

ARTICLES

CIVIL RECODIFICATION IN AN ANGLOPHONE MIXED JURISDICTION: A BRICOLEUR'S PLAYBOOK

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I. THE EMPIRE OF THE CIVIL CODE; THE PROTECTORATE OF RECODIFICATION

Classical mixed jurisdictions are durable emblems of interpenetrating legal traditions. Prefiguring the direction and scope of scholarly and judicial inquiries, the process of

interpenetration characterizes an array of source materials that a sister common law jurisdiction might regard as exotic and perhaps irrelevant. In a mixed jurisdiction's legal institutions, an eclectic tendency over time may harden into an aesthetic, a style, and eventually a method. In mixed jurisdictions, lawyers' arguments appeal routinely to both common law and civilian authorities. The mixed system's courts may regularly appeal to Roman texts (e.g. Scotland, Louisiana, and Puerto Rico) and modern French legislation (e.g., Quebec).¹ Law schools in a mixed jurisdiction appoint scholars for courses bearing a Roman imprimatur. Over time, the courses frequently dovetail with modern comparative courses, European law, admiralty, and a host of subjects that blend common law and civilian insights (e.g. international law of sales). Louisiana has supplied the template for our brief portrait. Quebec, Scotland, and Puerto Rico also fit the suggested pattern. Colleagues from other mixed jurisdictions, both codified and non-codified, likely recognize some of these intellectual patterns in their own faculties.

The ageing of a jurisdiction's civil code, whether original legislation or itself an update of the original, raises the stakes for the legal community. A civil code may seem outdated to the legal community, and lawyers may lament its language as quaintly Victorian, but a civil code preserves a central role in the lawyers' self-differentiation from their counterparts elsewhere. At an extreme, the code seems to be elevated to a kind of secular scripture. The civil code is not the Bible, but it may function as a civil constitution as the French Civil Code did in the aftermath of the Revolution.² Despite these traditional forces, pressure for the civil code's modernization may begin to fray a community's bonds with it, and a spirit of recodification, more cautious than the initial spirit of codification, will take hold.

Because a civil code's foundations are anchored in a Romanist lexicon, it is fair to say that no code, not even Justinian's compilation, has ever been written on a blank slate. Nonetheless, the original composition of a code provides wide

1. The recently adopted Quebec Civil Code, for instance, has been very influential on Louisiana's jurisprudence. *See, e.g.*, Civil Code of Quebec, S.Q. 1991 (Can.).

2. For arguments that the French Civil Code was a kind of secular scripture, see Shael Herman, *From Philosophers to Legislators and Legislators to Gods: The French Civil Code as Secular Scripture*, 84 ILL. L. REV. 612 (1984).

latitude for innovation. *A fortiori*, history and expectations, having intervened from the era of the original code to the piecemeal enactment of the recodification project, restrain the legal community's innovative impulses. To fulfill the community's expectations in a mixed jurisdiction, a recodification project typically continues the character of a legal system that the original civil code defined. Hence the contrast in the subtitle above: a protectorate, having gained confidence in an identity separate from the empire that established and nourished it, renovates its laws consistently with its new character. The legal community's conservatism prompts it constantly to check proposed innovations against the imperial legislation that formerly regulated the protectorate.

A researcher's reverence for the law inherited from the founding empire may prompt him to explore not only the law of the parent nation, but also the laws of nations inspired by the parent nation's law. To illustrate the researchers' eclecticism in selecting foreign materials, this Article concentrates upon the revision of the Louisiana Civil Code's obligations titles, enacted in 1984; it then explores briefly the more recent sale revision.

From the Louisiana Civil Code's (the Civil Code) enactment in the early nineteenth century until 1984, its obligations titles underwent a few basic changes. Judicial interpretation of the original obligations and sales regulations produced complex jurisprudential encrustations. For both revisions (sometimes collectively, revision), the reporter was the late Saul Litvinoff,³ one of the best-educated and most versatile foreign civilians to have graced Louisiana's law school faculties during the twentieth century. Asked to explain his legislative agenda, Professor Litvinoff usually answered laconically that he was engaged in modernizing and streamlining the regulation of obligations and sales. If he anticipated bold innovations, he did not say; and most lawyers sidestepped questions about them, as if following a policy of "don't ask, don't tell."

Sensitive to the Louisiana legal community's suspicion of legislative change, Professor Litvinoff, as the eventual revision evidenced, understated the scope of his drafting program. He would probably have agreed that his legislative approach owed something to Llewellyn's "situation sense," an intuition that

3. See *infra* note 8.

impelled a lawyer toward appropriate legal solutions for facts that were concededly indeterminate. The idea of situation sense, traceable to the German scholar, Levin Goldschmidt, captured a judge's vision of a judgment that would make it compatible with both black letter rules and the expectations of the mercantile community.⁴

A. BACK STORY: OF SAUSAGE, LEGISLATION, AND CLOSETED SKELETONS

According to a popular adage, one should never watch the production of either sausage or legislation. I leave to the reader's imagination the production of sausage. We offer here a back story about the "production" of legislation, that is, the revised code regulation of obligations, effective in 1984. In telling this story, one must balance the reader's delight in eavesdropping on private deliberations against the hazard of outing skeletons from a closet for all the world to see. A well-wrought code gives an impression of elegance, coherence, and completeness. Our back story displays none of these characteristics; for the revision, like any other legislation, emerged from a crucible in which jurisprudence, policy arguments, and strong personalities struggled with one another over many years. What remains of that struggle is a script consisting of the revision itself and explanatory comments that appear interstitially among the new code articles.

One could never be confident of the eventual Louisiana product because the drafting exercise was carried out in a

4. On the role of "situation sense" in Llewellyn's thinking, see John L. Gedit, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 369-70 (1988). Llewellyn frequently tried to explain situation sense. Yet, the idea seems usually to have been mysteriously suspended between conceptualism and instrumentalism. In the Common Law Tradition, he defined situation sense as "type facts in their context and at the same time in their pressure for a satisfying working result." KARL LLEWELLYN, COMMON LAW TRADITION: DECIDING APPEALS 60 (1960). See also Todd Rakoff, *Social Structure, Legal Structure, and Default Rules: A Comment*, 3 S. CAL. INTERDISC. L.J. 19, 22 (1993); Todd Rakoff, *Implied Terms of Contracts: Of "Default Rules" and "Situation Sense,"* in GOOD FAITH AND FAULT IN CONTRACT LAW 191, 208 (Jack Beatson & Daniel Friedmann eds., 1995). Many solutions based upon situation sense seem self-evident now, but the bench and the bar resisted them when they were proposed. For the first sixty years of the twentieth century, contract theory was virtually married to the mirror image rule for offer and acceptance, and lawyers questioned a principle of contract formation that salvaged agreements by discounting inconsistent terms or filling in the terms from a standardized category of gapfillers.

committee led by a reporter. Once the entire projet was finished, it was then submitted to debates in the full council of the Louisiana State Law Institute; finally it passed through several committees of the legislature. At any of these stages, a lawmaker or a committee member could throw a proverbial “monkey wrench” into the revision—over the years, a number of projects suffered this fate. The metaphorical wrench might take the form of a substitute term, a new definition, or even a new court decision; because the revision, like the original code, sought an organic unity, any of those ideas, however trivial they seemed, could distort the regulation of entire concepts.

It is impossible to discuss all the arguments pitched about during the revision process. Most of the time, the ongoing struggle was subtle; like good warriors, good lawyers are adept at holding their friends close and their enemies closer. One never knew whether the appellation “learned brother at the bar” would introduce a lethal argument. A lawyer could propose an anodyne modification that he thought would better protect his clients. To avoid explosive arguments that might do serious harm to the revision’s unity, the comments frequently made concessions and clarifications. Here we examine the working style of the chief reporter, Saul Litvinoff; his recognition of the character of the legal community, that is, his intuitions about ideas the lawyers were likely to accept or reject; and his unacknowledged uses of foreign legal materials in the revision. Of course, we are also concerned with the raw legal materials that the revision reshaped—these might be provisions from the prior civil code, legislative history, or treatises and law journals. Finally we shall see in play a powerful situation sense on the part of the reporter and the committee, for no matter how elegant and nuanced a regulation, it would be dropped if they thought it outside a range of solutions that reasonably reflected the legal community’s experience. For this, the reporter relied extensively upon his committee members; they were typically practitioners and judges with long practical experience, while the reporter himself had never practiced law in Louisiana.

