, Liv. I, Tit. II, Sect. II, n. I (381) (emphasis added).
72 *Reply* at 616-20.
73 In view of this, it is surprising that Professor Pascal missed the opportunity for a more justified correction when the writer, his native Spanish being the main culprit, used the term *Exposition des Motifs* rather than *Exposé des Motifs*. *See* Batiza at 7.
74 El Fuero Real de España, *De las Ganancias del Marido y la Muger*, Lib. III, Tit. III, Leyes I,II (c. 1255), *found in* 1 Los Códigos Españoles 353 (2d ed. A. de San Martín 1872).
75 Leyes de Toro, Leyes LII, LX, LXXVII, LXXVIII (1505), *found in* 6 Los Códigos Españoles 567 (2d ed. A. de San Martín 1872).
76 Resolution approved by Charles III, dated December 20, 1778. *See* 9 Los Códigos Españoles 326 (2d ed. A. de San Martín 1872).
77 *Reply* at 617.
78 Batiza at 29 (emphasis added).

The exact meaning of the writer's statement should be quite obvious: the *adaptation* by the drafter of the Spanish system of gains as one partial aspect of the general concept of conjugal partnership in a French inspired background of rules, irrespective of differences in their original metropolitan settings. Yet, Professor Pascal devoted an inordinate space to belabor this point and had to suppress significant words in the writer's original statement in order to make his point plausible. He then refers to the writer's statement as a "severe distortion" and feels "[a]stonished by Professor Batiza's characterization."[79] Professor Pascal resorted to the same technique of excision (but in a much greater scale) to deprive of any real significance that most interesting illustration of direct borrowing from Blackstone.[80]

Civil Code of 1808, 3.20.75:[81] Professor Pascal then directed his attention to this provision on acquisitive prescription of movables. In his view,

> [o]nce again, however, Professor Batiza showed his lesser regard for the substance of the law and the great latitude of his classification "substantially influenced" . . . .[82]

In all frankness, the writer confesses that, not being a Louisiana lawyer, he was not aware that article 3.20.75 "is well known to be different from the corresponding French *Code Civil* article on the subject."[83] The writer mostly observed two provisions, Louisiana and French, involving substantially similar situations, with the Louisiana provision surrounded by others adopted "almost verbatim" from the French *Projet* and Code. The writer is willing to admit, however, that it would have been preferable to have classified the provision as being only "partially influenced," or even (to satisfy Professor Pascal's scruples) to consider the provision of unknown origin.

Civil Code of 1808, 1.5.1-20:[84] The following statement by Professor Pascal came as an unexpected surprise:

> Here Professor Batiza's classifications are, on the whole, quite correct insofar as they show very substantial borrowings of whole articles or substantial parts of articles from the French *Code Civil* and *Projet* of 1800 . . . .[85]

The foregoing statement would have been more accurate, however,

[79] *Reply* at 619, 621.
[80] *Id.* at 610-11.
[81] *Id.* at 621-22.
[82] *Id.* at 621.
[83] *Id.*
[84] *Id.* at 622-23.
[85] *Id.* at 622.

had Professor Pascal acknowledged that, as shown in the writer's work, of the twenty provisions in Title V, thirteen taken from the French *Projet* are "almost verbatim" reproductions and four from the Code show the same degree of resemblance.[86] This particular instance should have also served Professor Pascal as an obvious illustration that the writer's work is something more than an exercise in philology.

Thus, in the manner presented in the preceding pages, on the basis of one omission, one possibly wrong classification, and a few questionable arguments, Professor Pascal has striven to minimize and discredit as a whole a work involving identification of the actual sources of more than two thousand provisions in the Code of 1808.

THE CENTRAL THESIS

Finally, we come to Professor Pascal's central thesis, which he propounds as follows:

> *[T]he Digest of 1808, though written largely in words copied from, adapted from, or suggested by French language texts, was intended to, and does for the most part, reflect the substance of the Spanish law in force in Louisiana in 1808.*[87]

Professor Pascal further explains that the Spanish-Roman law then in force did not exist in modern codified form, or even in a form suitable for drafting a civil code of Spanish-Roman orientation, and the necessity of drafting the code in French and English made the task still more difficult. He adds that French law, because of general common origins, often resembled Spanish law, and the French Civil Code of 1804 represented a valuable model of form since it provided both an organizational plan and a fund of civil law texts already in French. He then states that the *Projet* of 1800, on the other hand, furnished some of the purer Roman and Roman-Visigothic inspired institutions of southern France, more similar in substance to the Spanish-Roman law.[88] So, following Professor Pascal's version, in order to fulfill their mission,

