Interpretations of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title

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TABLE OF ABBREVIATIONS

Austin	J. AUSTIN, LECTURES ON JURISPRUDENCE (4th ed. 1873)
Blackstone	1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765)
Domat	1 J. DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER (Cushing ed., Strahan trans., 1850)
Fenet	P.A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL (1828-30)
FP	PROJET DE [CODE CIVIL] L'AN VIII DE LA COMMISSION DU GOUVERNEMENT PRÉSENTÉ LE 24 THERMIDOR AN VIII [1800], IN 2 FENET. ALL CITATIONS ARE TO THE LIVRE PRÉLIMINAIRE.
Gény, *Méthode*	F. GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (an English translation by the Louisiana State Law Institute, 1963)
Grotius	H. Grotius, *De Jure Belli ac Pacis*, *in* CLASSICS OF INTERNATIONAL LAW (Kelsey trans., 1925)
La.	*Louisiana Reports*
LCC	*Louisiana Civil Code*. Depending on its context, The reference may be to: A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808) (popularly known as "the Digest," "the LCC of 1808" or "the old Code"); *The Louisiana Civil Code* of 1825, called "the new Code"; or *The Revised Civil Code* of 1870. If one of these is not specified, the reference is intended to include all three.

Livingston, Preliminary Report	"Preliminary Report of the Code Commissioners, dated February 13, 1823," *in* 1 LOUISIANA LEGAL ARCHIVES lxxxv-xcv (1937)
Mart. O.S., -N.S.	*Martin's Louisiana Reports* (Old Series); - (New Series)
Montesquieu	MONTESQUIEU, THE SPIRIT OF THE LAWS (Nugent trans., 1949)
Portalis, *Discours*	*Discours Préliminaire prononcé Lors de la Présentation du Projet de la Commission du Gouvernement*. Only part of the original was available to me; therefore, a reference to the *Discours*: (1) followed by a page number only refers to the original in 1 Fenet 463-523; (2) followed by a citation to 43 TLR refers to a translation of the *Discours* in Levasseur, *Code Napoleon or Code Portalis?*, 43 TLR 762 (1969).
Pufendorf	S. Pufendorf, *De Jure Naturae et Gentium*, *in* CLASSICS OF INTERNATIONAL LAW (Oldfather trans., 1934)
Rob.	*Robinson's Louisiana Reports*
Savigny, *System*	F. SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (Guenoux trans., 1840)
Thibaut, *Pandekten*	A. THIBAUT, SYSTEM DES PANDEKTEN RECHTS, translated as AN INTRODUCTION TO THE STUDY OF JURISPRUDENCE by N. Lindley (1855).
TLR	TULANE LAW REVIEW

INTRODUCTION

When there are code texts on the subject, one who writes about interpretation of laws must interpret those texts. This does not happen often; most codes have declined to enact interpretive provisions. When there are provisions though, the writer is faced with a problem (or may be) which Gény has considered: what if the system of interpretation ordained is contrary to "reason"? Gény would then reject it as not law.[1]

On my view of interpretation, I need not confront the problem. Nevertheless, it must be mentioned, because both writer and reader may become confused unless both remember that one's views on interpretation of laws are necessarily influenced by one's views of the role and nature of law. So when I present the LCC system of interpretation, I am "interpreting" the LCC's provisions on interpretation. To prevent this confusion, it is best that I set out my own views on law and interpretation first.

Every legal system may be conceived as a unity of three elements: legal precepts, legal ideals and legal method.[2] Interpretation forms a part of the method for dealing with the precepts, and is influenced by the legal ideals. Thus, rules for interpretation will depend ultimately on the perceived or ideal nature of "legality" within a system. If, as in the Anglo-American common law system, cases are perceived as potential sources of law, rules for interpretation will be framed accordingly. If legislation is seen to be the ideal source of law, rules for interpretation will be framed to protect that ideal, and so forth.

That describes the process abstractly. If we want to examine it historically however, we will discover that no *one* legal method, or system of interpretation prevails throughout the history of a system. In order to accommodate historical fluctuations within a system, we must admit another criterion: that is, whether the system of interpretation tends to *maintain, overcome or deepen* the accepted notion of legality, the orthodox notion.[3] It is this criterion which I wish to apply to the LCC.

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1. Gény, *Méthode* No. 90.

2. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641 (1923); POUND, 3 JURISPRUDENCE §§ 89, 106 (1959); Franklin, *Law, Morals and Social Life*, 31 TLR 465, 465-67 (1957).

3. This idea, and much of its development, I owe to Professor Mitchell Franklin. His contributions to the field of comparative legal method and that of interpretation have been enormous and his influence on this work will be obvious to anyone familiar with his theories. For anyone who is not, the articles chiefly called in aid here are the following (all by Professor Franklin):

A Study of Interpretation in the Civil Law, 3 VAND. L. REV. 557, 565 (1950); *Equity in Louisiana: The Role of Article 21*, 9 TLR 485 (1935); *The Ninth Amendment as Civil*

Perhaps the best example of an interpretive rule which *maintains* legality is the "plain-meaning" rule, which we encounter in many forms in different systems. The LCC expresses it in article 13.[4] The legal precept contained in the law is to be applied "literally"; no attempt is to be made to expand or contract the legal force of the precept: it applies to all that it "contains" (or describes) and nothing more. Such an approach would figure large in a positivist philosophy of law.[5] This is the approach which Austin calls "genuine interpretation":

"The rule to be observed by the governed is not the *ratio legis*, but the *lex ipso*.

> The rule to be observed by the governed must be collected from the *terms* wherein the statute is expressed. Since a statute law is expressed in determinate expressions and those expressions were intended to convey the will of the legislator, it follows that the import or meaning which he annexed to those *very* expressions is the object of *genuine* interpretation.[6]

Austin also recognizes the tendency of interpretation to *overcome* the accepted notion of legality, this he refers to as "spurious" interpretation:

> Instead of interpreting a statute obscurely or dubiously worded, the judge modifies a statute clearly and precisely expressed: putting in the place of the law which the lawgiver indisputably made, the law which the reason of the statute should have determined the lawgiver to make. Consequently, where the judge in show interprets the statute restrictively, he abrogates or annuls it partially. And where the judge in show interprets the statute extensively, he makes of its reason a judiciary rule by which the defect is supplied.[7]

Something should be pointed out here which will be discussed in detail later: that the example Austin gives of spurious interpretation—that of interpreting a law by its reason—is "spurious" to the legal system of Austin's reference, the Anglo-American common law, in which the interpreter is held to the lawmaker's "intention" in the interpretation of

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Law Method and Its Implication for Republican Form of Government, 40 TLR 487, 500-01 (1966); Book Review, 7 TLR 632 (1932).

Other articles of his will be cited throughout this work. Citations will not, however, reveal my real debt to him, which is the perspective of law he has provided me and which pervades even the ideas herein which are originally mine.

4. *See infra* Part I, Texts and Sources.

5. By "positivism" I mean the theory that legal precepts are sufficient to state all or most of the law; the ideal form of a positivist system would be the one which stated all of the law in authoritative precepts. That is not the usual definition, I know (*cf.* PATERSON, JURISPRUDENCE 82 *et seq.* (1953)), but it is the significant distinction here.

6. 2 Austin 649.

7. 2 Austin 1026.

statutes; but interpretation by the reason of the law may *not* be spurious in another system. Romanist or civilian systems may authorize the interpreter to interpret by the reason, or motive, or principle of the law. The difference, of course, is between accepted notions of legality. If the accepted ideal of legality is "legislative intention," then interpretation of a law by its reason, insofar as the interpretation departs from, or tends to "correct" that intention, will be "spurious"; that is, will tend to overcome the accepted notion of legality. Another example of spurious interpretation is seen in the remark made by an opponent of the veto power contained in the U.N. charter, that "since it was virtually impossible to amend the Charter to do away with the veto . . . . The only practical way seemed to be through the twin processes of interpretation and the creation over a long period of time of a more liberal "*jurisprudence*."[8]

On a larger scale, spurious interpretation is an example of what Professor Franklin has called "paralaw," that is, the overcoming of accepted notions of law and legality by legal method which pretends to recognize the law's force while actually opposing it.[9]

> The history of legality is also the history of paralegality—English law has been overcome by English equity, Roman strict law by Roman praetorian law, positive law by natural law or by free-law, codes by *jurisprudence* (judicial decision) substantive law by procedural law . . . .[10]

The two classic examples of this process, this conflict between formally accepted notions of legality and the law recognized by the practice (or by legal method) are Roman praetorian law and English Chancery law.

> The Praetor cannot alter the civil law. It is true that he does fundamentally alter the law, but if he takes the sting out of the civil law rule, it is by indirect methods . . . . If he gives an *exceptio* not directly based on any statute (*exceptio, metus, pacti*) this may seem to be an infringement of a civil law right. . . . But the civil law was respected in form. The *formula* does not deny the civil law right: the *exceptio* paralyses it . . . . The new praetorian actions, not known to civil law, may seem an infringement of civil law rights, for the person liable is certainly deprived of a right or immunity. But it is not so looked at: it is supplemental of the civil law, not contradiction.[11]

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8. *Quoted in* Franklin, *The Roman Origin and the American Justification of the Tribunitial or Veto Power in the Charter of the United Nations*, 22 TLR 24, 43 (1947).

9. A paralegal system thus represents a *system* of spurious interpretations.

10. Franklin, *supra* note 8, at 42-43.

11. BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW 6-7 (1931).

Buckland also notices the resemblance of this system and that of English Chancery:

> Each effects reform in law. Each formally respects the existing system, but by new remedies and new defenses, overrides in practice a good deal of the law.[12]

Pound has criticized Austin's conception of interpretation as genuine or spurious on the grounds that spurious interpretation is an inevitable step in the development toward maturity of a legal system:

> As interpretation it is a fiction. . . . It belongs to a class of fictions under which a general course of procedure or general doctrines have grown up. . . . Moreover it is in large part a fiction which has done its legitimate work.[13]

But Pound misses the point here because he seems unable to see past Austin's two-fold division. What makes spurious interpretation objectionable—in any legal system, common law or civilian—is the fact that it opposes law in the name of the law. It is secret and therefore uncontrolled. Pretending respect for the law, it puts the law aside on the basis of some indeterminate ideal or end. It signals that the authentic or law-making power has been opposed and overcome by some other power. And in the end, because the usurper's power depends on the continued existence of this bifurcated state of affairs, reform of the overcome institutions will be difficult. This much Pound recognizes:

> But general fictions tend to become so deep-rooted that eradication is very difficult.[14]

In modern times, of course, opposition to authentic power is most likely to take the form of professional power, the judiciary, which reserves to itself the authority to interpret what the authentic power has enacted.

Now, the law-making power may be sensitive to the possibility of spurious interpretation and so may seek to contain the problem by directing the interpretation of its texts, or as Professor Franklin says, "by receiving within the professional process itself all the social forces historically capable of participating in the authentic power."[15] That is, the system may be so framed as to anticipate the arisal of new forces in the future which might alter the ideals it consecrates and thus may require the projection of its precepts beyond their "genuine" meaning so that the

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12 *Id.*

13. POUND, *supra* note 2, at 482-83.

14. *Id.*

15. Franklin, *A Study of Interpretation in the Civil Law*, 3 VAND. L. REV. 557, 566 (1950).

new forces are absorbed into the system and new situations are controlled. This is the process of *deepening* legality.

In modern civil law, the process of deepening legality is called analogy. This may be authorized in two ways:

1. Through rules of interpretation;
2. By embodying the legal precepts in "pliable" form, that is expressing them as legal norms which may be expanded.

One or both methods may be used. The *code civil* uses the second only, what Gény calls the "technique" of the code.[16] The LCC employs both.

What this means is that the law, instead of supposing the self-sufficiency of its *content*, instead of supposing that the legal precepts and ideals stated by the texts are sufficient to constitute a legal system, admits that legal method (or professional power) is also a necessary element. By this admission and by setting out either rules or a certain form to *guide* professional power in the application of its texts, the law-making power thus hopes to control spurious interpretation, turning it into a process whereby professional determinations in the application of law are controlled by the force of legal texts.

As I see it then, interpretation of laws in a given system is a reflection of the relationship between the law-making power and the interpreting power, and in our time this means the relationship between the legislative and the judiciary or bar. It must be remembered in what follows that we are here concerned with the interpretation of legislation and particularly codified legislation; thus when I speak of analogy, I mean the analogy from legislation. The common law method knows analogy, but not from legislation. Rather the common law develops (i.e. deepens) case-law by analogy, treating cases both as law and sources of law. Legislation in the common law is a source of law only in the first instance. Thereafter, it is to the cases construing the statute, and not the statute itself that we turn for guidance. Later cases insulate us from the force of the text.[17]

It is precisely this insulation which a system of codified legislation wishes to ward off. If cases are to be a source of law, then the very purpose of a code, as a comprehensive statement of the law in force, is

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16. Gény, *The Legislative Technic of Modern Civil Codes*, *in* SCIENCE OF LEGAL METHOD 498, *et seq.* (1917) (9 Modern Legal Philosophy Series). For a particular application of Gény's ideas to the LCC, see Morrison, *Legislative Technique and the Problem of Suppletive and Constructive Laws*, 9 TLR 544 (1935) (chiefly concerned with articles 11 and 12).

17. Franklin, Book Review, 7 TLR 632, 634 (1932); Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 TLR 351, 537 (1943).

defeated after the first interpretation. If the law-maker wishes to prevent this, the code must presume the existence of an interpreting power in such a way that the interpretation does not thereafter become itself a source of law; thus the way remains clear to return to the code. The code, and not the cases, remains the source of law.[18] The various rules established to this end we call rules of interpretation.

The first rule of interpretation is obviously fidelity to the text:

> FP art. 5.1: Le ministère du juge est d'appliquer les lois avec discernement et fidélité.
>
> LCC art. 13: "When the law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."

But if the judicial solution is not patent, if the law is not "clear" the judge must not be suffered to seek the answer in extra-legal material—in the cases, as happens in Anglo-American systems, or, as happened in Louisiana in the Spanish laws which preceded the new code. He must be directed to find the solution within the code, even though the answer is nowhere "genuinely" stated there. Various possible approaches to stating rules for this problem will be considered below, along with an examination of Louisiana's choice.

The law-maker may choose to control interpretation implicitly without depending on explicit formulated texts to do so, by so drafting its laws that the form of the laws themselves presuppose a certain type of development. Thus the French codes and the Louisiana code distinguish between "normal" law and *ius singulare*. "*Ius singulare* is one which was introduced by the authority of those establishing it for some useful end contrary to the course of reason."[19] Savigny says:

> Le droit est pur et sans mélange (*strictum jus. aequitas*), ou bien il se combine avec d'autres principes étrangers à son domaine, mais qui concourent à la même fin (*boni mores et tous les genres d'utilitas*). . . .[20]
>
> Or, ces éléments étrangers qui s'introduisent dans le droit altèrent la pureté de ses principes et vont par la même *contra rationem juris* . . . Les

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18. Thus the French *Projet* excludes cases (jurisprudence) as a source of law altogether:

> FP art. 5.3. "Le pouvoir de prononcer par forme de disposition générale est interdit aux juges." FP art. 5.8 "On ne doit raisonner d'un cas à un autre, que lorsqu'il y a même motif de décider."

19. D.1.3.16. Ius singulare est, quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est.

20. Savigny, 1 *System* 53.

> Romains l'appelaient *jus singulare* et lui donnaient pour base une *utilitas* ou une *necessitas* différente du droit.[21]

In the Louisiana code, *ius singulare* are designated as such by the particular texts. For example, article 3185:

> Privilege can be claimed only for those debts to which it is expressly granted in this code.

And article 3470:

> There are no other prescriptions than those established by this code.

Now, what this means is not that these texts are to be "restricted," or given a "restrictive interpretation," but that they may not serve the interpreter as a basis for analogical projection. The importance of this limitation is the presupposition it carries with it, that texts which are *not* so designated *may* serve as the basis for analogy. Thus the form of the code articles presuppose that "normal" texts (i.e. those which are not designated as *ius singulare*) will be developed to control situations not "genuinely" covered by the texts.[22] In the Louisiana code this implicit idea is made explicit by article 2, which declares that the law's "provisions generally relate not to solitary or singular cases, but to what passes in the ordinary course of affairs."

In the control of interpretation this formal element may be more important than rules of interpretation. Nevertheless, it is the *rules* which I propose to examine, and I mention formal control here for the obvious reason that the rules and the form may be dependant on each other. They should be, but as we shall see, this is not always the case.

Something should be said here of "legislative intention."

I will accept without question that the word "intention" has some objective meaning,[23] which is, the direction of thought to some purpose. I will accept that individuals may have discoverable intentions. Thus it is accurate to say that Portalis, or Moreau Lislet or Edward Livingston "intended" thus-and-such.

When we transfer this notion to a group of individuals, e.g. a legislature, the effect is much more complex. If we assume a situation in which each member of the body has his mind directed toward some

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21. *Id.* at 58-59. "Reason," as used by both Savigny and Paul in the Digest fragment, means "the reason of the law," Coke's "artificial reason." *See* Franklin, *supra* note 15, at 557. The term refers to legal method, *cf.* Portalis: ". . . we find in the codes of civilized nations the kind of meticulous attention *which covers a multiplicity of particular issues and seems to make an art of reason itself*." *Discours*, 43 TLR 762, 768-69 (1969). The passage Portalis emphasizes is drawn from Montesquieu, 1.6.1.

22. Franklin, *Equity in Louisiana: The Role of Article 21*, 9 TLR 485, 501 (1935).

23. This is debatable, but to do so would serve me no purpose here.

particular ill and the framing of a remedy to correct that ill, we may I think legitimately speak of "legislative intention." But what is "legislative intention" when an entire code of laws is passed? Does the legislature intend each of the separate provisions? Or does it intend, is its purpose the ideal of the code as a *corpus*.[24] The distinction is an important one, for if the purpose of a code is to state all the law on a subject comprehensively, and if, as Portalis tells us . . . *la perpétuité est dans le voeu des lois*"[25] then it seems contradictory to speak of legislative intention as to the separate provisions of the code.

There is a distinction between the existence of legislative intention and the effect of it, though this is not usually noticed, the assumption being apparently that if it exists, it controls. But this *is* an assumption; it is a theory, a limitation on interpretation, and though it may be a valid one, it is not a necessary one.

It is most likely to be valid when it is applied to particular[26] acts of the legislative body, for the reason given above, that in these instances, the existence of "intention" is most likely to be "real"; that is, the legislature focused its attention on some particular purpose and its act was determined by that purpose. And in the case of a code, this approach would be legitimate if the code is to be entirely positivistic, that is, if the code is so designed that its provisions (each separate provision) are to apply to certain situations "genuinely" contained within or described by them and no further. Such a code would be a systematic statement of positive law merely, with no inherent design for its own growth.[27] Control of interpretation by "legislative intention" then is to treat law as *ius singulare*.[28]

I say "legislative intention" is valid in the above cases, though not necessary. It becomes an *invalid* approach when it is applied to a code which makes provisions for its own growth, which assumes that legal

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24. *See* POUND, *supra* note 2, at 486-87; JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW 19 (1957).

25. FP art. 2.3.

26. A code is, of course, a legislative act, strictly speaking, but a general one.

27. The various "Uniform Laws" of the United States, such as the Negotiable Instruments Law, may be cited as examples here. They have been received, even in Louisiana, as positivist "codes" and are interpreted according to the presumed legislative intention of each separate provision. On the problems which this presents, see POUND, *supra* note 2, at 486-87; and Bentel, *The Necessity of a New Technique of Interpreting the N.I.L.—The Civil Law Analogy*, 6 TLR 1 (1931).

28. This is the traditional common law approach to legislation. That it is not a *necessary* one, even as regards particular legislative acts, and that it has not always been the common law method was demonstrated by Pound in his article *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908). The substance of his remarks is repeated in POUND, *supra* note 2, § 111, at 654-71.

method is an element of the unity which is the legal system. Either the code provisions are "intended" to apply to the cases which they genuinely describe, or they are "intended" to be projected beyond that meaning to situations and cases not dreamed of by the legislator. The two ideas repulse each other, and in the second, use of the word "intention" as to the meaning and limitations of a particular provision is inaccurate. It is only possible to say that the *code* was "intended," was designated, to be projected so that its force covers new situations. But we cannot say that, for example, the draftsmen of the French code (1804) or the Louisiana codes (1808, 1825) "intended" that articles 1382 and 2315, respectively, should be applied to automobile accidents.[29]

It follows from the above that I am in fundamental disagreement with Gény:

> Statute as such is the expression of the authority of a man or group of men, commensurate with their intelligence. Hence, to assure it all the effectiveness, it must be interpreted in accord with the authority which issued it, and from the viewpoint of the time when it was issued. . . . Especially we cannot accept the idea that, once promulgated, the statute becomes an independent entity separate from the thought of its author, which develops independently so that its meaning can change with the circumstances surrounding the evolution of social life.[30]

Rather, as I see it, law is "frozen history"[31] and

> the meaning of history does not derive from the actuality of history, but also from the real possibilities which are implicit in such actuality. The possibility itself becomes actual if it emerges from actuality . . . .[32]

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29. LCC art. 2315. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

30. Gény, *Méthode* No. 223. In terms of modern doctrine, Gény here chooses the "subjective" approach to interpretation and rejects the "objective" approach. The former connects the meaning of a text with its author; the latter severs this connection: once the law is created it leads a life of its own. See for proponents of both views Mayda's "Introduction" to Gény, *Méthode* at xxiv-xxv. The terms are misleading, especially when reference is made to the common law method. The common law approach to legislation is "subjective" according to the definition above: it looks for legislative intent. But it does not (to use the terminology of *contractual* interpretation) look for subjective intent, or actual intent, but for objective intent, the intent revealed by the words and circumstances. "[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used . . . . We do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means." Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899). It would be interesting to know how much this approach owes to Grotius 2.16.1.

31. Friedrich, *Law and History*, 14 VAND. L. REV. 1027 (1961), *reprinted in* FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 233 (2d. ed. 1963).

32. Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government*, 40 TLR 487, 500 (1966).

In terms of legal texts, this means:

> It is the historical forces, perhaps presuppositional or perhaps independent of particular consciousness, which establish the genuine legal role of the text, and which enjoy such determining role unless another historical force proves strong enough to seize, to occupy or to alienate the text and thus to veer its meaning.[33]

So an Eighteenth or Nineteenth Century text may have been emptied of its content and refilled several times before it reaches us. If we are to understand such a text, "intention" (if it is even relative at all) is only one of many considerations.

If a code then presupposes its own development, and is conscious of the possibility that its ideals may be alienated by other forces, and wishes to protect itself against that, it will attempt to ensure that "new developments" in law are real possibilities developing out of the code's own actuality. One way to do this is to envelop legal method—the process of interpreting the code—as an element of that actuality, as a part of the ideal of legality which the code consecrates. Thus by *recognizing* legal method (or professional power) as an element of itself, the code may define and direct the use of legal method, and thus hope[34] to protect itself. This is the relationship of analogy to legality.

> Analogy is the instinct of reason, creating an anticipation that this or that characteristic, which experience has discovered, has its root in the inner nature or kind of an object, and arguing on the faith of that anticipation.[35]

By permitting analogical professional development, the code hopes that its "inner nature," its ideal or purpose, the system of legality which it consecrates, will be protected and not be overcome.

To Austin, for whom the interpretation is constrained to the limits of legislative intention, who treats each law as *ius singulare*, analogy grounded in legislation is an example of "spurious" interpretation, and properly so, if legislative intention in his criterion. What *he* calls spurious though is a perfect description of what I would call the proper civilian method of developing, of deepening legality:

> [T]his bastard extensive interpretation *ex ratione legis* is frequently styled "analogical."
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> The cases which the law omits (but which fall within its principle, and the cases which fall within its principle, and which it actually includes,

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33. *Id.* at 500-01.

34. "Hope," because the best of preparations is only a safe bet.

35. Hegel, *quoted in* Franklin, *supra* note 15, at 563. Austin's theory of analogy is quite similar. See his *Excursus on Analogy*, *in* 2 Austin 1036-55. *See also* Gény, *Méthode* Nos. 165-167.

> are *analogous*. Or (changing the expression) they are resembling cases *with reference* to that common principle, in spite of the differences by which they are distinguished when viewed from other aspects. And, since they are resembling cases with reference to the principle of the law, *analogy* (as well as *equity*) is said to require that the law should be applied to *all* of them in an equable or uniform manner. Equity and analogy (as thus understood) are exactly equivalent expressions.[36]

Note: As I have said, I am concerned here with interpretation of legislation. According to the definition which I have given of interpretation though—as the process of maintaining, overcoming or deepening legality—I would admit that the common law method of projecting cases analogically may also deepen legality if it is accepted within the system that the process of case manipulation is essentially legislative, that is, if the process is open and not secretive.[37] This would require us to say that in Britain there are at least two law-making powers—Parliament and the courts.[38] In the United States there are at least three: Congress, the courts and administrative agencies (which in the United States are established by Congress with broad discretional powers to promulgate their own "rules").[39] But so long as we choose to recognize (formally) that only one "branch" of the government has the power, is authorized, to make laws, then a definition of interpretation

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36. 2 Austin 597-98. Compare the following statement, which comes near the end of his *Excursus on Analogy*, at 1050: "The extension of a statute etc., *et ratione legis* is an example of analogical interpretation (genuine)." This statement is unconnected with the remarks which precede or follow it. It is curious for the last word (Austin never defines "genuine analogical interpretation"), which implies a contradiction between this statement and the one quoted above. I am inclined to overlook the "genuine" as an uncorrected error in his manuscript, which was put together after his death.

37. It is a fair inference, I think, that this is what Pound has in mind. Pound, *supra* note 28. Pound's idea is that the legislature and the judiciary should be *formally* recognized as "separate but equal" lawmakers. This also seems to be the meaning of Mayda, *supra* note 30, at lvii, when he says that "the doctrine of separation of powers . . . must now be reinterpreted to conform with actual practice, the long standing pattern of which must be taken to represent the actual needs of an effective social administration." (Mayda is resurrecting Savigny's volksgeist here). The question raised here, i.e., who *ought* to make the law, is beyond the scope of this Article. I agree with both Pound and Mayda that Montesquieu's doctrine of the separation of powers is out of date (by two centuries) as a constitutional theory, although it is still accepted as formally valid in both the United States and Britain (see Lord Simon's opinion, *infra* note 38). The real significance of Montesquieu's theory today lies elsewhere; see *infra* note 40. I would object to Pound's and Mayda's solutions because both give legality within a system a *dual* nature: no single authority, or criterion, or theory, determines what is legal and what is not. I prefer a theory of legality whereby professional determinations are directed by the legislative authority. Query whether that is possible under the United States Constitution. *See infra Conclusions*.

38. On this, see the "Afterthoughts" of Lord Simon in *Jones v. Secretary of State*, (1972) 1 All ER 145, 198.

39. *Cf.* Mayda's list, *supra* note 30, at lviii n.190.

which includes case-law as a source of law can go no further than to distinguish between interpretations which defend and those which alienate legality, between the genuine and the spurious interpretation. This is as far as either Austin or Pound is able to carry us.

It is my contention that that interpretation of legislative texts according to the "intention" of the legislator is not a full, a complete, interpretation. It can at best give us only a partial view of the text's place within the legal system. This is so because such an interpretation isolates, abstracts, the text from its relationships with other sources of law (recognized or unrecognized) within the system. That interpretation *only* is a true one, which accurately describes the significance of a text as a component of a given system at a given time.[40]

The great sin of interpretation according to legislative intention is that it disregards the traditional element of law: legal method. Such interpretation assumes that once the form of a text is set, so is its meaning, when in fact history and legal method may empty the form's content and refill it again. So while we stand looking at the text in isolation, its relationships to the society it regulates and to the professional forces that interpret it may completely change what appears to be a constant thing. This phenomenon—borrowing a form and giving it a new content—is exemplified by modern civil law systems, whose codes are enormous *centos*, composed of Roman fragments.[41]

This paper is an attempt to demonstrate the truth of this as to one such code—Louisiana's. All of the articles of the LCC on the subject of interpretation have their formal correspondents in legal systems which preceded the Louisiana codifications. In most cases, the articles were borrowed *verbatim* from the source system or from some then popular legal treatise. The forms are constant, but the meaning, the substance has been changed. Part I sets out our authoritative material—the LCC articles and their immediate and mediate formal sources. Part II

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40. This is the true significance of Montesquieu's *Spirit of the Laws* today; this was recognized by both Portalis and Hegel. "He (Montesquieu) taught us not to separate details from the whole, he taught us to study the laws in history, which is like the applied physics of the legislative science." Portalis, *supra* note 21, at 766.

> Montesquieu proclaimed the true historical view, the genuinely philosophical position, namely that legislation both in general and in its particular provisions is to be treated not as something isolated and abstract but rather as a subordinate moment in the whole, interconnected with all the other features which make up the character of a nation and an epoch. It is in being so connected that the various laws acquire their true meaning and therewith their justification.

HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 16 (Knox trans., 1952).

41. Daube does not quite say this, but I think he would agree. Daube, *The Influence of Interpretation on Writing*, 20 BUFF. L. REV. 41 (1970).

considers the meaning of the articles in light of their history and relationships to each other. Part III considers the place of the articles in the early history of Louisiana's legal system.

I. TEXTS AND SOURCES

This Part contains the following textual or authoritative material:

1. Articles of the Louisiana Civil Code establishing, or essentially relevant to, its rules of interpretation. The most important of these (Articles 13-21) are contained in Chapter 4 of the Preliminary Title, entitled "Of the Application and Construction of Laws";
2. A list of the immediate sources of these articles—the provisions in other legal systems or legal treatises from which Louisiana's articles were drawn, or which seem to have inspired them;
3. Sources of the sources—the immediate influences are traced back to the mediate ones, as far back as I consider them to be relevant to the topics considered in the discussion of the Louisiana articles.

There have been three codifications in Louisiana—1808, 1825 and 1870—the 1825 code made great changes in other parts of the 1808 code, but not in the Preliminary Title, with which we are concerned. Though some slight alterations were introduced then, this title is essentially the one which was introduced in 1808. The 1870 revision did not change it at all.

The texts are set out below in their official English and French versions. The alterations made in 1825 are denoted as follows:

Brackets [ ] enclose those parts of an article which were deleted in 1825; parentheses ( ) enclose those which were added in 1825.

(1) *Articles of the Louisiana Civil Code*

Art. 1 Law is a solemn expression of Legislative will [upon a subject of general interest and interior regulation].

Art. 1 La loi est une déclaration solennelle de la volunté législative [sur un objet général et de régime intérieur].

Art. 2 It orders and permits and forbids;—it announces rewards and punishments;—its provisions generally relate, not to solitary or

singular cases, but to what passes in the ordinary course of affairs.

Art. 2 La loi ordonne, elle permet, elle défend, elle annonce des récompenses et des peines. Elle dispose en général, non sur des cas rares ou singuliers, mais sur ce qui se passe en général, dans le cours ordinaire des choses.

Art. 3 Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence acquired the force of a tacit and common consent.

Art. 3 La coutume résulte d'une longue suite d'actes constamment répétés, qui par cette répétition et une soumission non interrompue, ont acquis la force d'un consentement tacite et commun.

Art. 13 When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit.

Art. 13 Quand une loi est claire et sans ambiguité, il ne faut point en éluder la lettre, sous prétexte d'en pénétrer l'esprit.

Art. 14 The words of a law are generally to be understood in the most known and usual signification, without attending so much to the niceties of grammar rules as to their general and popular use.

Art. 14 Les termes d'une loi doivent être généralement entendus dans leur signification la plus connue et la plus usitée; sans s'attacher autant aux raffinements des règles de la grammaire, qu'a leur acceptation générale et vulgaire.

Art. 15 The terms of art or technical terms and phrases, are to be interpreted according to their received meaning and acceptation with the learned in each art, trade and profession.

Art. 15 Les termes de l'art ou les expressions et phrases techniques, doivent être interprétés, conformément à la signification, et acceptation qui leur sont données par les personnes versées dans chacun de ces arts, métiers ou professions.

Art. 16 Where the words of a law are dubious, their meaning may be sought by examining the context, with which the ambiguous

words, phrases and sentences may be compared in order to ascertain their true meaning.