B. BRICOLAGE

Professor Litvinoff was a master of “bricolage.” The celebrated anthropologist Claude Levi-Strauss first used the French term bricolage to characterize the way in which a society constructed cultural artifacts by scavenging among shards of pre-

existing artifacts rather than by creating an entire project *ex nihilo*.⁵ Realizing that his mission involved recodification, not codification from scratch, Professor Litvinoff embarked on a bricolage project of his own. In a quest for elegant legislative solutions for the revision, Professor Litvinoff surveyed United States law, Louisiana law, and foreign materials. His revision cut away thicket of rules through which the legal community had long sought clear paths. The revision sometimes compressed twenty original articles into a handful of lapidary provisions. For example, the regulation of vices of consent, stretching over many articles in the original Civil Code, was cut down to a relatively few epitomes and maxims.⁶ At other times, a series of diffuse rules was consolidated or enlarged to account for new jurisprudential and scholarly directions. To be expected from a scholar of Saul Litvinoff's intellectual stature, many innovations, sometimes acknowledged and at other times unremarked, were imported from foreign sources into the Louisiana revision.⁷ Trained in both Argentine and continental law,⁸ Professor

5. HARRY AUSTRYN WOLFSON, *THE PHILOSOPHY OF THE KALAM: THE STRUCTURE AND GROWTH OF PHILOSOPHIC SYSTEMS FROM PLATO TO SPINOZA* 355 (1976) (defining "*ex nihilo*" as meaning "from nothing," a term frequently associated with theological arguments about the time before the world's creation).

6. The nature of the transformation is revealed in direct comparisons of former Civil Code articles with new ones. A reader familiar with the Civil Code's former regulation of the vices of consent will appreciate the compression of the vices of consent in current Louisiana Civil Code article 1948: "Consent may be vitiated by error, fraud, or duress." LA. CIV. CODE ANN. art. 1948 (2012). The reader will likely appreciate the lapidary formulation of current Louisiana Civil Code article 1949, which links the theme of cause implicit in the former regulation with error: "Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party." *Id.* art. 1949. For a sketch of the transformation of the regulation of consent in the revision of 1984, see Shael Herman, *Under My Wings Every Thing Prospers: Reflections upon Vernon Palmer's The Louisiana Civilian Experience—Critiques of Codification in a Mixed Jurisdiction*, 80 TUL. L. REV. 1491, 1535 (2006) [hereinafter Herman, *Under My Wings*]. Hereafter, "current" or "new" designates the Civil Code revision of obligations, 1984. Unless otherwise indicated, the label "old" or "former" designates provisions of the Louisiana Civil Code (1870), LA. CIV. CODE (1870), available at http://books.google.com/books?id=ZtsXAAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

7. On the absorption of foreign influences into the revision of the Louisiana Civil Code, see generally Agustin Parise, *A Constant Give and Take: Tracing Legal Borrowings in the Louisiana Civil Law Experience*, 35 SETON HALL LEGIS. J. 1 (2010)..

8. The scope of Litvinoff's continental scholarship was demonstrable from his accurate citation, from memory, of provisions of foreign codes. However, this was not

Litvinoff was well equipped to transmit and adapt these foreign sources. He would have been impressed by the Argentine Civil Code's kinship with the early Louisiana Civil Code, for the latter substantially influenced the former. To close a circle begun over a century ago, the reporter's revision relied extensively, though sometimes covertly, upon the Argentine Civil Code.

C. CULTURAL REALITIES INFLUENCED THE REVISION PROGRAM

Although Professor Litvinoff's complex motivations are beyond our inquiry, we may nonetheless profit from a general orientation to the cultural realities that he would have confronted. First, Louisiana is politically and socially conservative.⁹ Louisiana lawyers have long resisted comprehensive code revision, preferring the devils they know over those they do not. Locals may have instinctively rejected an obvious foreigner with a self-conscious Argentine accent if he had parachuted onto the bucolic Louisiana State University campus for a tailgating party before a game. But Professor Litvinoff's decades of teaching at LSU and his devotion to the civil law made students proud of their heritage and inspired them to embrace him as a local, though a local unlike any other.

Louisiana's unique status as the only American state among fifty having a civil code makes Louisiana civilians solitary and sometimes insecure. Grippled by a fortress mentality, many lawyers seem bedeviled by a fear that common law institutions threaten the state's identity.¹⁰ Many lawyers claim that their

surprising, as he came to class without notes or a textbook and could hold forth without lapse for hours. His scholarship ranged widely over Roman law, French law, German law and American law. *See generally* Saul Litvinoff, *Force Majeure, Failure of Cause and Theorie de l'Imprevision: Louisiana Law and Beyond*, 46 LA. L. REV. 1 (1985). It is regrettable, as I suggest in this essay, that he did not speak more openly about the Argentine influences on the code revision.

9. For further discussion of this characteristic of the legal community, see generally Kenneth McNorrie, *The Legal Regulation of Adult Domestic Relationships*, in *MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND* 164-71 (V. Palmer & E. Reid eds., 2009).

10. *See, e.g.*, *Minyard v. Curtis Products, Inc.*, 205 So. 2d 422 (La. 1967) (for a consideration of the Louisiana (i.e. non-American) unjust enrichment action, the action de in rem verso). Once the case law had developed the action, some judges seized the opportunity to discover the action's roots in French law. *See, e.g.*, Albert Tate, Jr., *The Louisiana Action for Unjustified Enrichment: A Study in Judicial Process*, 50 TUL. L. REV. 883 (1976). *See also* *Ducote v. Oden*, 59 So. 2d 130 (La. 1952), in which the Louisiana Supreme Court rejected a claim of promissory estoppel on the basis that it had no place in Louisiana Law. This rejection betrayed a certain

counterparts elsewhere in the country misunderstand them. They often express resentment toward powerful national law firms that display “my way or the highway” attitudes and assume without negotiation that the law governing a transaction must be theirs because they have no interest in ours. Professor Litvinoff’s dedication to Louisiana law likely allayed local lawyers’ insecurity and enhanced their appreciation of their own worth.

Most private law practitioners have resolutely committed themselves to living under the empire of the Civil Code; it has become a feature of their identity even if they have only a passing familiarity with it. Even if a particular Civil Code article has been suppressed, jurisprudential interpretation of the article still influences the bench and bar. As American lawyers, they usually lack other linguistic skills that would readily enable them to explore foreign law for insights into legislation and doctrine.¹¹

judicial myopia because estoppel in many forms was early entrenched in Louisiana law, and some of these forms, i.e. estoppel by deed, closely resembled promissory estoppel. I wrote chidingly in 1984 that “to the extent that the judges have seen detrimental reliance as a ‘foreign importation,’ they have occasionally rejected it on a doctrinaire basis without fully exploring its practical utility.” Shael Herman, *Detrimental Reliance in Louisiana Law—Past, Present, and Future (?): The Code Drafter’s Perspective*, 58 TUL. L. REV. 707, 715, 744-50 (1984) [hereinafter Herman, *Detrimental Reliance in Louisiana Law*]. Among Louisiana lawyers, a countervailing impulse may also prompt them to understate their pride in their own law; if, for example, Louisiana legislation deviates too dramatically from constitutional norms, it may be stricken as unconstitutional. In *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), the United States Supreme Court blocked a mortgage foreclosure on the ground that the head and master provision of the Louisiana Civil Code offended the equal protection clause.

11. While we are unlikely to find judicial opinions advertising this incompetence currently present in the bar, the foreign language incompetence is generalized across society. For instance, after the terrorist attacks of 9/11, a committee of the Modern Language Association assumed the task of assessing a crisis in foreign language learning in the U.S. Said the committee:

In fulfilling [the] charge, the committee found itself immersed in a dynamic, rapidly changing environment marked by a sense of crisis around what came to be called the nation’s language deficit. The United States’ inability to communicate with or comprehend other parts of the world became a prominent subject for journalists, as language failures of all kinds plagued the United States’ military interventions in Afghanistan and Iraq and its efforts to suppress terrorism. The lack of foreign language competence is as much a fact within academic disciplines as in the society at large. According to a recent MLA survey, only half of the 118 existing Ph.D. programs in English require reading knowledge of two additional languages. At the graduate level, language requirements are notoriously under-enforced across the humanities and the social sciences. Citation indexes reveal a steady decrease in the use of non-English sources in research across the humanities and social sciences, a deficiency that impoverishes intellectual debate. Four-year language majors often graduate with disappointingly low levels of linguistic ability.

Their daily research depends upon standard English electronic databases such as Westlaw and LexisNexis. This dependence entails heavy reliance upon case law for practical strategies.

Given these realities, a code drafter, like Dante's Virgil, assumes the role of a trusted guide whom law students and lawyers alike count upon for illumination of the surest paths through the "dark woods" (*selva oscura*).¹² The reporter must render accessible the foreign materials that the lawyers themselves cannot read. Recognizing the transcendent importance of case law for local lawyers, he must distinguish leading cases from misleading ones. Professor Litvinoff was ideal for these functions, for his long years of teaching and research had earned him great stature in the legal community.