> [t]he commissioners, or redactors, acted as intelligent and practical men. Without in any way violating their mandate to draft a "civil code" based on Spanish-Roman civil laws in force, they used, wherever they could, the *French Code Civil, its projets, and other French language works,* the texts of which contained or could be modified to express provisions reflective of the Spanish-Roman substantive law in

[86] Batiza at 36, 50.
[87] *Reply* at 604 (emphasis by Professor Pascal).
[88] *Id.* at 605-06.

> force. Where, on the other hand, French language texts could not be copied or adapted to this end, they used other texts that could, or they drafted provisions that would serve the purpose.[89]

It is of interest to compare a statement by Professor Pascal on the same subject a few years earlier, before he knew the results of the writer's work:

> Both documents [the de la Vergne volume and the volume owned by Louisiana State University] will facilitate research into the sources of Louisiana civil law and help demonstrate that the redactors of the Digest of 1808 did indeed consider it a digest of the Spanish laws then in force in Louisiana *even though they cast it in the mold of the then new French Code Civil.*[90]

The preceding statement could not of course either cover or explain more than three hundred provisions in the Code of 1808 which were adopted in most cases literally or almost literally from Domat, Pothier, the Custom of Paris, and other sources. So Professor Pascal, taking advantage of the writer's findings but without acknowledging them, has conveniently expanded his original position to include "other French language works." This is another example both of the "philological" nature of the writer's research and of Professor Pascal's techniques. But even with this belated addition, Professor Pascal's central thesis completely fails to cover or explain numerous borrowings from half a dozen Louisiana Acts and twenty-five borrowings from Blackstone that were incorporated in the Code of 1808.

Substance v. Form

Professor Pascal further states:

> Proof or disproof of their having made the Spanish-Roman laws the "ground work" of the Digest, nevertheless, must appear from a comparison of the *substance* of the law in the Digest—the spirit and import of its institutions, principles, and rules—with the *substance* of the Spanish-Roman law in effect in 1808. If this substance is predominantly Spanish-Roman, then it does not matter that it is expressed in terms French and English rather than Spanish and Latin, or that the specific terms employed often were inspired by, adapted from, or even copied from texts on French or other systems of law. The Digest would remain what it was supposed to be and did purport to be, a digest of the Spanish-Roman "civil laws in force" in 1808.[91]

To make "substance" the sole criterion for the identification of sources when the actual sources can be established beyond doubt on the basis of both language and substance is nonsensical. On the basis of substance alone, either Portuguese or Italian rules, or those from any other "Roman-oriented" system, could be advanced as sources of the Code of 1808 as readily as the Spanish rules. Incidentally, in view of Professor Pascal's repeated use of the expression "Spanish-Roman law," it should be noted that the expression is inaccurate and should be, at best, "Castilian-Roman law." In effect, the marriage of Isabella of Castile and Ferdinand of Aragon did not bring legal unity to Spain, and the various regions in the Peninsula retained their particular legal systems. Louisiana, like the other territories comprising the Spanish Empire, was ruled by *Castilian* law as supplementary law. The Compilation of the Laws of the Indies provided in Law II, Tit. I, Lib. II, that in cases of gaps or *lacunae* the laws of the Kingdom of Castile, according to the order of preference set forth by the laws of Toro, would apply.[92] In addition to the Germanic influence, the Arabic should not be overlooked for a better appreciation of Castilian legal institutions. The Arabic influence can be readily seen in key legal terms such as *albacea, alcalde, alguacil,* and so forth.