Art. 16 Quand les expressions d'une loi sont douteuses, on peut en rechercher la signification, en examinant et comparant les termes ou phrases ambiguës avec les autres parties de la loi, afin de déterminer leurs véritables sens.

Art. 17 Laws in pari materia or upon the same subject matter, must be construed with a reference to each other: what is clear in one statute, may be called in aid to explain what is doubtful in another.

Art. 17 Les lois pari materia ou sur un même sujet, doivent être interprétées suivant le rapport qu'elles ont l'une avec l'autre; ce qui est clair dans une loi, peut servir de base pour expliquer ce qui est douteux dans une autre.

Art. 18 The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it.

Art. 18 Le moyen le plus universel et le plus efficace pour découvrir le véritable sens d'une loi, lorsque les expressions en sont douteuses, est de considérer la raison et l'esprit de cette loi, ou la cause qui a détermine la législature à la rendre.

Art. 19 When [to prevent the commission of a particular class of frauds] (to prevent fraud, or from any other motives of public good) the law declares certain acts void, its provisions are not to be dispensed with on the ground that the particular act in question has been proved not to be fraudulent (or not to be contrary to the public good).

Art. 19 Lorsque, [par la crainte de quelque fraude] (pour prévenir la fraude ou par quelqu'autre raison de bien public), la loi déclare nuls certain actes, ses dispositions ne peuvent être éludées sur le fondement que l'on aurait rapporté la preuve que ces actes ne sont point frauduleux (, et qu'ils ne sont pas contraires au bien public).

Art. 20 The distinction of laws into odious laws and laws entitled to favor, [made] with a view of narrowing or extending their

construction, [is a gross abuse] (cannot be made by those whose duty it is to interpret them).

Art. 20 La distinction des lois en lois odieuses et lois favorables, [faite] dans la vue de restreindre ou d'étendre leurs dispositions, [est abusive] (ne peut être faite par ceux qui sont chargés de les interpréter).

Art. 21 In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason or received usages, where positive law is silent.

Art. 21 Dans les matières civiles, le juge, à défaut de loi précise, est obligé de procéder conformément à l'équité; pour décider suivant l'équité, il faut recourir a la loi naturelle et à la raison, ou aux usages reçus, dans le silence de la loi positive.

(2) *Immediate Sources*

LCC art. 1 FP art. 1.6. La loi, chez tous les peuples est une déclaration solennelle du pouvoir législatif sur un objet de régime intérieur et d'intérêt commun.

LCC art. 2 FP art. 1.7. Elle ordonne, elle permet, elle défend, elle annonce des récompenses et des peines.

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

LCC art. 3 FP art. 1.5. La coutume résulte d'une longue suite d'actes constamment répétés, qui ont acquis la force d'une convention tacite et commune.

LCC art. 13 FP art. 5.5. Quand une loi est claire, il ne faut point en éluder la lettre sous prétexte d'en pénétrer l'esprit . . . .

LCC art. 14 Blackstone, p. 59, Rule 1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use . . . .

LCC art. 15 Blackstone, p. 60, Rule 1. Again; terms of art, or technical terms, must be taken according to the

acceptation of the learned in each art, trade and science . . . .

LCC art. 16 Blackstone, p. 60, Rule 2. If words happen to be still dubious, we may establish their meaning from the *context* with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate . . . .

LCC art. 17 Blackstone, p. 60, Rule 2. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point.

Domat, Prel.Bk.1.2.18. If laws in which there is some doubt, or other difficulty, have any relation to other laws which may help to clear up their sense, we must prefer to all other interpretations that which they may have from the other laws . . . .

LCC art. 18 Blackstone, p. 61, Rule 5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it . . . .

LCC art. 19 FP art. 5.9. Lorsque par la crainte de quelque fraude, la loi déclare nuls certains actes, ses dispositions ne peuvent être éludées sur le fondement que l'on aurait rapporté la preuve que ces actes ne sont point frauduleux.

LCC art. 20 FP art. 5.10. La distinction des lois odieuses et des lois favorables, faite dans l'objet d'étendre ou de restreindre leurs dispositions, est abusive.

LCC art. 21 FP art. 5.11. Dans les matières civiles, le juge, à défaut de loi précise, est un ministre d'équité. L'équité est le retour à la loi naturelle, ou aux usages reçus dans le silence de la loi positive.

(3) *Mediate Sources*

LCC art. 1 FP art. 1.6. Domat, Prel.Bk. 1.1 pr. We understand commonly by these words *laws* and *rules*, that which is

just, that which is commanded, that which is regulated . . . we give the name of rule, or law, to the *expression* of the *lawgiver*.

LCC art. 2 FP art. 1.7. Domat, Prel. Bk. 1.1.18. The use and authority of all laws, whether natural or arbitrary, consists in commanding, forbidding, permitting and punishing.

Id., 1.1.21. Laws are never made for one particular person, nor limited to one single case; but they are made for the common good, and prescribe, in general, what is most useful in the ordinary occurrences of human life.

Id., 1.1.22. Seeing that laws embrace, in general, all the cases to which their intention may be applied, they do not express in particular the several cases to which they may have relation. For this particular enumeration, as it is impossible, so it would be to no purpose. But they comprehend in general all the cases to which their intention may serve as a rule.

LCC art. 3. FP art. 1.5. Domat, Prel.Bk. 1.1.10. Arbitrary rules are of two sorts. The one is of those that have been originally enacted, written and promulgated, by those that had the legislative authority; and such are, in France, the edicts and ordinances of the kings. The other is of such laws, of whose origin and first establishment there is nothing appears, but which are received by universal approbation, and by the constant use that the people have made of them time out of mind; and these are the laws or rules to which we give the name of customs.

Id., 1.1.11. Customs derive their authority from the universal consent of the people who have received them.

LCC art. 13 FP art. 5.5. D. 32.25.1. Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio.

LCC art. 14 Blackstone, p. 59, Rule 1. Pufendorf, 5.12.3. About words the rule is as follows: If there is no sufficient conjecture which leads in any other direction, words are to be understood in their proper and so-called accepted meaning, one that has been imposed upon them, not so

much by their intrinsic force and grammatical analogy as by popular usage . . . .

See Grotius, 2.16.2.

LCC art. 15 Blackstone, p. 60, Rule 1. Pufendorf 5.12.4. As to terms used in the arts, it should be observed that they are explained in accordance with the definitions of those who are skilled in the art . . . .

See Grotius, 2.16.3.

LCC art. 16 Blackstone, p. 60, Rule 2. Statements are connected either in origin or also in place. Those are connected in origin which proceed from the same will . . . . Hence arises the need of conjecture, because in doubtful cases the will is believed to have been consistent. [footnote 1]: Augustine, *Against Adimantus*, well says "They choose out certain portions of the Scriptures in order to deceive the ignorant, without connecting these with the context which proceeds and follows, from which the will and intent of the author can be understood."

See Pufendorf, 5.12.5 *et seq.* and 5.12.9.

LCC art. 17 Blackstone, p. 60, Rule 2. Pufendorf, 5.12.9. A great light is cast upon the interpretation of obscure phrasings and words if they are compared with others which have some affinity with them; with those passages, for instance, where the same writer discusses a similar subject, or with their antecedents and consequences . . . .

See Grotius, 2.16.7.

Domat, Prel.Bk. 1.2.18.

D. 1.3.26. Non est novum, ut priores leges ad posteriores trahantur.

D.1.3.28. Sed et posteriores leges ad priores pertinent, nisi contrariae sint, idque multis argumentis probatur.

LCC art. 18 Blackstone, p. 61, Rule 5. Pufendorf, 5.12.10. But the main point in interpretation is the reason for the law, or that cause and concern which moved the lawgiver to have the law passed . . . .

See Grotius, 2.16.8.

LCC art. 19 FP art. 5.9. Domat, Prel, Bk. 1.1.19. Laws restrain and punish, not only what is evidently contrary to the sense of their words, but likewise everything that is directly or indirectly against their intent . . . and also everything that is done in fraud of the law, and to elude it . . . .

LCC art. 20 FP art. 5.10. Domat, Prel. Bk. 1.2.14. The laws which are in favor of that which the public good, humanity, religion, the liberty of making contracts and testaments, and other such like motives render favorable, and those which are made in favor of any persons, are to be interpreted in as large an extent as the favor of these motives, joined with equity, is able to give them; and they ought not to be interpreted strictly . . . .

Id., 1.2.15. The laws which restrain our natural liberty, such as those that forbid anything that is not in itself unlawful, or which derogate in any other manner from the general law; the laws which inflict punishments for crimes and offenses, or penalties in civil matters; those which prescribe certain formalities; the laws which appear to have any hardship in them; those which permit disinheriting, and others the like, are to be interpreted in such a manner as not to be applied, beyond which is clearly expressed in the law, to any consequences to which the laws do not extend. And, on the contrary, we ought to give to such laws all the temperament of equity and humanity that they are capable of.

LCC art. 21 FP art. 5.11. Domat, Prel.Bk. 1.1.23. If any case could happen that were not regulated by some express and written law, it would have for a law the natural principles of equity, which is the universal law that extends to everything.

From the foregoing we see what systems we must take into account to assess the significance of Louisiana's rules of interpretation. Blackstone, Domat, and the French *Projet* are direct influences. Through them it is possible that Pufendorf, Grotius, Domat (as understood by Portalis), and the Digest may be relevant. The criterion of relevance is the degree of change in the meaning of a text, when it moves from one system to another. To understand the meaning of a Louisiana text, it may be

important to know what the same text meant in the French *Projet*, and the latter may require some knowledge of Domat, and so forth.

To understand the *Livre Préliminaire* to the French *Projet* one finds the contemporaneous *Discours Préliminaire* of Portalis, its draftsman, invaluable.[42] The same may be said of Livingston's Preliminary Report on the LCC of 1825.[43] My frequent recourse of these works needs no justification. The references to Austin may not connect themselves so readily, but he likewise fits into the scheme of things. Although his *jurisprudence* was published after the period in our view, I regard Austin *in matters of interpretation* as the direct descendent of Blackstone: they both confront legislation with the same object in mind, and proceed in similar ways. Though he comes later, I regard Austin as an articulate exponent of Blackstone's rules, and therefore, found him useful.

Savigny and Thibaut are discussed simply as examples of early nineteenth century theorists of interpretation. There is no evidence of direct relationships between their works and the material above; but comparing their theories to the others helps to place them in proper perspective.

II. THE THEORY OF INTERPRETATION RECEIVED INTO THE LOUISIANA CIVIL CODE (LCC)

A. Interpretation of a Law: The Grammatical-Logical Problem

When we compare the texts in Part I with their sources, three points present themselves for consideration:

1. A tradition of form is apparent when we compare each rule with its immediate source; this gives us a first impression of

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42. The *Discours Préliminaire* and the *Livre Préliminaire* to the French *Projet* are almost certainly the work of the same man—Portalis, and are generally accepted as such. In discussing the rejection of the *Livre Préliminaire* by the code commission, Maleville says:

> Ce fut aussi sans contradiction que passa la suppression presqu' entière du livre préliminaire que M. Portalis avait rédigé a l'instar du Livre des Lois de Domat, et dans lequel il avait bien surpassé son modèle . . . .

MALEVILLE, 1 ANALYSE RAISONNÉE DE LA DISCUSSION DU CODE CIVIL AU CONSEIL D'ÉTAT 3 (2d ed. 1807). (Maleville and Portalis were two of the four draftsmen of the Code.) This passage establishes Portalis as the author of the rejected *Livre Préliminaire* and Domat as his source of inspiration.

43. The Preliminary Report (discussed in detail *infra* notes 186-200, 235-262) is probably the work of Livingston. Though it is signed by all three draftsmen, his name comes first and the haughty eloquent style is his. Compare his Preface to THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE (1873) and the more circumspect style of the Preface to MOREAU LISLET & CARLETON, THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA (1820).

stability: the meaning of a rule does not seem to change much from system to system.

2. There is, however, a divergence in the systems as we proceed backwards. The source systems can be grouped into two categories: those which are based on Roman Law and those which lead back to Grotius. The importance of the distinction lies in the purposes which gave rise to the rules in each category.

Until the late eighteenth century, Roman law had an inhibiting effect on the development of rules of interpretation. This is certainly true of the Roman law received into France and Spain—the principal sources of Louisiana law. The reason for this paucity is not far to find. Both French and Spanish law reserved to the King, as titular successor to Justinian, the power to make and interpret the law.[44] It is true that the King's power was not that of the Emperor's and was not exercised in such way, but it is there in theory, as the last resort in a dubious case, and as Jolowicz says,

> when you are dealing with the enactments of a sovereign, it is unnecessary to inquire whether what he says is strictly a construction put upon a previous rule, or the expression of a new one; it binds you in either case.[45]

This authoritarian ground for Roman law, obviates the need for a highly developed system of interpretation, and while it is there we do not get one.[46]

On the other hand, the reason behind Grotius' rules, and the reason they are divorced from Roman law concepts, is the opposite—not too much authority, but none at all. Grotius is faced with the existence of new states, which after the Reformation, cannot depend on the authority of Rome to mediate their disputes. These states face each other, for the

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44. DOMAT, Prel. Bk. 1.2.12 ("[I]f the true sense of law cannot be sufficiently understood . . . we must have recourse to the prince . . . ."); Partida 1.1.14 ("[W]hen doubts arise concerning the meaning of a law . . . it belongs to the legislator (the Prince) alone to explain such doubts."). Notice that here the relation of Prince to law is analogous to that of jury to fact: a result may be chosen (or not) regardless of standards. Under most canon law, bishops have this power in sentencing (or not) convicted priests.

45. JOLOWICZ, *supra* note 24, at 10.

46. I do not except even Domat from this. Although, of the systems known to the Louisiana draftsmen, his is certainly the most *lengthy*, it provides only a few rules for the interpretation of positive law. The rest of his rules are concerned with archaic features of French law (equity versus rigor in law, dispensations of the Prince, etc.) It is curious that Pothier nowhere treats of the subject of interpretation of laws, especially when one considers his enormous outpouring on every other aspect of French and Roman law. In his edition of *Corpus Juris*, he does collect all the Roman fragments and maxims on interpretation into one book but he never developed his own rules. *See* STEIN, REGULAE IURIS 178 (1966). Portalis and the French *Projet*, of course are a special case, representing a then new foundation for Roman law.

first time, as equals, as independent entities. Grotius must find a law that treats them as such.[47] Since he presumes equality, and not hierarchy, as his starting point, as he has treaties, and not legal systems, principally in view, his rules resemble more those which we apply to contracts than the ones we use for law. Pufendorf and Blackstone merely plunder Grotius, though they veer his rules in an important way which we will consider later.

So if the impression of continuity, of stability, which the rules present us is a true one, the possibility exists that rules from a Roman system will not combine effectively with rules derived from Grotius' system, since the ends of legal order which they presuppose differ so greatly.

> 3. If we attempt to answer this problem by comparing, not just the rules in each system with each other, but each *system* with the others, we discover that, despite their differences, they all have one feature in common—"*cette division qui domine toute la matière*";[48] the division of rules into "grammatical" and "logical." It is on the basis of this similarity that I propose to examine the various systems.[49]

The division is an old one, apparently first developed by the Glossators.[50] It is not Roman, though authority for it can be found in the *Corpus Juris*.[51] As the terms indicate, the one approach concentrates on the words of the law, the other on extraneous considerations related (logically) in one degree or another to the law. However, just what these relationships are and the relative importance of each category to interpretation has long been a matter of dispute, so that it is difficult to single out the necessary elements of the grammatical-logical process, and thus to justify its continued professional use. Some examples may demonstrate the difficulties it presents.

Thibaut gives us the doctrine in something like its classical form. Grammatical interpretation is one based on the meaning of the words, or

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47. On this, see FIGGIS, POLITICAL THOUGHT FROM GERSON TO GROTIUS 241 *et seq.* (Harper Torchbook ed., 1960).

48. Savigny, 1 *System* 313.

49. The draftsmen of the LCC seem to have been aware of the division. Article 13 refers to an opposition between the "letter" and the "spirit" of a law. Article 18 refers to "spirit." Other articles are framed in terms of "dubious expressions" and "doubtful words."

50. KANTOROWICZ/BUCKLAND, STUDIES IN THE GLOSSATORS OF THE ROMAN LAW 139-41 (1969); Meijers, *Le Conflit entre l'équité et la loi chez les premiers glossateurs*, 17 TIJDSCHRIFT 117 (1941).

51. *Id.*; JOLOWICZ, *supra* note 24, at 12-15.

"that which is signified by the words as they stand."[52] Logical is based on "the spirit of the law (*Sententia legis*)," that is, "upon the intention of the legislator" and "the result arrived at by a logical deduction from the reason of the law."[53] If a grammatical interpretation provides a solution, it excludes the use of a logical one.[54] Each category is sub-divided into rules. As to grammatical, words should be taken in their common (*vulgaris*) sense, or in their technical (*terminus technicus*), if they have one. Their meaning may be extended (*generalis vel lata*) or restricted (*specialis vel stricta*), and so on.[55]

Logical interpretation takes over when grammatical fails, or produces ambiguous results, and is divided into *declarativa* (which merely chooses one among several possible grammatical interpretations) *extensiva* and *restrictiva*.[56] Laws are intended by their reason, "whenever the very same reason for which the law was made to extend to certain specified cases is also applicable to another unspecified case."[57] Laws are restricted "only . . . when it can be shown that the law-giver did not intend the law to extend to the case in question."[58]

Reaction against this way of stating the process begins with Savigny and criticisms of it have continued to this day. Savigny criticized it as incomplete, adding two other categories himself, the systematic and the historical.[59] He also objected to the view that the grammatical-logical division represented separate categories or approaches to interpretation. Instead, he proposes the idea that his four-fold division (grammatical, logical, systematic and historical) are not separate processes but rather represent the constituent elements of each interpretive act, theoretically inseparable, though one or the other may predominate in a given interpretation.[60] The spirit of this attack has been picked up by others since then, including Jhering[61] (". . . [the word] is nothing more than the death mask of the thought") Gény[62] and Austin.[63] Jolowicz, for example, says that

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52. THIBAUT, PANDECTEN § 45.
53. *Id.*
54. *Id.* § 46.
55. *Id.* §§ 47-49.
56. *Id.* § 50.
57. *Id.* § 51.
58. *Id.* § 52.
59. Savigny, 1 *System* Sections 33, 50.
60. *Id.*
61. JHERING, GEIST DES ROMINCHEN RECHTS II.2, § 44 (1968).
62. Gény, *Méthode* No. 100.
63. 2 Austin 1028.

> the so-called grammatical interpretation requires a knowledge of legal terminology as well as of other laws, and thus shades off into the "logical."
>
> All that is true is that in one case arguments drawn from language, in another different arguments, will preponderate. . . .[64]

These critiques of the division do not go to the heart of the matter, however, for whether we separate absolutely the grammatical from the logical or not, whether we call them "elements" (Savigny) or "methods," we still find in each system something which would correspond to "grammatical" and something which would correspond to "logical" in another. Whether they oppose each other or are two ends of the same pole, the idea remains.

For example, Savigny, after setting out the constituent elements of each interpretive act, proceeds to classify interpretive *rules* according to the type of legal problem they attempt to deal with, and *this* division, into rules dealing with indeterminate expression in the law[65] and those dealing with improper expression,[66] corresponds to what others call, respectively, grammatical and logical interpretation.

And, Gény, after criticizing both the grammatical-logical division and "the somewhat childish choice between the *text* and the *spirit* of the statute" proposes:

> If any methodologically useful distinction can be made, it is I think the distinction between interpretation based on the *formula of the statutory text* and that based on *extraneous elements*.[67]

Gény's purpose, of course, is to limit the former category and expand the latter, but as to the division *ipsa* of interpretive rules, he, like Savigny, has done no more than change the terminology. The approach to the problem of interpretation, the method behind the name, remains essentially the same.

So, despite attempts to get round it, this division, by whatever name it is called, seems to persist, and so possibly expresses something inherent in the idea of interpretation. Therefore, as a working hypothesis, I propose to retain this traditional division of interpretative rules, and simply for the sake of convenience to keep the traditional terminology: "grammatical" we will call those rules which attempt to extract meaning

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64. JOLOWICZ, *supra* note 24, at 12.

65. Savigny, 1 *System* Sections 35-36.

66. *Id.* Sections 35, 37. The first division actually deals with the problems arising out of the expression (i.e., the words) of the law. The second—"improper expression" (*expression improper*)—deals with defects in the concept under the guise of correcting the expression, and here Savigny introduces extensive and restrictive interpretation in aid—processes reserved by others to the realm of "logical" interpretation. *Cf.* POUND, *supra* note 2, at 482-83.

67. Gény, *Méthode* No. 100.

from the *lex* in isolation; "logical" those which consider the *lex* in its relation to anything outside its text.

Now, when we apply this concept, so defined, to the various systems of interpretation before us, we will see that what distinguishes one from another is not *whether* they contain this division—for all of them do—but which aspect of it they emphasize. In all of the systems of interpretation we are considering we find some rules which correspond to grammatical and some which correspond to logical, though the nature of the rules grouped into each category differs greatly. And when we compare the rules under each category, we see that this difference seems to be a result of the system's *starting point*: some begin with the grammatical and emphasize it, making the rules under logical dependent on it; others emphasize the logical element. So it will be useful for our purposes to divide them accordingly.

Thus we may put into the "grammatical" group—that is, those which emphasize the grammatical element, which begin with the *lex*, and so to speak, branch outward from it—Thibaut, Grotius, Pufendorf, Blackstone, Austin, Gény and (apparently, though not actually) Domat. And in the "logical" group—that is, those which accord first importance not to the *lex* but to the relationships which it forms with things outside itself—Savigny, Portalis, and (actually) Domat.

Having done this, we are in a position to discover just what the members of each group have in common with each other, and what distinguishes them from members of the other group. And in the end, it seems to be this: the essential difference in approach which distinguishes the one from the other depends on *what the interpretive search is for*:

> The grammatical approach seems to be the starting point if the object of the search is "legislative intention" (by which I mean an intention supposed by the interpreter to have been held by an historical legislator; in this sense the meaning of the term is opposed to the "intention of the *law*," or to the "precept" or the "thought" of the law).

On the other hand, the logical approach is taken when the object of the search is the meaning which the law in question bears in its relation to other laws; in other words, the focus here is on the interpretation of a *corpus*, a legal unity, as opposed to the grammatical which focuses on the interpretation of a single law.[68] "Legislative intention" may be employed

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68. Compare this statement with the definition of "positivism" I gave *supra* note 5, and with Patterson's remark (*supra* note 5) that "Positivists ordinarily define 'law' by defining 'a law' . . . ."

as *a* criterion here, but it is never the determinative one, as it is the grammatical approach. Also where we encounter the term here, we find often that it is interchangeable with the terms "meaning" or "precept" or "thought" of the *law* (and not the legislator). Thus Domat says that in interpretation

> if they are arbitrary i.e. [positive] laws, we are to fix their equity [the limits of their truth] by the intention of the lawgiver.[69]

But to discover the "intention of the lawgiver," he says

> it is not enough to apprehend the apparent sense of the words, and to view it by itself; but it is necessary likewise to consider if there are not other rules that limit it. For it is certain that, every rule having its proper justice, which cannot be contrary to that of any other rule, each rule hath its own justice within its proper bounds. And it is only the connection of all the rules together that constitutes their justice and limits their use.[70]

It is obvious therefore that the lawgiver's "intention" as to one law is determined by and may be discovered in other laws. Thus it is not the intention which determines the meaning of laws; it is rather the meaning of laws which determines the "intention" or meaning of *a* law. This is why I classify Domat under the logical approach, though at first glance, he seems to be searching for intention.[71]

We will examine each approach in detail, and then apply the conclusions to the articles of the LCC.

Those systems which I have grouped under grammatical place first importance on the idea of law as an expression of a *will*, and

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69. DOMAT, Prel. Bk. 1.2 pr.

70. *Id.*

71. In the introductory paragraphs to this chapter on interpretation, Domat gives the impression that he is following the grammatical-logical divisions:

> It happens in two sorts of cases, that it is necessary to interpret the laws. One is, when we find in a law some obscurity, ambiguity, or other defect of expression. . . . And this kind of interpretation is limited to the expression that it may be known what the law says. The other is, when it happens that the sense of a law, how clear soever it may appear in the words, would lead us to false consequences, and to decisions that would be unjust, if the laws were indifferently applied to every thing that is contained within the expression. For in this case, the palpable injustice that would follow from this apparent sense obliges us to discover by some kind of interpretation, not what the law says, but what it means; and to judge by its meaning how far it ought to be extended, and what are the bounds that ought to be set to its sense. And this kind of interpretation depends always on the temperament that some other rule gives to the law . . . .

Id. The first type is grammatical; the second logical. But having said this, Domat forgets grammatical: all his rules presume a logical approach. Compare Domat's description of the division with Savigny's description of interpretation to remedy indeterminate and that to remedy improper expression. It will be seen that despite Savigny's remarks in 1 SYSTEM Section 50, they are talking about the same thing.

interpretation is seen to be the means of discovering that will. This is usually described as a search for "legislative intention." In other words, the grammatical approach attempts to tie the "meaning" of a text to what its creator "intended" that it mean, and in a doubtful case it is that intention which is supposed to determine the meaning. The theories in this group all have this in common, but they also have in common the dependence of their rules for interpretation on grammatical rules and their focus on the words of the law for meaning. Thus, for example, Thibaut says that a grammatical interpretation, if it yields a meaning, excludes a logical interpretation.[72] The others have similar rules.[73] What is the connection between a search for intention and this focus on words?

The connection apparently originates in Grotius, and passes from him in succession to, Pufendorf, Blackstone, and Austin.[74] Now, Grotius' concern is rules for the interpretation of *treaties*—agreements between two heads of state—so he is looking for a "real" intention, just as we look for a real intention in the interpretation of contracts. And when you look for intention, you look first to the evidence which is closest to the mind: the words which express the intention. Grotius makes a strong point for beginning here when he says that what matters is not so much the speaker's intention as the acceptation of the words it is expressed in by the other party. If you have this as your starting point—not the expression but the acceptation of that expression by the other party (a distinction which would seem to be related to the civilian or subjective versus the common law or objective approaches to interpretation of intention)[75] then the rules Grotius lays down are obvious and necessary. You take the words in their common sense first, or in their technical sense if they have one. If there still exists doubt, you look to the thing next closest to the doubtful words—i.e. the context. If that fails, then the next closest: other expressions on the subject by the same speaker, and so forth.

This makes good sense. The interesting thing though, is that Pufendorf picks up this Chapter out of Grotius, and "following in his

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72. THIBAUT, PANDECTEN § 46.

73. *See* 2 Austin 1024. The rule is only implicit, not explicit, in Grotius, Pufendorf, and Blackstone. Gény obviously is an exception to the blanket statement above, that the members of this group depend on grammatical rules and focus on words. He is much more sophisticated than that. Nevertheless, he belongs in *this* group, as opposed to the logical group because (1) he limits the force of legislation to the actual intention of the lawgiver and (2) he separates legal method from "the law" and thus bifurcates legality. Gény, *Méthode* No. 98 on (1) and No. 85 n.17 on (2): ". . . the case law represents the true positive law."

74. Thibaut's position in this group is indisputable, unlike Gény's but I cannot say why: I do not know his antecedents, though he does cite Pufendorf at Section 55, n.*i*.

75. *See* sources cited *supra* note 30.

footsteps" (as he puts it) reproduces it to apply to contracts, "pacts," *and laws*.[76] And Blackstone, apparently using Barbeyrac's translation of the latter author,[77] takes his chapter in turn and *mutatis mutandi* applies it exclusively to the interpretation of laws.[78]

Now, a great deal could be said about the analogy between contracts and laws. Even today the analogy is fruitfully advanced[79] and in the late eighteenth century it must have seemed irresistible. But in the end, analogy it is; the two are not the same. It is not an analogy which I would extend very far. But it seems to me that on any grounds one very important limitation of the analogy must be accepted: rules of interpretation based upon it, that is formulated with contracts in mind and then extended to laws, will be much better adapted to the interpretation of isolated laws than to the interpretation of a *corpus*. They simply are not adapted to working with what Savigny would call the historical and systematic elements of interpretation, elements which would have no bearing on the interpretation of an agreement.

This limitation is nothing applied to Blackstone and his system. Statutes in English law *are* isolated moments. They are not developed analogically or extended liberally as in Romanist systems, but are, rather, treated hostilely by the common law. It is consistent with such a system—or at least more consistent than it would be in a civilian system—to regard the statute as the expression of an historic legislator and its force as limited to what he "intended" it to cover.

This concept of interpretation received through Blackstone was fully developed later by Austin and what he says will help us to isolate the necessary implications of the rules that Blackstone gives. Austin's purpose is to distinguish "Interpretation (in the proper acceptation of the term) from the various modes of judicial legislation."[80]

> The discovery of the law which the lawgiver intended to establish, is the object of genuine interpretation: or (changing the phrase), its object is the discovery of the intention with which he constructed the statute, or of the sense which he attached to the words wherein the statute is expressed.[81]

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76. Pufendorf 5.12.1.

77. *See* BLACKSTONE 43 n.b.

78. *Id.* at 58-62.

79. *E.g.*, Gény, *Méthode* No. 98 and authorities cited by him in n.179. The contractual rules he calls in aid are those in the *Code Civil* (arts. 1156-1165). Essentially the same rules are found in LCC arts. 1950-1962. The source of both is POTHIER, TREATISE ON OBLIGATIONS pt. 1, ch. 1, § 1, art. 8, rules 1-12 (Evans trans., 1853).

80. 2 Austin 1023.

81. *Id.*

As words are the nearest index to the intention, interpretation begins with them:

> [T]he literal meaning of the words wherein the statute is expressed, is the primary index or clue to the intention or sense of its author.[82]

So we look to the meaning which custom has annexed to the words, or, if they are technical, to their acceptation by the profession. It may happen that the words will still seem ambiguous or defective though.

> The intention, however, of the legislature, as shown by the literal meaning, may differ from the intention of the legislature, as shown by other *indicia*; and the presumption in favor of the intention which the literal meaning suggests, may be fainter than the evidence for the intention which other *indicia* point at. On which supposition, the last of these possible intentions ought to be taken by the interpreter, as and for the intention which the legislature actually held . . . .
>
> It appears then, from what has foregone, that the subject of the science of interpretation are principally the following; namely the natures of the various indices to the customary meaning of the words in which the statute is expressed; the natures of the various indices, other than that literal meaning, to the intention or sense of the lawgiver: the cases wherein the intention which that literal meaning may suggest, should bend and yield to the intention which other *indicia* may point at.[83]

Now, it is obvious that when Austin begins to talk of "other *indicia*," he is getting into the civil law area of logical interpretation, a connection of which he was aware.[84] This is so because in the case of a legal interpretation it is likely that *indicia* to the intention, other than the words, may be found in other laws and the relation of the one in question to them. There is, however, a fundamental difference between the two approaches. For Austin, the comparison of a law with other laws to discover its meaning is an operation *contingent upon* the failure of the literal approach; the meaning of a law is first to be sought in the objective sense of its words, and only when this approach fails to yield the intention may one resort to other means. This is essential, for if the interpreter is not so checked, if his power to search is not restrained by the "doubtful expression" then there exists no means of preventing the spurious interpretation, that is, extension or restriction of the meaning of a statute *ex ratione legis*, or by its reason or motive. So, since the normal civilian approach to interpretation depends on analogical development of

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82. *Id.* at 1024, 644-45.
83. *Id.* at 1024-25.
84. *Id.* at 1028.

the statute's reason, it appears that Austin would condemn the civilian approach, and in fact he does:

> According to most of the writers (Modern Romanists) who have treated of interpretation, it is either *grammatical* or *logical*. The interpretation of a statute bears the name of *grammatical* in so far as it seeks the meaning which custom has annexed to the words, or seeks in that meaning exclusively the actual intention of the lawgiver. As looking for other indices to the actual intention through such other *indicia*, the interpretation of a statute assumes the name of logical. But as every process of interpretation involves a logical process, the contradistinguished epithets scarcely suggest the distinction which they are employed to express. The extension or restriction, *ex ratione legis*, of a statute unequivocally worded, is not interpretation or construction (in the proper acceptation of the term). According, however, to most of the writers who have treated of interpretation, this process of extension or restriction belongs to the kind of interpretation which they mark with the name of logical . . . . The spurious extensive interpretation *ex ratione legis*, is styled *analogy* as well as *equity*.[85]

So the possibility is presented that if this Austinian approach (which follows Blackstone's) is employed in a civilian or Romanist system it may contradict traditional civilian notions of interpretation. Pound noticed this:

> As Austin sees it, the difference (between genuine extensive interpretation and spurious extensive interpretation) is between extension or restriction of the meaning of the words in which the statute is expressed and extension or restriction of the statute itself. Such a line is not easily drawn. Indeed, it cannot be drawn with precision. In the Roman and modern Roman law, where the received technique is one of reasoning from the analogy of legislation there is no need of it. The common-law technique, which develops judicial decisions by analogy but does not reason from the analogy of statutes, logically requires the distinction.[86]

Pound goes to the heart of the matter here, but he fails to follow through. The point that must be made is that insofar as the approach is "grammatical" and the search is for intention, that is, insofar as interpretation focuses on the meaning of a text in isolation, and that meaning is limited to what its creator "intended" that it mean, then legal method—the professional process of developing and applying legal precepts—is not and cannot be subsumed under the accepted idea of

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85. *Id.* Austin almost certainly has Thibaut in mind here. He refers to him elsewhere with praise. *Id.* at 652-53.