D. CONVERGENCE OF SPHERES OF LAW IN ACTION AND LAW IN BOOKS

As a general proposition, a reporter's success depends upon his sympathy for the legal community's virtues as well as its anxieties and prejudices. In the intellect of an alert reporter, the law in the books should meet and even converge with the legal community's collective understanding of the law in action.¹³ The

Opportunities to study abroad and to do course work in the target language are eroding in favor of short-term study in which courses are in English. In addition, the need to work prevents many students from studying abroad at all.

See MODERN LANGUAGE ASS'N, FOREIGN LANGUAGES AND HIGHER EDUCATION: NEW STRUCTURES FOR A CHANGED WORLD, (May 2007), *available at* http://www.mla.org/pdf/forlang_news_pdf.pdf (internal citations omitted). Louisiana lawyers are as incompetent in foreign languages as their counterparts elsewhere in the U.S. The deficit in foreign languages is a national disgrace. No law school in the U.S., so far as I am aware, requires proficiency in a foreign language even if it advertises itself as a great international mecca. Furthermore, of all the books published in the U.S. in a given year, less than 3% are translations. See *Three Percent: A Resource for International Literature at the University of Rochester*, UNIVERSITY OF ROCHESTER, <http://www.rochester.edu/College/translation/threepercent/index.php?s=about> (last visited Dec. 23, 2012). Our bench and bar are woefully isolated from other legal systems, and they seem unaware of the condition. Some justices of the Supreme Court have aggravated the situation by condemning colleagues whose opinions refer to foreign legal sources.

12. DANTE'S INFERNO, canto I, ll.1-2 (Mark Musa trans., Indiana Univ. Press 1971) ("Nel mezzo del cammin di nostra vita mi ritrovai per una selva oscura, ché la diritta via era smarrita.") ("Midway on life's journey, I found myself/In dark woods, the right road lost.").

13. In contrasting the two spheres, one should recall that "law in action" and "law in the books" have a multitude of connotations and a complex ancestry traceable to

law in action is always in flux. Typically requiring intensive dialogue with practitioners, it is more elusive than the law in the books that evolves slowly in dialectic with case law, doctrine, and the law in action. Because practitioners are ethically constrained to keep their own counsel, they are characteristically reluctant to discuss their clients' ongoing concerns. If the law in the books for a particular institution overlaps with the law in action, then the reporter may proceed straightforwardly in his drafting tasks. But radical incompatibility between the two spheres can tax a drafter's ingenuity and improvisatory skills.

Paradoxically, novel legislative formulations frequently prompt a sense of *déjà vu* in lawyers suspicious of unnecessary change. At least, the protectorate's conservative impulse makes *déjà vu* an ideal toward which the revision should aim if the legal community is to embrace a particular formulation. This ideal is consistent with "path dependence," a psychological phenomenon that prompts someone to solve a new problem by reference to an old solution in his repertoire.¹⁴ Path dependence surely characterizes a lawyer's recourse to precedent, which calls for deriving a new solution from an older one that was used in an analogous situation. Creatures of habit anchored in statute and precedent, lawyers depend crucially upon path dependence. The legal system's legitimacy rests upon rules consistently applied to similar fact patterns. *Plus ça change, plus c'est la même chose*.¹⁵

In several respects, the revision stimulated the legal community's sense of *déjà vu*. A companion comment might moor newly formulated rules in enduring principles. Sometimes a comment has drawn attention to newly discovered continuities by

German sociology. Deriving from Max Weber's sociological theories, law in action is law as enforced by officialdom of the bureaucratic state. The contrast between the two spheres highlighted law as observable behavior on the part of actors in the legal community, on one hand, and law as intended meaning, rules, ideals, norms, and doctrinal reasoning on the other. The science of law in action, according to legal realists such as Karl Llewellyn, had to be a social science, not an abstract discipline. Michael Ansaldi, *The German Llewellyn*, 58 *BROOK. L. REV.* 705, 750 (1992).

14. Path dependence may be defined as the phenomenon of one's future decisions on any particular problem as being limited by those she has already made, even though past circumstances giving rise to the decision are no longer relevant. A good example of path dependence is the entrenchment of the QWERTY typing layout, which now seems frozen in place. See John Bell, *Path Dependence and Legal Development*, 87 *TUL. L. REV.* (forthcoming Spring 2013).

15. "The more things change, the more they remain the same." JEAN BAPTISTE ALPHONSE KARR, *LES GUEPES* (1849).

expanding a narrowly drawn pre-revision rule to new fact patterns previously thought beyond the rule's scope. A sense of *déjà vu* might also be promoted by seeding new code formulations with terms used elsewhere in the civil code or outside the code itself, in a branch of law closely allied with a code regulation. This technique is elaborated below in our discussion of insolvency in revocatory and oblique actions sought in a bankruptcy context.¹⁶

E. EXAMPLE OF MODEST INNOVATION FOR AN INSTITUTION AFFECTED BY COMPATIBLE SPHERES

An uncomplicated drafting approach characterized the revision of the topic of consent, a universal theme in both common law and civilian traditions. The traditions converge notably in a lawyer's understanding of offer and acceptance. The original civil code extensively regulated consent, and a rich jurisprudence flowed from the daily dicker and bargain of merchants as well as inconsistencies among the articles and inartful translations.¹⁷ The revision concisely transformed the pre-existing regulation into a relatively brief cluster of articles. Because the revised titles for obligations and sales were prepared over several years and submitted on a piecemeal basis to legislative advisory committees, the theme of consent afforded a productive starting point for the revision. As I observed in committee meetings, the intensive discussion of this universal theme permitted the committee members to build confidence among themselves and the reporter.

Although some members of the obligations revision committee had not been Professor Litvinoff's students, they had acquired in practice knowledge of problems surrounding the theme of consent and its intricate links with remedies. This was

16. See *infra* text accompanying notes 70-74..

17. For example, article 1805 of the Louisiana Civil Code of 1870 followed the mirror image rule of offers and acceptances: "The acceptance to form a contract must be in all things conformable to the offer: any condition or limitation contained in the acceptance of that which formed the matter of the offer, gives him, who makes the offer, the right to withdraw it." LA. CIV. CODE art. 1805 (1870). The principle of previous article 1805 inspired article 1943 in the revision. "An acceptance not in accordance with the terms of the offer is deemed to be a counteroffer." LA. CIV. CODE ANN. art. 1943 (2012). The revision of sales regulation deviated from the mirror image rule, adapting instead a UCC pattern for contracting by an exchange of documentary forms. See discussion *infra* notes 137-40 and accompanying text.

likely true even if a committee member had not systematically studied the Civil Code's regulation of consent. It should be recalled that many Louisiana lawyers, since Louisiana's statehood, have concentrated exclusively upon common law courses in law school.¹⁸ Navigating their way in local practice, these common law lawyers have serendipitously acquired civilian notions on the job in preparing cases for individual clients. Their school-day concentration on common law doctrine helps explain why legislative provisions and their companion comments often exhibit a spirit of "bijurality"¹⁹ that traces both common law and civilian underpinnings of a concept or institution. Bijurality functioned as a compass for the lawmaker in quest of paths through the thicket.

II. DIVERGENCES BETWEEN LAW IN ACTION AND LAW IN THE BOOKS; CHARACTERIZING THE LAW IN ACTION

Informed by a social vision anchored in the early nineteenth century, the vintage of the obligations titles made for discontinuities between the law in the books regarding a specific institution and the corresponding law in action. Facing such discontinuities, the reporter's ideal was a comprehensive

18. This is inevitable because, first, many Louisiana lawyers earned their degrees elsewhere in the U.S., or even abroad; as such, they never had any Louisiana code courses in school. Secondly, many law students in the Louisiana law schools no longer take code courses, and just sit for the bar exam after a bar cram course, which is not a substitute for regular code courses.

In contrast, Edward Livingston, a close confidant of President Jefferson and a prominent New York political figure, left New York with creditors in pursuit. He settled in Louisiana before 1812, the date of its statehood. Trained for the New York bar, Livingston also studied civil law systematically in France when he represented the young American republic and witnessed the incipient French revolution. Livingston's impressive command of both French law and the common law is sketched in Herman, *Under My Wings*, *supra* note 6, at 1513-15; Shael Herman, *The Louisiana Code of Practice (1825): A Civilian Essai Among Anglo American Sources*, 23 TUL. EUR. & CIV. L.F. 51 (2008); Shael Herman, *The Code of Practice (1825): The Adaptation of Common Law Institutions*, 24 TUL. EUR. & CIV. L.F. 207 (2009).

