Napoleon Code or Complex

Prefatory Note from the Editor

Since the founding of the Tulane Law School, its deans and professors have consistently extolled the inestimable advantages and opportunities afforded by a dual curriculum that bridges the common law/civil law divide. We have argued that our students, from whatever state they may originate, may absorb a far wider legal culture than their counterparts in other states and that this kind of legal education will be increasingly prized in a global society.

While we have always said these things, and while many of our civil law students have agreed, it is interesting to hear this argument analyzed from the point of view of one of our so-called "common law" students. These students now comprise about eighty-five percent of our student body. How do they perceive the civil law and how has the dual curriculum and international outlook of the school affected their legal development?

The following Essay was written by Paul Reyes who hails from Cockeysville, Maryland. Last year, while a second-year student, he took the Civil Law Seminar offered by Professor A.N. Yiannopoulos and submitted this Essay in fulfillment of the course. The Editor finds it to be a piquant mixture of insight, humor, and tribute to the values of education within a mixed jurisdiction. It should therefore be of great interest to the *Forum*'s readership.

Vernon Valentine Palmer

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I. INTRODUCTION: "IGNORANCE IS BLISS" AND OTHER HACKNEYED EXPRESSIONS 97
II. THE STUDY OF COMPARATIVE LAW 99
III. THE PERKS OF LEGAL EDUCATION IN LOUISIANA 100
IV. ADVANTAGES IN THE AREA OF INTERNATIONAL LAW AND PITIFUL SPORTS ANALOGIES 103
V. THE COMMON LAW STUDENT'S INADVERTENT STUDY OF THE CIVIL CODE 105
VI. CONCLUSION 106

In Journey to America, Alexis de Tocqueville suggested political and social reasons for the American debate on codification: Generally, American men of law emphatically sing the praises of the common law. They oppose codification with all their powers which is to be explained in this way. 1st. If a code of laws was made, they would have . . . [to] begin their studies again. 2nd. The law becoming accessible to the common herd, they would lose a part of their importance.[1]

I. INTRODUCTION: "IGNORANCE IS BLISS" AND OTHER HACKNEYED EXPRESSIONS

Nor are the most conscientious compilations of Natural History for the benefit of the young and tender, free from the same heinousness of mistake.[2]

Prior to my civil law seminar I had no idea what the study of comparative law was about or its usefulness. Furthermore, I was

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* J.D. candidate 2002, Tulane Law School. While admittedly guilty of a *faux pas*, I felt it necessary to begin this Article with a laconic apology. Legalese and bombastic dialect permeate my paper, perhaps in compensation for lack of actual meritorious content. As you will discover there is no hard evidence to prove my proposition, just the opinions of others and my flabby endeavors to interpret them. Thus in issuing this disclaimer, keep in mind that this document is for "edutainment" purposes only, and it is written in the spring of 2001 by a second-year law student who must refer to Black's Law Dictionary every time he encounters the word *inchoate*.

1. Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 417 (1996).

2. HERMAN MELVILLE, MOBY DICK OR THE WHALE 382 (Modern Library ed. 1992) (1930).

completely ignorant of the importance of studying the civil law, as my perception of its usefulness was limited to the linguistically unique Louisiana folk from the swamps. During my time at Tulane I have learned that I may have been mistaken in my rash brush-off of codified law, but still believe that many of my friends commute by pirogue. Legal training appears to be more complete with an understanding of a plethora of legal ideologies, rather than concentration on a sole system. When I began this paper, I was intent on disproving the civilian professor's conception that a civilian-trained lawyer was superior to his common law counterpart. While I am not fully convinced of the civilian's superiority, I am now aware of the extraordinary advantages stemming from the legal culture available to law students in Louisiana.

A major problem was encountered during the brainstorming stage of this paper: where to begin (a process made even more difficult by the brain numbing effect of eating too many Gator Tator Zapps chips). Exactly how or where does one launch his crusade to prove that civilian students and their curriculum are not superior to their common law counterparts? I had originally decided to set up a "Tale of the Tape" comparison of Napoleon and William the Conqueror as if they were going to go twelve rounds, but I decided that this idea might not be prudent.[3] I then sought advice from the code, but eventually realized there was no article in the Louisiana Code (even the Year 2000 Anniversary Collector's Edition was mute on this point) or treatise declaring that possession of a civilian law education was superior to others. Also, there was no jurisprudence, or restatement of the common law that conceded a civilian student was superior.

