THE LOUISIANA PRIVATE-LAW SYSTEM: THE BEST OF BOTH WORLDS

JOACHIM ZEKOLL*

I. INTRODUCTION

Traditionally, the system of private law in Louisiana has been regarded as an exotic outsider, tracing its origins to French and Spanish sources[1] and, in several instances, directly to Roman law.[2] Louisiana's

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* Associate Professor, Tulane University School of Law. Dr. jur., University of Hannover School of Law (F.R. German), 1986; LL.M., University of California, Berkeley, 1984; LL.B. (Assessorenexamen), University of Hannover School of Law, 1983. This Article is an expanded version of a paper presented to the Tulane Law School faculty in November of 1994.

1. There have been conflicting opinions as to whether Spanish or French sources dominated Louisiana's first codification of civil law, the *Digest of the Civil Laws*. According to Batiza, 85% of all provisions of the *Digest* are of French origin. *See* Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 10-12 (1972). By contrast, Pascal has argued that Spanish law provided the substance for most provisions. *See* Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 605-07 (1972). The dispute was never settled. *Cf.* Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972); A.N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, *in* LOUISIANA'S LEGAL HERITAGE 87 (Edward F. Haas ed., 1983). On the history of Louisiana law generally, see A.N.

special status as a mixed jurisdiction continues to be recognized by contemporary observers: "Inspired by the continental Roman tradition rather than by English law, the civil code makes Louisiana a civil law island in a common law sea."[3]

We might object to this metaphor by pointing to the largely unfettered rule-making power of the individual states which creates quite diverse currents in that "common law sea." But this caveat is of little relevance for my topic today. For although individual states may arrive at different resolutions of specific questions of substantive law, what binds them together, and distinguishes Louisiana's adherence to a Civil Code, is their basis in what we are accustomed to classifying as the common law: legal principles developed according to the traditional English[4] concept of stare decisis, whereby the precedents established by higher courts function as a primary source of law.[5] On the other hand, the same forces

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Yiannopoulos, *The Civil Codes of Louisiana*, *in* LOUISIANA CIVIL CODE s. XXV ff. (1993); Rodolfo Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and its Implications for Louisiana Law*, 56 TUL. L. REV. 477 (1982); SHAEL HERMAN, THE LOUISIANA CIVIL CODE, A EUROPEAN LEGACY FOR THE UNITED STATES 27 (Louisiana Bar Foundation 1993); John T. Hood, Jr., *The History and Development of the Louisiana Civil Code*, 33 TUL. L. REV. 7 (1958); Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, at 42 LA. L. REV. 1485 (1982).

2. Indeed, there is evidence that no civil code has been more influenced by Roman law than the Louisiana Civil Code. For example, the tripartite distinction between common, public, and private things, still in effect in Louisiana's property law, derives directly from Roman legal principles and can be found neither in French nor German law. *See* LA. CIV. CODE art. 448 (West 1995). There are, for example, articles in the Civil Code of 1870 which have verbatim or near verbatim language derived from Roman sources for which the French Code Civil provides no direct counterparts. For further details, see Bernard K. Vetter, *Louisiana: The United States' Unique Connection to the Roman Law—An Introduction to the 1993 Brendan F. Brown Lecture, The Roman Contribution to the Common Law*, 39 LOY. L. REV. 281, 289 (1993). Lesion beyond moiety, the seller's right to rescind a sale of immovable property sold for less than half its value, provides another direct link to Roman law. Codex 4, 44, 2, as found in REINHARD ZIMMERMAN, THE LAW OF OBLIGATIONS 259 (1990). By contrast, the French Civil Code provides for a seven-twelfths rule which finds its origin in the canon-law notion of the *juste prix*. CODE CIVIL [C. CIV.] art. 1674 (Fr.); PAUL ESMEIN, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS § 211 (Marcel Planiol & Georges Ripert eds., 1952).

3. SHAEL HERMAN ET AL., THE LOUISIANA CIVIL CODE: A HUMANISTIC APPRAISAL 3 (1981) (unpublished manuscript on file with Tulane Law School).

4. Note, however, that an independent legal culture has developed in the United States which clearly distinguishes itself from its English origins. See *Patrick S. Atiyah, Lawyers and Rules: Some Anglo-American Comparisons*, 37 SW. L.J. 545 (1983).

5. This should not serve to create the impression that common-law systems lack legislative input. Indeed, these systems experience a growing number of legislative regulations. What distinguishes those from the continental European tradition, which Louisiana has retained until

which have encouraged the development of an American legal style that transcends state divisions are present in Louisiana as well. These forces include integrated interstate markets operating in a country devoid of language barriers, a legal profession which functions within a strictly adversarial environment based on a common core of procedural rules, and a largely unified system of legal education premised on instructional materials and teaching methods that emphasize common rules rather than distinctions of individual states. Such economic and institutional conditions are also conducive to the larger movement towards legal unification or legal harmonization, without always requiring binding national legislation.

As a first conclusion, then, it is safe to say that Louisiana's continental tradition of civil law is exposed to constant pressure for conformity with what exists or emerges in the sister states. But does this pressure erode the "civil law island"? Is Louisiana in the process of emulating common-law rules that prevail in the other states? The main purpose of this Article is to show that these questions are based on doubtful premises and assumptions. I argue that the influence of one legal system on another is rarely discernible in clear-cut and unilateral terms. As the Louisiana example so eloquently demonstrates, legal principles imported into a foreign system may require adaptation to fit the particular needs and prevailing conditions of the adoptive system.[6] More

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now, is the fact that legislative action in common-law systems is highly specific and regulates only limited legal categories, such as specific aspects of consumer protection. It is not the objective of this type of legislation to systematically codify the entire body of private law; rather, it attempts to identify specific areas involving special interests (e.g., consumer protection) and to remove these areas from judicial law-making. Legislation of this type will do little to change the primacy of case law in the American states. This holds true even for those states that introduced a civil code, still in effect today, based on Field's draft of 1865. In the absence of any scholarly attention and practical use, these codes, which are still officially in effect today, have degenerated to subject matter indices for the cataloguing of judicial decisions. *See* Joachim Zekoll, *Zwischen den Welten—Das Privatrecht von Louisiana als europäisch-amerikanische Mischrechtsordnung*, *in* AMERIKANISCHE RECHTSKULTUR UND EUROPÄISCHES PRIVATRECHT 22 (Reinhard Zimmermann ed., 1995).

6. I disagree with Watson, who argues that an adaptation of legal transplants is usually not needed:

> This is so even when the rules come from a very different kind of system. The truth of the matter seems to be that many legal rules make little impact on individuals, and that very often it is important that there be a rule; but what rule actually is adopted is of restricted significance for general human happiness. . . . It follows . . . that usually legal rules are not peculiarly devised for the particular society in which they now operate and also that this is not a matter of great concern.

importantly, perhaps, the current status of Louisiana law demonstrates a convergence of civil law and common law that is becoming increasingly evident in other systems as well. These conceptual boundaries, under the pressures of commercial interaction, have begun to blur in the United States and in so-called civil-law systems, including Louisiana. Particularly in the fields of private and commercial law, the influences on Louisiana can thus no longer be attributed either to the civil law or common law, but instead to rules that do not belong in either category. Nevertheless, the process of convergence is not all-encompassing. In certain areas of private law, such as family law and the law of successions, each system remains firmly rooted in a special environment whose substantive and procedural rules reflect distinct local values.[7] In most areas, however, one can conclude that the traditional distinction between common law and civil law is becoming less relevant through the gradual convergence of private law.[8]

In light of these observations, I argue that Louisiana can serve as a role model for other legal systems as an already-existing microcosm of what we see developing elsewhere, and because it has proven capable of integrating new rules into an established system in a way that does not compromise basic values and assumptions. These are broad assumptions, which we will substantiate in three steps. First, we will briefly examine the general trend towards convergence noticeable in all major legal systems. Second, we will tamper with the widespread assumption that convergence is a one-sided process in which rules of Anglo-American origin invariably dominate. Finally, a closer look at the reception of American law in Louisiana will reveal that many of the adopted rules are not common-law products, and that even the reception of the trust, which

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ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 97 (2d ed. 1993). The issues associated with trust law in Louisiana suggest to me that Watson overstates his point (*see infra* notes 88-119 and accompanying text).

7. Differences remain even between the various civil-law systems and common-law nations. For example, the European Parliament, which has twice suggested the creation of a European Civil Code, does not contemplate including in such a code rules pertaining to persons, family law or successions. Diverging national traditions continue to stand in the way of unification or harmonization of these areas of law. *See* Winfried Tilmann, *Zweiter Kodifikationsbeschluß des Europäischen Parlaments*, *in* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 534, 541 (1995).