19. This bijurality seems definitional for mixed jurisdictions, and especially those like Louisiana, in which both civil and common law institutions co-exist in an English-language lexicon. The bijurality is reflected in current Civil Code article 1967, a codification of cause enhanced by a principle of detrimental reliance. The comments to article 1967 and those accompanying the current regulation of consent display this bijurality. For scholarship on detrimental reliance in Louisiana law, see annotations of law review articles and cases accompanying LA. CIV. CODE ANN. art. 1967 (2012).

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regulation infused partly with the community's folkloric assumptions about the institution. Some institutions (e.g. simulation and counter letter, discussed below) were revealed in legislative fragments. The fragmentary presentation frequently filled out by extracting an institution from the law in action and blending it with foreign materials. The latter were often decisive ingredients.

A. SEGMENTED COMMENTARY SIGNALS FOREIGN INFLUENCES

Laced among the new code provisions are *exposes des motifs*, venerable institutions in the French legislative tradition, which routinely identify foreign law sources. Used judiciously, these sources typically filled gaps revealed by the prior legislation. For example, the original Civil Code did not clearly articulate restitution as a remedy upon rescission of a contract based upon a party's incapacity. Figuring in the revision of obligations, current Louisiana Civil Code article 1921 (Rescission of Contract for Incapacity) provides:

Upon rescission of a contract on ground of incapacity, each party or his legal representative shall restore to the other what he has received thereunder. When restoration is impossible or impracticable, the court may award compensation to the party to whom compensation cannot be made.²⁰

According to comments accompanying current Louisiana Civil Code article 1921, Israel's Contract (Breach of Contract Remedies) Law (1970) supplied for the Louisiana revision a formulation of the principle of restitution after annulment of a contract.²¹ The Israeli rule provided:

When a contract is rescinded, the breaching party will restore to the injured party what he has received thereunder or—if restitution is impossible or unreasonable or the injured party so chooses—pay him the value thereof, and the injured party will restore to the breaching party what he has received

20. LA. CIV. CODE ANN. art. 1921 (2012). For a sketch of restitutionary relief within a hierarchy of remedies, see 6 LA. CIV. L. TREATISE, LAW OF OBLIGATIONS §16.3 (2d ed. 2011). For links between detrimental reliance and restitutionary relief, see Herman, *Detrimental Reliance in Louisiana Law*, *supra* note 10.

21. See LA. CIV. CODE, art. 1921 cmt. (1984) (citing Israeli Contracts Law art. 9(a) (1970)).

under the contract or—if restitution is impossible or unreasonable or the injured party so chooses—pay him the value thereof.²²

The Israeli provision exhibited a remedial clarity that the former Louisiana law lacked. Louisiana article 1921 generally followed the Israeli article's authorization of compensation to an aggrieved party if restitution of the contractual object itself was impossible or unreasonable. The principle of restitution after annulment embodied in article 1921 also inspired Civil Code article 1952.

B. OTHER FOREIGN LAW INSPIRATION

The Louisiana revision's companion comments also credited formulations in the Ethiopian Civil Code, a mid-twentieth century project of the comparative scholar, Rene David.²³ French sources were also often cited as influences.²⁴ The Quebec draft code was a frequent source of inspiration, partly because the Louisiana legal community and its Quebec counterpart have long had a special kinship. Situated in large Anglophone communities indebted to the English common law, lawyers in Louisiana and Quebec have long transacted business in English. During the 1960s-1970s, the two jurisdictions engaged in a brisk exchange of

22. See Gabriela Shalev & Shael Herman, *A Source Study of Israel's Contract Codification*, 35 LA. L. REV. 1091, 1113 (1975) (discussing the provision). The restitutionary principle in the quoted provision was complemented by a more recent provision in Israel's draft code. That rule provides:

[W]here a contract has been rescinded due to its breach, each party must restore to the other party whatever he received pursuant to the contract, and if restitution in kind is impossible or unreasonable—to pay him the value of what he received. (emphasis added).

At the risk of venturing beyond my expertise, it is worth noting that restitution *in integrum (in kind)*, as contemplated in the just quoted Israeli article, may sometimes be inappropriate when a party's breach is a basis for the rescission. Both federal courts and Louisiana courts would rely on a party's breach to justify denying her recovery of part or all of the value of her performance. In contrast, the innocent victim of the other party's breach might recover the full value of her performance. In my opinion, denial of restitution does not loom large in the application of Louisiana Civil Code article 1921 because the provision contemplates annulment of the contract based upon a party's incapacity, not her breach, as contemplated in the Israeli provision. The latter event routinely involves an assessment of fault while the former should not.

23. RENE DAVID, *CODE CIVIL DE L'EMPIRE D'ETHIOPIE DE 1960* (Librairie Generale de Droit et de Jurisprudence, 1962).

24. See, e.g., LA. CIV. CODE ANN. art. 1842 cmt. b (2012); LA. CIV. CODE ANN. arts. 3006, 3011, 3015 (2012) (demonstrating that French influences are pervasive).

scholars and jointly sponsored seminars and colloquia.²⁵ The proceedings of these meetings were regularly published by Professor Joseph Dainow of Louisiana State University, a native of Montreal who taught for many years in Baton Rouge. Such colloquia continued throughout the rest of the twentieth century.²⁶

There are notable similarities among the Louisiana revision, the Ethiopian Code, and the Quebec code. Knowing the mentioned foreign law sources, a patient student will quickly grasp these influences. For some provisions, however, the influence of foreign law has been either unclear or covert, and accompanying comments do not aid its detection. This nearly total silence is especially notable and puzzling in the case of the Argentine Civil Code (1871),²⁷ which Professor Litvinoff mastered

25. See, e.g., *ESSAYS ON THE CIVIL LAW OF OBLIGATIONS* (Joseph Dainow ed., 1970) (offering a collection of papers presented by Quebec and Louisiana scholars at an L.S.U. symposium in the late 1960s); see also Junij Fedynskyj, *The Role of Judicial Decisions and Doctrine in Civil Law and Mixed Jurisdictions*, 50 *IND. L.J.* 3 (1974).

26. For the communications of a joint Quebec-Louisiana meeting, see Donald R. Mintz, *Essays on the Civil Law of Obligations*, 45 *TUL. L. REV.* 450 (1969). In November 1991, the Canadian Institute for Advanced Legal Studies sponsored a bilateral conference titled "Codification in North America," on the eve of the enactment of the new Quebec Civil Code. For papers presented at the meeting, see Shael Herman, *Minor Risks and Major Rewards: Civilian Codification in North America on the Eve of the Twenty-First Century*, 8 *TUL. EUR. & CIV. L.F.* 63 (1993); Thomas B. Lemann, *Trust: A Common Law Institution in a Civilian Context*, 8 *TUL. EUR. & CIV. L.F.* 53 (1993).

27. *THE ARGENTINE CIVIL CODE* (Phanor J. Eder, Robert J. Kerr, & Joseph Wheless eds., Frank L. Joannini trans., 1917), available at www.archive.org/details/argentinecivilc00whelgoog. For an up-to-date translation of the Argentine Civil Code, see *CIVIL CODE OF ARGENTINA* (Julio Romanach, Jr., trans., Lawrence Pub. Co., 2d ed. 2008). Professor Litvinoff's treatises do not betray the deep imprint of Argentine law that I have argued for here. His treatises refer to Argentine law about a dozen times. See generally 5, 6 *LA. CIV. LAW TREATISE, LAW OF OBLIGATIONS* (2d ed. 2011). Over many decades, Professor Litvinoff kept abreast of developments in Argentine law through personal study as well as a stream of visiting professors, including Julio Cueto-Rua, and graduate students who subsequently became academics (such as Alejandro Garro (Columbia) and Agustin Parise (Maastricht)). For Litvinoff's stature in the legal community, see Agustin Parise & Julio Romanach, *Don Saul Litvinoff (1925-2010)*, 3 *J. CIV. L. STUD.* 17 (2010). For Litvinoff's personal reminiscences, see Julie Baxter, *Peppercorns & Poetry: A Conversation with Professor Saul Litvinoff*, 1 *LSU L. MAG.* 24 (2007). I thank Professor Agustin Parise of the Maastricht Law Faculty for having brought these pieces to my attention. For a collection on Professor Litvinoff and his scholarship, see also *ESSAYS IN HONOR OF SAUL LITVINOFF* (Olivier Moreteau, Julio Romanach, Jr., & Alberto Zuppi eds., 2008).

long ago as a law student in Buenos Aires. A celebrated achievement of the Argentine jurist, Dalmacio Velez Sarsfield, the Argentine code had borrowed a number of rules from the original Louisiana Civil Code (1825).²⁸

In law reform, there is no vice in adapting old formulations; indeed, imitation, an honorable form of flattery, may seem in constant tension with innovation in the eyes of the law drafter. But imitation also complicates the task of determining the directions in which influences flow. An original Argentine source may sometimes seem an inspiration for a provision in the new Louisiana revision. Close inspection reveals that the influences are bi-directional in the sense that original Louisiana code provisions inspired articles in the Argentine Civil Code (1871) that in the last decades of the twentieth century in turn inspired articles in the Louisiana revision.²⁹ Fused with Argentine law, the original Louisiana source may be seen through the prism of a fresh Louisiana formulation.