My first instinct in light of the aforementioned lack of information was to prove statistically that civilian law students were not superior to their common law counterparts. I quickly realized how difficult this task would be. Was I to pore over LSAT scores or Bar Passage rates of civilian and common law students and then compare the two? But, what would that prove? There would be an extraordinary amount of uncontrollable variables in any collection of statistics to make any conclusion meaningful, not that one would emerge in any event from my research.

The next logical step (besides bagging it and grabbing a fish platter at Cooter Browns) appeared to be to search out the experiences of common lawyers and civilians in their respective fields and then analyze

3. I cannot take full credit for this ingenious methodology, as the idea did not occur to me until one of my friends asked me what my paper was about. His response to my topic, civil law students vs. common law students, was "do you mean in a fight?"

how their education has affected their respective professions. After reading numerous accounts regarding the legal education of practitioners, judges and professors, complications arose in attempting to compare them. Actually, a larger dilemma became the necessity to learn more about codified law than I had ever imagined. I must admit that prior to my admittance to Tulane, I was completely oblivious to the existence of the Louisiana Civil Code. I believed the name itself, *Napoleonic Code*, summed it up. Napoleon wrote a code of law and it somehow found its way without being consumed by the gators and nutria to Louisiana, right? Not exactly, as I previously lacked comprehension of the impact that the Spanish and Romano-Germanic codes and the common law had on the Louisiana Civil Code.

II. THE STUDY OF COMPARATIVE LAW

> *Most people take their own world-view for granted as the product of our natural sane common sense, but in reality it is provided by our mother tongue. . . . This feeling is usually more of a weakness than a strength. It is a weakness from which many judges, attorneys, and scholars in the United States, as well as other unitary systems, suffer. It may be overcome by comparative law. It is overcome more easily in a mixed jurisdiction.*[4]

I vividly remember when I first learned of my acceptance to Tulane Law School. In deciding whether to attend, I factored in the school's reputation (a.k.a. the U.S. World News Report ranking), the weather (I did not foresee humidity in August), and nightlife (what exactly is that smell emanating from Bourbon Street?). However, one of my concerns about Tulane was not its curriculum. That is, not until one of my parents' friends was astonished at the fact that I planned to study civil law and consequently stay in Louisiana to practice. Of course this was all news to me. According to the majority of people, at least those from the North, Tulane teaches only civil law and the shelf date of a civil law education expires when one leaves the Sportsman's Paradise. Upon further investigation I discovered that Tulane offers both a civil and common law program. I have to admit I was still confused because I believed that all schools taught both civil (civil as in *A Civil Action* by Jonathan Harr) and criminal law classes. Also, I had no idea what a tort was; I mean, isn't it one of those desserts you have to order at the beginning of a meal?

4. Christopher L. Blakesley, *The Impact of a Mixed Jurisdiction on Legal Education, Scholarship and Law*, *in* Vernon Valentine Palmer (Ed.), LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 61, 75 (Carolina Acad. Press 1999).

To stomach three years of an American law school without acknowledgment of other legal systems leaves one's legal education at best unfulfilled. Comparative legal courses offer refreshment after a malnourished study of solitary legal systems, for "[e]ven if one's focus is fully 'domestic,' it is self-deception to think that a comparative perspective is not helpful. Legislators, for instance, who fail to realize this may promulgate inferior legislation. Judges may render inferior decisions."[5] Most nonresidents making the trek to Louisiana arrive with an ethnocentric idea of law, not aware of the existence of the Louisiana Civil Code or codified law in general.[6] However, naiveté alone does not warrant schools to compel comparative law studies, for "[w]e allow ourselves to be so manipulated when we limit ourselves to and by our own personal 'national' language and legal system. We tend to think in terms of 'us' and 'them.' We then become swallowed up by the propagandists; sometimes we do horrid things."[7]

Though mindful that "[c]omparative law and comparative insights may come through more clearly as one sees comparison become a valuable tool for clearer understanding of one's own legal system as well as that of others,"[8] still it may not offer enough to create a complete legal educational experience. A course in comparative law may open a student's eyes to the reality of a world with diverse legal cultures, but one's education is still incomplete as compared to those students who take both code and common law classes.

III. THE PERKS OF LEGAL EDUCATION IN LOUISIANA[9]

> *Because of our cross-training, Louisiana judges are knowledgeable in both civil and common law. We generally have the ability to operate with ease in both systems.*[10]

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5. *Id.* at 68.