8. The observation that we are witnessing an increasing convergence of the two dominant systems is not a new one. Quite appropriately, the latest account of this development originated from an American scholar publishing in German. *See* James Gordley, *Common law und Civil Law: eine überholte Unterscheidung (Common Law and Civil Law: A Moot Distinction)*, *in* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 498 (1993).

is a quintessential common-law institution, does not occur without changes that preserve other established principles of Louisiana law.

II. THE TREND TOWARDS CONVERGENCE

There are many signs of the ever-increasing confluence of common law and civil law. The ongoing effort to harmonize private law in Europe,[9] within and outside of the European Union, is one example. Even though the continental European systems are compartmentalized into one legal family, the civil law, there are significant differences, deeply entrenched through national codification and diverse legal cultures.[10] The approximation of divergent national laws, though partly influenced by American models, is also inspired by what has been termed the "Europeanization"[11] of private law. That is the rediscovery of a European *ius commune* as a shared foundation for all continental European legal systems. The harmonization of law on this basis has, in turn, a profound impact on the development of legal regimes in England and Scandinavia which fall outside the traditional civil-law classification.[12]

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9. *See, e.g.*, Article 3(h) of the Treaty of European Union, which provides for "the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market." TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY art. 3(h). So far, this objective primarily has been pursued by directives, which are issued by the EC Commission and EC Council and, since the coming into force of the Treaty of European Union, in collaboration with the European Parliament. *See id.* art. 189. The directives are addressed to the member states which are required to achieve the result set out in the directives. *Id.* Depending on the specificity and scope of the directive, there is more or less leeway in the transformation process. Thus, the efforts to harmonize certain subjects through directives have not always been fruitful. For the area of products liability law, where a 1985 directive failed to achieve the desired harmonization, see Joachim Zekoll, *The German Products Liability Act*, 37 AM. J. COMP. L. 809 nn.1-5 (1989). For a more general criticism of legislative attempts to forge a unified European private law, see Reinhard Zimmermann, *Civil Code and Civil Law: "Europeanization" of Private Law within the European Community and the Re-Emergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63, 73-82 (1994/95).

10. For example, Germany and France, the two countries that have had great influence on the development of the civil law throughout the world, follow diverging patterns in many respects. *See* JOHN P. DAWSON, THE ORACLES OF THE LAW 374 (1968). For examples of different solutions in France and Germany, see *infra* notes 81, 82, and 87 and the accompanying text.

11. For a detailed discussion, see Zimmermann, *supra* note 9.

12. *See, e.g.*, Jonathan E. Levitzky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347 (1994). *See generally* THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES, AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY (Basil Markesinis ed., 1994)

True showcases of what I mean by "convergence" or "confluence" are the legal systems in Eastern European nations. In the effort to gain access to the channels of world trade, former socialist nations are making every effort to forge a legal environment that comports with Western standards. Currently, American and European delegations alike are eager to serve as advisers to the new governments. Sometimes these groups fiercely compete to obtain the assignment of drafting new rules, while at other times there is collaboration. The current drafts of the new Estonian Civil Code and Code of Civil Procedure are instances of cooperation, even though the American Bar Association is serving as an organizational clearinghouse for these joint endeavors. The results are predictable: American and European ideas coexist and mingle in their new environment.

International conventions are also an indication of the high degree of convergence that we have reached in the area of private and commercial law. For example, the Uniform Law for the International Sale of Goods under the 1980 United Nations Convention (CISG) is such a hybrid. The rules pertaining to the formation of a sales contract are more reflective of civilian sources while the provisions that define the rights and obligations of the seller and the buyer closely resemble solutions espoused by Article 2 of the Uniform Commercial Code. This Convention, to which the United States and forty other nations are members, governs an increasing number of cross-border transactions. We will return to this subject later. The International Institute for the Unification of Private Law (UNIDROIT)[13] has recently presented further evidence for growing convergence. After more than ten years of deliberation, that institute, through a working group comprising twenty-two members from all the major legal systems, issued the *Principles for International Commercial Contracts* (Principles). These Principles, though not binding, were drafted with a view towards establishing "a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are applied."[14] The rules not only draw on

13. UNIDROIT originated in the late 1920s and in 1930 created a committee of French, German, English, and Scandinavian representatives to begin work on the first draft of the Uniform Sales Law, which was completed in 1935. Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, *in* INTERNATIONAL SALES § 1.01 (N. Galston & H. Smith eds., 1984).

14. *See* INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS at viii (1994) [hereinafter UNIDROIT Principles].

existing international commercial custom, but also attempt to solidify the emerging *lex mercatoria* and serve as a future model for legislators.[15]

III. EUROPEAN RULES IN AMERICAN LAW

It can hardly be disputed that the influence of American law on legal developments in Europe and elsewhere has been steadily growing since World War II. It has even become popular among European scholars to compare the importation of American legal ideas and culture with Europe's rediscovery of Roman law and the gradual reception within Europe between the twelfth and sixteenth centuries of a *ius commune* inspired by Roman law.[16] While I am rather skeptical about the vision of American law as the *ius commune* of our days, there are areas of law in all European nations—particularly rules of commercial law—that have felt an increasing American influence. Factoring, franchising and leasing, for example, are but a few of the concepts that evolved in an active and creative American business climate and have served as models for legal reform in other nations.

Despite this tendency, it has not only been the United States that has set the pace in this process of growing international consensus. Frequently, the rule that finds international acceptance originated in Europe. Thus, before we evaluate the impact of American substantive law on the Louisiana civil-law system, it may be instructive to identify a few rules of European origin that have found their way into American law.

A. *Consideration*

The "arcane doctrine"[17] of consideration, a concept that Louisiana never adopted and which does not exist in most other legal

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15. The Preamble reads in pertinent part as follows:

> (The rules) may be applied when the parties have agreed that their contract be governed by 'general principles of law,' the 'lex mercatoria' or the like. They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law. . . . They may serve as a model for national and international legislators.

Id. at 1.

16. *See, e.g.*, Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 *passim* (1991).

17. JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 284 (2d ed. 1991).

systems, has been increasingly eroded in the United States, even for purely domestic transactions.[18] The Uniform Commercial Code, whose sales provisions were drafted under the leadership of Karl Llewellyn, a "civilian in disguise,"[19] entirely dispenses with this requirement for firm offers of merchants (§ 2-205) and contract modifications (§ 2-209). In international sales to which the CISG applies, consideration also is unnecessary for promises not to revoke an offer (Article 16(2)) and for the modification of sales contracts through party agreement (Article 29). Likewise, the UNIDROIT Principles dispense with consideration by providing that "(a) contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement" (Article 3.2).

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18. Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45 (1993); *see also* Mark B. Wessman, *Retaining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. (forthcoming 1995).

19. Llewellyn's contacts with Germany—both in personal and academic respects—were profound and had a long-lasting impact on him: he graduated from high school in Schwerin where he studied from 1908 to 1911; between 1928 and 1932 he visited Germany for two nine-month stays, both to study law and sociology, and to give lectures in Leipzig and many other German cities; for a brief period, he even served as soldier in the German army during World War I. *See* Ulrich Drobnig, *Llewellyn and Germany*, *in* RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT: KARL N. LLEWELLYN UND SEINE BEDEUTUNG HEUTE 17-43 (Ulrich Drobnig & Manfred Rehbinder eds., 1994). The question whether similarities that exist between Article 2 of the U.C.C. and German law can be traced to Llewellyn's exposure to German influences is a difficult one. *See, e.g.*, Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987); James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987). However, in some instances, the resemblance of U.C.C. provisions to preexisting German models is so obvious that this influence can hardly be denied. For example, U.C.C. § 2-615 dealing with commercial impracticability closely follows the German doctrine of *Wegfall der Geschäftsgrundlage*, and it has been argued that Llewellyn must have been aware of this doctrine. U.C.C. § 2-615 (1995). *See* Stefan A. Riesenfeld, *Reminiscenses of Karl Llewellyn*, *in* RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT: KARL N. LLEWELLYN UND SEINE BEDEUTUNG HEUTE, *supra*, at 11, 15-16. Nevertheless, the assumption that Llewellyn relied on German sources is hard to prove because he apparently never admitted to having done so. At least one account suggests, however, that Llewellyn stayed silent for another reason: "He mentioned the failure of courses in comparative law and told me never to reveal when I relied on an idea coming from continental Europe, because that would be the 'kiss of death'. . . ." *Id.* at 14.