Three illustrations will clearly show that, contrary to Professor Pascal's thesis, in adopting rules from various French and other sources, Moreau Lislet did not, and could not have intended to, "reflect the Spanish law in force in Louisiana":

Civil Code (1808): *Les eselaves ne*	*Las Siete Partidas: E pueden los sieruos*	Pothier: *Les esclaves n'ayant aucun état civil,*	*Code Noir: Les solemnités prescrites par*

[89] *Id.* at 606 (emphasis added). Compare Professor Pascal's statement with the following: "Presumably, the commissioners, and the legislators as well, had a very high regard for the codification experience in France, *not only as to form, but also as to content* which reflected the results of the Revolution in adjustment to the world order of the new century. *Presumably also, the commissioners and the legislators were not intending deliberately to disregard their instructions to compile a civil code grounded on the civil laws by which the country was then governed.* On the contrary *it must be presumed* that what they did was in the fulfillment of that mandate." Dainow, *The Louisiana Civil Law*, in Civil Code of Louisiana at xix (2d ed. J. Dainow 1961) (emphasis added). It should be noted that the presumptions in the preceding quotation are of the kind civilians characterize as being *iuris tantum* rather than *iuris et de iure.*

[90] Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 with Marginal Source References in Moreau Lislet's Hand*, 26 La. L. Rev. 25, 26 (1965) (emphasis added).

[91] *Reply* at 606.

[92] The Laws of Toro (1505) essentially reproduced the order of preference set forth in *Ordenamiento de Alcalá* (1348). The order to be followed by courts in deciding legal disputes was: ordinances and decrees in force; where these were silent, resort was to the municipal *fueros* (local custom and usage having the force of law); where these were silent, the *Siete Partidas* would govern. *See* Ots Capdequi, El Estado Español en las Indias 9, 10 (1941). *Cf.* Moreau Lislet, *Preface* to 1 The Laws of Las Siete Partidas Which are Still in Force in the State of Louisiana at xvii-xviii (L. Moreau Lislet & H. Carleton transl. 1820). In the previous work, the writer referred to "Spanish sources" merely for convenience, but was not attempting to characterize, as Professor Pascal does, the national constituent elements of the "Spanish" legal system.

peuvent se marier sans le consentement de leur maîtres, et leurs mariages ne produisent aucuns des effets civils qui appartiennent à ce contrat.[93]	*casar en vno: e maguer lo contradigan sus señores, valdra el casamiento; e no deue ser desfecho por esta razon, si consentiere el vno en el otro, segund dize en el Titulo de los Matrimonios.*[94]	Servi pro nullis habentur; L.32,ff de reg. Jur. *quoique leur mariage fut valable par le Droit naturel, pourvu qu'il eût été fait du consentement de leur maîtres, & qu'ils n'eussent aucun empechement, c'étoit un mariage destitué de tous les effets civils, & qui n'en avoit d'autres que ceux qui naissent du Droit naturel: on appelloit ce mariage* contubernium. *On doit dire la même chose du mariage que les Negres, dans nos Colonies, peuvent contracter avec le consentement de leur maitres.*[95]	*l'Ordonnance de Blois et par la Déclaration de 1639, pour les mariages, seront observées, tant à egard des personnes libres, que des Esclaves, sans néanmoins que le consentement du pere & de la mere de l'Esclave y soit nécessaire, mais celui du Maître seulement.*[96]
(Civil Code (1808): Slaves cannot marry without the consent of their masters; nor do their marriages produce any of the civil effects which result from such contract.)[97]	(*Las Siete Partidas*: And slaves may intermarry, and their marriages will be valid, though opposed by their masters; nor can they be annulled on that account, if the spouses mutually consent as is said in the title of marriages.)[98]	(Pothier: Slaves, not having any civil status, *Servi pro nullis habentur*; L.32,ff.de *reg. Jur.*, although their marriage was valid by natural Law, provided it	(*Code Noir*: The solemnities prescribed by the Ordinance of Blois and the Declaration of 1639 for marriages shall be observed both in regard to free persons and slaves, without however the consent by the father and mother being necessary, but that of the Master only.)[100]

[93] La. Civil Code of 1808, I.VI.XXIII.
[94] Quarta Partida, Tit. V, Ley I.
[95] R. Pothier, *Traité du Contrat de Mariage*, Traités de Droit Civil, Part I, Chap. II, Sect. III (133) (2d ed. 1781).
[96] Le Code Noir ou Edit du Roi, Servant de Réglement pour le Gouvernement de l' Administration de la Justice, Police, Discipline & le Commerce des Esclaves Nègres, dans la Province ou Colonie de la Louisiane, donné à Versailles au mois de mars 1724, in Le Code Noir ou Recueil de Reglemens (1767).
[97] La. Civil Code of 1808, 1.6.23.
[98] 1 The Laws of Las Siete Partidas Which are Still in Force in the State of Louisiana 470-71 (L. Moreau Lislet & H. Carleton transl. 1820) (Partida Fourth, Tit. V, Law 1).
[99] Writer's translation.
[100] Writer's translation.