6. After writing these words, I may deem it scientifically prudent to test this hypothesis in depth at the Little Tropical Isle by questioning its patrons, after a stop at the Lucky Dog stand of course.

7. Blakesley, *supra* note 4, at 74.

8. *Id.* at 62.

9. *See* Roger K. Ward, *The French Language in Louisiana Law and Legal Education: A Requiem*, 57 LA. L. REV. 1283, 1311 (1997). Louisiana is home to four ABA-approved law schools: the Paul M. Hebert Law Center of Louisiana State University (Baton Rouge), Southern University Law School (Baton Rouge), Tulane University Law School (New Orleans), and Loyola University Law School (New Orleans). *Id.*

10. James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 2 (1993).

> *Their [Louisiana judges] legal education includes, in addition to civil code subjects, common-law courses taught by the case method with emphasis on analysis of facts and policy.*[11]

Conceptually it may be helpful to think of the civil and common law as shampoo and conditioner. Neither is inherently better than the other is, but rather they work synergistically, although, in an adversarial system, I doubt the goal is to leave others soft and shiny. Tulane Law School's curriculum may be the *Pert Plus* of law schools, offering programs in both a common law and civil law.[12] The curriculum that civil law students endure at Tulane compels them to swallow quite a bit of common law methodology. For instance, Legal Research and Writing, an obligatory course during the first year, culminates with the writing and oral argument of an Appellate Brief. The apparatus which students use to implement this chore originates from common law jurisdictions, especially common law jurisprudence. Furthermore, participants of the civil law program must sweat it out until the second semester of the first year before they are given the go-ahead to exercise their own sport.

The delineation between common and codified law apparently may be fading in favor of the

> conten[tion] that the two legal traditions, originally distinguished by a clear dichotomy between codification and case law, have been converging in the twentieth century. They describe for example, a "tendency toward codification in major common law nations" and countertendencies in that "civil law judges are becoming more consciously active, less inclined to conform to the image of a passive *bouche de la loi* and thus more like common law judges."[13]

This is far from a new proposition:

> As Jean-Louis Bergel notes, "One is tempted to say that there will be henceforth only mixed laws, because at the present hour the common law and civil law have a tendency to erase their differences." "Systems of

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11. *Id.* at 1.

12. *See* Mark A. Drumbl, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 SAN DIEGO L. REV. 1053, 1094 (1998) ("Louisiana State University ('LSU') fuses the study of both legal systems by obliging first year students to complete the following courses: Contracts, Torts, Louisiana Civil Law system, Basic Civil Procedure I and II, Criminal Law, Legal Writing and Research, Obligations, Civil Law Property, Constitutional Law I, and Administration of Criminal Justice.").

13. Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 440-41 (2000).

> mixed law become a sort of laboratory, indeed model, for the present evolution of the majority of legal systems."[14]

Not all scholars see the pilfering of legal doctrine as beneficial, "[f]or example, some recent decisions by the United States Supreme Court have adopted, or have pretended to adopt, some elements or aspects of the inquisitorial systems of the Romano-Germanic legal culture."[15] However, as a solution to the misapplication of legal tenets, it is proposed that "[c]areful jurists from mixed-jurisdictions should be utilized to help avoid these dangers and assist in proper borrowing."[16] Where does one find these *careful jurists*?

In general, the education of students situated in Louisiana choosing to study codified law "includes, in addition to civil code subjects, common law courses taught by the case method with emphasis on analysis of facts and policy."[17] Exposure to two legal schemes is an enriching experience: "The opportunity to study the basics of both the Romanist and the common law traditions and to apply them to modern legal problems in the classroom and in our scholarship promotes this intellectual magic."[18] The irksome task of a civilian law student soaking up two systems of law causes Louisiana law professors to conclude that, "our students [Louisiana law students] have the opportunity to become better common law lawyers for having had civilian methodology and they are better 'civilians' for having had the common law."[19] For example,

> [w]hen the distinguished jurist James Kent went on the bench in New York in the early nineteenth century, he described how his familiarity with the civil law came in handy: I made much use of the Corpus Juris, and as the judges (Livingston excepted) knew nothing of French or civil law, I had immense advantage over them.[20]

By studying law in the state which is home to the Rajun Cajuns, students are enveloped in a way of life that "is a natural creator of comparativists and international lawyers, providing a formidably broad

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14. Vernon Valentine Palmer, *Introduction*, *in* Palmer, LOUISIANA MICROCOSM OF A MIXED JURISDICTION, *supra* note 4, at 3, 4 n.6.