B. *Statute of Frauds*

Another change of American law which was precipitated by exposure to foreign standards involves the requirement that certain agreements be evidenced by a writing. This requirement hampers commercial transactions and defeats the purpose of new technologies which make possible instantaneous and paperless communication. In most legal systems, agreements involving commercial dealings need not comply with a statute of frauds. Even the UK Sale of Goods Act disposed of it in 1954.[20] In the United States, this English provision, which traced its origins to 1677 when the English Parliament enacted a Statute of Frauds, served as model for the Uniform Sales Act of 1896 and for its successor, § 2-201 of the Uniform Commercial Code.[21] The U.C.C. rule is lengthy and convoluted. It allows for exceptions which significantly undermine the rule of requiring a writing for the enforceability of sales contracts; however, it is costly to litigate the applicability of the rule or its exceptions. By contrast, the solution espoused in Louisiana comports with the modern trend not to impose a writing requirement. Louisiana Civil Code Article 2441 provides in pertinent part that "the verbal sale of all movable effects, whatever their value, is valid." In Louisiana this principle has been applied since 1808.[22] The rule is in effect in most other legal systems as well, even in those common-law jurisdictions that initially adopted the English Statute of Frauds.[23] Both the International Sale of Goods Convention and the UNIDROIT Principles follow this trend.[24] The declining importance of this form requirement has not gone unnoticed in the United States. Indeed, a drafting committee appointed by the National Conference of Commissioners of Uniform State Laws to revise U.C.C. Article 2 recognized the outsider status of the United States and recommended the repeal of the statute of frauds contained in § 2-201 of the Uniform

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20. *See* HONNOLD, *supra* note 17, at 183.

21. *See id.*

22. LA. CIV. CODE art. 2, ¶ 3 (1808).

23. *See* HONNOLD, *supra* note 17, at 183.

24. CISG Article 11 provides that "(a) contract need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." Article 1.2 of the UNIDROIT Principles contains virtually identical language: "Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses."

Commercial Code, "thus bringing Article 2 into line with the British Sale of Goods Act and the CISG."[25]

C. *Warranty*

It would be odd, of course, and quite unrealistic to attribute legal changes solely to foreign influences or comparative research and to exclude other factors, such as domestic economic conditions. *Caveat venditor*, for example, already existed in Louisiana sales law and other civil-law jurisdictions which adopted the Roman law *actiones redhibitoria* and *quanti minoris*[26] at a time when common-law courts still expected the buyer to beware.[27] The gradual shift of American common law towards favoring consumer interests, primarily by way of implied warranty actions in the late 19th century, did produce similar results,[28] but there is no evidence suggesting that civil-law models inspired this development. Instead, an array of intricate domestic factors, such as the friction between commercial and societal needs evolving in the age of mass production, generated case law and codifications[29] that favored the buyer's interest[30] and undermined the maxim *caveat emptor*.[31]

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25. Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1315 (1994) (footnotes omitted).

26. *See* LA. CIV. CODE art. 2520 (redhibitory action); *see also* C. CIV. art. 1641 (Fr.).

27. *See* Shael Herman, *The Influence of Roman Law Upon the Jurisprudence of Antebellum Louisiana*, 3 STELLENBOSCH L.R. REGSTYDSKRIF 143, 149-50 (1992).

28. *See* LAWRENCE M. FRIEDMANN, A HISTORY OF AMERICAN LAW 541 (2d ed. 1985) ("By 1900, the results of the cases (if not the way their doctrines were phrased) were probably about the same as those produced by the bleeding hearts of civil law.").

29. See, for example, Section 15 (2) of the Uniform Sales Act, which provided an early exception to the rule of *caveat emptor*: "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." UNIFORM SALES ACT § 15(2). For comments on this provision, see SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW UNDER THE UNIFORM SALES ACT §§ 227-257 (1948). In response to the developing case law, the U.C.C., as successor of the Uniform Sales Act, established the implied warranty of merchantability as a rule in § 2-314. U.C.C. § 2-314 (1995).

30. For a detailed account of this development, see Karl N. Llewellyn, *On Warranty of Quality, and Society* (Part I), 36 COLUM. L. REV. 699 (1936). Part II of the article appears at 37 COLUM. L. REV. 341 (1937).

31. It has even been suggested that the introduction of this principle into American contracts law may have been due to a historical misunderstanding. *See* Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 945 (1974).

D. *Maritime Law*

Despite the reservation that internal reasons alone may bring about change, intensifying international trade relations have been a fertile ground for the reception—and exportation—of legal transplants. Nowhere is this growing interdependence and the resulting interaction more evident than in the area of maritime law, which, in origin and development, is dominated by civil-law principles.[32] It is particularly in this field that American law has accepted significant change inspired by foreign law.[33] For example, the general rule under common law that there is no duty to rescue is not in effect under maritime law principles. These rules establish that

> the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land. From time immemorial, seamen have been called the 'wards of admiralty'; and in this country, as elsewhere, the Legislature has enacted an elaborate system of legislation for their protection.[34]

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32. *See* 1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY 15 (7th ed. 1993); GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 1-11 (2d ed. 1975); VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE 11 (3d ed. 1994); William Tetley, *The General Maritime Law—The Lex Maritima*, 20 SYRACUSE J. INT'L L. & COM. 105, 112 (1994).

33. *See* GILMORE & BLACK, *supra* note 32, at 47; *see also* Moragne v. State Lines, Inc., 398 U.S. 375, 386-87 ("Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law.") (quoted by Tetley, *supra* note 32, at 124).

34. Harris v. Pennsylvania R.R., 50 F.2d 866, 868 (4th Cir. 1931). The court went on to state:

> Regardless of legislation, it is uniformly recognized that it is the duty of a vessel to care for a seaman who is taken sick or receives an injury on a voyage in the service of the ship, to the extent of providing medical care and attendance, and, if possible, a cure at the expense of the ship. And it is even required, where a serious accident occurs, that the master shall exercise a reasonable judgment as to putting into the nearest available port, in order that proper treatment may be secured.

Id.

The principle of comparative negligence, different versions of which are now in effect in 46 American states,[35] provides another illustration of the importance of maritime law and, hence, civil-law influence in this country. Within the debate over its adoption, which led to the abandonment of the "all-or-nothing" results under the old common-law rule of contributory negligence, courts and commentators evoked with regularity the role of civil law and maritime law in the development of comparative negligence.[36]

There are more examples of solutions developed in civil law that gained subsequent acceptance in the United States and other common-law systems.[37] These few illustrations shall suffice, however, since they merely serve as a reminder that impulses for convergence do not only emanate from ideas originally conceived in this country.

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35. Only the following four states have maintained contributory negligence as a defense in tort actions: Alabama, Maryland, North Carolina, and Virginia. *See* JOHN J. PALMER & STEPHEN M. FLANAGAN, COMPARATIVE NEGLIGENCE MANUAL app. II, at 2-3 (1986).

36. See, for example, Vincent v. Pabst Brewing Co., 177 N.W.2d 513, 518-19 (Wis. 1970), in which Chief Justice Hallows (dissenting) stated:

> In the field of general negligence the European countries under civil law had moved toward comparative negligence at least 100 years earlier than its adoption as an admiralty rule. . . . In the country of its birth, the doctrine of Butterfield v. Forrester was laid at rest when England abolished contributory negligence by the English Reform Act of 1945. This history is convincing that the unjust doctrine of contributory negligence as a bar to a cause of action does not fulfill the needs of society and ought no longer be harbored and nurtured by the common-law courts at the expense of comparative negligence which mitigates damages as justice requires.

Id. (Hallows, J., dissenting). Justice Hallows dissented from the majority's decision not to introduce a pure comparative negligence standard through court decision but to await legislative action in this respect. Oddly, in Louisiana, contributory negligence was a valid defense until 1979; this was the result of court decisions that simply ignored LA. CIV. CODE art. 2323 and its predecessor, Article 2303 of the 1825 Louisiana Civil Code, both of which allowed for the apportionment of damages on the basis of comparative fault. On the subject of Louisiana's civil-law system and the long-lasting adherence to contributory negligence, see Wex S. Malone, *Comparative Negligence: Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945). In 1979, the Louisiana legislature rewrote Article 2323 to introduce comparative negligence as the prevailing rule. *See* Wex S. Malone, *Symposium on Comparative Negligence in Louisiana: Prologue*, 40 LA. L. REV. 293 (1980).

37. *See, e.g.*, Richard H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649 (1992); THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD (Mathias Reiman ed., 1993); *see also* Peter Stein, *The Attraction of the Civil Law in Post Revolutionary America*, 52 VA. L. REV. 403 (1966).

IV. THE RECEPTION OF AMERICAN LAW IN LOUISIANA

The significance of European rules in American law must not be overstated, for during the past fifty years it has been the United States that has served as the world's leading exporter of legal ideas.[38] This undeniable fact brings us back to our main topic: if this dominance is felt world-wide, it must affect with particular force the civil-law system in Louisiana. The pressure on Louisiana to assimilate the law as it exists in its neighboring states must be enormous.