was contracted with their master's consent, and that they did not have any impediment, it was a marriage deprived of all civil effects and did not have any others than those arising from natural Law; that marriage was called *contubernium*.
The same may be said of the marriage that Negroes in our Colonies may contract with their masters' consent.)[99]

From the preceding illustration it is evident that the Code of 1808 adopted the French sources' solution, a solution clearly at variance with that of *Las Siete Partidas* in requiring consent of the masters for the marriage of slaves. The following is the second illustration:

Civil Code (1808): *Néanmoins une loi explicative, ou déclaratoire d'une autre loi précédente, règle même le passé, sans préjudice des jugemens en dernier ressort, des transactions et décisions arbitrales passées en force de chose jugée.*[101]	French *Projcct* (Year VIII): *Néanmoins, une loi explicative d'une autre loi précédente, règle même le passé, sans préjudice des jugemens en dernier ressort, des transactions et décisions arbitrales passées en force de chose jugée.*[102]
(Civil Code (1808): Nevertheless a law explanatory or declaratory of a former law, may regulate the past, without prejudice, however, to final judgments, to transactions and to awards or arbitrations which have acquired the force of final judgments.)[103]	

Aside from the "almost verbatim" reproduction of language showing beyond discussion the actual source of the Code of 1808 provision, the significance of the illustration lies in the fact that the classification of "explanatory" or "declaratory" laws was unknown in Spanish law. One would search in vain from the *Fuero Juzgo* to the *Recopilación de Castilla* for a comparable rule or

[101] La. Civil Code of 1808, I.Prél. VIII.
[102] Projet de Code Civil, Prél. IV.III (1800).
[103] La. Civil Code of 1808, 1.Prel.8.

principle. How could the Code of 1808 provision possibly then "reflect the substance of the Spanish law in force in Louisiana in 1808"? The third illustration is even more conclusive since the rule was taken from a work antedating by several centuries *Las Siete Partidas* and was not adopted by the later work:

Civil Code (1808): By sea shore, we understand the space of land upon which the waters of the sea are spread in the highest water, during the winter season.[104]	Institutes: *Est autem litus maris, quatenus hibernus fluctus maximus excurrit.*[105]
	Institutes: The sea-shore extends to the limit of the highest tide in time of storm or winter.[106]

Professor Pascal's thesis is even more indefensible now that Dean Sweeney has shown that the foundation on which it rested resulted from mistakenly assuming that the words *"statut local"* in the de la Vergne volume's *Avant-Propos* were used to mean "digest."[107] Together with others, the present writer had also made that mistake,[108] but while Dean Sweeney's findings are fatal to Professor Pascal's thesis, they do not adversely affect either the nature or the results of the writer's work since the research was conducted entirely independent of the de la Vergne volume, which merely represented an incidental aspect of the final article.[109] In light of the foregoing, the reader can better appreciate the value of the explanation offered by Professor Pascal:

> Proof of the Digest's conformity to the substance of the Spanish-Roman laws in force in 1808 also would explain the failure of Moreau's notes in *The de la Vergne Volume* to contain a single reference to the French *Code Civil* or its projets.[110]

This strange explanation, which of course explains nothing, is as unconvincing as another one relating to the de la Vergne volume:

> Those [references] opposite the French text are to "the principal laws . . . from which *[the substance of]* the various provisions of our local statute were drawn . . . ."[111]

The insertion of the words in brackets (italicized) would mislead the reader into thinking that those words appeared somewhere in

[104] *Id.* 2.1.4.

[105] Institutes 2.1.3.

[106] The Institutes of Justinian 35 (5th ed. J. Moyle transl. 1945).

[107] Sweeney, *Tournament of Scholars Over the Sources of the Civil Code of 1808*, 46 Tul. L. Rev. 585 (1972).

[108] Batiza at 9.

[109] Batiza at 9-10 & ns.34-37.

[110] *Reply* at 606 (emphasis added).

[111] *Id.* at 606-07 (emphasis added).

the *Avant-Propos* when, in fact, they existed only in Professor Pascal's imagination.