86. POUND, *supra* note 2, at 496.

legality. If the lawmaker makes the law and his "intention" limits the meaning of the law, then the law assumes that it will not be developed *at all*. Thus instead of *directing* the interpretation of legislation, Austin's and Blackstone's approach, in a sense, *forbids* interpretation. And with the force of legislation (which is supposed to be of paramount authority) thus circumscribed, the interpreter is free to develop the common law.

Austin's rules for the interpretation of legislation (and Blackstone's) assume that the interpreted law will not be *developed* as it is interpreted, whereas in fact this is not so. In fact what happens is that after the common-law judge interprets the legislation once, it is the *case interpreting* the law and not the law itself which becomes the real source of the new law. Because Austin's rules of interpretation ignore this process, the *actual* interpretation of legislation is undirected after the first interpretation. Thus it is not the ideals of *legislation* which determine legality, but the ideals of the common law.

This approach will have a reciprocal effect on the drafting of legislation.[87] So legislation in common law jurisdictions is apt to be particular, singular, and thus the whole process is perpetuated.

Before we examine the implications of this problem for the LCC, we must back up and examine the other group of interpretive theories, which, I have said, stress the logical approach to interpretation.

It must be remembered that the change is one of emphasis and is not an absolute difference. A search for the meaning of words may figure in this area, and interpretation may be phrased as a search for "intention." What is really different is the criterion of "meaning"—what determines meaning in the interpretive search, on what does meaning depend. In those systems which emphasize the logical element, the meaning of *a* law depends on other laws. Intention may be called in aid, but it moves to the background. The motivating force of the interpretation becomes the *unity* of the law, of the legal system. This unity may be presupposed directly, as Savigny does:

> [L]a réunion des sources forme un vaste ensemble destiné à régler tous les faits qui se passent dans le domaine du droit. Considérées sous ce point de vue, elles doivent nous offrir le double caractère d'unité et d'universalité . . . .[88]

But the presumption is usually justified by saying that legislative rules are but the "raw material" for the jurist to work with. Thus Sohm:

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87. *See* Daube, *supra* note 41.

88. Savigny, 1 *System* 255.

> For the law, as begotten by custom or statute, is but the raw material, and is never otherwise than imperfect and incomplete. Even the wisest of legislators cannot foresee all possible contingencies that may arise.[89]

And Portalis, following Domat,[90] says:

> The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details of questions which may arise in particular instances.
>
> It is for the judge and jurist, imbued with the general spirit of the laws, to direct their application.[91]

This presupposed legal unity,[92] the preservation of which is the end or purpose of interpretation in a logically-based system, has two effects on the notion of legislative intention as presented by Austin. First we find that the term, when it is used, is usually interchangeable with the terms, "meaning" or "thought" or "precept," whereas this cannot be done in Austin's system. Secondly, as there are other "expressions of the law-maker's intention"—i.e. other laws—promulgated concurrently with the one in question, we are directed to seek the intention of one in the intention of the others, or, as Jolowicz puts it, ". . . it is the intention of the legal system as a *whole* which must be ascertained. . . ."[93] And since the other laws act as restraints upon the interpretation, the need for Austinian "intention" vanishes.

> Thus law separates itself from its creator and takes on an *objective* meaning, ". . . for what is given (by the speaker) is not what is intended to be given but is only to serve as a means for the other to procure for himself what he is to have by proper use of it. It requires independent activity on his part."[94]

This is what Portalis means when he says:

> Les codes des peoples *se font avec le temps*; mais, à proprement parler, *on ne les fait pas*.[95]

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89. SOHM'S INSTITUTES OF ROMAN LAW 28 (Ledlie trans., 1907).

90. DOMAT, TREATISE OF LAWS 11.27.

91. Portalis, *supra* note 21, at 769.

92. The way in which this unity is conceived bears a direct relation to the accepted notion of legality within a system. For Savigny, the system is partly a unity of content; legal method is not always a part of the law. For Portalis, the unity is a combination of content and legal method (of "application" of the law). *See infra* note 99.

93. JOLOWICZ, *supra* note 24, at 19. It is curious that Jolowicz assumes, without ever questioning it, that interpretation is always a search for "intention."

94. JHERING, GEIST DES ROMISCHEN RECHTS II 2, § 44.

95. Portalis, *Discours* 476.

This introduces a profound change into what Austin calls the reason or motive of the law—the *ratio legis*. For Austin this motive is always specific. That is, the lawmaker perceives some ill in society; his motive or reason for enacting a law is to remedy that particular ill; this motive directs his intention which frames the law. The intention is the immediate cause of the law; the motive the mediate. In a logically-based system, the *ratio legis* may be specific (as in the case of *ius singulare*) but it also has a more *general* meaning.

The terms, "*ratio legis*" and "motive" as they carry this double connotation are themselves a source of some confusion. Special, or specific motive means "the reason the law came into being." General motive thus means something like "general principles of law" and refers to the legal principle which unites a law with other laws, as opposed to the concrete historical situation which gave rise to a particular law (specific motive). For Savigny, *ratio legis*

> désigne, 1º la règle supérieure de droit, d'où sort la loi comme déduction et conséquence; 2º l'effet que la loi est appelée à produire . . . .[96]

It is this first meaning, that of a superior rule of law, that Portalis sees as the *ratio legis of legislation*.

> La science du législateur consiste à trouver dans chaque matière, les principes plus favorables au bien commun. . . .[97]

As this general motive, or general principle is found through other laws, it becomes obvious that any reference to other content is a reference to motive in this sense. Thus to compare laws *a pari* is to compare them with their common principle, or motive. Austin permits this reference only as "other *indicia*," after a literal approach to interpretation fails; a logically-based system begins with it.

> Pour fixer le vrai sens d'une partie de la loi, il faut en combiner et en réunir toutes les dispositions.[98]

Austin permits such a comparison only in a "doubtful" case and expressly forbids as spurious the interpretation which erects the principle into law; the task for the logically-based system is to find the principle, which is for it the *real* law.

It is the difference in the role of the *ratio legis*, the motive of the law, that is the real point of departure for rules of interpretation. In a grammatically-based, or Austinian system, which holds legal meaning to

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96. Savigny, 1 *System* 211.
97. PORTALIS, *Discours* 476.
98. FP art. 5.6.

historical intention, the process of interpretation is not conceived as part of the law, and is thus "free" and undetermined beyond the genuinely-interpreted force of the law. In a logically-based system, which is dominated by the desire to maintain a legal unity, the idea of legal development may form a part of the accepted theory of law; here the supposition is that the text alone, genuinely interpreted will *not* be sufficient to preserve the desired unity. The interpreter is therefore supposed to search the law for its principle, and take his direction from that. By supposing that an interpretation will take place, the law thus hopes to direct that interpretation.

But note that there is an ironic difference between supposing the existence of an interpretive process, and according to that process the force of law. Thus in the common law, legislation ignores the fact that it will be interpreted, yet ut is the cases interpreting the statute which eventually become the real source of law. In the French *Projet*, which acknowledges the interpretive process of a constituent element of the legal system's unity, as an element of the accepted notion of legality, the interpretation *itself* is denied any prospective legal force, and so may not interpose itself as a source of law between the code and some future undecided case.[99]

The "openness" of method in the French *Projet* is not an essential feature of a logically-based system of interpretation, however. Savigny belongs in this group, as he presupposes the necessary unity of the legal system and admits juristic activity to that end. In part he is open or honest about the role of the jurist or interpreter in the development of law. This is true of his rules on the use of analogy to fill *lacunae* in the legal system.[100] But he attempts to distinguish this process, which he would permit only in the absence of a law or rule to govern the case, from what he calls "extensive interpretation to rectify an improperly expressed law."

> [U]ne expression est impropre, quand elle donne un sens clair et déterminé, mais différent de la pensée réelle de la loi.[101]

Analogy may not be called in aid here, because, he says, there exists a law, even though it is improperly expressed, and analogy may be employed only when there is *no* law. How then are we to rectify the improper expression?

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99. FP arts. 5.3, 5.8, *quoted in supra* note 18.
100. Savigny, 1 *System* Section 46.
101. *Id.* Section 36, at 224-25.

> D'abord on suppose qu'il existe une pensée déterminée sous une expression défectueuse. Ce rapport n'admet pas . . . de preuves logiques. . . .[102]

But this supposition can only be justified on the basis of another supposition—that of the law's unity, which is the same justification for the use of analogy. But whereas the jurist's role in the use of analogy is open, here the same procedure is disguised in the name of a law which is supposed to exist and which the interpreter is supposed to "find." So, because he refuses to receive the interpreter openly into his concept of law, Savigny's "unity" becomes a fictional one, rather than an actual one.[103]

I have covered in a general fashion the principal differences between what I have styled (for convenience) grammatically-based theories of interpretation and those which are logically-based. Because of its importance to the LCC, I now want to examine in detail one of the logical theories, that of Portalis, which we find expressed in his *Discours Préliminaire* to the French *Projet* and in the *Livre Préliminaire* to that work.

Savigny's theory is directed toward interpretation of the *Corpus Juris* as received in Germany. Portalis is confronted with a *corpus* too, but of an entirely different type. His concern is not the adaptation of old laws to new needs, but the protection of a new system. He addresses himself to three problems principally: (1) how to protect the code from professional power; (2) how to direct professional power toward proper development of the code; (3) severance of the code from the system of law which preceded it. The third problem we will consider with the role of equity. The first two fit in here.

Under the *ancien regime* the separation of judicial power from legislative was affected mechanically by a legislative referral. Domat encapsulates the theory:

> If the words of a law express clearly the sense and intention of the law, we must hold to that. But if the true sense of the law cannot be sufficiently understood by the interpretations that may be made of it, according to the rules that have been just now explained, or the sense of the law being clear, there arise from it inconveniences to the public good; we must in this case have recourse to the prince, to learn of him his intention, as to what is liable

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102. *Id.* at 226.

103. POUND, *supra* note 2, at 482, sees this, but calls it "natural law." It is more properly classed as what Pound calls a "general fiction." *See Gény*, *Méthode* No. 165.

> to *interpretation*, *explanation* or *mitigation*, whether it be for understanding the law, or mitigating its severity.[104]

After the Revolution, this power was taken over by the procedure of a legislative *référé*.[105]

Portalis clearly sees the problems which this theory presents to the rule of law. On the one hand it involves the legislator directly in particular cases:

> Sur le fondement de la maxime que les juges doivent obéir aux lois et qu'il leur est défendu de les interpréter, les tribunaux, dans ces dernières années, renvoyaient par des référés les justiciables au pouvoir législatif, toutes les fois qu'ils manquaient de loi, ou que la loi existante leur paraissait obscure.
>
> Le tribunal de cassation a constamment réprimé ce abus, comme un déni de justice . . . .
>
> Forcer le magistrat de recourir au législateur, ce serait admettre le plus funeste des principes; ce serait renouveler parmi nous, la désastreuse législation des rescrits.[106]

And, on the other hand, it ignores the essential need for interpretation in the development and application of law.

> [I]l faut une jurisprudence parce qu'il est impossible de régler tous les objets civils par des lois, et qu'il est nécessaire de terminer, entre particuliers, des contestations qu'on ne pourrait laisser indécises, sans forcer chaque citoyen à devenir juge dans sa propre cause, et sans oublier que la justice est la première dette de la souveraineté.[107]

The real problem then, does not require proscription of all interpretation but rather the limitation and direction of interpretation, thus recognizing the legitimacy, the legality of a certain type of professional development (and so the need for the Prince vanishes).

This is the first of the three problems mentioned above—how to protect the code from professional power. In the *Projet*, we find Portalis' solution:

> FP. art. 5.2. "Il y a deux sortes d'interprétation; celle par voie de doctrine, et celle par voie d'autorité. L'interprétation par voie de doctrine consiste a saisir le véritable sens d'une loi, dans son application à un cas particulier. L'interprétation par voie d'autorité consiste a résoudre les doutes par forme de disposition générale et de commandement."

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104. DOMAT, Prel. Bk. 1.2.12.
105. *See* discussion *infra* Part II.B.
106. Portalis, *Discours* 474.
107. *Id.* at 473-74.

FP art. 5.3. "Le pouvoir de prononcer par forme de disposition générale, est interdit aux juges."

FP art. 5.8. "On ne doit raisonner d'un cas à un autre, que lorsqu'il y a même motif de décider."

By forbidding the expression of a *ratio decidendi*, as a general rule binding in future cases, in article 5.3, and denying the principle of *stare decisis* in article 5.8, Portalis hopes to prevent the development of a body of case-law (or *jurisprudence*) which *itself* has force as a source of law. He admits the need for legal interpretation but denies that interpretation legal force beyond the parties to the case.

The second problem he faces is more difficult, and his solution has not, I think, been generally understood. Once it is admitted that some professional development is a necessary element of law, how does the law direct that development toward its own ideals? Here the rules for interpretation unite with the formal element of law[108] to produce the solution. The rules which explicitly limit the interpreter contain implicit assumptions about the nature of law. In the *Discours*, Portalis says:

> Le pouvoir judiciaire établi pour apliquer (*sic*) les lois, a besoin d'être dirigé, dans cette application, par certaines règles. Nous les avons tracées: elles sont telles, que la raison particulière d'aucun homme ne puisse jamais prévaloir sur la loi, raison publique.[109]

And at another point:

> Le droit est la raison universelle, la suprême raison fondée sur la nature même des choses. Les lois sont ou ne doivent être que le droit réduit en règles positives, en préceptes particulières.[110]

This establishes the reign of "general principles of law," the "general motive" we spoke of earlier.

> La science du législateur consiste à trouver dans chaque matière, les *principes* les plus favorables au bien commun: la science du magistrat est de mettre *ces principes* en action, de les ramifier, de les étendre, par une application sage et raisonnée. . . .[111]

In other words, this code is not a positivist code; its provisions are not particulate but are rationally inter-related, and it is in the relations of its provisions that the judge, in the usual case, is to seek the law. In the *Projet* this idea is expressed by article 1.7:

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108. *See supra* Introduction n.16 *et seq.*
109. Portalis, *Discours* 479-80.
110. *Id.* at 476.
111. *Id.* (emphasis mine).

> Elle (la loi) ne statue point sur les faits individuels; elle est présumée disposer, non sur des cas rares ou singuliers, mais sur ce qui se passe dans le cours ordinaire des choses.

This establishes what Savigny would call the "normality"[112] of code texts, which taken altogether form the *ratio iuris*. It is this reason which is to guide the judge.

But every text is not "normal." There are some which are contra *rationem iuris*, or *ius singulare*, and as to these, the judge is directed by articles 5.7, 5.9 and 5.10 of the *Projet*. Article 5.7 is the most important of the three; it is a general text, of which the other two are particular instances.

> FP art. 5.7. "La présomption du juge ne doit pas être mise a la place de la présomption de la loi; il n'est pas permis de distinguer lorsque la loi ne distingue pas; et les exceptions qui ne sont point dans la loi, ne doivant point être suppléés."

At first glance this appears to be a text on proof, but it is not that, or the two clauses following the first one would be out of place. The eighteenth century term, "presumption," obscures the significance of the article. "Presumption," says Pothier, "may be defined to be a judgment which the law, or which an individual makes respecting the truth of one thing, by a consequence deduced from another thing. These consequences are founded upon what commonly and generally takes place."[113] This indicates the article's relationship with FP article 1.7 and article 2284 of the LCC (an exact rendition of *Code Civil* article 1349) which says:

> Presumptions are consequences which the law or the judge draws from a known fact to a fact unknown.[114]

The source of article 5.7 is apparently Montesquieu:

> In point of presumption, that of the law is far preferable to that of the man. The French law considers every act of a merchant during the ten days preceding his bankruptcy as fraudulent; this is the presumption of the law. The Roman law inflicted punishments on the husband who kept his wife after she had been guilty of adultery, unless he was induced to do it through fear of the event of a law-suit, or through contempt of his own shame; this is the presumption of the man. The judge must have presumed the motives of the husband's conduct, and must have determined a very obscure and

112. Savigny, 1 *System* Section 16.
113. POTHIER, *supra* note 79, pt. 4, ch. 3, § 2.
114. LCC art. 2284 (1870). The article is the same in all three Louisiana codes.

> ambiguous point; when the law presumes, it gives a fixed rule to the judge.[115]

Taking LCC 2284 and Montesquieu together, we see that a legal presumption is one which is *contra rationem iuris*, which the law establishes for considerations of convenience, and which are not grounded in the "universal reason" of other laws. Thus the term designates *ius singulare*. This conclusion is affirmed by article 2285 of the LCC (code civil article 2350):

> Legal presumption is that which is attached by a *special law*, to certain acts or to certain facts. . . .[116]

What this means is that article 5.7 defines the role of *ius singulare in terms of its judicial application*. It cuts off the *judge's* power to analogize from a legal presumption by establishing *his own* analogy. In analogy, says Austin, ". . . from . . . antecedents or data which are known . . . we argue or proceed to a consequent which is unknown without it. From our knowledge that several objects are connected by a given analogy and our knowledge that a further something is true of one or some, we infer that the further something is true of the other or others."[117] Analogy proceeds on the assumption (or presumption) of similarity, inferring likenesses unknown from characters known. If we know that Titus and Micaela refer to each other as brother and sister; we infer that they are related by blood to common parents and this is a reasonable analogy, since blood relation to common parents is what usually denotes brother and sister. (But the inference is not necessarily correct, since, for example, one may be adopted.) Or, to take Montesquieu's example, if we know that fraudulent acts are likely to be committed during the ten days preceding bankruptcy, it may be convenient to *establish* a parity—to treat *all* acts ten days before as fraudulent. The *law* in this case establishes the analogy: all acts within ten days are fraudulent; this act falls within the ten days; therefore this act is fraudulent. "This act" is likened, is analogized, to others by legal presumption. The important thing here is that the presumption may not be excepted from or distinguished. The presumption may not be reasoned against (though in fact it may be "unreasonable"); laws are such that a man's private reason cannot prevail over the law, which is public reason.

This carries important consequences for the concept of equity, which we will see later. What we want to notice here is the difference

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115. Montesquieu 2. 29.16.
116. LCC art. 2282 (1870) (emphasis mine).
117. 2 Austin 1040.

between this approach and Austin's. Austin forbids the judge to except from a law on the grounds that the principle it contains is broader or narrower than the rule stated by the law. In other words, Austin assumes that *every* legislative act is what the civil law would call *ius singulare*, that it is not susceptible of analogical extension. On the other hand, Portalis tells us in article 5.7 that only certain texts are insusceptible of analogy: only those which establish legal presumptions, only those which give the judge a fixed rule. This can be better seen by paraphrasing Montesquieu: ". . . when the law presumes it gives a fixed rule to the judge," becomes ". . . when the law presumes it limits the consequences which the judge may draw from the thing known." Note that article 5.7 does not "cut off" the judge's search into the motive of the law, as Austin does. But it *obviates the need* for the search, because the text establishing a presumption is marked as one which he can neither extend nor restrict.

LCC article 2285 contains some examples of legal presumptions:

> Legal presumption is that which is attached by a special law, to certain acts or certain facts; such are:
>
> 1. Acts which the law declares null, as presumed to have been made to evade its provisions, from their very quality.
> 2. Cases in which the law declares that the ownership or discharge results from certain determinate circumstances (i.e. prescription).
> 3. The authority which the law attributes to the thing adjudged (i.e. res judicata).[118]

Article 5.9 exemplifies article 5.7 and was probably drafted with Montesquieu's example in mind (Maleville's comment on it seems to prove this connection):[119]

> FP art. 5.9. "Lorsque, par la crainte de quelque fraude, la loi déclare nuls certains actes, ses dispositions ne peuvent être éludées sur le fondement que l'on aurait rapporté la preuve que ces actes ne sont point frauduleux."

How bound up are articles 5, 7, and 5.9 with the notions of legal motive and *ius singulare* may be seen from Louisiana's version of 5.9:

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118. Note that FP art. 1.7 in one sense makes *ius singulare* out of the whole code—that is, in the sense that it establishes an irrebuttable presumption that the provisions of the code express or describe "what passes in the ordinary course of affairs." The article says that ". . . *elle* (la loi) *est présumée disposer*, etc." *See supra* text accompanying note 112. In view of the fact that FP art. 5.7 was not included in the Louisiana code, it is interesting to note that FP art. 1.7 as adopted (LCC art. 2), was altered to leave out the presumption: "*Elle dispose en général*, etc."

119. Maleville, *supra* note 42, at 13: "On en voit des exemples dans l'ordonnance du commerce, relativement aux actes passés dans les dix jours avant la faillite . . . ."

> LCC art. 19. "When to prevent fraud, *or from any other motives of public good*, the law declares certain acts void, its provisions are not to be dispensed with on the ground that the particular act in question has been proved not to be fraudulent, *or not to be contrary to the public good*."[120]

The added phrases fit both the context of the article and the idea of *ius singulare* expressed in D.1.3.16. Together, articles 5.7 and 5.9 require the judge to give a "genuine" interpretation to articles which are *ius singulare*. Article 5.10 is aimed at defeating a practice which was authorized by Domat, according to whom there were certain "favorable" laws, such as

> those which the public good, humanity, religion, the liberty of making contracts and testaments, and other such like motives render favorable . . . .[121]

and then there were others which were "unfavorable," such as

> those which prescribe certain formalities, which are in derogation of common right, which appear to have any hardship in them, and others of the like . . . .[122]

The former were interpreted "in as large an extent as the favor of these motives" allowed; the latter were "not to be applied, beyond what is clearly expressed." Article 5.10 abolishes the practice:

> FP art. 5.10. "La distinction des lois odieuses et des lois favorables, faite dans l'objet d'étendre ou de restreindre leurs dispositions, est abusive."

If the article's only use was the abolition of this practice, then its force would be historically spent after it accomplished that. But it means more than that. Notice that it is an illation of articles 5.7 and 1.7. That is, to say that a law is "odious" or that it is "favorable" is to say that the judge "presumes" it so. Article 5.7 says that the presumption of the judge cannot replace the presumption of the law; and article 1.7 presumes the "normal" character of law which is not marked as *ius singulare*. The function of article 5.10 therefore, is the prevent the judge from "making" *ius singulare* out of normal law.

Taken together, all of these texts "promise" that there are two sorts of laws, distinguishable by the form of their expression. The one—*ius singulare*—is expressed as a fixed rule, which the judge must follow without question: the legal consequence of the rule is contained within

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120. Emphasis mine. The emphasized phrases were added in 1825. *See supra* Part I, Texts and Sources.

121. DOMAT, Prel. Bk. 1.2.14.

122. *Id.* Prel. Bk. 1.2.15.

it. The other is "all other law," "normal" law, for which the motive, the principle of the law *is* the law.

Austin may limit the judge to "genuine" interpretation of legislation, that is, treat each statute as *ius singulare* because he presumes that the common law will be developed analogically. The motive of the statute is restrained to the intention of the statute; the motive of cases however may be extended to new cases. Article 5.8 precludes this operation for the French *Projet*. The motive of cases may not be extended. It is only the motive of "normal" law which is to be extended.

The crux of Austin's system is that it limits the interpreter to the historical intention in all cases. The crux of Portalis' is that the law, and not its creator, directs the interpretation. The judge reasons from legal principles except in those cases which are *contra rationem*, which are governed by extra-legal principles (*ius singulare*), in which case he is bound to a "genuine" interpretation.

The Grammatical-Logical Division in the LCC

In comparing the constituent systems of the LCC's provisions, I have concluded:

1. Blackstone's (and Austin's) rules suppose the interpreter to be bound to the sense of the words which the law-maker attached to them—to the law-maker's intention. The interpretive search is for that intention, which is a limitation on the interpreter's power. Research into the law's motive is permitted only insofar as that motive *indicates* the intention. The focus of the rules is on the interpretation of the single *lex*.

2. Portalis' rules presuppose a comprehensive, unitary body of legislation. The interpreter 's purpose is to grasp the sense of the *whole*, to interpret each rule consistently with its place in the system. Here it is the motive (in a different sense—meaning "principle") which is important and controlling. The principle is the "reason" of law (law's artificial reason). It is assumed that each law rests on such a principle, which both directs and limits the interpreter. A further limitation is imposed on the interpreter in the case of exceptional law, which does *not* rest on legal principle, which is *contra rationem iuris*. Such texts may not be extended or prolonged by analogy in the manner that normal texts are.

The two systems conflict as to their use of the *ratio legis*. For Portalis it is the end of the interpretive search; for Blackstone it is the means. For the one it is the bird; for the other the bird-dog. What

happens when their approaches are combined in one system? Is the conflict inherent?

Article 13 of the Louisiana Code expresses a condition which both systems presuppose; a division between *verba* and *voluntas*, between the letter (or expression) and the spirit (reason or intention). As Portalis uses it, it is only cautionary. In a grammatically-based system though, such as Blackstone's, it becomes cardinal: if interpretation is to be limited to doubtful cases, this is the ideal expression of the opposite case. The next five articles (articles 14-18), with one important exception follow Blackstone verbatim. Do these articles establish a grammatically based system of interpretation? Most importantly, do they conflict with articles 19 and 20, which were taken from French *Projet* articles 5.9 and 5.10?

There can be no doubt that articles 13-18 follow the approach of a grammatically-based system as I have outlined it. First we are to look to the literal meaning of the text, taking the words in their customary, or if they have one, their technical sense. If the literal meaning is doubtful, we look first to the context of the provision; failing that, we look for other expressions on the same subject. Finally, all else failing, we look to the *ratio legis*. This approach easily divides itself into Austin's "literal meaning" (articles 13-15) and "other *indicia*" (article 16-18). Does it therefore authorize a search for legislative intention?

None of the texts mention the word "intention." All are framed in terms of a search for the "true meaning" or "sense" of the law. In doing this, however, the articles do no more than follow Blackstone's words, and there can be no doubt that for him the prize is intention:

> The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.[123]

This in itself is not determinative. The LCC's draftsmen might have veered the meaning of Blackstone's texts such that "true meaning" in them did not mean "intention." However, there is other evidence that this was not done.

Article 1 of the LCC, defining legislation,[124] was drawn from French *Projet* article 1.6, which reads:

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123. BLACKSTONE at 59.

124. Article 1 has been cited for years as an example of the LCC's "extreme positivism" (YIANNOPOULOS, INTRODUCTION TO CIVIL LAW 110 (mimeographed, 1964)). For example, Morrison, *The Need for a Revision of the Louisiana Civil Code*, 11 TLR 213, 239 (1937): "Article 1 is a legislative sanctioning of analytical theories of the source and forms of law . . .

> La loi, chez tous les peoples est une déclaration solennelle du *pouvoir* législatif sur un objet de régime intérieur et d'intérêt commun.

In the LCC, this becomes:

> La loi est une déclaration solennelle de la *volonté* législatif. [Law is a solemn expression of Legislative *will*.]

The change from *pouvoir* to *volonté* might well have commended Blackstone's rules, as being the "fairest and most rational method to interpret the will of the legislator."

Further evidence that the draftsmen were authorizing a search for legislative intention may be found in their "comments" on the *Projet* of the 1825 LCC.[125] In that *Projet* it was decided to introduce in the chapter on interpretation of *contracts* the rules contained in articles 14-17. This was done with the following comment:

> The . . . last preceding articles are copied from the section containing (rules for) the construction of laws—having declared in the first section of the title that the agreements of parties had on them the effect of laws, it was deemed analogous and proper that the same rules of interpretation should be established in both. . . .[126]

In addition, the first article of this chapter contains the following provisions:

> That courts are bound to give legal effect to all such contracts according to the true intent of all the parties.
>
> That the intent is to be determined by the words of the contract, when these are clear and explicit. . . .
>
> . . . [A]ll the articles of this section contain rules established by law for discovering the intent, when either the words of the agreement are ambiguous or circumstances render it doubtful. . . .[127]

This is very strong evidence of the "intention" of the draftsman on the matter. In the interpretation of contracts the search is definitely for intention. If they considered Blackstone's rules well formed to find intention in contracts, surely they were presumed to serve the same purpose in laws.

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showing indelibly the Benthamite influence on Edward Livingston." Well, Livingston did not put it in the code and Bentham did not draft it. The "positivist" charge apparently arises out of the English translation of the article—"La loi" = "Law." Properly translated it should read "Legislation is a solemn expression etc. . . . ." It amounts to no more than a definition of legislation. There *is* evidence of positivism in the code, but art. 1 is not it. See *infra* text accompanying notes 125-127.

125. *Projet of the Civil Code of 1825 in* 1 LOUISIANA LEGAL ARCHIVES 260 (1937).

126. *Id.* at 261.

127. *Id.* at 261-62. Notice that we have gone the full circle back to Grotius: his rules are once again employed to find a real "intention."

It is quite possible then, that the Louisiana draftsmen "intended" these articles taken from Blackstone to direct the interpreter to search for legislative intention. But here I reiterate what I said earlier: it is inconsistent, when one is dealing with a code, to speak of "legislative intention" as to particular articles. We may legitimately consider whether the *draftsmen* "intended" one thing or another by a particular provision or provisions, but that intention is only evidentiary and not controlling on us, unless the code provisions themselves force the opposite conclusion on us.

So we want to know—draftsmen's intention aside and historical antecedents aside—whether there is any intrinsic evidence that the search is to be for intention. *Is there in the nature of these provisions* (article 13-18) that which *requires* (not merely authorizes) a search for intention?

This brings us back to a question still unanswered, whether there is a necessary relationship between the grammatical approach to interpretation and a search for legislative intention. Do these rules, which focus on the meaning of the isolated *lex* and, ideally, take it literally, *necessarily* lead us to look for legislative intention? The best answer I can manage is another question. If not intention, then what *do* they lead us to? I think the answer must be that they *authorize* a search for legislative intention, although they do not *compel* it. Nor do these rules encourage a search for anything beyond intention.

Certainly there is nothing about these provisions, as they stand in Blackstone, which directs the interpreter to preserve a legal unity. There seems to be a natural opposition between the ideas of legislative intention on the one hand, and preservation of a legal, a legislative unity on the other. This is especially true of these ideas as embodied in the two component systems of the LCC's provisions—Blackstone and Portalis. The one idea excludes the other, and that conflict meets in the separate conceptions of legal motive. This is an obvious battleground. For Blackstone, who considers each statute as a separate entity, meaning in the last resort must be sought in extra-legislative material, the most obvious being the concrete situation the statute was enacted to meet. This limited notion of legal motive will not carry us far in the interpretation of a *corpus*, especially one enacted and drafted all at once. One cannot say that the legislature envisaged a particular concrete situation (in the way Blackstone does) when it enacted the general rules on obligations[128] in the code, or even those on delictual responsibility.[129]

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128. LCC arts. 1761–2291 (1870).

129. *Id.* arts. 2315–2324.