I do not believe, however, that the reception of this law entails the wholesale transfer of common-law schemes for the following two reasons: first, as the foregoing thoughts on the international exchange of legal norms and their gradual confluence already imply, what is being transferred often can no longer be unequivocally ascribed to either common-law or civil-law origins. Such rules, particularly in the area of commercial law, are in effect system-neutral. Second, for those few legal institutions that are considered building blocks of either system, my thesis will be that even their transfer will not disturb dominant legal principles and values of the adoptive system due to adaptations of the foreign law to local conditions.

The remainder of this Article will be devoted to testing the validity of both assertions. First we will explore the notion of system-neutral rule transfers, by examining recently enacted rules in Louisiana pertaining to conditional sales, secured transactions and general sales law. Then we will examine the argument that the adaptation of a common-law transplant preserves the identity of the host system by taking a closer look at the reception in Louisiana of the trust, an instrument that has been termed "a distinctive feature of the style of the Anglo-American Legal family."[39]

A. Conditional Sales

Under the Louisiana law of sales, the ownership of movable property passes from the seller to the buyer as soon as a valid purchase contract is concluded, that is, when the parties reach agreement as to a sufficiently individuated object and its price. For the transfer of

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38. *See* Wiegand, *supra* note 16.

39. *See* 1 KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 275 (1977).

ownership to occur, neither delivery of the object nor payment of the price is necessary.[40] There is nothing exceptional about the rule that ownership passes through the parties' agreement alone. Other legal systems, such as the Italian and the French, adhere to the same principle.[41] What has proven to be problematic, however, is the hostility that Louisiana courts have displayed toward the conditional sales of movables.[42] Typically, these transactions involve installment contracts which allow the purchaser to take possession of the item purchased while the seller remains the owner until final payment.[43] Early in this century, the Louisiana Supreme Court held that the retention of ownership in such contracts is incompatible with the provisions of the Louisiana Civil Code.[44] This meant that despite explicit contract language to the contrary, ownership unconditionally passed to the buyer prior to the payment of the purchase price. This rather peculiar rule, which is inimical to all credit purchase transactions to which Louisiana law applied, also applied to certain leases[45] and, arguably, to financed lease transactions,[46] thus preventing the emergence of a market that elsewhere developed into a viable alternative to traditional credit sale contracts.[47] When the potential economic impact of this void became apparent, the Louisiana legislature reacted. In 1985, it passed the Louisiana Lease of

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40. *See* LA. CIV. CODE art. 2456 ("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 the object has not yet been delivered, nor the price paid.").

41. C. CIV. art. 1583 (Fr.); CODICE CIVILE art. 1376 (Ital.). *Contra* BÜRGERLICHES GESETZBUCH [BGB] § 929 (F.R.G.) *and* ZIVILGESETZBUCH [ZGB] art. 714 (Switz.) (which require delivery of the thing as a prerequisite for the transfer of ownership). For examples and further details, see Jacob H. Beekhuis, *Property and Trust: Chapter 2, Structural Variations in Property Law*, *in* VI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 14-15 (Frederick H. Lawson ed., 1975). *See also* Franco Ferrari, *Vom Abstraktionsprinzip und Konsensualprinzip zum Traditionsprinzip*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 52 (1993); Andreas Roth, *Abstraktions: und Konsensprinzip und ihre Auswirkungen auf die Rechtsstellung der Kaufvertragsparteien*, 92 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 371 (1993).

42. SAUL LITVINOFF, SALE AND LEASE IN THE LOUISIANA JURISPRUDENCE 111 (2d ed. 1986).

43. *Id.*

44. Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193 (1908).

45. *See* Huey Golden, Comment, *The Conditional Sale in Louisiana Jurisprudence: Anatomy of a Synecdoche*, 54 LA. L. REV. 359, 366-67 (1993) (citing cases).

46. David S. Willenzik, *Personal Property Leases in Louisiana*, 44 LA. L. REV. 755 (1984).

47. On lease-purchase agreements and aspects of consumer protection, see James P. Nehf, *Effective Regulation of Rent-to-Own Contracts*, 52 OHIO ST. L.J. 751 (1991).

Movables Act[48], and it left no doubt about the driving force behind this enactment:

> It is declared to be the policy of this state to encourage and foster the leasing of movable property to individuals and businesses, thus promoting economic growth and development. To this end, financed leases, which have previously been construed as conditional sales transactions, are hereby recognized as valid and enforceable in this state.[49]

The Louisiana Lease of Movables Act thus codifies in part what has been an established rule in sister states.[50] However, contrary to the assumption of some,[51] the conditional sale, and its functional equivalent, the lease-purchase agreement, are by no means common-law inventions. Although it cannot be traced to Roman law sources,[52] civil-law systems, too, have long recognized the benefits of a rule that encourages economic activities while providing a measure of protection for the seller. The German Civil Code, for example, permits the seller of a movable thing to retain the ownership until the payment of the purchase price. Full payment is considered a suspensive condition (or "condition precedent") for the transfer of ownership.[53]

B. Secured Transactions—U.C.C. Article 9

A related, but more ambitious, rapprochement with prevailing American law occurred when the Louisiana legislature enacted in substantial part the law of secured transactions as regulated in U.C.C.

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48. LA. REV. STAT. ANN. §§ 9:3301-42 (West 1991 & Supp. 1995).

49. LA. REV. STAT. § 9:3302.

50. However, several provisions of the Act establish a degree of consumer protection that is lacking in other states. For example, in keeping with the civilian tradition, LA. REV. STAT. § 9:3329 establishes the principle that repossession of the leased item through self-help is prohibited. LA. REV. STAT. ANN. § 9:3329 (West 1995). By contrast, this is the typical remedy available against the defaulting debtor under the common-law rules of other states. With respect to the common-law approach, see Nehf, *supra* note 47, at 837-40.

51. *See* LITVINOFF, *supra* note 42, at 111. The same unwarranted assumption is found in Golden, *supra* note 45, at 376.

52. *See* Ulrich Hübner, *Zur dogmatischen Einordnung der Rechtsposition des Vorbehaltskäufers*, NEUE JURISTISCHE WOCHENSCHRIFT 729, 730 (1980).

53. *See* BGB § 455 (1896). In Germany, the origins of the rule can be traced to the seventeenth and eighteenth centuries. *See* Hübner, *supra* note 52.

Article 9.[54] Louisiana was the last state to adopt this comprehensive body of law,[55] which governs security interests over movable corporeal and incorporeal property. Like the Louisiana Lease of Movables Act, the adoption of Article 9 reflects an effort to widen access to national markets. Prior to the enactment, Louisiana's law regulating security devices was increasingly perceived as an overly complicated, if not obscure, patchwork of rules involving, among other things, assignments, pledge, and chattel mortgages. Multiple filing requirements and a great deal of uncertainty further added to the *status quo minus*.[56] These factors deterred outside investors who otherwise might have been willing to provide the capital for loans secured by movables. By contrast, in all other states the creation under U.C.C. Article 9 of a security interest followed uniform rules and was a relatively easy matter, which served to reduce costs and limit risks even when the collateral had moved to another state.[57] Built upon a single security device, the security interest,[58] Article 9 also enlarged the circle of assets that may serve as collateral and, as opposed to the old Louisiana security device law, is in line with relevant federal law, especially the Bankruptcy Reform Act, which was drafted with the language and concepts of the U.C.C. provisions in mind.[59]

All of these departures from the prior Louisiana rules are without doubt significant in the degree to which they broaden market access and reduce transaction costs.[60] In availing itself of these benefits, however, Louisiana has not imported rules of common law. Semantics alone would seem to support this conclusion; after all, the object of the

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54. LA. REV. STAT. ANN. §§ 10:9-101-605 (West 1993).

55. The law became effective as of January 1, 1990. *See id.*

56. *See* William Hawkland, A Brief Statement Concerning Chapter 9 (May 1988) (unpublished manuscript prepared for use in the Louisiana Senate Committee), *cited in* Henry Gabriel, *Louisiana Chapter Nine (Part One): Creating and Perfecting the Security Interest*, 35 LOY. L. REV. 311, 312-14 nn.8-11. (1989); *see also* Andrew A. Braun, *Executory Process and Self-Help Remedies under U.C.C. Article 9*, 38 LA. B.J. 315 (1991). Generally, on the adoption of U.C.C. Article 9, see Thomas A. Harrell, *A Guide to the Provisions of Chapter Nine of Louisiana's Commercial Code*, 50 LA. L. REV. 711 (1990).