Thus, the very words used by Professor Pascal in referring to the writer's work will aptly serve to condemn his own:

> [By] . . . employing a methodology vitiated by its unwarranted implicit assumption, [he] logically enough arrived at the unwarranted conclusions central to his whole work . . . .[112]

The Commissioners' Instructions

Another point is stressed by Professor Pascal in trying to make his central thesis convincing: The commissioners (actually Moreau Lislet)[113] complied with the instructions received despite the fact that mostly French, rather than Spanish, texts were used in the preparation of the Code of 1808. In the writer's opinion, the issue cannot be decided by speculating, as Professor Pascal does, on the intentions of the commissioners.[114] The question cannot be answered without a more precise knowledge of the social and political conditions prevailing in the Territory at that time and even knowledge of the personal and professional circumstances surrounding the commissioners. The issue must be decided solely on the basis of the instructions' final outcome—the Code of 1808 itself. On that basis alone it is clear that Moreau Lislet took considerable liberties with the instructions since the civil law of the Territory that was to be codified was almost entirely Spanish,[115] and the Code of 1808 shows an overwhelming French influence. The writer's research also proves that the following statement by Professor Pascal is baseless:

> The extent to which the Digest of 1808 is Spanish, French, other, or original, however, cannot be determined conclusively *by the mere tracing of provisions to texts extant in*

[112] *Id.* at 608.

[113] Batiza at 28 n.164.

[114] *Reply* at 606.

[115] It can be stated that the Spanish legal system, as established for Louisiana by O'Reilley in 1769, had remained extant as a whole until retrocession to France and delivery to the United States. A view had been expressed to the effect that the rule of twenty days under Laussat restored to Louisiana the civil law of France, so far as it was not incompatible with the Spanish legal system. In the absence of specific enactment, however, this view is questionable. Laussat took specific steps, such as replacing the cabildo with a municipality and re-enacting the *Code Noir*, but took no action regarding the general system. *See* F. Martin, The History of Louisiana 296 (1882) (republished in 1963); Batiza, *The Unity of Private Law in Louisiana Under the Spanish Rule*, 4 Inter-Am. L. Rev. 121, 122 (1962); Dart, *The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana*, 6 Tul. L. Rev. 84, n.1 (1931).

1803, when Louisiana was acquired by the Union, no matter how well this work is done.[116]

There is hardly any need to create an issue in terms of French versus Spanish influence. As a matter of fact, the writer's research revealed for the first time previously unsuspected Spanish sources in the Code of 1808.[117] However, the goal of the research was to identify the actual sources of the Code without any preconceived notions and guided only by unbiased objectivity.

The "Affirmative Note"

Professor Pascal concludes his long reply to the writer's article with the following condescending "affirmative note":

> Professor Batiza's work has not been in vain. On the contrary, it is a start in the direction of ascertaining both the "literal" and the "substantive" sources of the Digest articles.[118]

Later, he adds:

> There is, too, a fact that emerges conclusively from Professor Batiza's efforts. He has given concrete proof to the many doubters, though why anyone who had studied the three documents should have had a doubt is difficult to say, that the redactors of the Digest had both the French *Code Civil* and the *Projet* of 1800 in their hands.[119]

However, the general conclusions are drawn by Professor Pascal that the writer's work emerges as one of concordances rather than an index of sources, that it is not trustworthy as an index of sources, and that its statistics are not reliable indices to the sources of the substantive content of the Code as a whole.[120] He also remarks:

> The real importance of all this effort is not knowledge of the past for its own sake, but its relevance today for the understanding, construction, extension, and orderly amelioration of the Civil Code in force.[121]

[116] *Reply* at 625 (emphasis added).

[117] Batiza at 12. As a citizen of Mexico, and by reason of family and cultural background, the writer would have been tempted to see more Spanish influence in the Code of 1808. However, personal inclinations were consistently avoided in the research. Since the research was begun with no preconceived ideas on the subject and no vested interest (academic or of any other kind), it was conducted with complete objectivity. However, the writer's interest in and regard for Spanish letters and legal history can be seen in R. Batiza, Don Quijote y el Derecho: Cultura Jurídica de Don Miguel de Cervantes Saavedra (1964).

[118] *Reply* at 624.

[119] *Id.* at 625.

[120] *Id.* at 623-24.

[121] *Id.* at 626.