The essence of these statutes is also found outwith the bounds of each text, but not in concrete remedies intended—rather, in other texts, other code articles. So motive in a code, or in a unitary system can mean two things: it can mean Blackstone's particular motive, directed toward a concrete situation (though even here the provision is likely to have systematic relationships), or it can, and usually will, mean the principle or principles from which the rule in question and other rules are deduced.

If these approaches contradict each other, does it follow that the LCC provisions in this title are contradictory?

Almost. Following Blackstone, the first provisions of the title focus attention on the meaning of the isolated *lex*. We are admonished to interpret only in doubtful cases, to look to the various "signs" for meaning, including, in the last resort, "the cause which induced the legislature to enact it."

If this were all we might have to admit a contradiction between the first six articles of the title and the last three (including article 21), but the admission is prevented by article 17. This article is the exception mentioned above in the catalogue of articles taken verbatim from Blackstone. Article 16 is taken from Blackstone's second rule of interpretation, which reads:

> 2. If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point . . . .[130]

The last sentence approximates article 17:

> Laws in *pari materia* or upon the same subject matter, must be construed with a reference to each other: what is clear in one statute may be called in aid to explain what is doubtful in another.

But they are not the same, the most important difference being the "must" in article 17.[131] The article's placement (between articles 16 and 18) probably follows Blackstone, but that significant alteration in phrasing probably owes more to Domat's eighteenth rule:

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130. BLACKSTONE 60.

131. The French text reads "*doivent être*," which could mean either "must be" or "ought to be." I take it that the English translation fixes the sense. The 1808 code provided that in the event of obscurity or ambiguity, French and English texts "shall be consulted, and shall mutually serve to the interpretation of one and the other." La. Acts of 1808, at 128.

> If laws in which there is some doubt or other difficulty have any relation to other law which may help to clear up their sense, we must prefer to all other interpretations that which they may have from the other laws. Thus when new laws have a reference to old ones, or to ancient customs, or ancient laws to modern ones, they are interpreted one by the other, according to their common intention, in so far as the latter laws have not abrogated the former.[132]

Thus article 17 takes the Blackstonian character of "mere indicia" out of the comparison. By *requiring* that the comparison be made, article 17 makes it conceptually possible that "general principles" or the "general motive" may control the interpretation. This is all that saves the title. Thus it becomes possible to read article 18 as encompassing both general and special motive.

But if article 17 saves the title, it does not remove all the problems. As the articles stand, they do not force us to search for intention only, and thus do not exclude an actual unity to the code—a unity of precept and method—but there remains this unfortunate progression from the word toward the outermost indicia, which, though only apparent, tends to focus the attention on one law in itself and not as part of a whole.

There is also the unfortunate contingency of "doubtfulness" imposed on the interpretation. In itself this is not inconsistent with a logically-based system. There will occur "doubtful" cases in any system. But the limitation is really the hallmark of a search for intention. It presupposes that in the ideal case, the expression of the law and the intention (or spirit) of the law will exactly coincide. Now this is not an ideal of a logically-based system, which never presumes that the expression can itself contain *all* the law. There the expression merely gives some *determination* to the precept. So interpretation in a logically-based system will be required for, but not limited to, doubtful cases; it will be required for most cases. But the LCC conveys the impression that interpretation is required only in doubtful cases, and thus relegates to the realm of the unconscious that process which does not involve the obscure law. This may well account for the fact that Louisiana courts have imported so many interpretive tricks from other systems, and especially from the surrounding common law jurisdictions.

How well do articles 19 and 20 fit into the scheme established by the preceding articles? Articles 18-20 are all concerned with motive; article 18 is the general text here (replacing French *Projet* article 5.7), articles 19 and 20 are the particular applications. The trouble with this

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132. DOMAT, Prel. Bl, 1.2.18.

combination is not what the texts say together but what they do not say. They are not inconsistent for the reasons given above: article 18, because of article 17, can be read to mean both general and special motive; that is, it instructs the judge to look to the principle supporting the text for the real law. But the text *itself* does not require this. Indeed, the only thing which *does* require such a reading in an attempt to reconcile article 18 with articles 19 and 20. the latter articles presuppose a division of law into *ius normale* and *ius singulare*, without which they are senseless. Article 19 requires the judge to give a "genuine" interpretation to *ius singulare*, and by implication, forbids him to make *ius normale* out of it. Article 20 forbids the judge to make *ius singulare* out of *ius normale*. What is needed is a definition of the role of *ius singulare*, which French *Projet* article 5.7 defines in terms of its application, but which is nowhere found *explicitly* in the Louisiana code. Instead we get *two* pronouncements on *ius normale* in articles 18 and 2.

Article 18 is only directory; it suggests to the judge what he *can* do. French *Projet* article 5.7 is proscriptive, telling the judge what he *cannot* do, and thereby implying the rule of which articles 19 and 20 are consequences.

Article 5.7 might have been placed between articles 18 and 19. One wishes that this had been done. LCC article 2 and French *Projet* article 5.7 are a better combination than LCC articles 2 and 18 alone make. As the title stands now, the brunt of analogical development falls on articles 2 and 21, which is unfortunate because both have been misunderstood.

B. Interpretation of the Law: Equity and Analogy

When enacted or positive law fails to provide a solution, to what do we turn? If there is no law on a subject, on what do we base the decision and still remain within the legal order? When positive law is explicit, interpretation can be only genuine or spurious; the provision may be applied or it may be got round. But when positive law does not explicitly cover a case, genuine interpretation is no longer an issue. Interpretation then either overcomes the accepted notion of legality (i.e. is spurious) or it deepens it.

So the problem of the "unprovided-for case" takes us immediately into fundamental questions. What are the legal ideals of a given legal order which determines "legality"? What is the purpose of the legal order? On what presuppositions does it rest? The solution to the problem itself will usually provide some insight into what is accepted as "legal."

Some possible solutions:

1. The legislative referral—This is perhaps the oldest of the solutions we will consider: "la désastreuse législation des récrits," Portalis called it,[133] "A Species of Legislation above all others the most liable to abuse, and which most disfigures the body of the Civil Law."[134]

The idea here is that the judge's function is merely to apply, to give voice to the law as written. If he has any doubts about the meaning of law, or he thinks that there is no law on the subject, he appeals for the solution to the legislator, who then rules on the question. Quite obviously as to the rule so provided, this is not what we call interpretation at all, or rather it is *authentic* interpretation, as opposed to normal or *doctrinal* interpretation.[135] What I am here interested in, however, is not the nature of the rule handed down by the referral, but the implications which the process of referral *may* carry for the notion of legality.[136] It may carry the implication that, as to the rest of the law, the already existing law, the judge is held in the interpretation to legislative intention. Either positive law exists, expressing the will of the legislator, or we ask the legislator for his will and intention. Thus the creative function of the judge is denied altogether. Legal method is excluded from the idea of legality, which is mechanistic.[137]

I see this idea of legality implicit in the French post-revolutionary legislative *référé*, which preceded creation of the Court of Cassation by a few months.[138] Under this system, the judge was entitled to refer to the legislator legal questions depending on doubtful texts (facultative référé) and was required to do so in the event of contradictions or *lacunae* (obligatory référé). The positivist implications as to the nature of law in a system which contains such a procedure are inescapable. Portalis devotes a substantial portion of the *Discours* to refuting this positivistic

133. Portalis, *Discours* 474.

134. Livingston, Preliminary Report, lxxxviii.

135. Savigny, 1 *System* Section 32; JOLOWICZ, *supra* note 24, at 10-11.

136. Domat's system contains a legislative referral (Prel. Bk. 1.2.12), and he pretends obedience to intention, but as I have shown, he gets round it by seeking the intention in other laws.

137. As opposed to organic. Austin's "command theory" is mechanistic because it depends, is grounded on, an uncommanded commander. Domat's theory is similar: "The Prince knows the Law" but who enlightens the Prince? Under the United States Constitution, the Prince *en tres partes divisas est.*: which of these would inform the referral?

138. August 1790 for the *référé*; November 1790 for Cassation. *See* Gény, *Méthode* No. 40 for discussion.

notion of law,[139] and article 4 of the *Code Civil* (French *Projet* article 5.12) is designed to abolish the facultative *référé*.[140]

I would distinguish from the legislative referral described above various procedures which apparently resemble it, but do not imply the same notion of legality. I have in mind the role of Cassation, in its later form. This is confined to a veto power in the first instance, and in the second, a power to veto the decision combined with the power to formulate a binding legal rule. But the court is prohibited "to inquire into the merits of the case."[141] This idea is very different from that of the *référé*. Here the judge's power to apply the law creatively is not denied absolutely; Cassation is conceived as an equal power, which merely determines whether the judge's decision, *already created*, accords with legality. I would classify with the idea of cassation, and not the legislative referral, Livingston's proposal in the Preliminary Report to Louisiana's 1825 Code:

> [T]o govern the decisions of the judge in all cases, which cannot be brought within the purview of the Code, (we) have proposed that he should determine according to the dictates of natural equity . . . but that such decisions shall have no force as precedents unless sanctioned by the Legislative will. And in order to produce the expression of this will, and progressively to perfect the system, the judges are directed to lay at stated times, before the General Assembly, a circumstantial account of every case for the decision of which they have thought themselves obliged to recur to the use of the discretion thus given. . . .[142]

Again, the role of legal method in the creation of law is not denied, but the law thus created is denied prospective force as a future *source* of law, unless it received legislative sanction. Livingston clearly sees the difference between the creation of particular law, to govern concrete situations, which may be done by judge or legislator, and the creation of legal *principle*, which, thought it may be revealed by new cases, is the province of the legislator alone. Portalis also saw this:

> Il faut que le législateur veille sur la jurisprudence; il peut être éclairé par elle, et il peut, de son coté, la corriger; mais il faut qu'il y en ait une. . . . Or, c'est à la jurisprudence que nous abandonnons les cas rares et extraordinaires qui, ne sauraient entrer dans le plan d'une législation

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139. Portalis, *Discours* 467-76.

140. CODE CIVIL art. 4: "Le juge qui refusera de juger, sous prétexte du silence de l'obscurité on l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice." This was art. 5.12 in the *Projet*.

141. Gény, *Méthode* No. 40; Franklin, *supra* note 15, at 567-68; Franklin, *supra* note 8, at 27-29.

142. Livingston, Preliminary Report xcii.

> raisonnable, les détails trop variables et trop contentieux qui ne doivent point occuper le législateur, et tous les objets que l'on s'efforcerait inutilement de prévoir, ou qu'une prévoyance précipitée ne pourrait définir sans danger. C'est à l'expérience à combler successivement les vides que nous laissons.[143]

2. The Anglo-American common law solution—I have discussed this system, as I see it, above.[144] The main idea is that what purports to be *a* system of law is actually a dual system of legal sources. Two equal forces within the system oppose each other—the legislature or authentic power on the one hand and the judiciary or professional power on the other. If positive, or enacted law fails to provide a solution, the common law takes over. As a matter of "practice" (i.e. interpretation) the common law is hostile to enacted law and so limits its force to what a genuine interpretation reveals, thus in fact extending the power of the judiciary. The real objection here is not just duality but is rather that neither power *openly*, *in theory*, recognizes the other. Common law legislation is drafted as though it will never be interpreted, so, although the legislative claims supremacy for itself, by refusing to direct professional power in interpretation, it refuses to exercise the supremacy it claims. The courts pretend allegiance to the sovereign legislature, while using the doctrine of *stare decisis* to make palimpsests of the Acts.

3. Fall back on Roman law—this is the very difficult problem of the subsidiary force of Roman law. In modern times this may be expressed as the view that Roman law is the embodiment of natural law:

> [A]s for the laws of nature . . . we have nowhere the detail of them except in the books of the Roman law, and . . . they are placed there not in the best order . . . .[145]

So says Domat, and although Savigny had different idea of Roman law's force, the important view for our purpose is the one expressed above.

Functionally speaking, this solution to the problem of the gap in legislation is similar to that of the common law. That is, it means admitting dual legality within the system unless *positive* law directs the method of referral,[146] otherwise the judge is still undirected: *he* decides

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143. Portalis, *Discours* 476.

144. *See supra* Introduction and Part II.A.

145. DOMAT, TREATISE OF LAWS 11.19.

146. Obviously, the more precisely positive law directs the method of referral, and the more it incorporates or presupposes Roman law as part of itself, then the less duality there will be within the system. Otherwise there exists the possibility both that substantive provisions will compete with each other (that is, that the content of positive law will vie with the content of Roman law) and also that there will be a competition of methodologies. We get this in Domat,

whether positive law is insufficient and *he* decides what Roman law to import and how much. We will cover this problem in some detail below, when we discuss Domat.

Obviously, any system of laws based upon Roman law, even a codified one, supposes some knowledge of Roman law. Thus the Louisiana code abolishes *fidei commissa*, the Falcidian fourth and the *exceptio non numeratae pecuniae*,[147] without defining these. One must return to the Roman law to understand the implications of these articles. But this is a different problem than that of filling gaps in positive law with Roman law.

4. Analogy from existing legislation—The presumption is that positive law is a rational set of principles laid down by the state to establish the legal order. The principles are "rational" because they accurately describe existing social *relationships*: persons to persons, persons to things, and so forth. If the law is not express, or clear, if there is no law, the judge is directed to find the principles on which the law rests and thence to reason out an answer.

Note that this solution *does* rest on a presumption: that the law "accurately describes": thus this solution becomes a problem when the system of law is so old that it no longer really describes the society it purports to regulate, as LCC article 2 promises. This is in fact the unstated major premise of Gény's *Méthode*: how to reduce this disparity between the society a code describes and the one that it regulates a century or so later.

In Louisiana the solution for the *lacuna* is given by article 21:

> In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.

The article presumes a judicial solution to the problem, and relies on "natural law" to do it, so apparently it involves process (3) or (4) of the possible solutions given above. Which one?

First there is the term "equity" to get round—"this slippery expression" as Austin calls it.[148] He goes on to say that it may have four significations, "besides a multitude of others." Indeed it may be questioned whether the term is definable at all. "The fact of the matter,"

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who interprets the Roman law with equity and positive law with the "intention of the law-maker." *See infra* text accompanying notes 155-165.

147. LCC arts. 1520, 1616, 2237 (1870).

148. 2 Austin 1028.

says Professor Dainow, "is simply that the words in Article 21 of the Louisiana Civil Code were meant to be used in their ordinary popular nontechnical meaning, and everything could have been so much less complicated later if these words had been accepted for what they were."[149] He might have cited article 14 as authority.

We find a similar approach in Blackstone: In the paragraph immediately following his fifth rule of interpretation (LCC article 18) he says:

> From this method of interpreting laws, by the reason of them, arises what we call *equity*; which is thus defined by Grotius, 'the correction of that, wherein the law (by reason of its universality) is deficient.' For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed . . . . Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying it's [sic] very essence, and reducing it to a positive law.[150]

Two things should be noticed here. First this is a statement which would make Austin squirm. It is quite obvious, from its placement and from the first clause of it, that what Blackstone means by "equity" is what Austin calls "this bastard extensive interpretation *ex ratione legis*." So if the first clause stood alone, it would appear that Blackstone is attempting to introduce analogical reasoning from the principle (the reason) of statutes into the common law.

But—and this is the second point—he veers this first meaning of "equity" when he introduces the Grotius definition and concludes that "no established rules and fixed precepts of equity " can be laid down. This contradicts the first clause, in which he justifies the existence of equity as based on the reason of the law, which *is* a "fixed precept." This is very different from the idea which Grotius takes from Aristotle, that law, by its nature, must be laid down in general terms "and it is not possible to generalize accurately."[151] The essential presumption behind this second idea of equity is the formality of law, a strictness or rigor in

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149. Dainow, *The Method of Legal Development through Juridical Interpretation in Louisiana and Puerto Rico*, 22 U. OF PUERTO RICO L. REV. 109, 112 (1952). Professor Ramos actually *does* justify such an interpretation of art. 21 on the basis of art. 14. Ramos, *'Equity' in the Civil Law: A Comparative Essay*," 44 TLR 720, 723 n.16 (1970). Neither tells us what this "ordinary popular nontechnical meaning" is. The short answer to both is art. 15.

150. BLACKSTONE at 61-62.

151. JOLOWICZ, *supra* note 24, at 54.

its nature which can only be overcome by some stronger power, namely equity. The law is formal, this formality makes it deficient and it is equity's job to remedy the deficiency. This appropriately describes the relationship of statute to common law: the judge is the dispenser of this equity.

> And these are the cases, which, according to Grotius, "lex non exacte definit, aed arbitrio boni viri permittit."[152]

So, although Blackstone will not define equity for us, he nevertheless gives it two meanings. The first, extension of the statute according to its principle, might be useful in a codified system. The second—the Aristotelean one—would be dangerous to the existence of *any* code (including a positivist one), because it puts undefined power in the hands of the interpreter, and would be redundant in a code such as the French or Louisiana codes, which put the law into "pliable" texts,[153] and thus overcome the problem of formality, of strictness, which the second equity presupposes. The important thing to note here though is the possible danger of using "equity" without defining it.

I take "equity" therefore, to be the name of a process, a type of juridical method, which stands in a certain relation to law.[154] Depending on its historical context (a given system at a given time), it may mean one of two things. First it may embody an attempt to *reform* the law; in this sense (Blackstone's second sense) it stands in opposition to the law. Secondly, it refers to a process by which the force of law is extended; in this sense (Blackstone's first) it combines *with* formal law, positive law, as a part of legality, as a necessary element of a system's unity.

The two senses in their relation to natural law (to which article 21 ties "our" equity) have been described very well by Professor Franklin:

> When existing law has to be made to conform to natural law, "equity" has the task of overcoming the existing law. In part this has been precisely the role of Roman praetorian and of English chancery "equity" during the period of their expansion . . . that of negating an existing legal system. . . . But equity may have another meaning in natural law, according to which it

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152. BLACKSTONE 62.

153. *See supra* Introduction.

154. And so doing align myself with Professor Franklin and his view of equity. His early article on art. 21 (*supra* note 22) is a Louisiana classic and I have followed it closely. Compare with what follows Gény's definition (*Méthode* No. 163) of the "sentiment of equity"; ". . . a kind of instinct which aims automatically (that is, without making any appeal to its guiding reason) and directly to the solution which is best and most in conformity with the purpose of the whole legal system . . . ." His heart is in the right place, but I object to the abstract and subjective nature of his conception. A similar position is taken by Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 LA. L. REV. 235, 262-63 (1958).

> rectifies, by extension, the existing law, when the latter is itself an incomplete rendition of natural law. In Roman law, this often means the practice of employing legislation analogically. The existing law is taken to be an imperfect expression of natural law and the written text maybe "interpreted" to include more than the text itself says, so as to mirror more perfectly the natural law .... The first meaning of "equity"—that of contradicting the existing law in the name of a higher law—may be the reflection of a struggle between entrenched human interests and new human interests, arising from economic change and fighting to be recognized. The first meaning of equity accomplishes this. The second meaning of "equity"—that of projecting the existing law—may be the reflection of the actual conquest of the state itself by the new human interests. If the state has indeed been made over by the new forces, "equity" then becomes a weapon with which to defend the victory and to extend the conquest to every part of the society. In this situation its task is to enforce the policies of the new regime by excluding overthrown, archaic and archaistic legal conceptions when they present themselves unexpectedly for recognition, as well as to deepen or to advance the new policies into new and unanticipated situations. This may be accomplished by regarding the fresh body of existing law as the starting point for legal decision. This is the second meaning of "equity." The historical context in which "equity" appears becomes, therefore, vital; and it may lead to confusion to disregard the underlying basis on which each "equity" rests.[155]

Domat provides an example of the first meaning of equity. A proper interpretation, as Domat sees it, is based on a comparison of a law with other laws:

> [W]here it is necessary to interpret the sense of a law, ... this interpretation, which gives to the law its just effect, is always founded upon some other rule [law], which requires another thing than what appeared to be regulated by the sense of the law not rightly understood[;] ... for the right understanding of a rule, it is not enough to apprehend the apparent sense of the words, and to view it by itself; but it is necessary likewise to consider if there are not only rules that limit it. For it is certain that, every rule having its proper justice, which cannot be contrary to that of any other rule, each rule hath its own justice within its proper bounds. And it is only the connection of all the rules together that constitutes their justice, and limits their use.[156]

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155. Franklin, *Brutus the American Praetor*, 15 TLR 16, 22-23 (1940). In the cited article, he goes on to analyze the two meanings of equity in the light of French history and philosophy immediately before and then after the Revolution. The examples following in the text of this paper however are my own application of his theory to French law. *See also* Franklin, *supra* note 32, at 494.

156. DOMAT, Prel. Bk. 1.2.pr.

By this comparison we discern the "spirit of the laws" which is "natural equity," upon which all laws are based:

> Or rather it is natural equity, which being the universal spirit of justice, makes all the rules, and assigns to everyone its proper use. From whence we must infer, that it is the knowledge of this equity, and the general view of this spirit of the laws, that is the first foundation of the use and particular interpretation of all rules.[157]

But there are two sorts of law: natural law (which is found in the Roman law[158]) and "arbitrary" or positive law, that is, the ordinances and statutes of France. Interpretation is to seek the spirit of each; both are seen to rest ultimately on natural equity.

> But to this principle of equity we must add, in so far as concerns the interpretation of arbitrary laws, another principle, which is peculiar to them, and that is the intention of the lawgiver, which determines how far the arbitrary laws regulate the use and interpretation of this equity. For in this kind of laws, the temperament of equity is restrained to what is agreeable to the intention of the lawgiver, and is not extended to whatever might have appeared to be equitable before the arbitrary law was enacted.[159]

So the force of natural equity in positive law is supposed to be limited by the intention of the law.[160] Up to this point, "equity" or "the spirit of laws" is a theory of the relationships of laws to each other, an idea which probably inspired Montesquieu's theory of "necessary relationships,"[161] and which, indirectly through Montesquieu and directly through Domat, greatly influences Portalis' conception of law and interpretation.

But when we return to the chapter on interpretation of laws,[162] we find that "equity" means something else besides. There we find it opposed to the "rigor" of the law. Rigor may mean something like *ius singulare*, that is, "a rule thus is inflexible, but which has nevertheless its justice,"[163] such as a rule prescribing seven witnesses to a will; the judge may not permit the sufficiency of six, which, though harsh, would be to annul the law entirely. But rigor also refers to "a hardship that is unjust

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157. *Id.*

158. DOMAT, *supra* note 145, at 11.19.

159. DOMAT, Prel.Bk. 1.2 pr.

160. As to the distinction between "intention of the legislator" and "intention of the law," see my remarks *supra* notes 68-71.

161. SHACKLETON, MONTESQUIEU, A CRITICAL BIOGRAPHY 247-48 (1961). Montesquieu, 1.1.1: "Laws, in their most general signification, are the necessary relations arising from the nature of things." *Compare* Portalis, *Discours* 477: ". . . toutes les lois, de quelque ordre qu'elles soient, ont entrés elles des rapports nécessaires."

162. DOMAT, Prel. Bk. 1.2.

163. *Id.* 1.2.6.

and odious, and in no ways conformable to the spirit of the laws,"[164] an example of which is found in Rule 15:

> Laws which are restrained.—The laws which restrain our natural liberty, such as those that forbid anything that is not in itself unlawful, or which derogate in any other manner from the general law, . . . the laws which appear to have any hardship in them; those which permit disinheriting, and other the like, are to be interpreted in such a manner as not to be applied, beyond what is clearly expressed in the law, to any consequences to which the laws do not extend. And, on the contrary, we ought to give to such laws all the temperament of equity and humanity that they are capable of.[165]

Clearly here we have returned to the Artistotelean-Grotian notion of equity as a thing opposed to formal law. Its mission is to oppose itself to the law's growth, to "restrain" the law.

Equity in this sense, as a reforming institution, was rejected by Portalis. Although the form of French *Projet* article 5.11 (LCC article 21) is taken from Domat,[166] the meaning of the term "equity" is veered. In the French *Projet* we find the word used in Professor Franklin's second sense, not to correct positive law, but to extend its force into uncontemplated situations. The idea that equity is opposed to formalism in the law is entirely abandoned. The formal element of law, its "rigor," is de-emphasized; law is taken by the draftsmen to be a statement of *principle*. Thus equity's role is to *extend* legal principle into new situations. This is nowhere better seen than in the remarks of Portalis, defending the article against the Tribunals' attacks:

> On a déployé de grandes forces contre cet article.
>
> Un des orateurs a prétendu que nous donnions aux juges un pouvoir désavoué par la Constitution. Je sens, nous a-t-il dit, qu'il nous manque des tribunaux d'équité, qui puissent, suivant les circonstances, adoucir les lois. Il y a une cour d'équité en Angleterre; à Rome, le préteur était un juge d'équité; en France, le roi avait le droit de faire grâce; et les parlemens s'écartaient souvent de la lettre de la loi. Mais, parmi nous, le ministère du juge est circonscrit dans l'application fidèle des lois.
>
> Toutes ces objections ne prouvent rien contre l'article; elles prouvent seulement que l'article n'a pas été entendu.
>
> L'auteur de l'objection aurait raison, si nous laissions aux juges la liberté de mettre l'équité naturelle à la place de la loi positive. Ainsi, à

164. *Id.*

165. *Id.* 1.2.15.

166. *Id.* 1.1.23 (quoted in Texts and sources above). It is no answer, to my contention that the meaning of "equity" has been veered, to say that both Portalis and Domat are merely providing for the unforeseen case, and thus that Domat is not here opposing "equity" to positive law. Domat gives two definitions of "rigor," but only one of "equity."

> Rome, le préteur n'appliquait pas la loi, quand il la croyait contraire à l'équité naturelle. Il avait introduit les actions de bonne foi, pour éluder les lois qui avaient établi des formules précises, pour chaque action. En Angleterre, la cour d'équité, et en France, les cours souveraines, faisaient souvent des réglemens pour modifier les lois, Mais ce n'est pas ce dont il s'agit. Notre article ne dispose que pour les cas ou la loi est obscure ou insuffisante, et pour ceux ou il n'y a même point de loi. Or, dans ces différens cas, le juge doit-il suspendre son ministère ou le remplir?[167]

The "equity" of French *Projet* article 5.11 is therefore a rejection of "equity" as it was known to Domat and Blackstone. The purpose of the article is not to reform or "restrain" code texts, but rather to extend them to situations unforeseen by the legislator and not expressly covered by the code. So it represents a rejection of possible solutions (2) and (3) above, and acceptance of number (4).

Some confusion on this point may result from the fact that both Domat and Portalis base their concepts of equity on natural law. However, just as the role of equity is reversed from the one to the other, so with natural law.

Domat opposes natural law to positive law:

> The universal justice of all laws consists in the relation which they have to the order of society, of which they are the rules. But there is this difference between the justice of the laws of nature and the justice of arbitrary laws, that, the laws of nature being essential to the two primary laws, and to the engagements which are consequences of them, they are essentially just; and that their justice is always the same, at all times and in all places. But the arbitrary laws being indifferent to these foundations of the order of society, so that there is not any one of them which may not be altered, or abolished, without overturning the said foundations; the justice of these laws consists in the particular advantage that is found by enacting them, according as the times and the places may require.[168]

Positive law is of an inferior quality by comparison.

But for Portalis, natural law is the very basis of positive law:

> Le droit est la raison universelle, la suprême raison fondée sur la nature même des choses. Les lois sont ou ne doivent être que le droit réduit en règles positives, en préceptes particuliers . . . La raison, en tant qu'elle gouverne indéfiniment tous les hommes, s'appelle *droit naturel*. . . .[169]

In the *Projet* this is expressed in the first article:

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167. Portalis, *Discussion devant le corps-legislatif*, 6 Fenet 268-69. Portalis is actually referring to *Code Civil* art. 4, which was FP art. 5.12 (quoted *supra* note 140), but his remarks make it obvious that both articles are grounded on the same principle.

168. DOMAT, *supra* note 145, at 11.20; *see also* DOMAT, Prel. Bk. 1.1.3-4.

169. Portalis, *Discours* 476-77.

> FP art. 1.1."Il existe un droit universel et immutable, source de toutes le lois positives: il n'est que la raison naturelle, en tant qu'elle gouverne tous les hommes."[170]

So natural law is not something *opposed* to positive law. Law for Portalis becomes the definitive statement of the natural law in force:

> [E]lles [les lois] sont telles, que la raison particulière d'aucun homme ne puisse jamais prévaloir sur la loi, raison publique.[171]

Domat tells us that natural law is to be found only in the *Corpus Juris*. Portalis tells us that it is the legislature alone that knows natural law.[172] Natural law no longer opposes but is stated by legislation:

> FP art. 1.6."La loi, chez tous les peuples est une déclaration solennelle du pouvoir législatif sur un objet de régime intérieur et d'intérêt commun."

It is to this natural law—the natural reason which is the foundation of the code—that the judge appeals when positive law appears "silent, contradictory or obscure."[173]

If we transliterate its terms into twentieth century language, then we may say that French *Projet* article 5.11 justifies analogical extension of the general principles on which the code is based. This is the idea of *Rechtsanalogie*, which Portalis seems to have understood:

> Dans cette immensité d'objets divers, qui composent les matières civiles, et dont le jugement, dans le plus grand nombre des cas, est moins l'application d'un texte précis, que la combinaison de plusieurs textes *qui conduisent à la décision bien plus qu'ils ne la renferment*, on ne peut pas plus se passer de jurisprudence que de lois.[174]

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170. *Cf.* Montesquieu 1.1.3: "Law in general is human reason, inasmuch as it governs all the inhabitants of the earth . . . ."

171. Portalis, *Discours* 479-80.

172. The transition is from "Natural law is written in the heart of man (but especially the heart of the Prince)e" to "Natural law is written in the heart of the legislator."

173. Oddly, Portalis, neither in the *Discours Préliminaire* nor in any other of his discourses before the Commission (see 6 Fenet 243-73, 358-63), defines the difference between *droit naturel* and *loi naturel*. In the *Discours* (p. 477), he puts the difference between *droit* and *lois* thus: ". . . les membres de chaque cité sont régis, comme hommes, par le droit, et comme citoyens, par des lois . . . ." I take it that the same distinction applies to natural law. This would buttress my argument that natural law is only in force insofar as it is expressed by the code, so far as positive *lois* is founded on it. *See* CARBONNIER, 1 DROIT CIVIL § 10, at 37 (1957).

174. Portalis, *Discours* 476 (emphasis mine). This meaning of equity is very well illustrated by LCC arts. 520-32 (*Code Civil* arts. 565-77).

> LCC art. 520. "The right of accession, when it operates upon two movable things, belonging to two different owners, rests altogether upon principles of natural equity."
>
> "The following rules shall direct the determination of the judge in unforeseen cases, according to the peculiar circumstances of such cases."

Article 5.11 represents a brilliant refinement in the idea of legality, an attempt to receive into the law the forces that might oppose and corrupt it, and by so receiving them, to direct them so as to further, to deepen, its own ideals. As I have presented it so far, it is entirely compatible with the idea of cassation: the creative function of the judge is not denied. He is to be allowed to interpret the law creatively, but the decision so formulated is not a *source* of law. Articles 5.3 and 5.8 forbid that. And if the decision contradicts law, if it opposes legality, it is liable to cassation.

But this accomplishment, great as it is, in my opinion, is marred by something I have not yet mentioned.[175]

Article 5.11 also refers the judge to "*usages reçus*" in the silence of positive law. This presents problems. Portalis does not defines "usage" anywhere, but he seems to confuse the term with "custom."

> FP art. 1.4."Le droit intérieur ou particulier de chaque people se compose en partie du droit universel, en partie des lois qui lui sont propres, et en partie de ses coutumes ou usages, qui sont le supplément des lois."
>
> FP art. 1.5."La coutume résulte d'une longue suite d'actes constamment répétés, qui ont acquis la force d'une convention tacite et commune."

Throughout the *Discours*, Portalis never refers to usage or custom as anything other than the "supplement des *lois*" when positive law is silent, contradictory or obscure.