C. REGULATION OF NATURAL OBLIGATIONS DISCLOSES ARGENTINE INFLUENCES

By peering through the prism of the new Louisiana regulation of natural obligations, we may detect Argentine influences alongside Roman, French, and indigenous Louisiana

28. For the influence of the nineteenth century Louisiana Civil Code upon the Argentine Civil Code, see Rolf Knutel, *Influences of the Louisiana Civil Code in Latin America*, 70 TUL. L. REV. 1445, 1462-67 (1996). Professor Knutel has identified ninety-five Louisiana code articles that supplied inspiration for the Argentine Civil Code. For an extensive and more recent exploration of Louisiana code influences upon the Argentine Code, see Parise, *supra* note 7. Were the focus of our inquiry the revision of property law carried out by Professor A. N. Yiannopoulos, much inspiration would be found in the reporter's first code, the Greek Civil Code and, more remotely, the German Civil Code (Bürgerliches Gesetzbuch), a source of the Greek Code's foundations. Professor Yiannopoulos's multi-volume property treatise and his law review articles frequently supplied the running commentary for the property revision. See A. N. Yiannopoulos, *The Hellenic Legal Tradition in the United States*, 42 LOY. L. REV. 1, 8 (1996); Vernon Palmer, *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LA. L. REV. 1067, 1114 n.138 (2003) (eighty-six Louisiana code articles reflect Greek inspiration).

29. See generally Parise, *supra* note 7; Rolf Knutel, *Influences of the Louisiana Civil Code in Latin America*, 70 TUL. L. REV. 1445 (1996); Agustin Parise, *Codification of the Law in Louisiana: Early Nineteenth Century Oscillation Between Continental European and Common Law Systems*, 27 TUL. EUR. & CIV. L.F. 133, 136 (2012).

regulation. According to former articles of the Louisiana Civil Code (1870), natural obligations were “binding in conscience and according to natural justice.”³⁰ Echoing this view of natural obligations, the Argentine Civil Code provides that claims based “solely upon natural law and equity . . . do not grant a right of action to enforce their performance.”³¹ According to both article 1759 of the former Louisiana Civil Code (1870) and Argentine Civil Code articles 549-50, a natural obligation could not be enforced by suit. Once the natural obligation has been fulfilled, however, both codes authorize the recipient, i.e. the creditor of a natural obligation, to retain what he has received in virtue of the obligation.

Former Louisiana Civil Code article 1759 of the Louisiana Civil Code (1870), provided: “Although natural obligations cannot be enforced by action, they have the following effect: 1. No suit will lie to recover what has been paid, or given in compliance with a natural obligation.”³²

The tenor of Argentine Civil Code article 550, although not its precise formulation, betrayed inspiration from former Louisiana Civil Code article 1759: “The effect of natural obligations is to bar an action to recover what has been paid when the payment thereof was voluntarily made by a person who had the legal capacity to make it.”³³

Current Louisiana Civil Code article 1761 supplies a prism through which one might view the principles shared by former Louisiana article 1759 (1870) and the Argentine regulation of natural obligations: “A natural obligation is not enforceable by action. Nevertheless, whatever has been *freely* performed in compliance with a natural obligation may not be reclaimed.”³⁴

Meaning “without outside compulsion,” the adverb “freely” in the above article corresponds to “voluntarily” in Argentine Civil Code article 550.³⁵ In an important respect, current Louisiana article 1761 innovated upon original Louisiana article 1759 by providing that “a contract made for the performance of a natural

30. LA. CIV. CODE art. 1757 (2) (1870).

31. CÓD. CIV. art. 549 (1871).

32. LA. CIV. CODE art. 1759 (1870).

33. CÓD. CIV. art. 550 (1871).

34. LA. CIV. CODE ANN. art. 1761 (2012) (emphasis added).

35. *Id.* art. 1761 cmt. b.

obligation is onerous.” The new formulation contrasted with former Louisiana Civil Code article 1759 (2), which relied upon an Anglo-American lexicon in declaring: “a natural obligation . . . [is] sufficient consideration for a new contract.”³⁶ Extensive research into cause and consideration³⁷ militated in favor of substituting “onerosity” for “consideration,” (i.e. bargained for exchange). Companion comment d explained that a natural obligation, by rendering onerous the cause of an obligation, gave rise to an onerous contract, not a donation.³⁸

A full analysis of the surgical changes wrought by current Louisiana article 1761 would take us beyond the scope of our inquiry. Suffice it to note that behind the provision lie several premises that are unfamiliar to common law doctrine and perhaps to many civil lawyers as well. First, consideration is only roughly equivalent to onerosity. Traditional common law doctrine makes consideration an ingredient in the formational phase of a contract. Consideration is generally understood as a badge of the parties’ seriousness to conclude a contract not requiring formalities. The common law polices the bargaining stage and regulates contract formation more strictly than the civil law. In contrast with common law doctrine, civil law doctrine has typically sought onerosity in the contract’s performance, not its formation. More rigorously than the common law, civil law doctrine polices an onerous contract for equivalence of values exchanged by the parties. It more casually evaluates the parties’

36. LA. CIV. CODE art. 1759 (1870).

37. For English sources linking cause and consideration, see A.W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACTS: THE RISE OF THE ACTION OF ASSUMPSIT 384-86 (1975). Interpretations of the doctrine of cause vary, and they have been the subject of a vast literature. Among leading French works consulted for the Louisiana revision of obligations, see H. CAPITANT, DE LA CAUSE DES OBLIGATIONS (3d ed. 1927) and G. CHEVRIER, ESSAI SUR L’HISTOIRE DE LA CAUSE DANS LES OBLIGATIONS (1929). The most comprehensive work for Louisiana lawyers is 6 LA. CIV. L. TREATISE (1969); Saul Litvinoff, *Still Another Look at Cause*, 48 LA. L. REV. 3 (1987). In addition to J. Denson Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2 (1951), the reporter consulted other valuable articles in English. Among them are Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919); B.S. Markesinis, *Cause and Consideration: A Study in Parallel*, 37 CAMBRIDGE L.J. 53 (1978); Malcolm S. Mason, *The Utility of Consideration-A Comparative View*, 41 COLUM. L. REV. 825 (1941); Arthur T. Von Mehren, *Civil Law Analogues to Consideration*, 72 HARV. L. REV. 1009, 1024-26 (1959). For discussion of cause and consideration in the context of the obligations revision of 1984, see generally Herman, *Detrimental Reliance in Louisiana Law*, *supra* note 10.

38. LA. CIV. CODE ANN. art. 1761 cmt. d (2012).

negotiations leading up to their formation of a contract. This may stem from the civil law's requirement of a notary to assure the parties' due reflection upon their act.³⁹

Second, civilian doctrine deems cause either gratuitous or onerous depending upon whether the impulse actuating the obligor's undertaking is generous or selfish. In the latter instance, the obligor has rendered his performance in expectation of a counter performance. Civil law doctrine polices a donation for validity by seeking in it all of the ingredients (e.g., cause, capacity, object) exhibited by any other contract. In addition, the donation must typically take the form of an authentic act, executed by the parties before a notary public and witnesses.⁴⁰ In contrast, common law doctrine, influenced heavily by a presumption that parties have acted in a self-regarding manner through negotiation, deems a donation an agreement outside of the class of contracts.⁴¹ Almost reflexively, many courts assume that the donation's validity hinges upon bargaining between the donor and donee. This assumption prompts a court, in applying the consideration doctrine, to assign to a donor a selfish purpose that was extraneous to her thinking when she made the donation.

39. See generally Herman, *Detrimental Reliance in Louisiana Law*, supra note 10, at 716-21.

40. See *id.* (sketching these features of contracts and donations). This essay originated as a research project for the advisory committee on the obligations revision. By the time that the entire revision was ready for legislative consideration and despite the paradoxical coupling of cause with detrimental reliance, Professor Litvinoff and the committee had become convinced that incorporation of detrimental reliance would be salutary because the legal community had long experience with the doctrine in many forms and contexts. For example, it figured in a developed doctrine of estoppel in both substantive and procedural law. See, e.g., LA. CODE CIV. PROC. ANN. art. 1005 (2012). The published essay justified the codification of detrimental reliance and regarded as manageable the difficulties associated with its codification.