57. See Hawkland, *supra* note 56, at 313 n.8.

58. U.C.C. § 9-102.

59. *See* Hawkland, *supra* note 56, at 313-14 nn.10-11.

60. Indeed, the adoption of Article 9 was not triggered by esoteric, scholarly interests in law reform. Persuaded by representatives of Louisiana's business community, it was the Governor himself who advanced the proposal that led to the reception of the new law. *See* Gabriel, *supra* note 56, at 312.

reception does not derive from case law but from statutory provisions. A look at the substance of the reception also supports this conclusion. The substitution of one succinct, all-encompassing security interest for the great number of elaborate but cumbersome security devices reflects judicial thinking that is commonly associated with the prevailing pattern in civil-law systems: "Abstraction in the formation of principles, and deduction on the basis of these principles."[61] Furthermore, despite all uniformity, Louisiana's version of Article 9 differs significantly from the original in that it does not permit repossession of the collateral by self-help,[62] a remedy that is available in all other states. Despite pressure from commercial lenders and others to introduce this short-cut in favor of the secured creditor,[63] the legislature decided to stay with the long-standing civil-law requirement that the creditor pursue his claims in court proceedings.[64]

Perhaps most importantly for our purposes, the rules applying to security agreements in other nations differ widely from each other.[65] Within Europe the applicable rules have long been discordant. Rules pertaining to security agreements involving chattel mortgages were not even part of the great codifications in France and Germany, but emerged in response to specific needs in financed transactions.[66] Until today, national particularities remain. Indeed, this lack of uniformity has been

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61. Reiner Schulze, *Allgemeine Rechtsgrundsätze und Europäisches Privatrecht*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 442, 448 (1993) (author's translation). However, much of the idea got lost in the actual drafting process of Article 9. The final language, often awkward and convoluted, has been subject to severe criticism. *See, e.g.*, Robinson O. Everett, *Securing Security*, 16 LAW & CONTEMP. PROBS. 49 (1951); David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185 (1967). For a recent assessment of how the U.C.C. compares to European codes, particularly with respect to U.C.C. Articles 2 and 9, see Richard M. Buxbaum, *Is the Uniform Commercial Code a Code?*, *in* RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT: KARL N. LLEWELLYN UND SEINE BEDEUTUNG HEUTE, *supra* note 19, at 197-220 (1994).

62. LA. REV. STAT. ANN. §§ 10:9-503-504 (West 1995).

63. Gabriel, *supra* note 56, at 316. For further details on self-help in the adoption of Article 9, see Braun, *supra* note 56, at 316; Harrel, *supra* note 56, at 784-96.

64. This rule was already part of the Roman law during the pre-classical period. *See* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 770 (1992). The prohibition of self-help is firmly embedded in Louisiana jurisprudence. *See, e.g.*, Thomas v. Philip Werlein, Ltd., 181 La. 104, 158 So. 635 (1935).

65. *See* Ulrich Drobnig, *The Recognition of Non-Possessory Security Interests Created Abroad in Private International Law*, *in* GENERAL REPORTS TO THE 10TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 289 (Zoltán Péteri & Vanda Lamm eds., 1981).

66. *See* 2 HELMUT COING, EUROPÄISCHES PRIVATRECHT 427 (1989).

cited as the most disturbing obstacle to transborder business relations within the European Union.[67] All of this suggests that the traditional dichotomy between civil law and common law is of little significance in this area of the law.

C. *The Louisiana Civil Code and U.C.C. Article 2 Provisions*

Even central areas of the Louisiana Civil Code are not excluded from the pressure to conform to rules prevailing in the other states. The recent reform of the Louisiana Sales Law is perhaps the most striking example of the consequences of this pressure. Salient provisions of this revision are patterned after Article 2 of the U.C.C., and it does not come as a surprise when commentators view this latest legislative act as "final capitulation to the adoption of most of the Uniform Commercial Code."[68] Prior to the revision, only Articles 2 and 2A (on leases) of the U.C.C. had not been incorporated into Louisiana law. It would still not be warranted, however, to conclude that the adoption of the new sales provisions imperils the state's civilian legal heritage. Two of the most important provisions that the revision introduced into the Civil Code shall serve as the final examples for my thesis that many rules of private and, in particular, commercial law are system-neutral.

First, one of the key requirements for the validity of a sales contract, that the purchase price be certain,[69] was significantly relaxed.[70] While even under the old law contract clauses providing for the determination of the purchase price by means of arbitration could serve as a valid substitute, this possibility was narrowly drafted.[71] It failed, for example, when the agreement provided for only two arbitrators, with no mechanism for solving a dispute between them either by a third arbitrator

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67. HANS WERNER HINZ, DAS INTERESSE DER WIRTSCHAFT AN EINER EUROPÄISIERUNG DES PRIVATRECHTS, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 553, 558 (1994).

68. *See* Golden, *supra* note 45, at 386 n.123.

69. In literally following Article 1591 of the French Code Civil, the old LA. CIV. CODE art. 2464 established the following rule: "The price of the sale must be certain, that is to say, fixed and determined by the parties." *Compare* C. CIV. art. 1591 (Fr.) *with* LA. CIV. CODE art. 2464 (1952).

70. New LA. CIV. CODE art. 2464 provides: "The price must be fixed by the parties in a sum either certain or determinable through a method agreed by them." LA. CIV. CODE art. 2464 (West Supp. 1995).

71. LA. CIV. CODE art. 2465 (old): "The price, however, may be left to the arbitration of a third person; but if such person cannot, or be unwilling to make the estimation, there exists no sale." LA. CIV. CODE art. 2465 (1952).

or by a court.[72] The new rule approaches the problem from the opposite perspective: if a dispute over the selection of a third party or the determination of the price by a third person cannot be resolved, then it falls to the court to establish a price.[73] Even entirely open price clauses no longer prevent the formation of a valid sales contract as long as the thing sold is something that the vendor habitually sells.[74] Particularly in this latter respect, the textual similarities to U.C.C. § 2-305 are evident and indicative of the Uniform Commercial Code's function as a model for law reform in Louisiana.[75]

Before we evaluate the significance of this adoption, consider another, even more important reception of U.C.C. sales law, the rule relating to the transfer of risk in sales transactions. Louisiana law prior to the revision followed the maxim of *res perit domino*, i.e., the risk shifted to the buyer at the same time the transfer of ownership occurred.[76] This rule could generate harsh results since ownership in movables passes through mere consent.[77] Thus, the buyer had to bear the risk of having to

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72. *See* Louis Werner Sawmill Co. v. O'Shee, 111 La. 817, 35 So. 919 (1904); *see also* Rosenkrantz v. Baton Rouge Psychological Assocs., 657 So. 2d 1353 (La. Ct. App. 1995).

73. LA. CIV. CODE art. 2465 (new): "The price may be left to the determination of a third person. If the parties fail to agree on or to appoint such a person, or if the one appointed is unable or unwilling to make a determination, the price may be determined by the court." LA. CIV. CODE art. 2465 (West Supp. 1995).

74. The first paragraph of LA. CIV. CODE art. 2466 reads:

> When the thing sold is a movable of the kind that the seller habitually sells and the parties said nothing about the price, or left it to be agreed later and they fail to agree, the price is a reasonable price at the time and place of delivery. If there is an exchange or market for such things, the quotations or price lists of the place of delivery or, in their absence, those of the nearest market, are the basis for the determination of a reasonable price.

75. U.C.C. § 2-305, ¶ 1 reads:

> The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time of delivery if (a) nothing is said as to price; or (b) the price is left to be agreed by the parties and they fail to agree; or (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Contrary to the Louisiana Civil Code, however, the validity of open price terms does not depend on the habitual sale of the thing sold.

76. *See* LA. CIV. CODE art. 2467 (1952) ("As soon as the contract of sale is completed, the thing sold is at the risk of the buyer, but with the following modifications." These modifications did not materially alter the risk allocation.); *see also* American Creosote Works v. Boland Machine & Mfg. Co., 28 So. 2d 342 (La. Ct. App. 1946).

77. *See supra* note 40 and accompanying text.

pay the purchase price in case of accidental destruction of the purchased item even before its actual delivery. The reform legislation departs from the much-criticized traditional risk allocation,[78] and again follows in essence the Uniform Commercial Code which generally requires the delivery of the thing to the buyer as a prerequisite for the transfer of risk.[79]

That neither of these changes involves the importation of common law to Louisiana follows from essentially the same reasons that we recognized as pertinent for the reception of U.C.C. Article 9: technically, it is not case law but codal provisions that serve as models for law reform in Louisiana,[80] and the substance of the legal transplants does not reflect a unique attribute of either of the major Western legal traditions. For example, German law concerning the transfer of risk is quite similar to the solution espoused in the Uniform Commercial Code, while risk-shifting in English law is very similar to the pre-revision rule in Louisiana.[81] The French Code Civil, too, is essentially in accord with the pre-revision Louisiana solution.[82] Under Roman law, the risk generally shifted to the buyer when the sale was perfected, which ordinarily occurred at the time of the agreement.[83] However, the transfer of ownership was treated as a separate step; the buyer acquired ownership only upon delivery of the goods.[84] Swiss law still adheres to this Roman principle of risk transfer.[85]

As to the required specificity of the purchase price, we notice a high degree of tolerance in modern civil-law systems which have long outgrown the constraints that existed under Roman law. The German

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78. *See* LA. CIV. CODE art. 2467 & Revision Cmts. 1993 (the principle drew criticism for not reflecting practical business considerations).