15. Blakesley, *supra* note 4, at 80.

16. *Id.* at 81.

17. Dennis, *supra* note 10, at 1.

18. Blakesley, *supra* note 4, at 62 (referring to comparative study as a "springboard from which to ponder law and philosophy as well as more exotic subjects, including, geography and law; language and law; religion and law").

19. *Id.* at 67.

20. E. Allan Farnsworth, *A Common Lawyer's View of His Civilian Colleagues*, 57 LA. L. REV. 227, 228 (1996).

foundation from which to learn and analyze law."[21] Common Law students, however, are given the green light to hone their skills from the beginning, embarking and terminating their education with the case law method.[22] Concurrently the civilian counterpart is in the process of

> [b]ecoming a cross-cultural, bilingual attorney or scholar, so to speak, [which] is better than being limited to one perspective. A diligent student in a mixed jurisdiction like Louisiana becomes "bi-lingual" in this sense. Daily experience in Louisiana (if one takes advantage of it) provides access to a rich and varied culture and legal universe, to be used to become a "bi-lingual lawyer."[23]

In consideration of the diversity of a civilian's legal education, a common law student's scholastic experience may later be looked upon as an inadequate or incomplete legal indoctrination. It is a shame that more students of the common law domiciled in Louisiana do not dabble in one or two civil law courses, since "Louisiana law professors may be doing an even better job than their counterparts on the continent because they have advantages of American legal education and hence have the ability to combine the lecture with the case method of instruction."[24]

IV. ADVANTAGES IN THE AREA OF INTERNATIONAL LAW AND PITIFUL SPORTS ANALOGIES

> *Today, the overwhelming majority of the countries in the world have a civil law system. To this end, familiarizing American law students with civilian practice would not only promote integration within NAFTA, but would also allow them to be better positioned within the global legal market.*[25]

What happens in a football game if you have a team possessing an explosive offense that is nearly exclusively grounded on the passing game and that particular Sunday you encounter a snow storm that Rudolph would have trouble tackling? Your opposition, the one with a

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21. Blakesley, *supra* note 4, at 61-62.

22. This may not be entirely true; as will be discussed later, common law students are exposed to a smattering of codified law by way of the Uniform Commercial Code.

23. Blakesley, *supra* note 4, at 72; *see also* William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 724 (2000).

> In consequence, in our day-to-day work, we found no major problem in practicing civil law in Quebec and then moving over to the common law of another province or of the Federal courts. In other words, lawyers and judges are not concerned with practicing and adjudging law in the mixed jurisdiction of Quebec. Rather, if they [are] aware of the dual legal systems, they rejoice in them.

24. A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 TUL. L. REV. 830, 848 (1980).

25. Drumbl, *supra* note 12, at 1069.

balanced offensive attack (complete with Riggo, the Hogs, Theisman, Monk, and the Smurfs) will most likely prevail. These types of game conditions are not unique to the fields and courts of athletics. As the practice of American lawyers expands beyond our country's borders, many may find their freezing hands in need of a muff and a quality running back to hand the work off to.

A background predicated on one legal discipline may be inadequate, for as John Sexton notes, "there are few significant legal or social problems today that are purely domestic .... It is virtually impossible to avoid the transnational implications of almost any subject."[26] It is more and more critical that law students prepare themselves for a barrage of converging legal principles. As Arminjon, Nolde, and Wolfe have said, "[T]here doesn't exist in the modern world a pure judicial system formed without exterior influence.... This mixed character reveals itself above all in the systems where the roman elements dominate, but which have undergone in large measure the influence of english law."[27]

The naked truth looks as though, "[o]ne who understands both the common law and Romano-Germanic models is better able to understand the methods, analytical approaches, sources, and problems of international law."[28] Those who possess an understanding of both "models" of law are found among the "[g]ood students from Louisiana [who] become naturals at negotiating and resolving problems relating to international contracts, interpreting treaties or other international instruments, and litigating cases in and on international law."[29] Balance in legal studies if prepared properly will result in a more complete practicing attorney ready for the international context.

> The Civil Code and "code courses" can prompt deep analysis of legislation that is designed to cover a subject coherently, systematically, and completely. At the same time, the common law subjects provide opportunity for classic Socratic style case analysis and synthesis. Thus, we have a double benefit, not available in law schools in unitary systems of either the common law or the 'civilian' or Romano-Germanic tradition.[30]

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26. *Id.* at 1055.
27. Palmer, *supra* note 14, at 4 n.6.
28. Blakesley, *supra* note 4, at 64.
29. *Id.* at 68.
30. *Id.* at 66.