41. This assumption is implicit in the concept of consideration as a benefit for the promisor or a detriment for the promisee. The detriment or benefit is assumed to result from bargaining between the parties. Hence, a donation falls outside the definition of contract because one party, the donor, has conferred a benefit upon the donee, but the donee does not have to bargain for a sacrifice on his part. For the contrasts between cause and consideration, see Lorenzen, supra note 37. The assumptions about consideration gave rise to the case of *Hamer v Sidway*, 124 N.Y. 538 (1891), wherein an uncle promised his nephew a sum if the nephew would stop smoking and otherwise act dissolutely.

III. FURTHER EXPLORATION OF FOREIGN LAW INSPIRATION

The balance of this inquiry explores an array of intellectual attitudes assumed by the obligations reporter and his advisory committee in quest of inspiration among foreign legal materials. To facilitate the exploration, these portraits are organized around an opposition of the law in the books versus the law in action, a convenient theme developed by the social theorist, Max Weber, and later popularized by an American school of legal realists.⁴² With a foot in each realm, the drafter is guided by pragmatic intuition toward formulations that will give lawyers and judges secure footing in their daily tasks. Far from random brainstorming, the drafting process is systematic. Sometimes, as in the preceding example of onerosity and its analogous consideration, the drafting task calls for uprooting outdated formulations and replacing them with adaptations of foreign provenance. The goal is a crisp formulation compatible with the community's received wisdom of a certain field or issue. This formulation may require displacing a law in the books that has been overtaken in practice by a modern conception reinforced perhaps by federal law.⁴³ Occasionally, the resulting formulation may constitute a meta-norm that stands astride both the civil law and common law traditions, as occurred in article 1967's combination of detrimental reliance and the definition of cause.⁴⁴ The revision also sought to dispel confusion arising from misstatements and inconsistencies in the law. The confusion represented a thorny problem because the language of the original Louisiana Civil Code was French, and some of its translations were infelicitous.

In the following sections, we focus mainly upon the use of foreign legal materials to fill legislative gaps in the Civil Code.

42. Perhaps the most important contribution of the legal realists was to have shown that legal concepts were not purely logical constructs, but rather were responsive to moral and political discourse. More than classical jurisprudence, legal realism was interested in interactions between the real world and legal principles. Yishai Blank, *Symposium: The Future of Legal Theory: Essay and Comment: The Reenchantment of Law*, 96 CORNELL L. REV. 633, 643-44 (2011).

43. For example, federal bankruptcy regulation of fraud overtook the code's counterpart regulation. See e.g., *In re Lawrence Goldberg*, 277 B.R. 251 (M.D. La. 2002).

44. See Herman, *Detrimental Reliance in Louisiana Law*, *supra* note 10, at 717-720.

The gap filling provisions often fill blanks left by the parties' failure to agree on key terms. Section A explores ways in which foreign materials have inspired enlargement of pre-existing institutions, such as imputation of payment and tender and deposit. Moving beyond the role of foreign materials in enlargement of pre-existing institutions, Section B illustrates techniques for filling gaps with newly constituted material. This section considers first the companion oblique and revocatory actions, and then a creditor's security measures pending fulfillment of a contractual condition. Concentrating on simulations and counter letters, Section C illustrates construction of a new legislative institution largely by reference to the law in action, essentially a creature of practice. Section D considers the influence of the Uniform Commercial Code (UCC) upon the Louisiana Civil Code by reference to a new regulation of the battle of forms in the context of documentary sales of movables. There follows, in Part IV, an informal scorecard that tallies some of the revision's effects upon jurisprudential development since 1984, the date of the revision. Finally, we explore difficulties in realistically evaluating the success or failure of the Revision.

A. FOREIGN MATERIALS' INSPIRATION OF THE ENLARGEMENT OF PRE-EXISTING INSTITUTIONS

History will always outstrip a law drafter's imagination; hence, no civil code can be perfect. Even assuming a code were perfect on its enactment, the constant deployment of its legal institutions over a century and a half will inevitably reveal its unanticipated virtues and shortcomings. Even so, a durable institution likely continues to do its job well, and indeed, some have functioned without important changes from the time of the era of classical Roman jurists such as Ulpian. The twentieth century drafters likely concluded that the skeleton of such an institution was sound, but some provisions still required reconceptualization; at least, they could be streamlined to account for jurisprudential developments. This section explores the influence of foreign materials upon two such institutions. Starting with a law in the books that is reasonably compatible with the corresponding law in practice, subsection 1 illustrates the revision's improvement of a pre-existing institution, "Imputation of Payment." Typically invoked as a gap-filler when contracting parties have not attributed a payment to a particular debt, the preexisting title was adjusted and refined. Inspired by foreign models, clear standards replaced vague ones. Subsection

2 illustrates the revision's expansion of the scope of "Tender and Deposit" to account systematically for a number of fact patterns that the lawyers had formerly considered outside its scope. Subsection 3 speculates upon the influence of the Argentine Civil Code upon the Louisiana regulation of tender and deposit.

1. ORIGINAL LOUISIANA CIVIL CODE IMPERFECTLY REGULATED IMPUTATION OF PAYMENT

In civil codes modeled on the French Civil Code, the regulation of "Imputation of Payment" has traditionally governed the application of a debtor's payment to a particular indebtedness when he owed a single creditor several debts. Usually the application of the debtor's payment is not troublesome because a typical creditor is more interested in receiving the payment than in specifying the debt to which the payment should apply. In many cases, a creditor is willing to allow his debtor to designate the debt to which a particular payment should be applied. Alternatively, the creditor and his debtor may jointly identify the debt to which the payment should be credited. Absent such a designation, however, there is a gap in the parties' agreement.⁴⁵ A priority scheme in former Louisiana Civil Code article 2162 filled the gap by directing the payment's application:

When the receipt bears no imputation, the payment must be imputed to the debt, which the debtor had at the time most *interest* in discharging, of those that are equally due; otherwise to the debt which has fallen due, though less burdensome than those which are not yet payable. If the debts be of a like nature, the imputation is made to the less burdensome: if all things are equal, it is made proportionally.⁴⁶

The obligations revision committee recognized the vagueness in defining an imputation norm in terms of a debtor's "interest." To sharpen this vague standard, and regulate systematically a

45. This discussion is characteristic of discussion among the reporter and members of the revision committee. Typically, the committee, in an effort to be systematic, sought to identify the most likely and least likely circumstances that the revised regulation should affect. Before computerized research bases, counting cases would have been time consuming, so the committee relied generally upon collective experiences, sometimes recorded in the archives of the Louisiana State Law Institute.

46. LA. CIV. CODE art. 2166 (1870) (emphasis added).

wide spectrum of circumstances, new Louisiana article 1868 adopted a granular priority scheme. The criterion of the debtor's "interest" continued to be relevant, but it was moved to the end of a series of more objective criteria. Current Louisiana Civil Code article 1868 provides:

When the parties have made no imputation, payment must be imputed to the debt that is already due. If several debts are due, payment must be imputed to the debt that bears interest. If all, or none, of the debts that are due bear interest, payment must be imputed to the debt that is secured. If several unsecured debts bear interest, payment must be imputed to the debt that, because of the rate of interest, is most burdensome to the obligor. If the obligor had the same *interest* in paying all debts, payment must be imputed to the debt that became due first. If all debts are of the same nature and became due at the same time, payment must be proportionally imputed to all.⁴⁷

According to companion comment a, new Civil Code article 1868 reproduced the substance of former Civil Code article 2166.⁴⁸ The author of the comment arguably overstated the scope and precision of the original code article, and perhaps added this comment to make lawyers comfortable with the new regulation. A comparison of the two articles reveals that the criteria in prior article 2166 were looser and less refined than those in new article 1868. For example, current article 1868, unlike former article 2166, distinguishes unsecured debts from secured ones, and defines "burdensome" in terms of the obligation's interest rate.