79. *Compare* U.C.C. § 2-509 *with* LA. CIV. CODE art. 2467 ("The risk of loss of the thing sold owing to a fortuitous event is transferred from the seller to the buyer at the time of delivery.").

80. *See supra* note 61 and accompanying text.

81. *See* BGB §§ 446(1), 929 (F.R.G.) ("The risk of loss or damage and ownership pass simultaneously when the goods are delivered to the buyer; under English law, risk follows ownership."); *see also* Sale of Goods Act, 1979, §§ 20, 49 (Eng.). Both transfers require only the consent of the parties. *See* ZIMMERMANN, *supra* note 2, at 292.

82. *See* C. CIV. arts. 1138, 1583 (Fr.).

83. For details on the risk rule of Roman law, see ZIMMERMANN, *supra* note 2, at 281-84.

84. *Id.* at 271-72.

85. *See* OBLIGATIONENRECHT art. 185(1) (Swiss Law of Obligations). For a concise and instructive account of European rules on the transfer of ownership and risk in sales transactions, see WATSON, *supra* note 6, at 81. Note that the CISG rules on risk transfer are quite similar to the U.C.C. approach now embodied in the Louisiana Civil Code. *See* CISG arts. 66-70.

Civil Code not only allows for the determination of the purchase price (and more generally, the performance) by a third party[86] but also sanctions a determination made by only one of the contracting parties when the contract so provides. Even the agreement that the price be fair and reasonable is regarded as sufficiently certain.[87]

The foregoing examples of the conditional sale, secured transactions, and the sales rules on price specificity and risk transfer have one thing in common: a closer look at the history of these rules and their transformation over time confirms that the pedigree of substantive legal norms, if at all ascertainable, is less relevant for our purposes than one might assume. Attempts to distinguish between common law and civil law, therefore, have become a rather futile exercise, in particular when the inquiry focuses on commercial law transplants consisting of amorphous and malleable rules that respond to shifting business expectations. But what happens with a legal system when it adopts norms that are said to be indigenous to only the donor system? We will pursue this question by examining the reception of the trust in Louisiana.

D. The Trust and Louisiana Civil Law

The trust "demonstrates better than almost any other legal institution the special style of the Common Law."[88] In adopting this institution,[89] has Louisiana assimilated common law at the expense of its civil-law heritage? These are actually two queries which trigger different

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86. BGB § 317 (F.R.G.).

87. *Id.* §§ 315-316. For further details, particularly on how Roman law regulated this subject, see ZIMMERMANN, *supra* note 2, at 253-55. The French Civil Code continues to provide an important exception regarding the requirements for a determinate price. According to Articles 1591, 1592 and 1129, the validity of a sales contract requires either a fixed price or a price-fixing procedure upon which the parties agreed in advance. C. CIV. arts. 1591-1592, 1129 (Fr.). The CISG rules on price specificity represent a compromise between this rather rigid French approach and the more flexible solutions favored in other civil-law systems and the U.C.C.. *Compare* CISG art. 55 (permitting open-price contracts) *with* CISG art. 14 (appearing to limit this option significantly). For a discussion of how to solve the tensions between the two provisions, see HONNOLD, *supra* note 17, at 197-203, 409-13.

88. *See* ZWEIGERT & KÖTZ, *supra* note 39, at 275.

89. The first legislative authorization of private trusts in Louisiana occurred in 1920. *See* 1920 LA. ACTS No. 107. Although this act adopted basic trust features of the common law, the Louisiana version contained strict limitations. For example, the trust had to terminate no later than ten years after either the settlor's death or a minor beneficiary's reaching the age of majority. *See* Edward F. Martin, *Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code*, 50 LA. L. REV. 501, 519 (1990).

responses. First, there can be little doubt that the adoption of the trust carries with it the importation of ideas that originated and evolved in England, the "home" of the common law.[90] We need not here delve into the historical reasons for this development, which date back to the decisions of the Lord Chancellor.[91] It suffices for our purposes to point out that essential features of the trust depend on principles that cannot easily be reconciled with basic concepts that inhere in civil-law systems. The most dramatic difference from traditional civil law lies in the division of ownership between the trustee as legal owner and the beneficiary as equitable owner of property known as the trust "corpus."[92] This feature permits an extremely flexible use of the trust, ranging from charitable trusts, to voting trusts and insurance trust as well as public trusts and business trusts.[93] Civil law adheres to a diametrically opposed principle. It treats ownership as an absolute right. The powers associated with this right may only be encumbered in certain legally prescribed ways, for example, by way of mortgage which entails the creation of a so-called limited real right. The concept of coexistent legal and equitable ownership that is at the heart of the trust concept has not made its way into this exhaustive catalogue of limited real rights and therefore historically has not been accepted in most civil-law systems.[94] Thus, our first inquiry has to be answered in the affirmative: from the very beginning, Louisiana trust law rested on the division of ownership between trustee and beneficiary,[95] thus embracing a concept that evolved and matured in the common-law systems of England and the United States.

It is, however, quite a different question as to whether this adoption imperils basic values of Louisiana's civil-law tradition. This

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90. On the history of the trust, see GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUST AND TRUSTEES §§ 1-8. For a concise account, see David William Gruning, *Reception of the Trust in Louisiana: The Case of* Reynolds v. Reynolds, 57 TUL. L. REV. 89, 90-97 (1982). However, the undeniable similarities between common-law trusts and trust-like instruments in Roman law (so-called *fideicommissa*) cast some doubt on the widespread assumption that the trust is an indigenous creature of the common law alone. For details on trust-related instruments in Roman law, see DAVID JOHNSTON, THE ROMAN LAW OF TRUSTS (1988).

91. For details, see JOHNSTON, *supra* note 90.

92. *See, e.g.*, Kathryn Venturatos Lorio, *Louisiana Trusts: The Experience of a Civil Law Jurisdiction with the Trust*, 42 LA. L. REV. 1721 (1982).

93. *See, e.g.*, BOGERT & BOGERT, *supra* note 90, §§ 231-251.

94. *See* Beekhuis, *supra* note 41, at 10.

95. *See supra* note 92.

brings us to our second inquiry, and I submit that the answer has to be different here. Trust law in Louisiana continues to vary in quite significant ways from common-law models, and these differences serve to accommodate strong interests that permeate the civil-law system in this state.

A few examples suffice to illustrate my point. The most recent version of the Louisiana Trust Code[96] establishes as a ground rule that trusts terminate at the death of the last surviving income beneficiary or at the expiration of twenty years from the death of the last surviving settlor, whichever occurs last.[97] This duration period is shorter than the maximum term in any other state.[98] Other restrictions contained in the Trust C ode also differ from the common-law model and evidence even greater concern about long-lasting restraints on the disposition of property. Particularly, the requirements that all beneficiaries be designated in the trust instrument,[99] and that they be in existence at the time of the creation of the trust,[100] prevent the creation of dynasty trusts that in other states are capable of tying property over very long periods of time.

Further undermining the settlor's power to control the future disposition of trust property is the rule against substitutions.[101] These are arrangements "whereby property could be made to pass successively from one donee or legatee or heir to another, for several degrees, each being charged to preserve and deliver the property to his immediate

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96. LA. REV. STAT. ANN. §§ 1721-2252 (West 1991 & Supp. 1995).

97. *Id.* § 9:1831.

98. *Id.*.

99. *Id.* § 9:1803.

100. *Id.* An important exception applies to class trusts. A class consists of the settlor's children, grandchildren, nieces, nephews, grandnieces, grandnephews, or a combination thereof. Provided that at least one member of the class is in being when the trust is established, later-born class members too may be beneficiaries of such a trust. *See id.* § 1891. Effective August 15, 1995, a class trust can include the settlor's great-grandchildren. 1995 LA. ACTS Nos. 274 and 1038. Ironically, a trust for great-grandchildren in common law would probably violate the rule against perpetuities.