> But if there is no precise provision on a particular matter, then an ancient custom, constant and well established, an unbroken line of similar decisions, an opinion, or an accepted maxim takes the place of enacted law. When we are guided by nothing which is established or known, when what is involved is an absolutely new occurrence, we go back to principles of natural law. For if the lawmaker's foresight is limited, nature is infinite; she applies to all things that concern men.[176]
>
> Il est trop heureux qu'il y ait recueils, et une tradition suivie d'usages, de maximes et de règles, pour que l'on soit, en quelque sorte, nécessite a juger aujourd'hui, comme on a jugé hier . . . .[177]

The articles following provide examples, suitable for analogical development.

175. Franklin side-steps the issue, *supra* note 22, at 502 n.60; Dainow, *supra* note 149, at 119-20.

176. Portalis, *supra* note 21, at 770. Where I have been able to compare the translation with the original I find that *usage* in the later is consistently rendered as "custom," so probably "usage" is the proper term here. But since Portalis himself confuses the two, the point is academic. We find a similar confusion of the terms by the French courts who commented on the *Projet*. *See, e.g.*, *Observations du tribunal d'Ajaccio*, 3 Fenet 118.

177. Portalis, *Discours* 472.

> Si l'on manque de loi, il faut consulter l'usage ou l'équité. L'équité est le retour à la loi naturelle, dans le silence, l'opposition ou l'obscurité des lois positives.[178]
>
> Les parties qui traitent entre elles sur une matière que la loi positive n'a pas définie, se soumettent aux usages récus, ou a l'équité universelle, a défaut de tout usage. Ou, constater un point d'usage et l'appliquer à une contestation privée, c'est faire un acte judiciaire, et non un acte législatif.[179]

This last statement, and his use interchangeably of "custom" and "usage," seem to imply that Portalis may have meant what we today call "conventional usage," rather than "custom," in the sense that the laws of northern France before the codification were "customs." That is, he may be referring to the common habits of daily life, rather than to judicial custom, or legally binding custom.[180] This would accord with articles 5.3 and 5.8, which prohibit the establishment of legally binding judicial custom.

But he is equivocal. Although articles 1.4 and 1.5 define usage (or custom) as sources of *droit* which is morally obligatory, and not *loi*, which is binding, nevertheless they are there. This seems to me to contradict the idea of legality which Portalis presents, or, at least it permits the possibility that his idea *will be* contradicted.[181] For even though usage (or custom) is to be no more than the "supplement" of law, its reception into the sphere of legality is still uncontrolled, undefined,[182] according to the very terms of article 5.11, it is the judge alone who determines whether to extend the code analogically, or to apply "*usages reçus*." It is precisely this feature which I objected to in the systems of Domat and Blackstone.[183] It is on this point that Austin bases his *critique* of the French Code:

> [I]n the main, they [the draftsmen] intended that where the code should not be found sufficient, the Courts should decide by what they called *usage* and *doctrine*: that is the customary law previously obtaining within the resort of the particular Court, and the *jurisprudence* commonly followed by former tribunals within that same resort. To show the indefiniteness of

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178. *Id.* at 476.

179. *Id.* at 475.

180. Usage in this sense has force only as a supplement to *contractual* intent. It is defined by LCC art. 1966: "By the word *usage* . . . is meant that which is generally practiced in affairs of the same nature with that which forms the subject of the contract."

181. Gény, *Méthode* No. 128 in support of his own theory that custom is a source of law, relies (quite properly) on Portalis as authority. But I think they are both wrong.

182. And ". . . historic equity has undermined the old law no less politely than resolutely," Franklin, *supra* note 22, at 494.

183. *See supra* text accompanying notes 150-152 and 162-165. The point of objection is the arbitrary, undetermined power placed in the hands of the judge. *See supra* note 146.

> their notions, I shall mention some of the *subsidia* which are referred to in their discussions. 1. *Équité naturelle*, *loi naturelle*. 2. The Roman law. 3. The ancient customs. 4. Usage, *exemple*, *décisions*, *jurisprudence*. 5. *Droit commun*. 6. *Principes généraux*, *maximes*, *doctrine*, *science*. It thus appears that they intended to leave many of the points which the code should have embraced to *usage* and *doctrine*: that is, to the tribunals as guided by *usage* and *doctrine*, not by the code itself.[184]

Austin is criticizing the French code for falling short of his ideal of a positivist code. On points 1 and 6 of his list, we obviously are separated by denominational differences, and as to points 2 and 5, I find nothing in the *travaux* to justify calling these *subsidia*. But as for custom and usage, his is at least a fair reading of the evidence, and one which has the support of recent history.[185]

Equity in the LCC

Article 5.11 of the French *Projet*, though formally inspired by a similar statement in Domat, reverses the meaning of the latter, I have argued, because of changes in the French history intervening between the two formulations. Article 21 of the LCC is an almost exact copy of French *Projet* article 5.11. Does article 21 have the same meaning as its source article, or did history veer it again?

Unfortunately we are not blessed here with the elaborate *travaux* which accompanied the French code's birth. As to the 1808 LCC there is no evidence at all of the draftsmen's reasons for including it, and precious little of their ideals of legality. For the 1825 code, we have Livingston's remarkable Preliminary Report. I will discuss both the 1808 and 1825 codes, and the ideas of the Preliminary Report with the jurisprudential history below, which really amounts to a history of article 21 for the period under consideration.

Several points need to be made here, however. In the Preliminary Report, Livingston is chiefly concerned with two problems. First he

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184. 2 Austin 695.

185. E.g., Gény and his followers today. Gény has been warmly received in Louisiana because he may be taken to justify the control which the legal profession and the *jurisprudence* have exercised for years over the LCC without him. For example, Justice Albert Tate of the Louisiana Supreme Court, in his review of the Louisiana Law Institute's translation of the *Méthode*, reads him to mean that

> while we must apply legislative intent (irrespective of whether the general rule produces results which seem fair to the interpreter), we are not so bound when the rule is devised merely from doctrine or interpretation rather than from actual legislative intent.

Tate, Book Review, 25 LA. L. REV. 577, 582 (1965).

wants to sever completely the code's ties with the laws from which it is drawn—the ancient Spanish and Roman laws: Secondly, he wants to prevent the arisal of an authoritative body of case-law, which will make over the code after its enactment.[186] The solution to both he puts in one paragraph:

> We could not effect this without recommending an express repeal of all former laws and usages defining civil rights and indicating the means of preserving and asserting them. This we have accordingly done; and to govern the decisions of the Judge in all cases, which cannot be brought within the purview of the Code, have proposed that he should determine according to the dictates of natural equity, in the manner that 'amicable compounders' are now authorized to decide, but that such decisions shall have no force as precedents unless sanctioned by the Legislative will.[187]

Now, in both the 1808 and 1825 codes, the authority of the "amicable compounder" in arbitration is set out by the following articles:

> Art. 3109. "There are two sorts of arbitrators: The arbitrators properly so called; And the amicable compounders."[188]
>
> Art. 3110. "The arbitrators ought to determine as judges, agreeably to the strictness of the law. Amicable compounders are authorized to abate something of the strictness of the law in favor of natural equity . . . ."[189]

This juxtaposition of "equity" to the law's "strictness" sounds more like Blackstone or Austin than Portalis. It intimates a positivistic view of law.

This is important I think because both the Preliminary Title to the LCC and Livingston's Preliminary Report waiver undecidedly between Portalis' conception of a code, as a statement of legal principles to be extended by the judge, and Austin's—or rather Bentham's—ideal of a positivist code,[190] as a statement of positive law to be genuinely interpreted. Neither Livingston nor the drafter of the Preliminary Title[191] seems to have committed himself entirely to the one view or the other: do we give the judge freedom to seek the principles of the code and apply them, or do we limit his to a genuine interpretation, hold him to the "intention" of the legislator? They seem never to have made up their minds.

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186. Livingston, Preliminary Report lxxxviii–xcii (reprinted in the Appendix).

187. *Id.* at xcii. Note Livingston's usage of the word "use."

188. LCC art. 3109 (1870); art. 3076 (1825); art. 11, at 442 (1808).

189. LCC art. 3110 (1870); art. 3077 (1825); art. 12, at 442 (1808).

190. 2 Austin 671. On the influence of Bentham on Livingston, see Franklin, *Concerning the Historic Importance of Edward Livingston*, 11 TLR 163 (1937), and HATCHER, EDWARD LIVINGSTON (1940).

191. Probably Moreau Lislet. *See infra* note 211.

Livingston (at least several years later) had clear views on the role of analogy in the code:

> If the case be a new one, he must decide without positive law; he must frame his judgment by analogical reasoning from the law in similar cases.[192]

But compare this with what he says in the Preliminary Report:

> To determine what is the true meaning of the Law when it is doubtful; to decide how it applies to facts when they are legally ascertained is the proper office of the Judge—The exercise of his discretion is confined to these, which are called CASES OF CONSTRUCTION: in all others he has none, he is but the organ for giving voice, and utterance and effect, to that which the Legislative branch has decreed.[193]

In another place, he says that a part of his duty in the work of revising the code is

> to restrain the Legislation of precedent, where it has gone beyond the letter or true intent of the statute.[194]

Finally, it must be said that the terms in which article 21 is expressed proved it a poor choice for its purpose in Louisiana. "Equity" and "natural law" were justifiable in France by French history. But in Louisiana, as I will show in the next section, "natural law" meant "Spanish law" and in a short time, "equity" was taken to mean English Chancery equity.[195] In both cases the result was the same. Instead of protecting the code from extra-codal sources, article 21 proved to be the vehicle by which the judiciary took over (or took apart) the code.

C. Conclusions

When I first proposed to write about *the theory* of interpretation contained in the LCC's Preliminary Title,[196] I was told by a justly esteemed Louisiana legal scholar:

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192. 1 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 171 (1873). The remark was made in the Introduction to his *Projet* for a criminal code submitted to the Louisiana legislature several years after the 1825 LCC was adopted.

193. Livingston, Preliminary Report xci.

194. *Id.* at xc.

195. This development comes after the period under consideration, so I have not addressed myself to it. *See* Franklin, *supra* note 22, at 507-09. The leading case is *Le Blanc v. City of New Orleans*, 138 La. 243, 70 So. 212 (1915), which allows the Louisiana judge to look to chancery precedents if they are "considered with respectful caution." *See* Dainow, *supra* note 149.

196. I published the sources of these articles and briefly commented upon them in T.W. Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat and the French Codes*, 44 TLR 264, 293-95 (1970).

> In my opinion, the articles [of the Preliminary Title] represented at the time basic ideas which were shared in certain English, French and Spanish legal circles. Their drafting would have come out very much the same way no matter which of the three types of sources the draftsmen had elected to use.

I hope that I have shown that this is not so, that quite different theories are represented, not only *by* "the three types of sources" but *within* them as well. But does the Title represent *a* theory of interpretation? We have addressed this question several times already; it is nonetheless difficult to answer.

The ambivalence of Livingston over the proper role of article 21, just mentioned, marks the whole Title, and is, I think, the key to understanding it. According to the only evidence, Livingston did no work on the original chapter on interpretation in the code; it was put there in 1808, probably by Moreau Lislet. But the interpretive theory expressed in both the Preliminary Report and the articles on interpretation is the same: the draftsmen never really decided whether to hold the judge to legislative intention or to let him research the law's principles. The first articles of the chapter start us on a search for intention; the last articles presuppose controlling legal principle. The result is that we are *authorized* to follow either approach to interpretation but are not *required* to do either—though it should be said that unless the ultimate search is for legal principle, the general motive of the law, it is impossible to reconcile articles 19-21 with the others.

If Livingston had drawn up this chapter of the Title, we might dismiss this anomaly as bad influence from Bentham. But there is no evidence of a positivist streak in Moreau Lislet. How then this peculiar composition? The answer may well lie in something I have not yet mentioned.[197]

Throughout this Part, I have referred to the Louisiana articles as though they were the expression of one code. In fact, though the articles on interpretation have remained essentially the same, they have passed through three "codifications," 1808, 1825 and 1870, and I shall attempt in the next Part to prove that the 1808 "code" was not a code at all, but purported to be a mere digest of the Spanish laws, which retained their subsidiary force. The argument, insofar as it is pertinent here is as follows: The Digest of 1808 (even though most of its provisions were uplifted from the French *Projet* and the *Code Civil*) was intended to be an outline of the "civil" law in force in the State of Louisiana, including

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197. Because what follows here presupposes familiarity with what I cover *infra* Part III (Jurisprudence and the Code: The Theory in Practice), the reader may do well to return to these remarks again after having read that Part.

such alterations in the law as were required by the United States Constitution and local needs. But the body of Spanish and Roman law which had preceded the Digest as Louisiana's law, remained in force except where it was "contrary to the dispositions contained in the said digest, or irreconcilable with them." Aside from this supplementary, subsidiary force, Spanish and Roman law also enjoyed the position of *ratio scripta* and were cited in court to prove or disprove the justness of a particular code provision: the old law was regarded as the expression of natural law.

This argument finds great support in the difference between the cause of codification in France and the cause in Louisiana. The former codified to unify its laws and solidify the accomplishments of the Revolution. Louisiana was prompted by the sudden and immediate threat of receiving a common law regime, which Jefferson wanted to impose on the newly acquired territory. Louisiana did not codify in order to *do away* with its archaic system of laws; it codified as an excuse to *keep them*.

If this is true, then the chapter on interpretation *in its relation to the 1808 Digest* represents Moreau Lislet's attempt to introduce a system something like Domat's: one adapted to the interpretation of a *corpus* of laws, but a *corpus* which consecrates dual legality within the system. So *in the 1808* Digest, we look first for the intention of the lawgiver, as it is expressed in positive law, i.e. the Louisiana Digest (articles 13-20) and failing there we look to "natural law and reason or received usages," i.e. Spanish and Roman law (article 21). Whether or not this is the theory that Moreau Lislet intended, it is certainly the one which the Louisiana courts applied to the interpretation of the 1808 Digest.

This cannot have been the theory which Livingston intended for the 1825 Code. Everything he says in the Preliminary Report contradicts the idea that Spanish and Roman law are to have any subsidiary force at all. The Code is to be self-sufficient; the old laws are to be abolished. *But* . . . why did he retain the same articles in the chapter on interpretation? As I hope I have shown, the articles *as they stand in the 1825 Code* need not be read as consecrating a search for intention; they may be interpreted as a theory for protecting and projecting the new legal unity that the 1825 Code was to represent. But past experience should have warned Livingston. The Louisiana courts had developed a theory of interpretation which arguably had its roots in these articles of the 1808 Digest. Livingston wanted to suppress this theory. Apparently he considered it to be a misinterpretation of articles 13-21. If his remarks in the Preliminary Report are any indication (the hints of positivism

notwithstanding), and, if we may infer his views from the type of code that the LCC of 1825 represents,[198] he must have seen in articles 13-21 the means for protecting and projecting, for deepening this new legal unity.

But articles 13-21 must be held to be at least partly accountable for the shabby treatment which the courts accorded to the 1808 Digest, and a misinterpretation cannot be corrected simply by re-enacting the abused text or texts. Whatever virtues these articles possess, they are at least susceptible of being read to authorize a search for intention and to authorize a referral to Spanish law under the guise that it represents natural law. That is how the courts took them. If he wanted to suppress that practice, Livingston should have redrafted these articles.

It is impossible to read the Preliminary Report without being struck by Livingston's foresight. At the time it was written, the immediate threat to civil order was the unwieldy mass of Roman and Spanish law. "Jurisprudence" was but a sobriquet to distinguish the few volumes of reported cases. Yet Livingston clearly saw a real threat to the new code in the judiciary and the jurisprudence. He saw it, he expressed the danger clearly, and yet it must be said that he failed to do anything about it.[199] By simply proposing for re-enactment the Preliminary Title in essentially the form it had in the 1808 Digest, he and the commission permitted the courts to maintain the relationship they had already established with the code and the ancient civil laws. Why did not the 1825 Code Commission recommend the adoption of FP articles 5.3 and 5.8? We will probably never know the answer.

In one respect at least, the Louisiana draftsmen in 1825 attempted to improve on Portalis. No change was recommended in their *Projet* as to article 21: "*usages reçus*" remained. But they attempted to abolish article 3 (French *Projet* article 1.5) with this comment:

> Suppress art. 3. To say that customs have the force of laws in a country where all the laws are written appears to us a contradiction.[200]

The recommendation was apparently rejected, for article 3 remains.

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198. "[O]f all republications of Roman Law . . . the clearest, fullest, the most philosophical and the best adapted to the exigencies of modern society." SIR HENRY MAINE, CAMBRIDGE ESSAYS 17 (1856).

199. The fault is not entirely his and his brethren of the Code Commission. The result might have been different had the legislature adopted their proposal for legislative review of the jurisprudence.

200. *Supra* note 125, at 1.

III. JURISPRUDENCE AND THE CODE: THE THEORY IN PRACTICE

From our knowledge of French history, from what we know of the revolution in French thought between Domat and Portalis, from the copious *motifs* left us by the draftsmen, we are able to reconstruct what the French codifiers thought they were doing and place their efforts in the context of time. Only by doing this, by placing the French code in historical perspective, can we grasp the real significance—legal and historical—of it or of any particular text of it.

The same is true for the LCC. Legislation is not a phenomenon isolated from the social conditions that give rise to it. Legislation represents the attempt of a social order to express itself; codified legislation represents its attempt to outline itself. But texts by themselves—especially the cryptic texts of a code—do not reveal history; they represent the solution of historical problems. Like the opinions of those courts which are given without dissents or concurrences, legislative texts do not reveal the clashes and disagreements which they absorbed or suppressed. To find these things we must examine the times.

As I foreshadowed in the conclusion to the last Part, I think the LCC's chapter on interpretation may well have been given two different meanings by the two code commissions, 1808 and 1825, which chose to employ it. But evidence is hard to come by in Louisiana. For the 1808 code or Digest, there are no *motifs*, not even any reported cases for the first three years of the work's life. For the 1825 code there is, by comparison, an abundance of material: the jurisprudence under the Digest and Livingston's preliminary Report, a few contemporary opinions recorded in histories or speeches. This is very different than the meticulous, self-conscious remembrances of French jurists, a difference of cultures, perhaps, but not one of volume. It is the best evidence we have, and at least as regards the 1825 code, the evidence is sufficient to establish the true position of the code in Louisiana legal history.

In what follows, I have attempted, using the evidence available to me, to reconstruct the *climate of legal opinion* surrounding the 1808 Digest and the 1825 Code, to show the conditions which gave rise to them and the reception accorded them.[201] In one respect there is an

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201. I regard the attitude of the bench and bar to the Louisiana codes as the most significant factor besides codification in Louisiana's legal history, and determinative of the rest. It is because I want to reconstruct this that I have employed so many quotations. Even in the cases, I am more interested in the mind of the times than the law of the times. Because I was resident in Scotland while I researched and wrote, in many instances primary sources were unavailable to me, and I have had to rely on law review articles which quoted from them.

apparent discontinuity between this Part and the last. That is, I have not presented in this Part an unbroken line of opinions reflecting directly the court's opinion of the Preliminary Title. There are not many early cases construing these articles, but that is to be expected. These articles are not the material for the decision of cases: they represent an authorized legal method.

What we really want to examine, what I have in fact examined, is the legal method followed by the courts, whether or not the courts cited the Preliminary Title as authority for their practice. For it is in their approach of interpreting the code that we are able to see how well the Title served its purpose. Earlier in this work we have considered the nature of the Preliminary Title itself. We turn now to its Code.

The first question to be answered is the nature of the 1808 codification—what sort of thing was the Preliminary Title designed to interpret?

It is popular today to regard the Digest of 1808 as something not different in kind from its 1825 successor. For example, Judge Hood says: "Although the compilers described their work as a digest of the laws then in force, it actually was a complete civil code."[202] There is no direct evidence on the point. No notes or *motifs* were left by the draftsmen, Brown and Moreau Lislet. In fact the only evidence for seeing the Digest as a code is the structure of the work itself. This is Hood's argument.

> [I]t actually was a complete civil code, divided into three books, each of which was broken down into titles, chapters and articles, similar to our present Code, except that in numbering the articles a new series of numbers was used in each title.[203]

The argument would run something like this: Brown and Moreau were appointed to codify the Spanish law then in force. They saw fit, for their own reasons, to emulate the recent French example, to such an extent that they virtually transcribed large portions of the French *Projet* and code into the 1808 Digest. Nearly seventy percent of the Louisiana Digest

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However, at one time or another, I have read everything relied on in the original and can vouch for its authenticity. The most useful sources of this second-hand material have been the following: J. TUCKER, SOURCE BOOKS OF LOUISIANA LAW, LOUISIANA LEGAL ARCHIVES xvii-lxxxiv (1937) (reprinted from Vols. 6-9 of the TLR); Hood, *The History and Development of the Louisiana Civil Code*, 33 TLR 7 (1958); Groner, *Louisiana Law: Its Development in the First Quarter-Century of American Rule*, 8 LA. L. REV. 350 (1948); Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 TLR 319 (1942) [hereinafter Franklin, *The Place of Thomas Jefferson*]; Franklin, *The Eighteenth 'Brumaire' in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806*, 16 TLR 514 (1942). All of these "histories," except the last two, tend to narrate facts without assessing them.

202. Hood, *supra* note 201, at 13.

203. *Id.*

consists of articles copied nearly verbatim from either the French *Projet* of the French code.[204] The remaining articles, though drawn from disparate sources, yet were molded in the form of the French codes. Thus the draftsmen must have intended, and the legislature consented to, a "code," in the French signification of the word.

The argument might be convincing if the Digest stood alone as evidence of its existence. But there is other evidence which contradicts this formal illusion.[205] First of all, there is the name of the work: "Digest of the Civil Laws Now in Force in the Territory of Orleans *with Alterations and Amendments* adapted to its Present System of Government." This is anything but indicative of the work's intended self-sufficiency. It implies on the contrary that the work is but an outline, a résumé of a larger system, which is to remain in force. Indeed, the title echoes that of the translation made by Moreau Lislet and Carleton of the *Partidas* in 1820: "The Laws of Las Siete Partidas which are Still in Force in the State of Louisiana."

And if the legislature "intended" the Digest to stand on its own, why were not the laws from which it was drawn repealed? They were not. The enacting clause says merely:

> Whatever in the ancient civil laws of this territory, or in the territorial statute [sic], is contrary to the dispositions contained in the said *digest*, or irreconcilable with them is hereby abrogated.[206]

It is not enough to argue that the Digest's enactment implicitly repealed the old laws. The French were not so naïve and both French *Projet* and Code were in the draftsmen's hands. It is hard to believe that anyone could grasp the significance of a self-contained statement of the law without realizing, not the utility, but the absolute necessity of repealing anterior laws.

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204. Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TLR 1, 11 (1971).

205. On the issue of "code" vs. "digest": Judge Hood's remark, quoted in the text above was delivered "off the cuff." He merely gave voice to a tradition, albeit an inaccurate one. Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TLR 628, 629-30 (1972), has no such excuse. He rebuts the title "Digest" citing as authority two Acts which refer to a "code." Neither these Acts, nor two I cited, nor the title of the work are conclusive. But Batiza fails to consider the purpose of codification, and unforgivably, I think, fails to cite one case. I find in the purpose of codification and in the cases the evidence that matters. The reader may answer for himself whether, after the court had finished with the 1808 "enactment," it matters at all what the draftsmen "intended"—code or digest. Pascal, *Sources of the Digest of 1808; A reply to Professor Batiza*, 46 TLR 603, 604 n.4 (1972), correctly sees the work as a Digest, but cites no proof. See *infra* note 236 for the views of the 1825 Code Commission on the issue. *See also infra* note 269.

206. La. Acts of 1808 at 128: TUCKER, *supra* note 201, at xix (emphasis mine).

But the conclusive argument against admitting the 1808 Digest as a "code" is found in the purpose for which it was drawn up.[207] In 1804, Jefferson and his appointed governor, Claiborne, attempted to introduce the common law into the newly acquired Territory of Orleans (as the state then was), their object being the unity of private law in U.S. states and territories. The result of this well-meaning attempt was a near-revolution. The citizens, under Livingston's leadership, drafted a "Memorial" demanding immediate statehood from Congress, and the right to self-government. Congress rejected the former demand, but by an act of 21 March 1805 permitted to the Territory a legislature. The new legislature convened in 1806 and promptly adopted "An Act declaring the laws which continue to be in force in the territory of Orleans, and authors which may be recurred to as authorities within the same,"[208] according to which the law of the Territory was to be "the Roman Civil Code, as the foundation of Spanish law and not derogated by it, including the Institutes, Digest and Code of Justinian, aided by commentators of the civil law, particularly Domat" and Spanish laws "consisting of the compilation of Castile, *Autos Acordados, las Siete Partidas*, the *Fuero Real*, the *Recopilación de Indias*, the Laws of Toro, and the ordinances, royal orders, and decrees enacted for Louisiana, the whole aided by the authority of commentators admitted in the courts."[209]

On May 26, 1806, Governor Claiborne vetoed this Act,[210] and on June 7, 1806, the legislature appointed Brown and Moreau Lislet "to compile and prepare jointly a *Civil Code* for the use of this territory." The resolution provided that

> [t]he two jurisconsults shall make the civil law by which this territory is now governed the groundwork of said code.[211]

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207. On the history which follows, Hood, *supra* note 201, at 8-15; Franklin, *The Place of Thomas Jefferson*, *supra* note 201, at 323-26.

208. La. Acts of 1806, *in* Franklin, *The Place of Thomas Jefferson*, *supra* note 201, at 323-26.

209. *Id.*

210. Hood, *supra* note 201, at 11.

211. La. Acts of 1806, at 214, in Hood, *supra* note 201, at 12 (emphasis mine). Who drafted the Digest of 1808? Brown and Moreau were appointed and an act of 14 April 1807 authorizes 3/5 payment of their fee to both, the rest on completion. But Brown left Louisiana right after his work on the Digest according to tradition. Could he have left before? That seems to be the implication of this passage in the Preliminary Report (p. xciii) referring to the 1808 Digest:

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

At this point Claiborne bowed out. He approved this resolution and in April 1808 approved the Act adopting the Digest.[212]

The various acts drawn up by the "ancient Louisianians," as Claiborne calls them, from the 1804 Manifesto through the Act promulgating the Digest, and the rapidity of their succession, emphasizes the direction of their concern, which is less toward the specification of a civil law system then toward the repulsion of the common law. The Memorial is eloquent on the virtues of the former and the vices of the other. The two Acts of 1806, though brief, are charged with the same emotion; they speak not of laws but of systems: the civil law prevails; the "frightful chaos of the common law" is forbidden.[213]

In other words, the "ancient Louisianians" had no intention of repealing the "ancient civil laws" that governed them. They had no mind to reform, to unify, to systematize, when they appointed Moreau and Brown to draw up a digest. They wanted a palliative to serve up to Jefferson and Claiborne. They did not codify to do away with the old laws; they codified so they could keep them.[214]

What other evidence is there? First the opinion of contemporary historians and jurists. There is remarkably little of this, but what there is contradicts the idea that the Digest was to stand on its own.

First we have Francois Xavier Martin, Judge of the Superior Court from 1813-1845, Chief Judge from 1837. After he left France, Martin worked as a printer in North Carolina for a few years, and while there published the first English translation (his own, translated as he set the type) of Pothier's treatise on Obligations (1803). On his removal to Louisiana he began to publish the decisions of the then Territorial Court (1811) and continued to do so, after his appointment to the bench, for the next twenty years. In 1822 he published his two-volume *History of Louisiana*, which covered the new state's history "from the earliest times" through the Battle of New Orleans in 1812.

If one person drew up the Digest, it was likely to have been Moreau. I recall reading in a New Orleans newspaper of 1822 the ballot results of the legislatures' appointment of the 1825 Code Commission. I remember being surprised at Moreau's lead over Livingston. The results were something like: Moreau 60, Livingston 40, Derbigny 30, Carleton 28.

212. Hood, *supra* note 201, at 13.

213. "Regardless of the French sources used by the redactors, the primary significance of the adoption of the Civil Code of 1808, of course, was that it constituted the formal recognition and establishment of the *civil law* and not the *common law*, for the Territory." *Id.* at 15.

214. I am alone, I think, in this contention. See, for example, besides the writers quoted above, Franklin, *Some Observations of the Influence of French Law on the Early Civil Codes of Louisiana*, *in* LE DROIT CIVIL FRANCAIS, LIVRE-SOUVENIR DES JOURNÉES DU DROIT CIVIL FRANCAIS 833, 840 (1934): "So on the one hand, the French texts were also used to defeat the regime of uncodified Roman law."

From a man so intimately associated with the state's legal system for so many years, we might have hoped for more than the two or three pages of the *History* which he devotes to the 1808 Digest. His comments are to the point though. As to whether the work was intended by the legislature to be a code or a digest, he says:

> Their labor [Moreau Lislet & Brown] would have been more beneficial to the people than it has proved, if the legislature to whom it was submitted, had given it their sanction as a system, intended to stand by itself and be construed by its own context, by repealing all former laws on matters acted upon in this digest.[215]

And what was the opinion of this man, whose business it was to interpret the Digest daily during most of its eighteen year life—what was his opinion as to its completeness?

> In practice, the work was used as an incomplete digest of existing statutes, which still retained their empire; and their exceptions and modifications were held to affect several clauses, by which former principles were absolutely stated. Thus the people found a decoy in what was held out as a beacon.[216]

This view was shared by Moreau Lislet and Carleton, at least in 1820, when they were commissioned by the legislature to translate the Partidas. In the introduction to that publication, they said of the Digest:

> But it is easy to perceive, that a work of that nature, however, excellent it may be, can only contain general rules and abstract maxims, still leaving many points doubtful in the application of the law; hence the necessity of going back to the original source, in order to obtain new and additional light.[217]

Finally, among contemporary opinions expressed outwith the jurisprudence, we have that of Etienne Mazureau, another native of France who became in a few years one of the luminaries of the New Orleans Bar—nicknamed "The Eagle" (according to de Tocqueville, who visited him in 1832), no doubt because of his courtroom manner.[218]

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215. MARTIN, HISTORY OF LOUISIANA 344 (1822), *reprinted in* Stone, *The Civil Code of 1808 for the Territory of Orleans*, 33 TLR 1, 5 (1958).

216. 2 MARTIN, HISTORY OF LOUISIANA 291 (1822), *reprinted in* Batiza, *supra* note 204, at 30 n.172.

217. MOREAU & CARLETON, *supra* note 43, at xxii.

218.

> He is of an ardent temperament and the sacred fire of the orator glows in his breast. He is an adroit and most powerful logician, but on certain occasions his eloquence becomes tempestuous. He delights in all the studies appertaining to his profession, and possesses a most extensive and profound knowledge of the civil law, from the twelve tables of Rome and the Institutes of Justinian to the Napoleon code. He is also

Twice Attorney General of Louisiana, frequently counsel in cases before the Superior court, Mazureau delivered a Panegyric on the death of George Matthews (Chief Judge, La. Supreme Ct., 1809-1837) in 1837. In passing, he says of the Digest:

> Our Code of 1808, where *co-existence* with the ancient laws that were not incompatible was wisely maintained, remained in vigor during almost eighteen years. If, as it must be acknowledged, imperfections were noticeable in it, *jurisprudence aided by the enlightenment found in the Roman and Spanish laws* had ended by embodying itself into a *corps* [*sic*] *of legal doctrine* which, if not perfect (what work of the human mind can be so) was at least sufficiently complete, sufficiently comprehensible to all slightly studious minds, to satisfy in great part the exigencies of reason and justice.[219]

Mazureau did not place much faith in the utility of even a Digest though. The acknowledged master of the Corpus Juris Civilis and all its progeny, fluent in four languages, did not admire simplicity in laws. If it came to a choice, his faith was in lawyers, not the law:

> [I]f instead of busying ourselves so much in making codes we had translated and studied the laws we did not understand from not knowing how to read them, we would have had occasion for congratulation instead. Let us not dissimulate it, we must have masterly minds, jurists of vast erudition and of rare sagacity, highly enlightened, foreseeing and very wise legislators to make better digests than that of Justinian and better laws than those of Alfonso the Wise.[220]

In 1818, the editor of Wheaton's United States Supreme Court Reports affixed a "Note on Louisiana Law," to a Louisiana case decided by Chief Justice Marshall (at 3 Wheaton Reps. 202, n. 1 (1818)). His source of information we do not know, but his charming description of the Louisiana legal system under the regime of the 1808 Digest cannot, I think, be bettered:

> Louisiana, being a French colony, was originally governed by the custom of Paris, and such royal ordinances as were applicable. In August, 1769,

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> thoroughly familiar with the Spanish jurisprudence, which is derived from the same source. He is deeply versed in the common law, which . . . it is his special pleasure to ridicule. . . . He is not free from a certain degree of arrogance based on the consciousness he has of his learning and of the superiority of his splendid intellectual powers . . . .