Although not cited in companion comments, Argentine Civil Code article 812 also seems to have influenced current Louisiana Civil Code article 1868. Argentine Civil Code 812 provides:

When the receipt of the creditor does not state to what debt the payment has been applied, it must be applied, among those which are matured, to that most burdensome to the debtor either owing to the fact that it bears interest, or that a penalty has been stipulated for non performance of the obligation, or that the debt is secured by a mortgage or pledge, or for some other similar reason. If the debts are of

47. LA. CIV. CODE ANN. art. 1868 (2012) (emphasis added).

48. *Id.* art. 1868 cmt. a.

the same nature, it shall be applied to all of them *pro rata*.⁴⁹

The quoted Argentine provision, like new Louisiana code article 1868, notably defines the criterion of “burdensome” in terms of the interest rate borne by the debt. It also defines secured debts as more burdensome than unsecured ones. This is probably a sound principle, although a secured debt bearing interest at a low rate could conceivably be less burdensome for a debtor than an unsecured debt bearing a higher rate of interest. Unlike the new Louisiana article, however, Argentine Civil Code article 812, by inviting attention to the phrase “some similar reason,” blurs the standard for determining the hierarchy of debts to which the payment should be imputed. It directs the parties to agree on a criterion for imputation at a moment when the parties are unlikely to agree because their interests are at odds. Unduly subjective and unwieldy, the criterion “some similar reason” would be characterized in von Jhering’s lexicon as “formally unrealizable.”⁵⁰

Westlaw source references accompanying new Louisiana article 1868 cite Italian Civil Code article 1193, which provides:

The payment should be imputed to the debt that has already matured; between several due debts to the one that is less secured (guaranteed); among several debts equally secured to the one most burdensome to the debtor; among several debts that are equally burdensome to the most ancient; if these criteria do not resolve the issue, then imputation is made *pro rata* to the several debts.⁵¹

Unlike new Louisiana article 1868 and Argentine article 812, the Italian article does not explicitly define “burdensome” in terms of the interest rate, though this idea may be inferred. The absence from the Italian provision of an explicit link between “burdensome” and the interest rate, on one hand, and the presence of the link in the Argentine article, on the other, suggest

49. Cód. Civ. art. 812 (1871).

50. The term “formal realizability” is shorthand for a judicial practice of determining applicability of a rule based on the presence of objective criteria. For discussion of the term, see Shael Herman, *Minor Risks and Major Rewards: Civilian Codification in North America On the Eve of the Twenty-First Century*, 8 TUL. EUR. & CIV. L.F. 63, 70-74 (1993) (quoting RUDOLPH VON JHERING, *GEIST DES ROEMISCHEN RECHTS AUF DEN VERSCHIEDEN STUFEN SEINER ENTWICKLUNG* (1906)).

51. C.C. art. 1193 (1942), available at host.law.lsu.edu/ahclouisiane/documents/CivilCodes.pdf.

that the latter may have been more important than the former as a source for the new Louisiana provision.⁵²

2. FOREIGN MATERIALS' INSPIRATION OF THE ENLARGEMENT OF REGULATION OF TENDER AND DEPOSIT

Despite the broad scope of a particular law in the books, the counterpart law in action sometimes unnecessarily limited the scope of an institution's application. Without apparent reason, in other words, the law in action seems to fall short of the full potential contemplated by the law in the books. The institution's crabbed footprint in practice prompted the reporter and his advisers to enlarge the scope of the regulation. An example of this enlargement can be seen in the evolution of the code article regulating tender and deposit.

a. Evolution of Tender and Deposit

The institution of tender and deposit had long played a role in the law in action, but its practical scope seemed narrower than that contemplated by the law in the books. As new Louisiana article 1869 stipulated, an obligor's tender in both legislation and practice constituted "an offer to perform according to the nature of the obligation."⁵³ This principle was typically manifested in immovable transactions, although a literal reading of the original regulation would have authorized the principle for a variety of movable transactions as well.⁵⁴ In a typical case predating the obligations revision, a Louisiana real estate purchase agreement provided for an aggrieved seller's offer to perform by authorizing him to put a purchaser in default "without formality beyond

52. The Italian formulation has remained durable for code drafters. In Giuseppe Gandolfi's draft code, the subjective standard is expressed as "does not help" (Italian: *se tale criteri non soccorrono*). Article 84 (3) states:

If neither the debtor nor the creditor have expressed an imputation, the payment shall be imputed to the matured debt; among several matured debts, to that which has least security; among equally secured debts, to the one which is most burdensome to the debtor; among equally onerous debts to the oldest, if these criteria do not help, imputation is made proportionally to the various debts.

1 EUR. CONT. CODE 545-46 (2004) (on file with author).

53. LA. CIV. CODE ANN. art. 1869 (2012).

54. The French Civil Code regulated both movables and immovables, and the Louisiana Code followed the French pattern. Most articles in the code regulation of sales affected rights in immovables, but they were presumed to regulate movable transactions as well, unless the context of a rule indicated otherwise. This argument is confirmed in the quotation at note 143, which clearly contemplates sales of movables.

tender of title.”⁵⁵ The original regulation of tender in original Civil Code article 2163 signaled the breadth of that policy by speaking generically of debtors and creditors, not merely purchasers and sellers. Instead of directly addressing tender of title, original Civil Code article 2163 first addressed tender of payment:

When the creditor refuses to receive his payment, the debtor may make him a real tender; and on the creditor’s refusal to accept it, he may consign the thing or the sum tendered. A real tender, followed by a consignment, exonerates the debtor; it has the same effect, with regard to him, as a payment, when it is validly made; and the thing thus consigned remains at the risk of the creditor.⁵⁶

An example of inartful drafting, original Louisiana code article 2163 muddled tender of a sum of money with tender of an object. Having initially mentioned only payment, the article’s introductory phrase enlarged its scope to a “thing or a sum” that was tendered, though the provision supplied no antecedent for “thing.” The second sentence of the prior article first contemplated tender of a thing, next evoked payment, and then returned to consignment of a thing. “Consignment” here translated the French “consignation,” meaning “deposited in court.”⁵⁷ This should not be confused with the popular term signifying placement of an article for sale with a broker or merchant.

Former article 2163 required the drafter to clarify the risk of loss because it was unhelpful to treat equivalently the risk of a loss of payment with the risk of loss of an object. It was true that the timely tender of an object, rather than money, shifted the risk of loss to the other party in case of accidental damage to the object. But it did not make sense to formulate the risk of a lost payment in terms of accidental damage.

The new Louisiana regulation of tender and deposit

55. 1 LA. PRAC. REAL EST. § 9:93 (2d ed. 2011) (discussing tender of performance and putting into default). In immovable transactions, both a seller’s tender of title and his purchaser’s correlative tender of the price were informed by a salutary policy of facilitating the parties’ ongoing communications over the course of their contract, and post performance even when due process does not dictate such communications.

56. LA. CIV. CODE art. 2163 (1870).

57. LA. CIV. CODE ANN. art. 1869 cmt. f (2012).

expressly addressed serially the tender of both a thing and a payment of money. By specifying the steps entailed in a tender, the new regulation clarified the meaning of “valid tender” as judicial approval of the tender. The new regulation in current Louisiana article 1869 made valid tender a prerequisite to occurrence of all effects of performance, including the transfer of risk to the creditor.

b. Current Louisiana Civil Code Article 1869

Current Louisiana Civil Code Article 1869 states:

When the object of the performance is the delivery of a thing or a sum of money, and the obligee, without justification, fails to accept the performance tendered by the obligor, the tender, followed by deposit to the order of the court, produces all the effects of a performance from the time the tender was made if declared valid by the court.⁵⁸

According to comment a, accompanying Louisiana's revised regulation of tender and deposit, the substance of the law predated the new regulation.⁵⁹ Allowing some leeway for analogical gap-filling, the comment seems accurate and likely enhanced the legal community's acceptance of the provision. Companion source references acknowledged the influence of both the Italian Civil Code and the draft of the Quebec Civil code.⁶⁰ But the Quebec draft code's regulation of tender and deposit, which is longer and more elaborate than the new Louisiana regulation, did not clearly treat the shift to the creditor of a risk of loss effected by a valid tender.

3. ARGENTINE CODE'S INFLUENCE UPON LOUISIANA REGULATION OF TENDER AND DEPOSIT

The Argentine Civil Code seems to have been a latent influence upon the new regulation of tender and deposit; it was likely as decisive as any of the acknowledged influences. A virtue of the Argentine Civil Code lay in its elaboration in separate titles of tender of payment and tender of object. Though the new Louisiana regulation did not follow this pattern, its systematic treatment of tender of both money and the object of the obligation

58. LA. CIV. CODE ANN. art. 1869 (2012).

59. *Id.* art. 1869 cmt. a.

60. *Id.*

improved the predecessor Louisiana regulation.

Argentine Civil Code article 790 seems also to have informed the new Louisiana regulation's expansion of risk shifting to include all effects of performance. The current Louisiana regulation was likely influenced by the itemization of prerequisites for a valid tender detailed in Argentine Civil Code Article 792:

Consignment does not have the force of payment unless all the requisites as to persons, object, mode and time, without which payment would not be valid, are present. In the absence of these requisites, the creditor is not compelled to accept the tender of payment.⁶¹

Unlike the original Louisiana regulation of tender and deposit, the current Louisiana regulation did not explicitly codify the prerequisites recited in Argentine Code article 792. Accompanying current Louisiana Civil Code article 1869 comment c evoked these prerequisites: "A tender is valid only if the requirements for a valid performance, such as capacity, amount, and kind of performance are fulfilled."⁶² Comment c made clear a preference for systematic enumeration; following comment d, one might argue that these requirements are implicit, but a systematic approach required them to be explicit in order to alleviate confusion.