101. *See* LA. CIV. CODE art. 1520(1) ("Substitutions are and remain prohibited, except as permitted by the law relating to trusts."). The exceptions are narrowly prescribed and hardly affect the general prohibition. Sections 1895 and 1973 of the Trust Code, for example, do allow for substitutions, but only if the principal beneficiary died intestate and without descendants. *See also* Martin, *supra* note 89, at 515.

successor."[102] The rule against such substitutions is by no means an axiom of modern civil law or Roman law. Instead, the origins of the prohibition of these dispositions can be traced back to the French Revolution—not further. Substitutions were abolished, among other reasons, because they could thwart the new order of the law of succession and because they kept property out of commerce.[103] Following the rule contained in the Code Napoleon,[104] the Louisiana Civil Code outlaws what is plainly permissible in other civil-law systems. Under German law, for example, a testator may designate a so-called "reversionary" heir (*Nacherbe*), that is, one or several persons whose interest will vest only after another person, also an heir (*Vorerbe*), has held and administered the property for a period of time, including the lifetime of the first heir, specified by the testator.[105] Not unlike a trustee under common law,[106] the *Vorerbe* owes the *Nacherbe* the fiduciary duty to preserve the substance of the estate. Seen from this perspective, Louisiana civil law finds itself at an even greater doctrinal distance from the common law than does German civil law, which, in some areas, allows for equivalent solutions even without formally adopting the trust.[107]

Louisiana's forced heirship law[108] provides another illustration of how a legal transplant will undergo modifications if important local policies so demand: Though the forced portion can be placed into trust,

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102. Report by the Louisiana State Law Institute to Accompany the Proposed Louisiana Trust Code II, see LA. REV. STAT. ANN. PREC. § 9:1721 (West 1991).

103. *See* LA. REV. STAT. § 9:1721; *see also* Martin, *supra* note 89, at 509.

104. C. CIV. art. 896 [1804] (Fr.).

105. BGB § 2100 (F.R.G.).

106. *See* RESTATEMENT (SECOND) OF TRUSTS § 2, at 13-14 (1959).

107. For details on German rules that can serve as functional equivalents of the common-law trust, see HEIN KÖTZ, TRUST UND TREUHAND: EINE RECHTSVERGLEICHENDE DARSTELLUNG DES ANGLO-AMERIKANISCHEN TRUSTS UND FUNKTIONSVERWANDTER INSTITUTE DES DEUTSCHEN RECHTS 97 (1963).

108. Forced heirship was abolished in Louisiana effective January 1, 1996, for children and their descendants who reach their twenty-fourth birthday. This change came about through a 2/3 majority in the state legislature authorizing a referendum on October 21st, 1995, both of which were required to change the state's constitutional provision that had raised the institution to constitutional status since 1921. The successful assault on this citadel significantly limits a feature of Louisiana law that is unique in the United States. It is important, however, to note that historically forced heirship has by no means been a single, unified concept. Although Roman law embraced the basic idea, civil-law systems have witnessed in the course of history a great variety of different solutions that reflected shifting societal interests in the freedom to dispose of one's property and the concern for the family nucleus. On the history of different approaches to forced heirship, see COING, *supra* note 66, at 628-32.

that disposition must meet strict standards. For example, the duration of this kind of trust cannot exceed the life of the forced heir and may thus be shorter than the maximum term of regular Louisiana trusts.[109] Furthermore, the trust must be reformed if the trust assets do not generate a reasonable income, to be distributed at least once a year to the beneficiary.[110]

It should be obvious from the foregoing that the reception of the trust in Louisiana did not involve the uncritical importation of common-law ideas. Based on the draft revisions presented by the Louisiana State Law Institute, the legislature has instead adopted a customized version of this legal institution which provides most of the traditional benefits without compromising central values of the Louisiana civil-law system.[111] Louisiana is not alone in this approach towards importing foreign law. Bolivia, Costa Rica, Mexico, and other Latin American nations which form a part of the civil-law tradition have incorporated certain features of the trust concept into their legal systems.[112] Several Eastern European countries, such as Poland, and the Czech and Slovak

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109. *See* LA. REV. STAT. ANN. § 9:1841 (West 1991). The trust may, however, last for the lifetime of the settlor's surviving spouse if he or she is an income beneficiary.

110. *Id.* § 9:1841(1); *see Succession of Dunham*, 393 So. 2d 438 (La. Ct. App. 1980), *aff'd in part and rev'd in part on other grounds*, 408 So. 2d 888 (1981); *Succession of Burgess*, 359 So. 2d 1006 (La. Ct. App. 1978), *writ denied*, 360 So. 2d 1179 (1978).

111. The reporter of the last major trust revision project, prepared by the Louisiana State Law Institute in 1964, states explicitly that these twin objectives informed the drafting of the new rules:

> It is no longer necessary to continue the argument raised in some quarters that the trust should not be introduced in Louisiana. In the first place, Louisiana has had trusts since 1920 and, in the second place, even if Louisiana had no trust concept, Louisiana residents could still set up trusts in other states. Moreover, there is no reason why Louisiana residents should be denied the family and tax advantages enjoyed by residents elsewhere. This does not mean that Louisiana should adopt the common law trust in its entirety but rather that the trust device in Louisiana should accord when practicable and desirable with our civil law concepts.

See Oppenheim, *supra* note 98.

112. *See, e.g.*, Rodolfo Batiza, *Trusts in Mexico*, *in* CIVIL LAW IN THE MODERN WORLD 128-33 (A.N. Yiannopoulos ed., 1965); Roberto Goldschmidt, *The Trust in the Countries of Latin America*, 3 INTER-AM. L. REV. 29 (1961). Generally on trusts in civil-law systems, see 6 WILLIAM R. FRATCHER, 6 TRUST, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 11 (1973). *See also* THE TRUST: BRIDGE OR ABYSS BETWEEN COMMON AND CIVIL LAW JURISDICTIONS? (Frans Sonnenfeldt & Harrie L. van Mens eds., 1992); Richard A. Gordon & Victoria Summers, *Trusts and Taxes in Civil Law Emerging Economies: Issues, Problems, and Proposed Solutions*, 5 TAX NOTES INT'L 137 (1992).

Republics, are considering adoptions which would allow the setting up of investment trusts, thus attracting capital to these evolving markets.[113] South Africa, Quebec, Scotland, and other nations, which, like Louisiana, traditionally are classified as mixed jurisdictions, have each instituted trust law.[114] Until recently, even the French legislature pondered the question of whether it should adopt essential elements of the trust[115]—of course without coming under any suspicion of abandoning its civil-law "identity." Common to all these initiatives is the realization that the flexibility of trust law is more capable of meeting today's business needs than traditional means, such as agency and deposit.[116]

Trust law now displays effects even in those legal systems in which its reception was never contemplated. This is a result of the Hague Convention on the Law Applicable to Trusts and their Recognition.[117] Under the Convention, a trust established in accordance with its requirements will be recognized in each member state.[118] Recognition means at "a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity."[119] Trust dispositions affecting property located in a

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113. *See* Gordon & Summers, *supra* note 112, at 137.

114. *See* TONY HONORÉ & EDWIN CAMERON, THE SOUTH AFRICAN LAW OF TRUSTS (4th ed. 1992); K. MCK. NORRIE & E.M. SCOBBIE, TRUSTS (1991); Benjamin H. Silver, *Commercial Highlights of Quebec's New Commercial Code*, 7-AUT INT'L L. PRACTICUM 90 (1994).

115. *See* JEAN-PAUL BÉRAUDO, LES TRUSTS ANGLO-SAXONS ET LE DROIT FRANÇAIS (1992). The French Ministry of Justice had already completed a comprehensive draft of the new provisions, including a detailed *Exposé des Motifs*. *See* RÉPUBLIQUE FRANÇAISE, MINISTÈRE DE LA JUSTICE, NOR: JUSX9200018L PROJET DE LOI—INSTITUANT LA FIDCIE (1992) (on file with the author). Shortly before adoption, however, the project was suddenly abandoned: *"Il n'a même pas été discuté et a été simplement enterré."* LE MONDE, 3 August 1994.

116. The most thorough German publication on common-law trusts recommends partial reception in Germany. The author argues that rather than protecting the interests and expectations of the beneficiary, current German law unduly favors creditors of the fiduciary in bankruptcy proceedings. *See* KÖTZ, *supra* note 107, at 166-67. For a discussion regarding the need to adopt the trust in Switzerland, see Gubler, *Besteht in der Schweiz ein Bedürfnis nach Einführung des Instituts der angelsächsischen Treuhand?*, *in* ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 73 (1954).

117. Final Act of the Hague Conference on Private International Law, Fifteenth Session, The Hague (Netherlands), signed October 20, 1984 [hereinafter Hague Convention]. The text of the convention is reproduced in 23 I.L.M. 1389-92 (1984). For an analysis, see Emmanuel Gaillard & Donald T. Trautman, *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*, 35 AM. J. COMP. L. 307-40 (1987).