C. Gayarré, *The New Orleans Bench and Bar in 1823*, *in* MCCALEB, THE LOUISIANA BOOK 55-56 (New Orleans 1894).

219. *Address of Etienne Mazureau as a Panegyric on George Matthews, President of the Supreme Court of Louisiana, 1837*, 4 LA. HIST. Q. 154 (1921) (emphasis mine).

220. *Id.*

> when La. passed under the dominion of Spain, the Spanish Governor, O'Reilly, published a collection, or rather, an abstract of the administrative regulations adopted in the Spanish colonies, and a few leading principles contained in the Spanish laws, referring for further elucidations to the text in the Partidas, the Recopilación of the Indies, etc. . . . until further orders (which have never been given) . . . Things remained in this situation until the government of the United States took possession of the province in 1803, when the increasing commerce of New Orleans brought into action the whole body of the Spanish laws . . . Everything in the ancient laws repugnant to the constitution of the United States was taken away and all other subsisting laws were confirmed by the Act of Congress of the 26th of March, 1804, ch. 391; which also gave the right of trial by jury in all civil and criminal cases if required by either of the parties. In 1808, the civil code was adopted, which is principally a transcript of the code Napoleon, or civil code of France. Where that is silent, its omissions are supplied by a resort to principles derived from the Roman law, and the codes founded on it, including the laws of Spain, France and the commentaries upon them. The works of elementary writers, and the English and American reporters are cited in the courts, not as binding authority, but as the opinion of learned men, entitled to respect and attention. A regular series of reports of the decisions of the Supreme court of the state is published by Mr. Martin, one of the judges . . . .

Finally, determinatively, we see the 1808 Digest reflected in the jurisprudence. This is, in a sense, evidence after the fact. Reported cases do not even appear for three years after promulation of the Digest. But if the cases are not "best evidence" of what the Digest was supposed to be, they are the evidence that counts. Regardless what the 1808 enactment was *supposed* to be, the cases tell us what it was.

It is important to note that the Court in the earlier cases did not distinguish between interpretation of the Digest and interpretation of mere legislative acts. That is, both Digest and acts were treated as statutes, subject to the same methods of interpretation.

In *Marr v. Lartigue*, 2 Mart. O.S. 89 (1811), plaintiff contended that the *praetorium pignus*, established in his favor by an act of the territorial legislature, excluded the other creditors of defendant. The court held that the act established only a mode of relief, and

> [a]s this mode of relief, or the corresponding process, has originally come to us from the French or Spanish law, it follows, if our statute provides only a *mode* of relief, leaving the effect of the process to be ascertained by pre-existing laws, [then] as neither *prenda* nor the *saisie-arrêt* entitled the plaintiff to the strong lien which is now claimed, the court must say that the property attached must be considered as part of the general fund, from which all creditors are paid. Such was the law of Rome . . . .

Just as the Spanish and Roman laws served as the "common law" ground, the subsidia, in construing statutes, so it was the basis for decision when there was no statute law. In *Folk v. Solis*, 1 Mart. O.S. 64 (1809), defendants, held to bail in an action for libel, moved for discharge of bail. The court refused to analogize from a territorial statute permitting bail in suits for property damage and went on to consider "whether the laws of Spain or common law of England, have provided a remedy like the one to which the plaintiffs have resorted." The common law yielded no applicable principle; the Spanish law permitted plaintiff a surety if such had been stipulated in the contract, or if the defendant "meditated a removal." The court concluded that "the law of Spain alone may be invoked by the plaintiffs, and as they have not complied with what it requires . . . they cannot have benefit of it."

Sandry v. Lynch, 1 Mart. O.S. 57 (1809), and *Debon v. Bache*, 1 Mart. O.S. 160 (1811), were decided simply on "the Spanish Authorities cited."

In *Bourcier & Lanusse v. Schooner Ann*, 1 Mart. O.S. 165 (1810), plaintiff sued to recover the cost of provisions furnished to the schooner. The ship sailed without paying and became insolvent before her return. On the plaintiff's claim to a privileged debt, the Court said:

> The Authority cited out of the *Curia Philippica* is conclusive as to the creation of the privilege, and I am not able to say that the departure of the vessel destroys it.

In *Adrelle v. Beauregard*, 1 Mart. O.S. 183 (1810), plaintiff sued for her freedom. Defendant countered that "she must prove she was born free or has been emancipated." The court said:

> Although it is in general correct, to require the plaintiff to produce his proof before the defendant can be called upon for his, it is otherwise when the question is slavery or freedom. Partida 3, tit. 14, 1.5.

In all matters of commercial law, the Ordinance of *Bilbao* controlled; it was "our commercial code": *Sandry v. Lynch*, 1 Mart. O.S. 57 (1809). Also, *Stackhouse v. Foley's Syndics*, 1 Mart. O.S. 228 (1811) ("the Ordinance of *Bilbao* must determine this case) and *Syndics of Amelungs v. Bank of the United States*, 1 Mart. O.S. 322 (1811).

The search through and citation of Spanish authorities in novel situations (and *most* situations were novel to the young jurisprudence) by lawyers in briefs and courts in opinions became reflexive. Both became unable to trust even the most settled points of the law to the dictates of the Digest or the Acts. Each argument had to be buttressed with an untidy heap of citations, first from Spanish law and the Corpus Juris, and

later, as competition became more sophisticated, and, no doubt, as libraries expanded, the work of French authors and Dutch commentators—even English treaties and cases—were thrown in, just to show that nothing more was asked of the court than it acquiesce in the judgment of all mankind.

One case will illustrate. In *Beard v. Poydras*, 4 Mart. O.S. 348 (1816), the question was proof necessary to establish plaintiff's freedom. Livingston for plaintiff cited D.40.4.16; D.40.33; D.40.34; D.40.52; D.40.55. Moreau Lislet for defendant: D.40.4.23.1; Pothier's Pandect of Justinian 55; 14 Rodriguez Dig. 187; Part. 6.9.31; *id.* 6.9.21; 1 Febrero Contratos, ch. 1, n.46; Febrero, *id.* n.47, 48; D.40.8.1; 14 Rod. Dig. 287; 2 Dict. du Dig. 1667, and so on (this is about half of Moreau's citations) ending with 2 Pothier Don. Intervivos, part. 7. art. 3. Derbigny J. decided the case on the authority of Partida 4.22.1.

This case is anything but exceptional; it is quite the rule.[221] The propensity of lawyers to cite the laws and jurisprudence of every country whose law books they could obtain and read was almost pathological, and we may imagine a corresponding receptiveness in judges who frequently complained they were unable to obtain the requisite books on circuit.[222]

Not that their decisions were dictated by the briefs of counsel. As in *Beard*, the case often goes off on some point cited by neither opponent—but the sources, if not the citations, go undisputed.

It can hardly come as a surprise then, to find that the Digest is no exception to this system. It is taken to be a statute and, like all statutes, is to be construed in accordance with received and well recognized principles of law. Larger than most statutes it is, and in some respects more comprehensive, but no different in kind. Alone it was but a skeleton; the breath, the life of the thing came from the "principles of the civil law," that is, from the subsidiary force of Spanish and Roman law.

As early as 1812 the court had passed directly on the issue. In *Hayes v. Berwick*, 2 Mart. O.S. 138 (1812), plaintiff attempted to prove the death of her husband by introducing evidence of his absence for twenty years. Defendant countered with a provision in the Digest

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221. *See, e.g.*, Breedlove v. Turner, 9 Mart. O.S. 353 (1821); De Armas' Case, 10 Mart. O.S. 158 (1821); Erwin v. Fenwick, 6 Mart. N.S. 229 (1827); Waters v. Backus, 8 Mart. O.S.1 (1820); Broh v. Jenkins, 9 Mart. O.S. 526 (1821); Morgan v. His Creditors, 8 Mart. N.S. 599 (1830).

222. "There are certain parts in the state, in which a particular volume, containing the textual law on which a judgment is grounded may not be within a circle of one hundred miles." *De Armas' Case*, 10 Mart. O.S. at 162. (I am sympathetic; the same may be said of this work.)

establishing a presumption of death after a hundred years had passed since his birth. Plaintiff argued against this:

> The party in the present case went away long before the adoption of the *Civil Code*, and possession was taken when the principles invoked by the defendant's counsel were not yet established.

The court met this contention straight on:

> What we call the *Civil Code* is but a digest of the civil law, which regulated this country under the French and Spanish monarchs. It is true, some new principles have been intercalated, and others abrogated or omitted.
>
> By a maxim, consecrated by the best authorities, every absentee, whose death is not clearly and precisely established, is presumed to live until the age of one hundred years; that is to say, the most remote period of the ordinary life of man. 1 *Denisart* 13 *Verbo Absens*.
>
> An absentee is presumed to live till the contrary is proved; otherwise the absence must be such, that the life of a man, who may live one hundred years, should be presumed to have ended. 1 Ferriere 13, *Verbo Absens*.
>
> Death is never presumed from absence; therefore he who claims an estate, on account of a man's death, is always held to prove it. An absentee is always reputed living until his death be proved—or until one hundred years have elapsed since his birth. 2 *Ferriere* 226, *Verbo Mort*.
>
> Although a man be absent, and there be no account of him, his death is not to be presumed: they do not proceed to the division of his estate, for he is presumed to live one hundred years. 2 *Pigeau* 2.
>
> These principles are drawn from the Roman law. . . .

Then in 1817 came the classic case of *Cottin v. Cottin*, 5 Mart. O.S. 93 (1817). Plaintiff's son died, leaving defendant, plaintiff's daughter-in-law, pregnant. Several weeks later defendant was delivered of a child who lived only a few hours. The question was whether the child inherited. Judge Derbigny, speaking for the court, held that it did not.

> There is no doubt that according to the Roman law, and to the laws of many modern nations, this child would be deemed capable of inheriting.
>
> In Spain, however, the laws of which were, and have continued to be ours, where not repealed, there exists a particular disposition, by which it is further required, that the child in order to be considered as naturally born and not abortive, should live twenty-four hours. Is that law still in force among us, or is it virtually repealed by the expressions used in our civil code, in relation to this subject?
>
> Of the different articles, in which our code has occasion to touch upon, two may be selected as bearing more directly upon the question before us. The first is the definition of what is an abortive child: the second is that which declares, that the child born incapable of living, is incapable of inheriting.

> "Abortive children," according to that definition "are such as by and untimely birth, are either born dead, or incapable of living." No such thing is required here, as their living twenty-four hours. Hence it is argued that the Spanish law, which made that circumstance necessary, is impliedly repealed. *Civ. Code* 8, art. 6.
>
> It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.
>
> Is the definition given of abortive children in the code, incompatible with the disposition of the law, 2 *tit.*, 8, *book* 5 of the *Recopilación de Castilla*, which declares that those will be deemed abortive, who shall not live twenty-four hours? We think not. The definition given in the code, must hold as good in Spain as anywhere else, *for it is dictated by nature itself*: "the abortive child is that, which from an untimely birth, is born incapable of living."—But how shall that the ascertained? The law cited above says that, to remove doubts on the subject, the child shall be reputed abortive, if he has not lived twenty-four hours. So our civil code provides that, in order to inherit, the child must be born capable of living (viable) and the *Recopilación de Castilla*, requires a legal presumption, that he was capable of living—that he shall have lived twenty-four hours . . . .[223]

Cottin touched off a reaction which led directly to a new code. If the case surprised anyone though, it was not the surprise of newness,[224] but of excess. The legal community had been jolted once before, when Jefferson and Claiborne attempted to introduce the "frightful chaos of the common law." Enactment of the Digest quieted that issue for nearly a decade. Then came the decision in *Cottin*. If this was a shock, it was the shock of a rear-guard action: with all eyes turned toward the Mississippi, to discover that the problem was within. It was no surprise that the "code" was a Digest, or that Spanish law remained in force. How could it be, to lawyers who daily turned to Spanish law for authority? What surprised them was the extent of its force and the sudden realization that Spanish law in full force—"eleven codes, in twenty-three volumes, containing 20,335 laws,"[225] all in a foreign language—promised as frightful a chaos as the common law.

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223. Emphasis mine.

224. TUCKER, *supra* note 201, at xxii, calls *Cottin* as "Virtual revival of the Spanish law." He has been followed in this contention by most other writers, for example, Hood, *supra* note 201, at 16; and Batiza, *supra* note 204, at 30.

225. Foreword, 1 LA. LEGAL ARCHIVES, at vi (1937).

The first legislative step to ameliorate the problem was taken on 3 March 1819; "an act to authorize and encourage the translation of such parts of the *Partidas* as are considered to have the force of law in this state."[226] Livingston, Mazureau, and Derbigny were instructed to examine a translation of the *Partidas* being prepared by Moreau Lislet and Carleton (apparently already under way) and to see

> that it is faithfully done and contains all such parts of the laws of the Partidas as are considered to have the force of law in this State, and they shall certify the same, and the said certificate shall be affixed in the said work when it is printed.[227]

We may surmise from the last clause and from the preamble to the Act that the legislature intended to enact the completed work as law.[228] But the task proved to be too much for the translators. On 16 February 1820, an Act changed the nature of the certificate, requiring only that the translation had been "correctly and faithfully made," and set completion date at 1 March 1821.[229] A year later (19 Jan. 1821) the date was extended to 10 April 1821.[230] The reason for the delay is to be found in the translator's preface:

> The translators have thought proper to give the translation of all those laws which have not been expressly repealed by the legislature, or which are not repugnant to the constitution of the United states, or to that of this state, leaving to *the proper tribunals to determine whether they are in force or not*.[231]

The process of selecting those laws which still applied to the State of Louisiana had proved too much, and so the work was not enacted.[232]

On 26 February, 1822, publication and distribution were authorized, and two weeks later Moreau Lislet, Livingston and Derbigny were

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226. La. Acts of 1819, at 44, in TUCKER, *supra* note 201, at lvi-lvii.

227. *Id.*

228. Such is the conclusion of Groner, *supra* note 201, at 377. I think it is a fair one from the change in the certificate required by the proof-readers, from certifying that the translation contains all the law "considered to have the force of law in this state" to certifying the faithfulness of the translation.

229. La. Acts of 1820, at 20, in TUCKER, *supra* note 201, at lvii.

230. La. Acts of 1821; *id.* notwithstanding, the publication date on the work's title page is "1820." *See* TUCKER, *supra* note 201, at lvii.

231. MOREAU & CARLETON, *supra* note 43, at xxiv (emphasis mine). One tries to imagine the problems which drove men, paid to prepare a legislative enactment, to abandon their resolve and yield to the judiciary's future determination.

232. Note that this translation took longer to complete (three years) than it took to draft both civil codes (one year each).

appointed to draft a new code,[233] or rather, to revise the old one. The wording of the Act later became an important matter:

> *Resolved* . . . That three jurisconsults be appointed by the joint ballot of both houses of the general assembly of this state, to revise the civil code by amending the same in such a manner as they will deem it advisable, and by adding under each book, title and chapter of said work, such of the laws as are still in force and not included therein, in order that the whole be submitted to the legislature at its first session, or as soon as the said work have been completed.[234]

Up to this point, we encountered no positive evidence of the modern idea of a code. The energies of citizens and legislators is turned first to repelling the attempted intrusion of the common law and after that question is settled, they turn, almost with relief, to a decade of legislative somnolence. Action takes the place of introspection, and interest in the main is less toward broad principles of law then toward working out the fine points of its application. If a local were asked during this time, what law governs this place, the answer would have been "civil law" or "Spanish law," no distinction being made between the two, and hard on that would follow, "we won it from the common law."

For that was the attitude. They fought hard to keep the civil law and they loved the system because they had fought for it. Spanish law might be a medieval system, it might be contained in "a multiplicity of books, which being for the most part written in foreign languages offer in their interpretation inexhaustible sources of litigation," but that passed for a while unnoticed.

Cottin was the first shock to this sentiment, but not a severe one. Over two years passed between *Cottin* and the Act authorizing translation of the *Partidas*; another three before the Code Commission was appointed. The real shock came during this second period, when even the mind of Moreau Lislet was unable to refract that feudal system into a Louisiana mold. Even then it apparently occurred to no-one that the task was impossible. Difficult, yes, but given a bit more time, and the uninterrupted efforts of the three best minds in the state, the Spanish system could be made to work. Their job was not to draw up a new code, but to revise the old one, "by adding . . . such of the laws *as are still in force* and not included therein."

Such was the mandate. But at some point in their deliberations the Code Commissioners devised a new approach, the evidence of which is

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233. Groner, *supra* note 201, at 377.

234. La. Acts of 1822, in TUCKER, *supra* note 201, at xxiii.

contained in their Preliminary Report to the legislature, dated 13 February 1823.

The Report is in part a plan of proposed changes, but very little of it touches on changes to the *corpus* of the new code. It is almost entirely devoted to the proposed system of interpretation and because of its importance to this point is quoted *in extenso* below.

In Louisiana legal history, this document stands next in importance to the code itself. The draftsmen left no other *motifs* or records; we know hardly anything even of the men on the commission.[235] For our purposes, it is the more important still, as it is almost entirely concerned with the problem of interpretation. We have seen that the Digest's first problem in Louisiana was its relation to the sources—it was unable to overcome the problem of proximity.[236] This is the problem which vexes the draftsmen; to it they address themselves directly. Therefore it is against the statements of this Report and the knowledge we possess of Louisiana law at that time—the context of the Report—that we must weigh the system of interpretation ordained by the 1825 Code.

The draftsmen are obviously conscious of the problem posed by *Cottin* and by the abortive attempt to transcribe the *Partidas*, that of describing literally nineteenth-century society with fifteenth-century thought. It is to this they refer when they iterate that

> the principal Object the legislature had in view, was to provide a remedy for the existing evil, of being obliged in many Cases to seek for our Laws in an undigested mass of ancient edicts and Statutes, decisions imperfectly recorded, and the contradictory opinions of Jurists; the whole rendered more obscure, by the heavy attempts of commentators to explain them; an evil magnified by the circumstance, that many of these Laws must be studied in Languages not generally understood by the people, who are governed by their provisions.[237]

To remedy this "Evil" they propose two things. First, the enactment of a complete code, or one as complete as human frailty will allow, for

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235. I do not except Hatcher's Edward Livingston (1940), which is not satisfying.

236. Note the Code Commission's opinion on the question, "code vs. digest":

> The Legislative assembly of the Territory made one step toward the removal of the evil by adopting the Digest of the Civil Law, which is now in force:
> This was an extremely important measure. . . . But it was necessarily imperfect: not purporting to be a Legislation on the whole body of the Law; a reference to that which existed before, became inevitable in all those cases (and they were many) which it did not embrace.

Livingston Preliminary Report, lxxxvii-lxxxviii; *see supra* note 205.

237. *Id.* at lxxxvii.

> the idea of forming a body of Laws, which shall provide for every case that may arise, is chimerical.[238]

Here we have, for the first time in Louisiana history, the idea of a self-contained code, the awareness of its possibility. For its form, they suggest

> such a digest of positive enactments, as shall provide for most of the cases, that can now arise, leaving omissions and imperfections, to be supplied and corrected as they shall be discovered, and changes to be made, as circumstances shall require.[239]

The unity and self-sufficiency of the work is a theme which recurs throughout the Report.

> . . . [W]e have thought it our just duty *to comprise in the several codes* we were directed to prepare, *all the rules* we deem necessary for stating and defining the rights of individuals in their personal relations to each other, for giving force and effect to the different modes of acquiring, preserving and transferring property and rights.[240]
>
> . . . [W]e shall not be deterred by the fear of innovation from proposing such changes as in our opinion are *necessary to render the plan consistent with itself*, and with the unchangeable principles of justice, which we shall steadily keep in view.[241]
>
> . . . [A]nd the whole will be presented in the form of a new Code providing for as many cases as can be foreseen and rendering a reference to any other authority necessary in as few cases as our utmost care can avoid.[242]

Important as this new notion of a code is to the Report, it is subsidiary to the Commissioner's second proposal, the "great question" as they call it.

> The question which presented the greatest difficulty to us was, whether, after embracing within the provisions of the New Code all the cases which could suggest themselves to our minds we should recommend a repeal of the pre-existing Laws altogether, or leave them so far in force as to govern the Decisions of courts in the unforeseen cases that should be omitted.[243]

In discussing this problem, the commissioners isolate and accurately describe a legal phenomenon which I propose to call "juridical recidivism"—that is, the tendency to fall back into old, familiar habits of

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238. *Id.* at lxxxviii.
239. *Id.*
240. *Id.* at lxxxix (emphasis mine).
241. *Id.* at xc (emphasis mine).
242. *Id.* at xci.
243. *Id.* at lxxxviii.

legal thought. When lawyers, confronted with a new system of law, encounter some omission or *lacuna* in that system, they will commonly fill it up with some part of the preceding system. The reason for this is quite simple; *unrelated* innovation is a thing repellent to lawyers (in this respect the antitheses of novelists). A mind trained to proceed only on the premises of legal order is, deprived of that order, as immobile as a train without tracks, and rather than grind to a complete halt, the legal mind would sooner switch deftly into another, familiar track and by-pass the trouble altogether. Thus the lawyer will instinctively, reflexively, relapse into the mode of thought with which he is most familiar—usually the system of law just repealed and replaced by the problematic new one.

In the Report, Livingston anticipates this propensity in everything but name.

> [I]t arises from the nature of things . . . it is a necessary alternative, that you must furnish a rule to the Judge, or suffer him to make or select one.[244]

And in another connection, referring to the sweeping repeal which accompanied enactment of the *Code Civil*, he says:

> Yet the Courts and Commentators, unwilling it would seem to render their knowledge of the previous laws, useless and unavailing; clung to the shreds and patches of the ancient system, and consider them as their guide in all cases which do not come within the express provisions of the Code.[245]

That juridical recidivism is the chief obstacle to their *projet*, the commissioners do not doubt. They see it as a natural phenomenon, recurring throughout history whenever one system of laws replaces another.

> In other countries where Digests have been made in order to avoid the necessity of recurring to ancient, obscure and contradictory Laws, this necessity was felt, and different means have been resorted to, for the disposal of those omitted cases . . . .[246]

Legal history as they see it offers three means of dealing with the unforeseen case. First is the Roman rescript, or legislative referral, "a Species of Legislation above all others the most liable to abuse." This they see as disallowed by the U.S. constitutional prescription against union of the legislative and judicial powers.[247]

Second, there is the repeal of all old laws upon introduction of a new system, but without providing in their place something for the judge

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244. *Id.* at xci.
245. *Id.* at lxxxix.
246. *Id.* at lxxxviii.
247. *Id.*

to refer to when the new system proves deficient. This was the path of Spain, "the first of the modern Nations, that undertook the formation of a Code," which "by an early law made it death to cite in her courts any other than the positive laws of the Kingdom."[248] And in France, this was the design of the *Code Civil*—"that rich legacy which the expiring Republic gave to France and to the world"—which was intended to "supercede all the other laws of the country; and be for future cases, the only rule of conduct."[249] But, in both cases, the grand designs of systematic repeal and enactment were limited by the courts' recidivous reception of them; thus

> the Spanish Digests have done very little, and the French Code not so much as might have been expected in correcting the evil of continual references to the pre-existing laws.[250]

The third way of developing law to cover the unforeseen case is that of

> the Jurisprudence of all nations, governed wholly or in part, as England is by unwritten Laws, or such as can only be collected from decisions. In such a country where a precedent cannot be found, one must be made; in other words where the Judge can find no Law that applies to his case he must make it; he must however cautiously avoid saying that he does so. Although dormant from the beginning of time, although never laid down by any Jurist nor applied by any Judge; it is by legal fiction supposed always to have existed: and from the moment that he creates or applies it, the rule acquires all the veneration due to antiquity and becomes, under the name of a precedent, the evidence of pre-existing Law and a guide to future decisions.[251]

Such a system is "vicious" because, like that of the Roman rescripts, it confounds legislative power with judicial duty.

> To determine what is the true meaning of the Law when it is doubtful; to decide how it applies to facts when they are legally ascertained is the proper office of the Judge—The exercise of his discretion is confined to these, which are called CASES OF CONSTRUCTION: in all others he has none, he is but the organ for giving voice and utterance, and effect, to that which the Legislative branch has decreed. In cases where there is no Law, according to strict principles he can neither pronounce nor expound nor apply it . . . but in the litigation of individual rights, he must decide between the two parties and in order to do this, if he can find no rule, he

248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* at xci.

> must of necessity frame one. It is therefore the duty of the Legislature to prevent this necessity; it can only be done by providing for as many cases as can be foreseen, and indicating some source to the Judge from which he is to draw the rules for guiding his discretion in the others.[252]

As none of the systems examined provide acceptably for the unforeseen case, and thus all contain the seeds of their own destruction, all are rejected. In their stead, the commissioners put forward their own proposal.

> [W]e never flattered ourselves with the hope that we should present a system for your consideration without errors and omissions; but we did think, that with great diligence, much care, and the utmost exertion of our abilities, we might furnish a body of Law, a system; and that it was better to offer a whole, an integral work, however imperfect, than to present a series of unconnected amendments and corrections, that must have required continual reference to the existent law . . . .[253]
>
> We in the execution of our trust determined that we should not perform it in the manner required of us; unless we relieved your Courts in every instance from the necessity of examining into Spanish Statutes . . . before they could decide the Law; . . . unless we gave your constituents a Code accessible and intelligible to all; and unless we removed the oppression, the reproach, the absurdity, of being governed by laws, of which a complete collection has never been seen in the state . . . .[254]

And what is the plan, to insulate their code from "continual reference to the existent law"? In what way is Louisiana to avoid the experience of every other nation in history? We have it in this astonishing paragraph:

> We could not effect this without recommending an express repeal of all former laws and usages defining civil rights. . . . This we have accordingly done, and to govern the decisions of the Judge in all cases, which cannot be brought within the purview of the Code, have proposed that he should determine according to the dictates of natural equity, in the manner that "amicable compounders" are now authorized to decide, but that such decisions shall have no force as precedents unless sanctioned by the Legislative will.[255]

It seems incredible that this is all—that, having isolated and described with such precision the phenomenon of juridical recidivism, having correctly forecast it as the tragic flaw in any system which fails to

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252. *Id.*
253. *Id.* at xciv.
254. *Id.* at xcii.
255. *Id.* On the meaning of "amicable compounders" as used, see *supra* notes 187-190.

acknowledge it, the commissioners can have been satisfied with the sufficiency of this proposal.

Several criticisms present themselves for discussion. First, as was pointed out above, the common feature of each legal system reviewed by the draftsmen is that new rules are made out by the courts from the rubbish of old extra-legislative material, and by the fact of their pronouncement in a case, these new rules become law. There are two aspects of this problem—one is the source of the rule found, the other its force after pronouncement. The draftsmen here propose "natural equity" as the source, and refuse any force to the pronouncement (outwith the bounds of the case in question) unless it receives later legislative sanction.

Surely there is a contradiction, a compromise, in the appointment of natural equity to replace the old law as a source for new rules. The essential feature of juridical recidivism is that it seizes an already existent rule, out of ease, to fill a vacuum. Can the draftsmen who said "it arises from the nature of things . . . that you must furnish a rule to the judge, or suffer him to make or select one," really have believed that "natural equity," in the light of what that term had been taken to mean in the 1808 Digest, would sufficiently describe the process, the method they were trying to institute? In the Digest it represented the method they wanted to abolish; in the face of the times, to propose "natural equity" as a source of positive rules was no proposal at all; it was to ignore the problem.

In France, the term was intended to mean and was taken to mean, that new cases, and cases for which the law was obscure, were to be provided for out of the code, by analogy from the institutions of the code. The term thus defined legal method as an element of law, controlled by law. But in the Digest, "equity" and "natural law" and "received usages" all meant one thing: Spanish law. Article 21 thus told the judge: if you do not find the answer in the Digest, turn to Spanish law. So in Louisiana, "equity" meant that legal method formed *no part* of law; it was a free element. In the Digest, article 21 consecrates duality in legality.

We do not know what happened to the second half of the proposal: ". . . unless sanctioned by the legislative will." Following this clause, the Report goes on to elaborate how this will is to be given:

> [A]nd in order to produce the expression of this will, and progressively to perfect the system, the Judges are directed to lay at stated times, before the General Assembly, a circumstantial account of every case for the decision of which they have thought themselves obliged to recur to the use of the

> discretion thus given; while regular reports of the ordinary cases of construction, to be made by a commissioned officer, will enable the Legislative body to explain ambiguities, supply deficiencies and to correct errors that may be discovered in the Laws by the test of experience in their operation.[256]

A little more than one month later, on 22 March 1823, the Legislature approved the plan "which the jurists charged to review the Civil Code . . . have presented in their report to the Legislature." On 25 March, the distribution of the Report to members of the Legislature and judiciary was ordered.[257] We are told that the *projet* of the new Code was discussed "elaborately" during the 1824 session.[258] But that is all we know. No records exist of these discussions. All we know is that this proposed legislative ratification of judicial innovation was never enacted. We do not know why it was dropped. Obviously the Commissioners' concern was directed at the *Cottin* decision, to prevent both the resurrection of Spanish law and the prospective legal force of such judicial decisions. As we shall see, this omission was fatal to the draftsmen's plans on both counts.

Finally—and this perhaps most surprising—in connection with their plan in the Preliminary Report, the Commissioners proposed no changes to the articles on interpretation in the Preliminary title of the code. The only proposal at all related to all subject was that article 3, defining custom, be abolished, because "to say that customs have the force of laws in a country where all the laws are written appears to us a contradiction." This proposal was evidently rejected; article 3 still stands. And nothing significant was added to the Preliminary Title in 1825 or in 1870 enactment.

This is hard to accept, even more difficult to reconcile with the Preliminary Report. Even if we allow that, on review, these articles commended themselves to the Commissioners as theoretically sound, and technically adequate to supply for their plans, the fact remains (of which the commissioners were well apprised) that these articles had failed in their purpose, and mere re-enactment was unlikely to change that.

Professor Franklin's presentation of article 21 is correct.[259] It had the historic potential to align itself with the *motifs* of the Preliminary Report, and Livingston, the author of article 35 of the Code of Practice

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256. *Id.*
257. TUCKER, *supra* note 201, at xxiii.
258. Groner, *supra* note 201, at 377.
259. Franklin, *supra* note 22.

knew that.[260] But the courts and the bar by and large did not appreciate the intended role of article 21, and Livingston knew that too. The Preliminary Title had proven itself inadequate, its potential had been rejected during the fifteen years since 1808. The commissioners must be condemned for believing that it would work without amendment in 1823.

The New Code, as passed by the legislature, did contain one concession to Louisiana's legal history. Article 3521, the last article of the Code, read:

> From and after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretence that their provisions are not contrary or repugnant to those of this Code.

This is the repeal which the commissioners recommended. It is more specific, more complete than the repeal which accompanied enactment of the 1808 Digest:

> Whatever in the ancient civil laws of this territory, or in the territorial statute, is contrary to the dispositions contained in the said digest, or irreconcilable with them is hereby abrogated.[261]

To understand the importance of these two enactments and their effect on interpretation of laws in Louisiana, we must go back to the jurisprudence of the 1808 Digest and follow forward one peculiar and characteristic feature of Louisiana law: the law of repeal. Its importance lies in this, that through it, we are able to see, as in a mirror, the court's attitude to the codes. That attitude was not friendly. Juridical recidivism was so pronounced, even from the beginning, that the court, assisted by the Separation of Powers clause of the United States Constitution, came eventually to regard as an inalienable right the power vested in itself to refer to old laws in the exposition of new ones.