Yet, Professor Pascal does not mention Appendix D of the writer's article, an important element of the research which for the first time disclosed the specific provisions, representing about three fourths of the Code of 1808, that survive in the present Civil Code and account for practically fifty percent of its contents.

Professor Pascal submits a proposal of his own:

> What is necessary is a study of the institutions, principles, and rules of the Spanish law of that time so that they—as opposed to the legislation and doctrinal writing in which they were represented—can be compared and contrasted with those of the Digest. This task is not so simple. Spanish civil law had not achieved systematic statement in 1803, 1808, 1825, or even 1870. This was the cause of the need for a Digest in 1805. . . .
>
> A practical approach, however, might very well be to begin by attempting to determine how well the Digest reflects the substance of the law contained in the references cited in the Moreau notes in *The de la Vergne Volume*, now readily available in libraries and on the open market.[122]

Professor Pascal admits that this work "will be long, often tedious."[123] If Professor Pascal considered the writer's work no more than an exercise in philology, it is submitted that the work proposed by Professor Pascal, while a harmless exercise in comparative law, would only result in another, rather useless, concordance.

SOME IRREFUTABLE FACTS AND A CHALLENGE

Professor Pascal's negative conclusions concerning the writer's article should not be allowed to obscure significant facts. Even if all provisions classified in the writer's work as "subtantially" or "partially" influenced were not to be taken into account, for the sole purpose of eliminating all possible controversial sources (and they are not as numerous as Professor Pascal would have the reader believe), the following facts are conclusively established: the Code of 1808 includes 315 provisions from the French *Projet*, 293 from the French Civil Code, and nine from Domat that are "verbatim," and 398 from the *Projet*, 382 from the Code, 98 from Domat, 32 from Pothier, and three from the Custom of Paris that are "almost verbatim." The total number amounts to 1,530 provisions, 617 "verbatim" and 913 "almost verbatim," representing almost three fourths of the Code of 1808.[124]

[122] *Id.* at 625-26.

[123] *Id.* at 626.

[124] Batiza at 11-12 & nn.42-47.

Professor Pascal, on the other hand, by his reiterated public statements proclaiming the Spanish origins of the Code of 1808, owes a duty to the legal profession that he no longer can postpone. Professor Pascal has committed himself to produce, for each of the 1,530 provisions from French sources, as well as those from Blackstone and others of non-Spanish origin, a rule or principle "substantially" the same from any of the various Spanish enactments. This writer looks forward to Professor Pascal's *magnum opus*.

SHIMEI AND ÖRN: THE CONSTRUCTION OF A RESTRAINT

DAVID DAUBE*

In the First Book of Kings, King David is depicted as giving Solomon a few last instructions before death. One of them[1] concerns a prominent citizen, a relative of Saul's by name of Shimei, who, long before, on the occasion of Absalom's revolt against David, had grievously insulted the latter, indeed, had placed a curse on him.[2] David had sworn, however, not to put him to death. He had taken this oath when, after Absalom's defeat, Shimei immediately asked for a pardon.[3] Now on his deathbed David exhorts Solomon to find a way in which the hated man may be dispatched without infringing the pledge. If he can be brought to a violent death covered in sin, insult and curse will be wiped out—not to mention the ever threatening danger of such a person. Solomon in his wisdom, David declares, will somehow manage this: he will contrive to entrap Shimei in a misdeed for which retribution may be deservedly exacted.

Apparently, Solomon is not as firmly bound by his predecessor's guarantee as the latter himself. It is assumed that, should a plausible ground for eliminating Shimei offer, he will be free to avail himself of it. Besides legal or semi-legal considerations, there is also the practical one that people will charge him with going back on his word far less readily than they would have charged David, who personally entered into the obligation.

The Biblical narrator sees nothing to criticize in David's entrusting his son with the job he himself was forbidden or did not dare to do. The very sequence of the instructions is significant. After a general admonition to be strong and godfearing, come three specific directions: first, to see to it that Joab, a mighty soldier who has become very inconvenient, may be despatched with just cause; second, to be gracious to the family of Barzillai who had proved loyal during Absalom's revolt; and third, to see to it that Shimei may be despatched with just cause. To reward one's friends, to tread down one's foes—in the narrator's eyes, this is all as it should

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1 I Kings 2.8-9.
2 II Samuel 16.5 *et seq.*
3 II Samuel 19.19 *et seq.*