118. Hague Convention art. 11.

119. *Id.*

nontrust jurisdiction that is a member of the Hague Convention are therefore valid. One important consequence following from this type of international recognition is that such assets can no longer be seized by creditors or heirs of the trustee in the nontrust jurisdiction.

The growing success that trust law now enjoys even outside the realm of its origin provides us with another example of convergence of the major legal traditions. Nevertheless, as we noticed in relation to forced heirship and the rule against substitutions under Louisiana law, the unqualified reception of the trust would affect several sensitive areas of an organic whole and would therefore call into question the idiosyncratic local character of Louisiana's private law. Our example thus underscores the ability of the Louisiana legal system to resist the temptation of wholesale adoptions and to import foreign law with modifications when this is necessary to preserve the character of its civil-law system.

V. CONCLUDING REMARKS

My reference above to this "ability of the Louisiana legal system" perhaps requires some clarification. As in other places, in Louisiana economic interests are the impetus for many revisions of private law.[120] That law reform does not result in a loss of identity but, instead, serves to strengthen Louisiana's civilian tradition must primarily be credited to the efforts of the Louisiana State Law Institute. Founded in 1938, the Institute is responsible for drafting the revisions to the Civil Code and most other private law enactments. In the past, it has also commissioned translations of authoritative French works and initiated the publication of a comprehensive treatise on Louisiana civil law.[121]

It would be clearly outside the scope of this Article to elaborate in great detail on the various drafting projects of the Institute. For our purposes, however, it is important to note that most of these projects have one thing in common. They involve sincere and thorough exercises in comparative law that have a significant impact on the ultimate

120. This motive was also the engine for the reform of trust law in Louisiana. Referring to older and more restrictive versions of trust law, the Report accompanying the proposed Louisiana Trust Code of 1964 states: "The Louisiana Bankers Association became acutely and distressingly aware of this restrictive situation, and along with many citizens sought legislative relief from a situation harmful to the economy of Louisiana and the well-being of its citizens." LA. REV. STAT. § 9:1721; *see also supra* notes 49 & 60 and accompanying text.

121. *See* John H. Tucker, *Introduction, The Civil Law Objectives of the Louisiana State Law Institute*, *in* CIVIL LAW IN THE MODERN WORLD xi-xvi (A.N. Yiannopoulos ed., 1965).

formulation of the new rules. All of the most recent revisions, including those on the *negotiorum gestio*,[122] sales, leases, property law, and mandate, attest to this distinct approach. Thirty years ago an eminent German scholar had the following to say about the rules of mandate (or agency), which are currently being revised:

> The usefulness of a worldwide rapprochement of common law and civil law especially in this field and the necessity of achieving the best solution of both legal systems cannot be over-stressed. Through her civilian heritage, the common law tradition of her sister states, and in the light of her present position, which is strengthened considerably by the efforts and successes of the Louisiana State Law Institute, Louisiana is especially qualified for this process of amalgamation, a movement which will foreshadow the future developments of the European and Anglo-American legal systems.[123]

I agree with this assessment, particularly because such revision efforts are usually directed by the most experienced academic members of the Institute. Not only does their work carry great weight in the actual drafting process, but as prominent academic teachers and publishing scholars, they also wield considerable influence on the transformation of these revisions through legal education and judicial interpretation.

There are no doubt countervailing forces in both of these spheres: as in other states, the Socratic method forms an integral part of legal training in Louisiana's law schools. Facts, interests, and policies rather than abstract concepts and deductive thinking appear to be the pivotal

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122. The Roman law-based institution of *negotiorum gestio*, which translates into "the management of another's affairs," provides a remedy for a person who acted on behalf of another or in his interest, even if this assistance was unsolicited. For example, the person rescuing another is entitled to compensation from the rescued person, a remedy which never developed under common law. *See, e.g.*, John P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817, 1073 (1961). For an excellent and comprehensive treatment of *negotiorum gestio*, see ALAIN A. LEVASSEUR, LOUISIANA LAW OF UNJUST ENRICHMENT IN QUASI-CONTRACTS 53-142 (1991). *See also* Ross Albert, Comment, *Restitutionary Recovery for Rescuers of Human Life*, 74 CALIF. L. REV. 85 (1986). This fundamental civilian remedy will remain part of the Louisiana Civil Code. *See* Cheryl Martin, Comment, *Louisiana State Law Institute Proposes Revision of Negotiorum Gestio and Codification of Unjust Enrichment*, 69 TUL. L. REV. 181 (1994).

123. Wolfram Müller-Freienfels, *The Law of Agency*, *in* CIVIL LAW IN THE MODERN WORLD 126-27 (A.N. Yiannopoulos ed., 1965).

criteria in most class discussions and final exams. This fact-oriented common-law methodology also permeates procedure—inside the court room through the presence of a jury,[124] and during the pretrial phase through a discovery process that is as intrusive as fact-gathering in every other American state.[125] Here too, legal heritage embodied in refined concepts of substantive law tends to take a back seat.

Nevertheless, the perseverance of the Institute has been rewarded. To a considerable degree the civil-law curricula in the state's law schools espouse doctrinal and statutory interpretation and instill in their students conceptual thinking that draws on historical context and comparative thought. The Louisiana Supreme Court also shows devotion to these values. In several of its more recent decisions, it has admonished lower courts to base their decisions on applicable statutory provisions rather than on previously decided cases.[126] Furthermore, the decisions of the Louisiana Supreme Court distinguish themselves from those in other jurisdictions by their deductive structure as well as their tendency to focus more on the scholarly treatises on the subject matter of the action, often including French and occasionally Spanish and Roman legal sources.[127]

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124. In comparison to sister states, the jury's role in civil cases in Louisiana is less prevalent. For example, a jury is not available in cases involving a sum in controversy below $50,000. *See* LA. CODE CIV. PROC. ANN. art. 1732 (West 1990 & Supp. 1995).

125. For a particularly gloomy account of the state of civil procedure in Louisiana, see Kent A. Lambert, Comment, *The Suffocation of a Legal Heritage: A Comparative Analysis of Civil Procedure in Louisiana and France—The Corruption of Louisiana's Civilian Tradition*, 67 TUL. L. REV. 231 (1992). I wonder, though, whether a "civilian" type of procedure ever was part of Louisiana's civilian tradition.

126. *See, e.g.*, Ardoin v. Hartford Accident & Indemnity Co., 360 So. 2d 1331, 1334 (La. 1978):

> In deciding the issue before us the lower courts did not follow the process of referring first to the code and other legislative sources but treated language from a judicial opinion as the primary source of law. This is an indication that the position of the decided case as an illustration of past experience and the theory of the individualization of decision have not been properly understood by our jurists in many instances. Therefore, it is important that we plainly state that, particularly in the changing field of delictual responsibility, the notion of stare decisis, derived as it is from the common law, should not be thought controlling in this state. The case law is invaluable as previous interpretation of the broad standard of Article 2315, but it is nevertheless secondary information.

Id.

127. *See, e.g.*, Barlett v. Calhoun, 412 So. 2d 597 (La. 1982) (a decision in which the Supreme Court expounded, among other sources the French authors Planiol and Aubry & Rau); *see also* Rozell v. Louisiana Animal Breeders Co-Op, 434 So. 2d 404 (1983) (a case involving the

Even the United States Court of Appeals for the Fifth Circuit has shown considerable sensitivity in applying Civil Code provisions as rules of decision in diversity case.[128]

We may conclude, therefore, that there does exist in Louisiana an indigenous private law doctrine which, "as [an] amalgam forged in the crucible of comparative law,"[129] is here to stay—as long as it remains the object of academic discourse and judicial implementation. As private law evolves and the limitations of "pure" common-law or civil-law approaches encounter limits, Louisiana stands as an example of a jurisdiction which has successfully chosen the best of both worlds, by adopting commercially sound rules without compromising its civilian heritage.

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interpretation of a Civil Code provision on the liability caused by animals; rather than relying on French sources, the Court rested its decision on Roman law origins). On the so-called revival of the civil-law tradition in decisions of Louisiana courts, see Kenneth M. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 LA. L. REV. 1 (1988).

128. *See* Shelp v. National Surety Corp., 333 F.2d 431 (5th Cir. 1964) (in interpreting a Civil Code provision on leases, drawing extensively on historical as well as comparative considerations).

129. T.B. Smith, *The Preservation of the Civilian Tradition*, *in* CIVIL LAW IN THE MODERN WORLD 13 (A.N. Yiannopoulos ed., 1965) (referring to South African law).