The repealing clause of the 1808 Digest was too loosely worded. The Digest by everyone's account was far from comprehensive, and the repeal only of those "ancient civil laws" which were "contrary to . . . or irreconcilable with" its dispositions did not repeal much. The Court was quick to apply this literally, and a rule of construction developed that posterior laws did not repeal prior ones unless their provisions were

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260. *Id.*

261. *See supra* note 206.

irreconcilable; it was not enough that they were *different*; they must be *contrary*.[262]

In the *Hayes* case (1812)[263] the Court had hinted that such was the rule, when it said the Digest was but a *resume* of the old law, with "some new principles … intercalated, and others abrogated or omitted."

In *Rogers v. Beller*, 3 Mart. O.S. 665 (1815), Judge Martin was more explicit. An ordinance of Governor Claiborne handed down before the 1808 Digest had directed the manner of administering the estates of nonresident intestates who died in New Orleans. It was argued that provisions in the Digest regulating intestate successions generally superceded Claiborne's ordinance:

> A general provision does not repeal a particular one by *implication*. If a particular thing be given or limited in the preceding part of a statute, this shall not be altered or taken away by subsequent *general* words of the same statute . . . . In this case, the provision was not in the same statute, but it was one *in pari materia* and all such are to be taken as if they were one. Douglas 30.
>
> Unless the ordinance cannot exist with the Civil Code, it must be holden unrepealed. Now the duties it imposes are not more at war with the provisions of the Civil Code, than with the act of the legislative council. We conclude it not repealed.

The point here emphasized that prior laws may be read *in pari materia* with the Digest provisions is an important one. Though not often enunciated in later cases, the authority to do so is assumed by the court. Under such a view, the Digest is not "the" law; it is simply a recent addition to a kind of law of Citations, according to which authoritative sources are listed by order of authority. Thus the Digest, as most recent, would come first, followed by the Recopilación de las Indias, etc.[264]

The *Cottin* case (1817), of course, went off on this rule. In a much celebrated brief to the case, Livingston, counsel for the losing defendant, argued:

> The definition of an abortive child, as drawn from the Spanish law, and from our own code, are not the same. Which are we to adopt?

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262. *Cf.* LCC art. 23 (1808). "The repeal is either express or implied . . . . It is implied, when the new law contains provisions contrary to or irreconcilable with those of the former law . . . ." The article is the same as in the 1825 and 1870 codes. I am not being inconsistent by contending both that the 1808 Digest was "intended" to be a digest, a restatement of Spanish law, and also that the repealing clause was too loosely worded. The Court was hostile to the Digest even as a digest, and "grounded" that hostility in this clause.

263. Hayes v. Berwick, 2 Mart. O.S. 138 (1812).

264. See, e.g., the opinion of Mathews, J. in *De Armas' Case*, 10 Mart. O.S. 158, 171-74 (1821). *See infra* text accompanying note 267.

> There can be but one answer to this; we must adopt the last: but can we superadd the former? . . . I think not.
>
> A definition is *ex vi termini* an exclusion of every thing not expressed . . . . *A posterior act therefore giving a different definition from a pre-existent law necessarily repeals it*. . . .[265]

The Court of course rejected his argument, and rightly so, for however sensible it sounds today, it was not grounded in the law at that time:

> It must not be lost sight of, that our Civil Code is a digest of the Civil laws which were in force . . . and that such parts of those laws *only* are repealed, *as are either contrary to, or incompatible with* the code.[266]

After *Cottin* as we have seen, the legislative forces depart in another direction to assess the situation. But between *Cottin* and the new Code it engendered, there is a gap of eight years, during which the court continued to develop its own approach to code interpretation, an approach which seems to have been ignored by the draftsmen.

De Armas Case, 10 Mart. O.S. 158 (1821), did not involve the Digest, but illustrates the Court's treatment of legislation (and the Digest, after all, was but another statute), which it considered merely different from the Spanish law. De Armas was found guilty of contempt and barred from practice for a year. In his request for a rehearing, he pointed out that an Act of Legislature authorized the court "to punish all contempts by fine, not exceeding fifty dollars for each offense, and also by imprisonment not exceeding ten days," and argued that this act impliedly repealed the law of the Third *Partida* under which he was sentenced. Judge Martin, reasoning from common law examples, rejected the argument:

> A statute is said to repeal a former one, when it is contrary thereto in matter. Leges posteriores priores contrarias abrogant. It is not enough that the latter statute be different in its matter; it must be contrary.

As the law of the Partidas applied to contempts committed by lawyers, and the Act applied to all contempts, the latter being general, did not exclude the former.

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265. Cottin v. Cottin, 5 Mart. O.S. 93, 98-99 (1817) (emphasis mine). This brief of Livingston's (which is quite long and eloquent) has been taken as evidence of the Great Codifier going it alone against the Court. TUCKER, *supra* note 201, at lvi. If Livingston was defending the integrity of the Digest here he did so incidentally in his capacity as counsel for defendant. (The report styles Livingston as "for the plaintiff." However, plaintiff wins and Livingston's brief for rehearing is couched only for defendant.) Just six months before *Cottin*, in *Beard v. Poydras*, 4 Mart. O.S. 348 (1816), he puts forth the opposite argument. In both cases he is supporting his client, not a particular view of the Digest.

266. *Cottin*, 5 Mart. O.S. at 94.

In a concurring opinion, Judge Mathews enumerated (without reference to any authority, as was his wont) the "known and established rules of abrogation and repeal" on which the decision turned:[267]

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

Two years later the same question came before the court, but this time the questioned relationship was Digest and Spanish law. In *Heirs of Dubrauil v. Rousan*, 1 Mart. N.S. 158 (1823), the power of an attorney, acting under a general procuration, to appoint a substitute was disputed. Article 24, p. 424, in general terms, forbids an attorney to act beyond the powers of his procuration.[268] The contention was that this prescription repealed a law of the *Partidas* (Part. 3.5.19) which permitted the substitution. Judge Porter disagreed.

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267. Though neither Judge Martin nor Judge Matthews cites him, it is quite apparent from the examples they use for illustration (all from the common law) that their arguments are based on Blackstone at 89-90. This comfortable reference becomes such commonplace that, in *Reynolds v. Swain*, 13 La. 193 (1939), *infra* notes 288 *et seq.*, while pronouncing a *coup de grace* on the Code's integrity, Judge Martin quotes Justinian for authority . . . as found in Blackstone 44. *Reynolds*, 13 La. at 197-99.

In an earlier publication addressing the curious importation of Blackstone for the delicate development of a Romanist code (T.W. Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat and the French Codes*, 44 TLR 264 (1970)), I suggested the message to judges was dangerous (*id.* at 295):

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

In an article later published, Professor Batiza took issue with the statement above quoted (Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TLR 1, 11 (1971)):

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

After reading the discussion of cases here and following, the reader may decide for himself whether the cuttings from Portalis, or those from Blackstone, took hold in our soil and flourished.

268. LCC art. 24, at 424 (1808).

> We understand this article to be nothing more than an enunciation of the general principle common to all laws that treat on this subject, and that it leaves the particular provisions on the power of substitution untouched.

On comparing the two, he found that the first part of Partida 3.5.19 was "identical" with article 24, p.424, of the Digest (this is at least an overstatement; the Digest article was taken almost verbatim from the French *Projet* article 3.17.26) and that the second half of *Partida* 3.5.19 allowed substitution. He concluded that the laws were *pari materia* and must therefore be read together.[269]

> Under no sound rule of construction then could we hold that the re-enacting the same provisions in our code repealed that authority [i.e. Partida 3.5.19].

Judge Porter is responsible for most of the court's decisions on the law of repeal. He was on the bench during the critical period in codal development, from 1820-1833, and of the three judges, he seems, at least during his tenure, to be by far the most recidivous. It is for his elaborate and erudite opinions that he is remembered today. One of these, *Saul v. His Creditors*,[270] is still a landmark case in U.S. conflict of laws; the opinion is over a hundred pages long, and following the usual pattern of Judge Porter's decisions, discusses all of the Spanish, Roman, French, common, Dutch, and Louisiana law which might have any bearing on the case. His complete command of all those systems in their native language is beyond dispute. It is perhaps just that accomplishment though which made him treat the codes with such disdain—much in the fashion that Savigny scorned the French code. The notion of the code as a self-contained statement of the law is so alien to his decisions that one wonders at times whether the idea ever occurred to him. We *can* be fairly sure that if it did, it was promptly dismissed. Four important decisions in this area of law, all handed down by Judge Porter in 1827 will illustrate.

In *Broussard v. Bernard*, 7 La. 211 (1834) (though not reported till 1834, the case was decided in 1827) defendants offered evidence that it was customary in Attakapas (a region in southwest Louisiana) to continue the existence of the community after the death of a spouse until an inventory was made. The lower court refused the evidence of tending to prove something prohibited by law. Porter reversed and remanded for taking of evidence, citing article 3 of the 1808 Digest.

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269. Compare this against the arguments of Batiza and Pascal, *supra* note 205. Here, even though the Digest article has a French source, the Court read a quite different Spanish content into it.

270. Saul v. His Creditors, 5 Mart. N.S. 569 (1827). The case unfolds, propelled as if by Porter's erudition, at 7 Mart. N.S. 425, 594, 620 (1829) and 1 La. 302 (1830).

> The particular custom, on which defendants relied in this instance [that the *Fuero Real* of Spain was in force in Attakapas] is required to be proved by other partitions and divisions that may have been made in the same place, and that it has prevailed without interruption. *Febrero*, p. 2 lib. 1, cap. 4, section 4, No. 91; 3 Mart. 120. The recognition of customs by our code necessarily admitted proof other than that required to establish laws. The custom which the defendants attempted to prove was not, as plaintiff objects, contrary to the general law of the land, but an exception to the ordinary rules which regulate partnerships.

And he concludes, with unassailable logic:

> If the proof of customs could be rejected because it established something different from the law, no custom could be proved, for if it were not different, it would make a part of the law.[271]

In *Erwin v. Fenwick*, 6 Mart. N.S. 229 (1827), Porter seems to make the rule even more onerous. Not only must subsequent laws be contrary to former ones to repeal them, but

> [t]he re-enacting general provisions existing in our former laws, and inserting them in our code, did not repeal the exceptions which attended these provisions in the system from which they are taken. *Curia Phillipica*, lib 2 cap. 7, *verbo* Page No. 7.

In this case, however, he finds a limitation to the application of the rule, for

> [w]hen one law requires no act on the part of the creditor to confer a right, and a subsequent one does, the latter is so far contrary to the former, that a compliance with it is indispensable, otherwise, it would be without any effect whatever.

La Croix v. Coquet, 5 Mart. 527 (1827), arose, as did the two before, under the 1808 Digest. The question was whether a woman could be a surety. *Partidas* 5.12.2 forbids it. The Digest provides[272] that women are capable "in cases expressed by law" Judge Porter held, expectably,

> therefore according to the affirmative and express terms of the code articles cited, the provision in the Partidas is preserved—not repealed. Subsequent

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271. When the case came up on appeal again, the lower court having decided that the *Fuero real did* control the case, Judge Bullard, Porter's successor, held:

> That a community of acquets and gains as such continues after the death of one of the partners . . . is a proposition so repugnant to all our notions of a community and so repugnant of first principles that it cannot be for a moment admitted. . . . We are therefore of the opinion, that the court erred in declaring that the *Fuero Real* was in force at the death of Madame Broussard . . . .

Broussard v. Bernard, 7 La. 216 (1834).

272. LCC arts. 23-24, at 204 (1808).

> laws do not repeal former ones by containing different provisions, they must be contrary.

One might justifiably wonder at this point whether Judge Porter would acknowledge it within man's power to repeal the force of Spanish law. However, in *La Croix* he goes on to note that the Napoleon code "repealed all prior dispositions of the Roman law concerning matters which formed the object of that code."

> But our digest of the civil laws was enacted without any such legislative declaration; consequently it is subject to the ordinary rules which govern courts of justice in the construction of statutes.

What would be his reaction then if the same question arose under the new code of 1825, which did, as we have seen, repeal the old laws, much in the same way that the *Code Civil* did? The Preliminary Report of the draftsmen had been printed and circulated to members of the Court. We know that Judge Porter was familiar with it and may assume he knew the new code was intended to stand on its own. Would he treat it as such, or would it be for him simply a second edition of the same work, something else to add to Louisiana's Law of Citations? *Flower v. Griffith*, 6 Mart. N.S. 89 (1827), presented the chance.

The issue in *Flower* was, again, repeal of old laws by new ones, but this time the new law was the 1825 code, and the old one was not the Spanish law but the 1808 Digest. The question arose in a dispute over the validity of a forced sale. Under the regime of the Digest, this was governed by Title 21 of Book 3; under the new Codes,[273] however, forced sale was governed by different provisions contained in the new Code of Practice. As to this case, if the provisions of the Digest governed, the sale was valid; if the Code of Practice governed, it was not. The problem of the case was that Title 21 of Book 3 was completely omitted from the new *Civil* Code, but the omission was nowhere recommended in the *Projet* of 1823. Was this inadvertence or was the title intentionally suppressed?

As the decision was based on the method chosen by the Commission of presenting the *Projet* of 1823 to the Legislature, a few prefactory remarks on this may be helpful to understanding the case.

As we have seen, all of the legislative acts preceding the Preliminary Report referred, not to a new "code," but to the revision or amendment of the old one. Not until the Preliminary Report do we

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273. The Code Commissioners had also drawn up a Code of Practice (civil procedure), which was enacted along with the Civil Code of 1825.

encounter the proposal for a "new," a different sort, of code. And even in that work, the draftsmen presage the form of their presentation thus:

> Every proposed alteration, whether by *repeal* or *amendment*, of any article in the old Code, or by *the insertion* of any new title or article will be fairly written in one column of the page and the reasons for proposing it in another.[274]

The *Projet* of 1823 was actually entitled "*Amendments and Additions* to the Civil Code of the State of Louisiana Proposed in Obedience to the Resolution of the Legislature of the 14th March, 1822, by the Jurists Commissioned for that Purpose"[275] and in a prefactory "Note" to that work, the commission alter somewhat the method of presentation which they proposed in the Preliminary Report.

> The *words* enclosed between brackets [ ] are those which it is proposed to *suppress*.
>
> The *words* enclosed between commas, "are those which it is proposed *to add* . . ."
>
> The *articles* which it is proposed *to suppress entirely*, are not transcribed, but simply noted . . .
>
> *We have noticed, since the printing, several omissions and some faults*, both of phraseology and of the press, which we will take care to see corrected in the manuscript which will be presented to the Legislature.[276]

It might be argued that the remarks quoted above are merely matters of editorial convenience and are indifferently related to the validity of laws either contained in or omitted from the new code, that what was important was the final form of the code as officially printed and promulgated and the simultaneous repeal of all other laws. This is in fact the gist of the debtor's argument in *Flower*. It was rejected by Judge Porter.

> If it appeared that the legislature had made it a part of their amendments to that work that this title should be suppressed then perhaps this argument would be correct.
>
> But nothing of that kind has been shown . . . . The jurists who were appointed to alter and improve our old code, in their report to the legislature, proposed amendments of three kinds. *The first*, the insertion of new provisions; the second, the modification of those already existing, and *the third*, the suppression of those articles which were incompatible with the changes they thought proper to recommend.

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274. Livingston, Preliminary Report xciv (emphasis mine).

275. *Projet of the Civil Code of Louisiana of 1825*, *in* 1 LOUISIANA LEGAL ARCHIVES frontispiece (1937) (emphasis mine).

276. *Id.*

> We have carefully examined this report and not a word is said in it of the last title of the old code; it is neither proposed to be amended nor modified nor suppressed.
>
> The amendments to the other parts of the old code were submitted to the legislature and with some slight alterations adopted. But the remaining provisions in it did not pass a second time under the view of the legislature nor were they re-enacted. They were left as they originally stood.
>
> After these amendments were passed the best way perhaps would have been to have printed them separately. The citizen would have seen at once then what change had been made in the old law.

The crux of the court's decision is that the thing known as the Civil code of 1825 was never passed as a *whole*:

> The amendments to the old code have received legislative sanction; the old code itself has, and if the book now printed as the code of Louisiana contains that old code and the amendments, then all the provisions in it are binding and have the force of law. But if it contains anything more, what has been added has not. And if anything was omitted without being suppressed, it still has the force of law.

What is mostly likely to strike the twentieth century reader about this opinion is its literalness. Technically it is correct; the conclusions are logical, even if they are not sensible. But if anyone could doubt after *Flower* the court's hostility to the Code, he need but remember that the provisions of Title 21, Book 3, which the Court here held to be in force, had been removed with alterations to the new Code of Practice. And although article 3521 of the new Civil Code would not apply to this case, the enacting statute for both Civil Code and Code of Practice declared that in case of conflict between the provisions of the two, those of the latter should prevail.

In deciding *Flower* as he did, Judge Porter effectively threw article 18 out the window; "the reason and spirit of it, or the cause which induced the legislature to enact it" have no place in this narrow, technical approach, and here we get to the heart of the matter. *Flower* shows, as *Cottin* had and as *Reynolds* was to show later, the distrust of the Court for this innovation that the legislature had turned out. What none of these cases prove though is what has often been alleged—that the code failed of purpose in Louisiana because the judges were uneducated. On the contrary, the erudition these men display while they nimbly deny effect to the code would mark them for distinction on any bench at any time. It was not their ignorance or judicial negligence that foiled the design of the Code; they did it intentionally.

The Code appeared to them much as the then new Renaissance style must have appeared to Gothic craftsmen seeing it for the first time—a fanciful aberration that, God willing, would pass in time. The old way had worked well for centuries and would remain serviceable if things were not interfered with from above. There was no "reason and spirit" to this dry Act; what light it had was borrowed light, from the systems that preceded it, without whose continued existence the code was a dead letter.

It was this attitude, and the Commission's failure to take it into account, that killed the Grand Design of the Preliminary Report.

Another factor contributed and may be mentioned here. The Civil Code itself contains a great deal of doctrinal material[277]—probably more than any other modern code—evidently intended by the draftsmen to supply for the want of treatises in a provincial state. Certainly one reason for its incorporation was to facilitate analogical extension of code texts when such was required; in that respect this material compensates somewhat for the absence of *motifs*. But the Preliminary Report in no way foreshadows this development, which was an innovation of the 1825 Code. Rather the Report contemplates a more positive code. The idea runs through the whole Report.

> [W]e deem it practicable, to make such a digest of positive enactments, as shall provide for most of the cases, that can now arise . . . .[278]
>
> [T]he whole will be presented in the form of a new Code providing for as many cases as can be foreseen . . . .[279]
>
> It is therefore the duty of the Legislature to . . . [provide] for as many cases as can be foreseen. . . .[280]

These statements seem more apt to the description of another digest than of a code. Other remarks in the Report, of course, mollify this impression—even contradict it, if you want to read it that way. But the Court in *Flower* did not, and its opinion mirrors the limitation quoted above.

Three of the last four cases, all decided in 1827, were decided after enactment of the new code but based on the Digest. It had taken that long for cases arising under the new code to reach the Court. *Flower* came at the end of the court session—June 1827 (the State did and still does close down for the summer months). The next session of the legislature, though, came down strongly against the case. Two acts were

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277. *E.g.*, LCC art. 2292 (1870).
278. Livingston, Preliminary Report lxxxviii.
279. *Id.* at xci.
280. *Id.* at xci-xcii.

passed:[281] Act 40 of 1828 repealed all articles contained in the Digest of 1808 which were not reprinted in the Code of 1825, and Act 83 of the same year, provided

> that all of the civil laws which were in force before the promulgation of the civil code lately promulgated, be and are hereby abrogated . . . .

The test of these was a while coming, but in 1836 the Court held that even though the cited Spanish law at issue in the case had not been repealed by the 1808 Digest, or by the 1825 Code, the Acts of 1828 had effectively repealed the whole body of Spanish law in force before promulgation of the Digest.[282]

Spanish law was not dead yet though, and it was no longer the only threat to the Code: during all this time a sizeable *jurisprudence* had been growing up, the effect of which we haven not yet taken into account.

When Judge Francois Xavier Martin was appointed to the Court in 1810, he began to collect copies of the decisions and briefs of cases before the court. In 1811, he published the first volume of these, covering cases from 1809-1811. In the Preface, he laments the absence of reported decisions and points out the obstacles to his plan to publish them. The decisions he has collected are often, he says, of necessity the opinion of one judge, who cannot on circuit obtain the "foreign laws" required by the case:

> The publisher could not but be sensible that the decision of a tribunal thus constituted, could not be treasured up, as those of such courts of dernier resort in which the concurrence of a majority . . . is necessary . . ., *where at the same time that the rights of the parties in the suit are pronounced upon, a rule is forming by which every future case of the same kind, will be determined and the opinion of the court becomes the evidence of the law of the land*.
>
> He has however believed, that although these considerations certainly lessen the utility of the present publication, they do not entirely destroy it. It is true that no judge in deciding any future question, will think his conscience bound by the opinion of any one of his brethren or any number of them *less than a majority*; but he may derive aid or confidence from the knowledge of anterior decisions, the arguments of counsel and the opinion of another judge in points on which he has to decide. In matters of practice, he will at times conform himself to what has already been done, *though, had there been no determination, he might have suspended his assent*. General and fixed rules are in this respect a great consideration. At all events a knowledge of the decisions of the court will tend to the

281. TUCKER, *supra* note 201, at xxviii.

282. Handy v. Parkinson, 10 La. 92 (1836).

> introduction of more order and regularity in practice and uniformity in determination.[283]

The phrases emphasized foreshadow the attitude that F. X. Martin, the Judge, was to take in later years, but for the rest, the opinion of Martin the Reporter was true for some years: the influence of *cases* on the law was not to be felt, save in isolated instances, such as *Cottin*, for a generation, perhaps longer. Martin published the cases with his own money and in his spare time, and the volumes were, understandably, slow to appear. By the time of *Cottin* (1817) only three volumes had come out. When the Code Commissioners began work on a new code in 1822, there were but nine.

From then on though, the pace quickened. By 1827 the number of volumes had nearly doubled to seventeen and by 1839 when *Reynolds v. Swain* was decided,[284] the number had more than trebled to thirty-two.

In the Preface when Martin implies that the decision of a majority of the court forms a binding rule, he is not speaking *ex cathedra*; his opinion is his own. But what was the place of the case in this hybrid civil law system? Did each case form a binding rule which would operate with prospective force? Or was the rule announced binding only on the parties to the case? In 1821 the issue was raised for the first time in *Breedlove v. Turner*, 9 Mart. O.S. 353 (1821).

The defendant had represented plaintiff in another suit and had lost it through his ignorance of a recent ruling handed down by the Court. The defense was that "lawyers practicing in this state are not under any necessity of noticing the judgments given by the supreme court." Judge Porter, then newly on the bench, regarded the defense as "novel and dangerous."

> In support of this position, a great deal of time was occupied in showing that the decisions were not law; that nothing could be properly so called, but those acts passed by that branch of our government, in whom the power of legislation is vested by the constitution. This is true and we never before supposed that they were so considered. But . . . I had supposed it not doubted, that the decisions of this tribunal were to be regarded as the interpretation of the legislative will; as an exposition of its meaning and intention. And that, until the legislative authority, by subsequent acts chose to make different provisions on the subject, that it is an acquiescence on their part, that the court fairly understood their meaning, and wisely and faithfully expounded it. There is, also, a variety of questions presented for decision, where positive law is silent, and where recourse must be had to

283. Preface to 1 Mart. O.S. dated 30 October 1811 (emphasis mine).

284. Reynolds v. Swain, 13 La. 193 (1839) (discussed below).

> legal analogies, to arrive at truth. Are not the decisions which this court makes, amid the frequent conflicting opinions of foreign jurists to be received as determining which doctrine is in force here? . . . .
>
> It is no answer to this reasoning to say that the law is different from the decision of the court, for that is begging the question and taking for granted, the very point which the court has otherwise decided.

In another place he says "they are evidence of what the law is."[285] If this were all, the civilian could hardly object. As Judge Porter is at pains to point out, both France and Spain publish the decisions of their courts, and for what purpose, if not to provide "evidence of what the law is"? This is the theory of a *jurisprudence constante*, which nominally prevails to this day in Louisiana.

To say that cases are evidence of the law is only half true though, for they are themselves also sources of law. This is the implication of Porter's remark, that standing decisions represent an "acquiescence" on the part of the legislature. This is what Martin meant in his preface when he said that "had there been no determination he might have suspended his assent." The "law" in this sense means historically recognized rights. Once the rule of a case is announced, it becomes as binding for the future, and as susceptible of analogical extension, as a code text. What is more the possibility arises that code texts will be ignored or even contradicted.[286] The case then is no less politely "evidence of the law" but it is no longer merely that.

It was this possibility, that jurisprudence would usurp the force of legislation, which prompted the Commissioners to propose that "such decisions shall have no force as precedents unless sanctioned by the Legislative will." This was in 1823, less than two years after *Breedlove* and when the "jurisprudence" of Louisiana was contained in a mere nine small volumes. In this way, "decisions will be the means of improving legislation, but will not be laws themselves." Otherwise, says Livingston in another place, a code ". . . provides for its own corruption and final destruction if it admits judicial decisions, unsanctioned by law, to eke out its deficient parts, to explain what is doubtful, or to retrench what may be thought bad."[287]

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285. *Cf.* BLACKSTONE 69: "And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law, ..."

286. For example, LCC art. 2323 (1870), which consecrates the doctrine of comparative negligence in computing delictual damages, has been rejected by Louisiana courts in favor of the common law doctrine of contributory negligence.

287. 1 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 173 (1873).

We will probably never know why this proposed legislative review was never adopted. What is important to note here though, is that the Commission's prediction proved itself true. In a short time, the jurisprudence had grown large enough to be itself a source of law and a rival to the code. And that is what it became.

A good case could be made out here for historical materialism, but whatever the reason assigned to explain it, the fact remains that, by 1828, when Spanish law was repealed as a subsidiary source, something existed to take its place.

Which brings us to the case of *Reynolds v. Swain*.[288]

In 1822, when Judge Martin wrote his *History of Louisiana*, he said, speaking of the 1808 Digest and its draftsmen:

> Moreau Lislet and Brown reported "a Digest of the civil laws now in force in the territory of Orleans with alterations and amendments adapted to the present form of government." Although the Napoleon Code was promulgated in 1804, no copy of it had as yet reached New Orleans: and the gentlemen availed themselves of the project [the French *Projet* of 1800] of that work, the arrangement of which they adopted, and *mutatis mutandis*, literally transcribed a considerable portion of it. Their conduct was certainly praiseworthy; for although the project [the French *projet*] is necessarily much more imperfect than the Code (Code Napoleon), it was far superior to anything, that any two individuals could have produced, early enough, to answer the expectation of those who employed them. Their labor would have been more beneficial to the people than it has proved, if the legislature to whom it was submitted, had given it their sanction as a system, intended to stand by itself and be construed by its own context, by repealing all former laws on matters acted upon in this digest.[289]

The 1825 Code *was* "intended to stand by itself and be construed by its own context." Would Martin treat it as such? *Reynolds* presented the chance.

> In the case of *Christy v. Cazanave*, 2 Mart. N.S. 451 the Court held that if the tenant abandoned the premises during the lease, he is bound for the rent for the whole term at once. It has been contended that this decision took place under the civil laws of this state, which were repealed in 1828 and before the promulgation of the Louisiana Code, which provides that the Spanish, Roman and French laws, which were in force in this state when Louisiana was ceded to the U.S. . . . are repealed in every case, which are specially provided for in that code, and that they shall not be invoked as

288. *Swain*, 13 La. 193.
289. *Supra* note 215.

> laws, even under the pretence that their provisions are not contrary or repugnant to those of the code. *See* La. Code art. 3521.
>
> The repeal spoken of in the code and the Act of 1828, cannot extend beyond the laws which the legislature itself had enacted; for it is this alone which it may repeal; *eodem modo quiquit constitutur, eodem modo disolvitur*.
>
> The civil or municipal law, that is, the rule by which the particular districts, communities, or nations are governed, being thus defined by *Justinian—"jus civile est quod quisqui sibi populus constitutit"* 1 Bl. Com. 44.[290] This is necessarily confined to positive or written law. It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the laws of peace and war and those laws which are founded in those relations of justice that existed in the nature of things, antecedent of any positive precept.
>
> We therefore conclude that the Spanish, Roman and French civil laws, which the legislature repealed, are the positive, written or statute laws of those nations and of this state; and only such as were introductory of a new rule, and not those which were merely declaratory—*that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice*.
>
> Testing the judgment of this court in the case of *Christy v. Cazanave* by these rules, we do not find it grounded on any statute of Spain, of the late territory or the present state. We know not any Roman or French statute which was in force in this country at the period of the cession, and to which the repeal in the code and the Act of 1828 could extend. Nevertheless, it is the daily practice of our courts to resort to the laws of Rome and France and the commentaries of those laws, *for the elucidation of principles applicable to analogous cases*. Although the Roman law on which the case of *Christy v. Cazanave* was determined had no intrinsic authority here, the reason that dictated that law has great cogency.[291]

Martin goes on to reason that if the tenant takes property off the leased premises, he defeats the lessor's privilege on that property for payment of the rent, thus the lessor ought to be able to protect himself by seizure, or a personal action against the tenant.

Reynolds is so brazen on so many points that its importance is hard to delimit. But these things stand out—

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290. *Cf.* BLACKSTONE 44: ". . . municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian," etc. *See supra* note 267. The reader will observe that, as with sin, so with Blackstone: a little bit always becomes a lot.

291. *Reynolds*, 13 La. at 197-99 (emphasis mine).

1. The Court there holds for the first time that certain aspects of the old law are not within the province of legislation. At least the "spirit"—"those principles"—of Spanish, Roman, and French law retains its force. This is precisely the *imperium rationis* of Roman law which Livingston feared and which he said prevailed in Spain, where Roman law "was uniformly admitted by the tribunals not as the Common Law, but as a System which they considered obligatory on the conscience of the Judge whenever it was not contradicted by positive local law."[292]

2. The Court held for the first time that its jurisprudence was beyond the reach of the legislature, that historically determined rights could not be reached by a general abrogation. For the first time in Louisiana, case law was explicitly declared to be an authoritative source of law.[293]

3. The case is perhaps most important for what the Court did *not* do: it did not turn to the Code for analogical extension. The Code was rejected as an authoritative source for new rules in favor of historically sanctioned (as opposed to legislatively sanctioned) rules from the "ancient civil law" and from the cases. Martin should have analogized from the Code. In this case, the lessor is protected for payment of the rent by a privilege on the lessee's property which lasts for fifteen days after the property has been removed.[294] No provision of the Code specifically covers the case of the absconding lessee. Certainly the lessor is empowered then to terminate the lease.[295] Had the Court desired, as it obviously did, to extend greater protection than this to the lessor, it might, consistent with codal principles, have analogized from article 2681,[296] which permits the lessor to evict a tenant who misuses the property, yet requires the tenant to pay rent until another lessee can be found. This solution protects the lessor for so long as he need be, without necessarily making the tenant liable for the whole term—which is logically unnecessary.

Finally, it should be noted that *Reynolds* is still "the law"[297] and has been cited as authority both to permit actions not sanctioned by the Code,

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292. Livingston, Preliminary Report lxxxix. This result had been hinted earlier by Martin in *Carlin v. Stewart*, 2 La. 73 (1830).

293. This had been held, though without the declaration, earlier as to certain procedures created judicially, which had not specifically been included in the Code of Practice. Crocker v. DePasau, 5 La. 37 (1833); Jennison v. Warmack, 5 La. 493 (1833). The Court held that the legislative repealer did not affect these procedures, which remained available.

294. LCC arts. 2675–2679 (1825); arts. 2705-2709 (1870).

295. LCC art. 2682 (1825); art. 2712 (1870).

296. LCC art. 2681 (1825); art. 2711 (1870).

297. Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1928).

but sanctioned by the jurisprudence and also to deny actions not sanctioned by the jurisprudence, whether or not a Code article might be analogically extended to cover them.[298]

Reynolds is quite literally the epitome, the summation of the judicial approach to codal interpretation in Louisiana.[299] It contains all of the elements which characterize legal interpretation in the state; not only during the period under consideration but also up to the present day:

1. Juridical recidivism to a marked degree. This applies first as Spanish and Roman law, later to the jurisprudence of the Court.