V. THE COMMON LAW STUDENT'S INADVERTENT STUDY OF THE CIVIL CODE

> *Just as civilians look first to the provisions of their codes and only then to the cases that have applied those provisions, we Americans do the same with our Uniform Commercial Code.*[31]
>
> *To the American Law Institute and the national conference of commissioners, it was apparent by 1940 that restatements and uniform state laws would not unify commercial law well enough to fulfill the business community's requirement of stability and predictability in transactions. Both law-reforming entities concluded that commercial law had to be codified, and the eventual result was the United States Uniform Commercial Code.*[32]

A core curriculum course during the first year of law school is contracts.[33] Pupils plod to and from this class as they lug around their cumbersome copies of the Uniform Commercial Code (UCC). In fact this is why I believe numerous students at my school have made the switch from backpacks to suitcases with wheels.[34] The course in contracts is a common law student's first in-depth analysis of a legal document in the guise of a code. The word *guise* in the preceding sentence was carefully chosen to describe the UCC because it is a "commercial code, not a civil code. Hence, it is not as comprehensive as European-style codes. Rather, it is 'code-like' in the sense that its drafting techniques have relied extensively on European codification techniques."[35]

I now believe that it is not only shabbily written papers that should come with a disclaimer, but that the UCC should come with one also. If the UCC did indeed come with a disclaimer, would I be able to return it if it was concealed in shrink-wrap and not noticeable until after opening? You may want to consider that to be unconscionable. It is interesting to note that the UCC, which "has a particular civil law influence because of its principal moving force, Karl Llewellyn,"[36] has been referred to as "one of our best exports."[37]

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31. Farnsworth, *supra* note 20, at 228.
32. Herman, *supra* note 1, at 427.
33. At Tulane, Contracts is split into two semesters, Contracts I and II. I only mention this because in order to figure out if Sam Shady, who sells me a watch in the bathroom at the Rathskeller that breaks three days later, is considered a merchant, I may need Contracts III, a.k.a., I want my money back.
34. Just a warning, some of your fellow students may institute a baggage check at the school entrance.
35. Herman, *supra* note 1, at 435.
36. Farnsworth, *supra* note 20, at 229.
37. *Id.*

The inevitable need for the UCC has led "[e]ven lawyers hostile to the Uniform Commercial Code [to] realize that American commercial practice would be inconceivable without the Uniform Commercial Code."[38] In fact, while it appears as if common law practitioners "are happiest solving problems and negotiating transactions without too many reminders that we have traveled doctrinal channels that would be familiar to our European ancestors and contemporaries," the reality remains that the UCC's origins are firmly planted in foreign law.[39]

VI. CONCLUSION

There is always someone to put you in your place[40]

When one commences a research paper, especially one aspiring to disprove the theories of one's highly educated elders, the tendency is to latch onto an idea that one is intent on proving correct. Unfortunately for me what I aspired to establish is close to impossible. But do not break out the world's smallest violin to pity me with a song, or even to shed a tear in your beer, for I emerged from this experience grateful. I am grateful for the fact that I have inadvertently happened upon a city within a state endowed with an unparalleled uniqueness.

It's not just the fact that New Orleans has the best cheese fries at four in the morning (F&M's) or that you might have to walk through your roommate's bedroom to get to your own. I have been given an opportunity to study the civil code, a legal system that has cornered the market of law worldwide and, my exposure to the civil law was in conjunction with my common law studies. So as I drift off to a land of scrumptious hot alligator sausage po-boys, I leave you with the immortal words of Bob and Doug McKenzie, "Take off hoser, Eh?"

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38. Herman, *supra* note 1, at 433.

39. *Id.* at 437; *see also id.* at 427 ("The leader of this legislative effort [passage of the UCC] was Karl N. Llewellyn, a jurist of wide experience and learning. Llewellyn, a student of both continental and American law, social sciences, and anthropology, had firsthand experience with German law, fluently read and spoke German, and had written a German thesis on the role of precedent. He also studied in Paris and Lausanne."); Farnsworth, *supra* note 20, at 229 ("It is therefore, no coincidence that a centerpiece of the Code is the concept of good faith—much as the analogous concept of Treu und Glauben is a centerpiece of the German Civil Code.").

40. Paul Hornung, Green Bay Packers.