2. Rejection of the Code as an exclusive *source* of law, the tendency being to treat it rather as a mere *restatement* of other law, to which reference must be made to elucidate the Code. Thus analogies extending and developing the law tend to be drawn first from the "ancient civil laws," later from the cases, rather than from the Code. Eventually this process assumes the force of a logical imperative, ending all creative reference to the Code.

3. A concomitant of the two above—inarticulate, unregulated judicial or professional control over the law (instead of the other way around) and the resulting duality in legality.[300]

Conclusions on the Jurisprudence

To explain the Preliminary Title's reception, I have though it necessary to recount in some detail the intricate history of codification in Louisiana. For my purposes, the essentials of that history are these.

1. The 1808 Digest was never *received* as a code, as a self-sufficient statement of the law, and there is little evidence that it was ever intended to be a code. This fact explains why more comprehensive systems of interpretation, which were available to the draftsmen, were rejected for the short chapter adopted in 1808.

2. *Cottin v. Cottin* was not a "virtual revival of the Spanish law," which had never lost its force. What was disturbing to the mind of the time and moved the legislature was the incompleteness of the Digest; not that Spanish law was its supplement but that the need to supplement was

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298. *Id.*

299. *See* Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727 (1962); Tate, *Policy in Judicial Decisions*, 20 LA. L. REV. 62 (1959); and especially Tate, *Civilian Methodology in Louisiana*, 44 TLR 673 (1970).

300. "But here a very natural and very material, question rises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles . . . ." BLACKSTONE 69.

a frequent one. No code was proposed to remedy this, not even after a fruitless attempt to translate the *Partidas* three years later. A commission was appointed to amend the Digest—to make it more complete—but the idea of a "code" first comes out of the commission's work. We first see it in the Preliminary Report of 1823—probably Livingston's work and his idea.

3. But by the time the new code was passed (1825) juridical recidivism was so firmly established in the practice that the plan for a self-contained, complete system of law was doomed. In the climate of opinion that existed then, the idea could only have worked if Livingston's proposal for legislative review of judicial innovation (or somesuch) had been adopted, and if the Preliminary Title had been revised. As neither of these was done, there was nothing to check the bar's habit of referring back to the old laws, establishing first the supremacy of the old laws and later, as if by force of habit, the supremacy of jurisprudence, over the code.

4. We have seen this *habit* of reference to prior laws evidenced in the judicial development of the law of implied repeal. The essence of this development is the court's failure to recognize that *legal method* can be repealed as well as substantive law. The Court chose to believe that legal method was outwith legislative power. The result was that, when the legislature enacted a new system of law, the Court held provisions of the old to retain their force unless the substance of the old was irreconcilable with the substance of the new, completely disregarding the possibility that the reference back itself might be methodologically irreconcilable with the new system.

What is perhaps most interesting in this phenomenon—that is, the contention by the courts that legal method was beyond the competence of the legislature—is the guise under which it passed. *Reynolds* puts it quite clearly: legal method cannot be repealed by the legislature because it is natural law.

> [W]e therefore conclude that the Spanish, Roman and French civil laws, which the legislature repealed, are the positive, written or statute laws of those nations, and of this state; and only such as were introductory of a new rule, and not those which were merely declaratory—that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice.[301]

301. Reynolds v. Swain, 13 La. 193, 288 (1839).

Pound has noted that what happened in Louisiana was a phenomenon common to all of the United States at this time.[302] At the first quarter of the nineteenth century, natural and civil law theories and treatises were popular everywhere in the states, and were cited as authority by the common law courts as well as by the civil law court in Louisiana. The reason he gives for this is, in part, correct. All the new states were faced with a problem novel to history; where to find the law to govern a new state. The problem was solved by a sort of homologation of the similar features presented by civil, natural and common law systems of the day. The Roman law established property and regulated sales; the common law established property and regulated sales; therefore there must be—particular differences aside—something "natural" about the rules governing these institutions. It was these "essences" which appealed to judges in need of some law for the case at hand.[303]

Pound also points out that, as happened in Louisiana, the appeal of natural law as a source of law lasted only until a substantial body of case law had been established. Then it was *out* with natural law and *in* with *stare decisis*.[304]

But he does not go far enough with his analysis. He does not point out what I regard to be the essential feature of this process, both in Louisiana and in other states, that is, the power, the control which this "reception" put in the hands of the judges, and the "naturalness" of it all in terms of the hostile approach which both common law and Louisiana courts took to legislation (or, that the judicial branch assumes toward the legislative branch). Pound makes the whole process appear inevitable. Perhaps it was, but the result of it cannot be justified on the grounds of historical inevitability, and there can be no doubt that the result was the erection by the courts of legal method into natural law, which obviously was beyond reach of the legislature. The legislative failure, to articulate legal method as a necessary part of legislation, resulted in assertion by the judicial branch that legal method is "ours" and inherently inarticulate. It is written in judge's hearts: we cannot define it but, like obscenity, we know it when we see it.

In Louisiana, the court did not have to turn to natural law treatises or to similar features of the common law as a source of law (though it did, and often). Natural law, in the form of the old French, Spanish and

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302. POUND, THE FORMATIVE ERA OF AMERICAN LAW 31-38, 81-37 (1938); *see also* Stein, *The Attraction of the Civil Law in Post Revolutionary America*, 53 VA. L. REV. 403 (1966).

303. POUND, *supra* note 302, at 91-96, 105, 108.

304. *Id.* at 110.

Roman law, had always prevailed in the state. Even before 1828 and before *Reynolds*, Spanish law was regarded as natural law. Witness the opinion of Moreau Lislet and Carleton, in their preface to the Partidas (written only a year before Moreau's appointment to the 1825 Code Commission):

> Since the promulgation of the Partidas, some of its provisions have been abrogated, or amended by subsequent laws, particularly by the laws of the Recopilación of Castille, of which we shall presently speak. But these alterations have not, in any way, changed *the great principles of natural law*, contained in the Partidas. They relate to certain laws only of a positive nature, which nations establish, modify or repeal, as their wants, interests or situation may require. . . . The Partidas may therefore be considered as containing *the fundamental principles* of the laws of Spain.[305]

About the same time Alexander (later Judge) Porter, on the editor's request, submitted a Note on "The Laws of Louisiana" for publication in the Reports of the United States Supreme Court—essentially an essay on the contents of the various Spanish source books. Of the *Partidas*, he has this to say:

> The Partidas, which was concluded and published by the direction, and under the auspices of Don Alonzo [sic] the Wise, in 1260, is a complete body of law (*El cuerpo completo*) which combines the public with the private law, all digested and prepared . . . in a most scientific, just, solid, Christian, and equitable manner; and which has not, perhaps, its equal in all Europe. . . .
>
> This work, for the praise of which it has been a regret of the Spanish writers, that their language is inadequate, comprehends so many rules of religion and justice, and of pure and Christian policy, that a volume would be necessary to state . . . even the principal ones.[306]

What chance could the enactments of a mere legislature, even a code, have as against such an idea? The answer is put for us nicely in a remark made by Etienne Mazureau to Alexis de Toqueville when the young Frenchman visited New Orleans in 1832. De Toqueville was especially keen to discover whether a democratic electorate could completely govern. Mazureau scoffed at the idea:

> [O]pen the acts of the sessions. It is the work of Penelope: To make, unmake, remake, is the work of our legislators. . . . Here is an example: After the cession to Spain many points in our law were taken from Spanish

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305. MOREAU & CARLETON, *supra* note 43, at x (emphasis mine).

306. Alex. Porter, *On the Laws of Louisiana*, Note II, 5 Wheaton Reps. Appendix, at 31, 42-43 (1820). Note the "has not, perhaps, its equal in all Europe," was written sixteen years after the French Civil code became law.

> laws. Late in 1828, at the end of a session, a bill was passed unnoticed repealing these laws in a body without putting anything else in their place. Waking up the next day the bar and the judges discovered with horror what had been done the day before. But the thing was done.[307]

In this single paragraph we have an outline of the crisis that divided the forces in Louisiana's legal history. On the one hand, contempt for the legislature and consequent scorn for its enactments; and opposed on the other, a reverence for the wisdom of the ancient laws, and faith in the lawyers who knew them. In a short time *Reynolds* replaced the "natural law" of Spanish law with the "natural law" of the jurisprudence and so defeated for good Livingston's attempt to unify law and legal method. The "natural law" of article 21, which in France was intended to protect the code, became in Louisiana the means to overthrow it.[308]

CONCLUSIONS: THE FAILURE OF LEGISLATION TO DIRECT ITS OWN DEVELOPMENT

What I have to say in conclusion has less to do with what I have covered than what I have not. Throughout the work I have taken pot-shots at Gény without confronting him. That is not a well-considered approach: when you shoot at a king, you shoot to kill. So I make my homage to him here. I disagree with his *Méthode* and his method, but I confess that I cannot answer the question to which he has provided an answer: what if the code is out of date? What if the principles of natural law which it consecrates are no longer those of the society it purports to regulate? I have argued that analogy based on existing legislation, directed toward the end of the legal order is the proper means of developing law, and the *only* one which can combine legal precepts with legal method, and thus achieve a unity of things legal. But obviously if

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307. DE TOCQUEVILLE, JOURNEY TO AMERICA 106 (Lawrence trans., 1960). The passage quoted is noted to be a conversation "with a very well-known New Orleans lawyer whose name I have forgotten (1st January 1832)." However, other notes in his notebooks make it almost certain that the person was Mazureau. *See id.* at 101, 164, 171, 383.

308. I confess I am unable to understand or explain Louisiana's legal history in any other way than in terms of the bar's and the judiciary's consistent opposition to the legislature. The question is "who knows the law?" and since 1828 (or if we date it from the *coup de grace*, 1839) the legal profession's supremacy has been acquiesced in by the legislature.

What was once merely traditional control has today been institutionalized. Today the Louisiana Law Institute is charged with the responsibility to draft new codes. These are anything but self-sufficient. In the Code of Civil Procedure (1960), for example, each article is followed by an elaborate "comment" (which enjoys quasi-official force), without which the article makes no sense. This Comment refers one back to preexisting jurisprudence for elucidation of the text. By this means, the "law" remains knowable only to the lawyers—their control is maintained. Natural law is written in the heart of the lawyer.

the main body of legislative ideals (toward which the analogy should be directed), the code, is too old, if the ideals consecrated by it are no longer those of the social order, analogy is eventually going to provide a tenuous link with "reality." And to say merely that it is time to revise the code, to recodify, is cold comfort to a judge who must decide cases under the old one until this is accomplished.

Professor Peter Stein has pointed out[309] that toward the end of the Republic, when the Roman jurists ceased to see law as a static thing, there occurred a split in the techniques that they applied to written law and unwritten. Until then, there was a tendency to see *lex* as an expression of *ius*, and *interpretation* the means of developing (or rather, of "revealing," of "interpreting"), both. Under the Principate, this static conception of law no longer holds true. The jurists then begin to see two laws—*lex*, which is interpreted in the old way, and *ius*, which is developed according to new methods borrowed from the grammarians: *natura, analogia, consuetude* and *auctoritas*.[310]

This sounds remarkably like Gény: *loi* is no longer sufficient to meet the needs of society; the concept of *droit* must be expanded to include custom, "free scientific research," etc. It also sounds like the common lawyer's approach to legislation and the common law, something that Stein himself notices.

> The classical jurists approached the civil law in much the same way as Anglo-American common lawyers approach their law. . . . The law . . . is not developed by a simple method but by four methods, analogy, history, custom and utility, and the judges use whatever is most appropriate to the case in hand.[311]

"The law" in the quotation above refers, of course, to the *ius civile* and to the common law. It does not include *lex*, which must make do with *interpretation*, or legislation, which can go no farther than "legislative intention."

Except for the quoted comparison, Stein's remarks are confined to a particular development in Roman legal history. But perhaps what he is describing may be generalized. Perhaps he is writing about a particular instance of a legal phenomenon. Professor Franklin has said that legal

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309. Stein, *The Relations Between Grammar and Law in the Early Principate: The Beginnings of Analogy*, *in* ATTI DEL II CONGRESSO INTERNAZIONALE DELLA SOCIETA ITALIANA DI STORIA DEL DIRITTO 1967, 767-69 (Olschki ed., 1971).

310. *Id.* at 760-62, 767-69.

311. *Id.* at 768-69. In the second sentence, Stein is referring specifically to statements by Cardozo about the common law, but he says that Cardozo's common law method is "strikingly similar" to the way Varro developed language and the way Labeo developed law. *See id.* at 768-69.

development by analogy from existing legislation is always strongest when the legislation is "fresh."[312] So for a long time the exegetical school in France served a legitimate purpose. It adapted the Code by analogy to fit French life. But after a hundred years use, the Code was out of date, the natural law premises on which it rested were no longer those of the society it purported both to describe and regulate. Analogy was insufficient to provide all the answers. Enter Gény.

In other words, I see Gény as accomplishing through his *Méthode* what the jurists under the Principate did when they divided *ius* and *lex* and led them in different directions. For the one, *lex* is no longer seen as a declaration of *ius*; for the other, positive law no longer declares natural law, and *loi* no longer declares *droit*.

This is a common phenomenon—as old as enacted law. Legislation describes and fixes a moment in social history and if the techniques for developing its potential are sophisticated—as Roman law techniques are[313]—the rigidity inherent to its form can be overcome, without destroying its content, its essence. But there is a limit to what technique can do. (Imagine the anguish of Moreau Lislet as he tried to translate those parts and only those parts of the *Partidas* that had "force" in Louisiana.) Eventually the content's potential is spent, and yet the form, the sentence of the *lex* remains. Legal technique, always constant to the present, then has to get round and delimit what it once worked to extend.

This is a common phenomenon, but it does not seem to be seen as such. I would be less antagonistic toward Gény and his followers[314] if his work were recognized as a stop-gap measure, as an open solution to what is *really* the pressing need: fresh legislation. In that light this statement by Gény seems to me almost incomprehensibly naïve:

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312. Franklin, *supra* note 15, at 564.

313. "Les Romains ont des idées fort justes sur l'analogie employée comme complément du droit . . . ." 1 Savigny, *System* Section 46, at 287.

314.

> Gény's apparent weakness—his resistance against recognizing the full-source status of decisional law—is in the last analysis only formal. . . . The extensive reinterpretation [of the judicial process needed to overcome this weakness] requires a final and unequivocal recognition of the central position of the judge in, and responsibility for, the socially efficient actual use of law.

Mayda, *supra* note 30, at lii, lix. "In any event, Gény's analysis of the discretionary element in judicial decision-making is as valid today as it was when he wrote it in 1899. . . ." Tate, Book Review, 25 LA. L. REV. 577, 588 (1965). "Indeed, the new method [of Gény's] of necessity worked a substantial change in French legal thought, for now it must be admitted that justice is not synonymous with legislation. . . ." Loussouarn, *supra* note 154, at 243; *see* Bonnecase, *The Problem of Legal Interpretation in France*, 13 J. COMP. LEGISLATION 79, 88 (3d ser. 1930).

> The question of methodology plays a very insignificant role in the history of legal theories.[315]

What is the proper source of law when the code is too old I cannot say. I admit the problem; what I object to is solutions which do not. Unless the methods applied to old legislation openly admit the age of the legislation, what Pound has called a "general fiction" develops in the law. Method adapts the old law as it pleases to fit new life, and soon the need to relegislate is not obvious. As Pound says, general fictions tend to become entrenched and are hard to get rid of.[316]

> What I have tried to point out is that unless legal method is subsumed into the law, unless *lex* is seen to be the expression of *ius* and both are developed by the same method, then it is nonsense to talk of law—we have law*s*. Nor can we honestly say that development of such a legal system is by interpretation; the process of interpretation*s*.

315. Gény, *Méthode* No. 8.

316. POUND, *supra* note 2, at 482-83.

APPENDIX

Preliminary Report of the Code Commissioners, dated February 13, 1823

New Orleans, February 13, 1823

SIR,

We have the honor to inclose a report which we pray you to lay before the Senate.

We are,

with great respect,

your most obedient Servants.

EDW. LIVINGSTON
MOREAU LISLET
P. DERBIGNY

The Honorable the President of the Senate.

To The

HONORABLE THE SENATE

and

HOUSE OF REPRESENTATIVES

of the

STATE OF LOUISIANA

In General Assembly Convened.

THE Subscribers, Jurists, appointed for the Revision of the Civil Code, Respectfully report:

THAT they undertook the trust reposed in them by the General Assembly, under a deep impression of its importance, and have progressed in its execution with all the diligence it has been in their power to bestow, but that the work being still incomplete, it becomes their duty to report the Progress they have made; and to state the ideas they have formed of the nature and extent of the duties it is expected they should perform, that if there should be any misapprehension, it may be corrected by the Authority under which they act.

Taking the resolution under which they were appointed, in connection with the report of the committee which introduced them; they consider the principal Object the Legislature had in view, was to provide a remedy for the existing evil, of being obliged in many Cases to seek for our Laws in an undigested mass of ancient edicts and Statutes, decisions imperfectly recorded, and the contradictory opinions of Jurists; the whole rendered more obscure, by the heavy attempts of commentators to explain them; an evil magnified by the circumstance, that many of these Laws must be studied in Languages not generally understood by the people, who are governed by their provisions. The Legislative assembly of the Territory made one step toward the removal of this Evil, by adopting the Digest of the Civil Law, which is now in force: this was an extremely important measure; because it was an advance towards the establishment of system and order, in the several points of Jurisprudence, which are contained in its provisions; because it took away on those subjects, the necessity of a reference to the Spanish and Roman authorities; and because it demonstrated the practicability of a more extensive reform.—But it was necessarily imperfect: not purporting to be a Legislation on the whole body of the Law; a reference to that which existed before, became inevitable, in all those cases (and they were many) which it did not embrace.

The idea of forming a body of Laws, which shall provide for every case that may arise, is chimerical; the continual change which takes place in the state of Society; the new wants, new relations, new discoveries, which continually succeed each other, and which cannot be foreseen; would alone render it impossible to provide Laws for their Government. Therefore, even, if men could be found capable of framing regulations, sufficiently minute and comprehensive, to embrace all present relations, and to govern the intercourse of the present day, the System would in the

course of years be as inconvenient, and as ill suited to our descendants, as the antiquated Laws, of which we complain, are now to us.

But although this task was not imposed upon us, and could not be performed if it were; yet we deem it practicable, to make such a digest of positive enactments, as shall provide for most of the cases, that can now arise, leaving omissions and imperfections, to be supplied and corrected as they shall be discovered, and changes to be made, as circumstances shall require.

The question which presented the greatest difficulty to us was, whether, after embracing within the provisions of the New Code all the cases that could suggest themselves to our minds we should recommend a repeal of the pre-existing Laws altogether, or leave them so far in force as to govern the Decisions of courts in the unforeseen cases that should be omitted. That after all our care there will be many such, there can be very little doubt, they must therefore be provided for.

In other countries where Digests have been made in order to avoid the necessity of recurring to ancient, obscure and contradictory Laws, this necessity was felt, and different means have been resorted to, for the disposal of those omitted cases; according to the Roman Law, they were referred, as they arose, to the Emperor; and his decisions formed that part of its Jurisprudence, known by the name of the *Rescripts*; a Species of Legislation above all others the most liable to abuse, and which most disfigures the body of the Civil Law.

Independent of the manifest injustice of making the Law with reference to an existing case, the positive clause in our Constitution which forbids the Union of Legislative and Judicial powers, is a bar to any proposition for a similar reference in the plan we shall propose.

Spain, the first of the modern Nations, that undertook the formation of a Code, by an early Law made it death to cite in her Courts any other than the positive Laws of the Kingdom. By a Law of the Partidas it is declared that all new cases should be provided for by the King in Council. A later Law (1713) forbids the Roman Law to be read in their Courts, and in (1741) it is directed to be taught in all the Universities of the Kingdom. Amid all this confused and contradictory Legislation the body of the Civil Law was, in point of fact, always applied to in cases where the Spanish Statutes and Customs were silent, and was uniformly admitted by the tribunals not as the Common Law, but as a System which they considered obligatory on the conscience of the Judge whenever it was not contradicted by positive local Law.

In the Napoleon Code, that rich Legacy which the expiring Republic gave to France and to the world, we have a system approaching

nearer to perfection than any which preceded it. It was evidently designed by the wonderful genius which planned, and the learned Jurists who executed that great work that it should supersede all the other Laws of the country; and be for future cases, the only rule of conduct,--for the Law which gave it operation declares, that "from the time it goes into operation, the Roman Laws, the Ordinances, the general or local Customs, the Statutes and regulations shall cease to have any force in the matters which form the object of the Code." Yet the Courts and the Commentators, unwilling it would seem, to render their knowledge of the previous laws, useless and unavailing; clung to the shreds and patches of the ancient system, and consider them as their guide in all cases which do not come within the express provisions of the Code. It is for these reasons that the Spanish Digests have done very little, and the French Code not so much as might have been expected in correcting the evil of continual references to the pre-existing laws.

In our case we have thought it our first duty to comprise in the several Codes we were directed to prepare, all the rules we deem necessary for stating and defining the rights of individuals in their personal relations to each other, for giving force and effect to the different modes of acquiring, preserving and transferring property and rights, and for seeking civil redress for any injury offered to either. These rules, properly developed and distributed will form the Civil and Commercial Codes, and the System of Judicial procedure which we are directed to furnish for your consideration.

In the execution of the work we shall keep a reverent eye on those principles, which have received the sanction of time, and on the labors of the great Legislators, who have preceded us. The Laws of the Partidas, and other Statutes of Spain, the existing digest of our Laws, the abundant stores of the English Jurisprudence, the comprehensive Codes of France, are so many rich mines from which we can draw treasures of Legislation; and where they differ, and we doubt we shall apply to that oracle to which an eloquent writer asserts "All nations yet appeal, and from which all receive the answers of eternal truth;" to those inspirations of prophetic Legislation, which enabled the Roman Jurists to foresee almost every subject of civil contention, and to establish principles for the decision of Cases, which could only arise in a state of Society different from their own, and maxims applicable to all nations, at all times and under every form of Government.

We shall draw largely from these sources but we would not from thence have it inferred that we think it our duty to innovate in any case where a change is not called for by some great inconvenience in the

existing Law, either felt, or foreseen, or some inconsistency in the present system with the provisions of that which we mean to offer. When these cases occur we shall not be deterred by the fear of innovation from proposing such changes as in our opinion are necessary to render the plan consistent with itself, and with the unchangeable principles of justice, which we shall steadily keep in view. But we pledge ourselves that no new provisions shall be introduced of which we shall not scrupulously have examined the tenor, and carefully considered every consequence, that can occur to us; and in all cases they shall if possible be borrowed from some Code of which the operation is known, rather than from our own resources.

Where however, local causes or other considerations require the establishment or rules never before applied, it shall be our endeavor to frame them in accordance with the spirit of the Legislation on which they are to be engrafted and to impress on them a character that will entitle them to equal duration.

In all Cases where the materials of our work shall be drawn from written Laws, we shall deem it our duty to examine the decisions that have taken place under them, in order to fix by positive enactment, disputed constructions, to explain obscurities which have embarrassed tribunals in their decisions, to avoid evils which those decisions have rendered apparent, to supply omissions which experience has discovered and to restrain the Legislation of precedent, where it has gone beyond the letter or the true intent of the statute.

These are the principles which will guide us in performing the task we have undertaken, these are the sources from which we shall draw the material that are to compose the work. At present we contemplate no material change in the order and great divisions of our Civil Code, some new titles and many additional articles will be introduced, and the whole will be presented in the form of a new Code providing for as many cases as can be foreseen and rendering a reference to any other authority necessary in as few cases as our utmost care can avoid.

To what authority shall that reference in these cases be made? This is the great question which we anticipated in the beginning of this report and of which it is a duty incumbent on us, to give you our solution, that your wisdom may correct if it erroneous, or confirm us in our conclusions if they be well founded.

To determine what is the true meaning of the Law when it is doubtful; to decide how it applies to facts when they are legally ascertained in the proper office of the Judge—The exercise of his discretion is confined to these, which are called CASES OF

CONSTRUCTION: in all others he has none, he is but the organ for giving voice, and utterance, and effect, to that which the Legislative branch has decreed. In cases where there is not Law, according to strict principles he can neither pronounce nor expound, nor apply it. Governments under which more is required from, or permitted to, the Magistrate are vicious because they confound Legislative power with Judicial duties, and permit their exercise in the worse possible shape, by creating the rule, after the case has arisen to which it is applied. This is a vice inherent in the Jurisprudence of all nations governed wholly, or in part, as England is by unwritten Laws, or such as can only be collected from decisions. In such a country where a precedent cannot be found, one must be made; in other words where the Judge can find no Law that applies to his case he must make it; he must however cautiously avoid saying that he does so. Although dormant from the beginning of time, although never laid down by any Jurist nor applied by any Judge; it is by legal fiction supposed always to have existed: and from the moment that he creates and applies it, the rule acquires all the veneration due to antiquity and becomes, under the name of a precedent, the evidence of pre-existing Law and a guide to future decisions. Where the Judge is not directed by the Legislative power, this irregular exercise of his own, is not to be imputed to him as a fault, it arises from the nature of things, for in civil cases it is a necessary alternative, that you must furnish a rule to the Judge, or suffer him to make or select one. In criminal Jurisprudence there is no offence but where there is a breach of positive Law, and the Judge must acquit, wherever the law is silent; but in the litigation of individual rights, he must decide between the two parties, and in order to do this, if he can find no rule, he must of necessity frame one. It is therefore the duty of the Legislature to prevent this necessity; it can only be done by providing for as many cases as can be foreseen, and indicating some source to the Judge from which he is to draw the rules for guiding his discretion in the others.

We have seen that in England this source, in cases where there were neither precedent nor authority, was the undefined and undefinable common Law; and that there the Judge drew his own rule, sometimes with Lord Mansfield, from the pure fountain of the Civil code, sometimes from the turbid stream of doubtful usage, often from no better source than his own caprice. That in France, because the Great Code had no provision on this subject, they were obliged to make out these supplementary rules of decision, from the rubbish of ancient ordinances, local customs and forgotten edicts; and to introduce in all omitted cases, the confusion of jurisprudence from which it was the intent of the Code

to relieve them. We in the execution of our trust determined that we should not perform it in the manner required of us; unless we relieved your Courts in every instance from the necessity of examining into Spanish Statutes, ordinances and usages, Latin Commentaries, the works of French and Italian Jurists, and the heavy tomes of Dutch and Flemish annotations, before they could decide the Law; and at last giving their opinions under the mortifying doubt, whether in some book not now to be found in the state, a direct authority might not hereafter be discovered, which would shew their decision to be illegal; unless we gave to your constituents a Code accessible and intelligible to all; and unless we removed the oppression, the reproach, the absurdity, of being governed by laws, of which a complete collection has never been seen in the state, written in languages which few, even of the advocates or judges, understand, and so voluminous, so obscure, so contradictory, that human intellect however enlarged, human life however prolonged, would be insufficient to understand, or even to peruse them.

We could not effect this without recommending an express repeal of all former laws and usages defining civil rights and indicating the means of preserving and asserting them. This we have accordingly done; and to govern the decisions of the Judge in all cases, which cannot be brought within the purview of the Code, have proposed that he should determine according to the dictates of natural equity, in the manner that "amicable compounders" are now authorized to decide, but that such decisions shall have no force as precedents unless sanctioned by the Legislative will. And in order to produce the expression of this will, and progressively to perfect the system, the Judges are directed to lay as stated times, before the General Assembly, a circumstantial account of every case for the decision of which they have thought themselves obliged to recur to the use of the discretion thus given; while regular reports of the ordinary cases of construction, to be made by a commissioned officer, will enable the Legislative body to explain ambiguities, supply deficiencies and to correct errors that may be discovered in the Laws by the test of experience in their operation.

By these means our Code, although imperfect at first, will be progressing towards perfection; it will be so formed that every future amendment may be inserted under its proper head, so as not to spoil the integrity of the whole; every judicial decision will throw light on its excellencies or defects. Those decisions will be the means of improving legislation, but will not be laws themselves; the departments of government will be kept within their proper spheres of action. The Legislature will not judge, nor the Judiciary make laws. The whole body

of our jurisprudence being brought under the inspection of the General Assembly, they will be enabled by a comprehensive view of the whole ground of legislation, to avoid those inroads on the unity of its design which have been made by statutes hastily passed for local or temporary purposes; and at no very remote period, we may hope to have the rare and inestimable blessing of written Codes, containing intelligible and certain rules to govern the ordinary relations and occurrences of life, the operations of commerce and the pursuit of remedies by action. The consequences of such an improvement we may readily anticipate; security to property, stability to personal rights, certainty in commercial contracts, a decrease in the number of litigated questions, dispatch in their decisions when they arise; all these effects will be produced in proportion to the accuracy of the work, and to the extent which is given to its provisions. But if performed only with diligence and attention, directed by moderate ability, it cannot fail to produce them in a very beneficial degree.

We are justified in this conclusion, not only by reason, but experience in the operation of the Digest of the Civil Laws now in force. Its rules being concise, and in general easily understood, have been read by the people and have enabled them to avoid disputes, on the subjects embraced by its provisions, that without them, would have led to endless litigation; and if some parts have given rise to questions of construction, they have arisen chiefly either from a faulty translation, or from errors inevitably attending a work so hastily compiled. Sufficient time was not given for an accurate examination of the existing Law in its various sources. No decisions had then been reported to throw light on their operation, and the unaided exertions of one person were not sufficient for the completion of the task. The manner in which we have begun the execution of ours will, it is hoped, enable us to avoid some of those errors, and given an opportunity to the Legislature easily to correct others when they occur. Every proposed alteration, whether by repeal or amendment, of any article in the old Code, or by the insertion of any new title or article, will be fairly written in one column of the page and the reasons for proposing it in another. This, although originally the sole work of that one of us to whom the consideration of that part of the Code was assigned, in our division of the labor, will be discussed by all; and when finally modified or agreed to, will be submitted with the entire work, to the consideration of the Legislature. In order that they may judge of it with facility, as well as that it may be submitted to the consideration of others, when observations may be important, we respectfully suggest the propriety of making provision for the printing of

a number of copies sufficient for this end. It may also, we hope, not be deemed improper to observe, that as the termination of this very important work is an event impatiently expected by the people of the state, that object could be more speedily attained by the addition of another Jurist to our number.

The progress already made justifies a belief, that if not the whole, at least a very considerable portion of the Code will be ready for the consideration of the Legislature at its next session. The amendments to the first book are in considerable forwardness, by one of the commission; another is equally advanced in several titles of the third book, and the same gentleman has made the sketch of a Code of Procedure. In the division of the preparatory labor, the draught of the Commercial Code was assigned to a third member of the commission, who has begun and made some progress in the work.

In giving the extensive construction to our duties, which it has been the object of this report to develop, we hope it may not be inferred that we are influenced by any improper confidence in our own powers to execute them. Fully aware of the difficulty, the high responsibility, of the task, of the intellectual as well as physical labor required for its execution, we never flattered ourselves with the hope that we should present a system for your consideration without errors and omissions; but we did think, that with great diligence, much care, and the utmost exertion of our abilities, we might furnish a body of Law, a system; and that it was better to offer a whole, an integral work, however imperfect, than to present a series of unconnected amendments and corrections, that must have required continual reference to the existent law, in all its diversity of language and origin; that could not be compared with the old statutes without great difficulty; or be understood by any but the professed legist; and that consequently would provide only a partial remedy for the evil of a confused and uncertain jurisprudence, which it was the intent of the Legislature to remove.

In the adoption of this plan, we were actuated by the desire to assimilate the projected improvements in the branches of jurisprudence which it embraces, with those now progressing in another; and by our joint labors, corrected and improved by the wisdom of the Legislature, to furnish our fellow citizens with a single book, in which each may find an intelligible and concise rule to ascertain his rights, direct him in his duties, regulate his contracts, explain his civil relations and guide him in his applications for justice, while the other work, to which we have alluded, unconnected with this, will complete the system, and shew him what acts are offences, and what penalty is attached to their commission.

To be entrusted with such a work we consider the highest honor our country can bestow. Without daring to hope that we shall perform it satisfactorily, we promise all we can answer for—diligence, fidelity, and the best exertion of our faculties in the task.

EDW. LIVINGSTON,
MOREAU LISLET,
P. DERBIGNY.