B. FILLING LEGISLATIVE GAPS BY REFERENCE TO FOREIGN MATERIALS.

This section considers legislative gaps that more heavily taxed Professor Litvinoff's inventive powers than those discussed in Section A. Perhaps a practitioner has mentioned to the reporter a need theretofore unfulfilled by the code and not satisfactorily addressed by the jurisprudence. The reporter may have appreciated the problem posed as a classical gap in the law in action requiring new law in the books. To avoid unnecessary effort, the reporter or a staff member of the Law Institute typically developed a research paper for the advisory committee members who offered their views before full scale drafting efforts began in earnest.⁶³ In the interest of systematic elaboration of

61. Cód. Civ. art. 792 (1871).

62. LA. CIV. CODE ANN. art. 1869 cmt. c (2012).

63. Many of Litvinoff's law review pieces analyzed jurisprudence interpreting

provisions that regulate a large number of potential cases, the reporter modeled a new regulation upon predominantly French sources.⁶⁴ In preparing a new regulation, the reporter may have sensed that he was skating on proverbial thin ice; for instead of improving a pre-existing institution familiar to the practicing bar, he had to craft an institution that would overcome the bar's characteristic resistance to legislative creation *ex nihilo*. If the advisory committee believed that the resistance could be overcome, then the reporter would persevere in his drafting assignment, hoping that the bar could profit from a systematic elaboration of the theme inspired by foreign sources.

We illustrate this phenomenon of creation *ex nihilo* in the oblique action. Though the original code did not regulate the oblique action by name, the revocatory action title authorized a narrowly tailored claim for a creditor to exercise his debtor's right of inheritance if the debtor's failure to accept it had prejudiced the creditor.⁶⁵ A second subsection illustrates creation from scratch by reference to a gap identified under the rubric "Creditor Measures Pending Fulfillment of Condition."⁶⁶

Doctrinally, the oblique action and the revocatory action had kindred functions and rested upon kindred criteria. Authorized in the French Civil Code, both actions contemplate an underlying indebtedness between a creditor and a debtor.⁶⁷ Both confer a right of action upon someone who is not a party to a contract. The revocatory action authorized a creditor to annul his debtor's act or transfer made in fraud of the former's rights. By contrast, an oblique action does not contemplate a creditor's annulment of his debtor's act or transfer. Rather, the oblique action, embodied in French Civil Code article 1166, authorized a creditor to exercise the debtor's right, provided the right was not strictly

themes in the civil code, set the themes in context of both foreign and Louisiana doctrine, and suggested improvements of existing code regulation. Possible structures for the code revision were analyzed in Herman & Hoskins, *infra* note 129.

64. LA. CIV. CODE ANN. art. 1869 cmt. b (2012).

65. LA. CIV. CODE art. 1990 (1870):

In case the debtor refuse or neglect to accept an inheritance to the prejudice of his creditors, they may accept the same, and exercise all his rights in the manner provided for in the title of successions and they are authorized [to] . . . exercise all of the rights existing in favor of the debtor for recovering possession of the property to which he is entitled . . . to make the same available to the payment of their debts.

66. See *infra* notes 84-89 and accompanying text.

67. C. CIV. arts. 1166-67 (Fr.).

personal for the debtor.⁶⁸ French doctrine established this exercise and made it depend upon the concurrence of twin conditions: (1) the debtor's failure to enforce the right against his own debtor; and (2) the creditor's consequent loss of the only means of satisfying the debt. The current Louisiana regulation of the oblique action collapsed the two conditions into a new formulation, i.e., (1) the debtor's failure to act that (2) causes or increases his insolvency, as will be seen below.⁶⁹

1. DEBTOR'S INSOLVENCY A PROXY FOR HIS FRAUD

Louisiana's original regulation of the revocatory action authorized revocation of a debtor's act or asset transfer if it constituted fraud on his creditor.⁷⁰ The creditor could typically challenge such an act or transfer if a debtor had impaired assets available to his creditors by failing to receive fair value for the transferred asset. The new regulation of the revocatory action dropped the standard of fraud in favor of a standard of insolvency. (Under prior regulation, the debtor's insolvency had been an alternate standard if a transferee knew of the debtor's financial embarrassment). This choice of insolvency reflected the advisory committee's judgment that it was a more manageable standard than fraud.⁷¹ Insolvency required reasonable verification in the form of a third person's audit of the debtor's assets and liabilities; in contrast, fraud called for a subjective assessment that was unwieldy for a court—it required proof of a debtor's intent to defraud the creditor and perhaps his collusion with a third party transferee. A standard of constructive fraud could also require psychological scrutiny of the third party's guilty motives. A virtue of a standard of insolvency was that it dovetailed nicely with the federal bankruptcy regulation of fraudulent transfers, an analogue of the revocatory action under state law.⁷² Current Civil Code article 2036 imposes an

68. C. CIV. art. 1166 (Fr.) (stating that “creditors may exercise all the rights and actions of their debtor, except those that are exclusively personal.” (Author's translation).

69. See *infra* text accompanying notes 75-83.

70. See LA. CIV. CODE. ANN. arts. 1970-94 (2012).

71. See *infra* note 162 (quoting *In Re Goldberg*, 277 B.R. 251 (M.D. La. 2002)).

72. 11 U.S.C. § 548 (ii) (1) (2005) (discussing criteria for setting aside debtor's transfer; e.g. if fraud was actual or constructive; the transfer was made for inadequate consideration, especially if debtor was insolvent at time of transfer; or the transfer had made him insolvent; or the debtor was engaged in a business with unreasonably small capital, or the debtor intended to incur debts that would be

insolvency test for a defendant in both the revocatory action and the oblique action:

An obligee has a right to annul an act of the obligor, [as in the revocatory action] or the result of a failure to act of the obligor [as in oblique action], made or effected after the right of the obligee arose, that causes or increases the obligor's insolvency.⁷³

A familiar feature of bankruptcy law, the insolvency standard enshrined in the oblique and revocatory actions illustrates our earlier point that successful innovation often combines a sense of novelty with *déjà vu*. In this particular instance, the sense is prompted by the fact that insolvency had long been a touchstone in the commercial lawyer's lexicon. Figuring as a bankruptcy standard for a federal action for fraudulent conveyance and a creditor's strong-arm action, insolvency appealed to the obligations committee as a convenient way of achieving compatibility between bankruptcy regulation and the revocatory and oblique actions. Coupled with federal claims, these two state law claims might be prosecuted in a bankruptcy proceeding. Outside bankruptcy jurisdiction, the claims could be prosecuted in an ordinary civil proceeding.

The committee's hunch seems to have been vindicated in a scholarly bankruptcy opinion, *In Re Goldberg*.⁷⁴ The opinion's astute use of comparative and foreign materials suggests the rich insights to be gleaned from Roman and civil law. These might have been missed if Louisiana courts did not consult the foreign law materials.

2. OBLIQUE ACTION

The former Louisiana Civil Code had no generalized regulation of the oblique action; nor was there a specific chapter title devoted to it. The revocatory action titles contained a narrowly tailored regulation akin to the oblique action. Former Civil Code article 1985 provided:

In case the debtor refuse or neglect to accept an inheritance to the prejudice of his creditors, they may accept the same,

beyond its ability to repay). See Westlaw database: Fr-Transfers 4:14.

73. LA. CIV. CODE ANN. art. 2036 (2012).

74. *In re Lawrence Goldberg*, 277 B.R. 251 (M.D. La. 2002).

and exercise all his rights in the manner provided for in the title of successions, and they are authorized, by virtue of the action given by this section, to exercise all the rights which the debtor could do for recovering possession of the property to which he is entitled, in order to make the same payable to the payment of their debts.⁷⁵

Former article 1991 also denied a creditor the oblique action if he sought to enforce his debtor's personal right: "[T]here are rights . . . of the debtor which the creditor cannot exercise even should he [the debtor] refuse to avail himself of them."⁷⁶

The traditional standard of a "merely personal" right has continued in the new regulation of the oblique action. Before the obligations revision, virtually no Louisiana jurisprudence had recognized the oblique action. Although former Louisiana Civil Code article 1985 occasionally provided courts with a basis for a narrow claim akin to the oblique action, many claims were also denied.⁷⁷ Only one law review article predating the obligations revision explored the oblique action in depth.⁷⁸

In 1984, newly enacted Civil Code article 2044 authorized the oblique action and separated it from the revocatory action:

If an obligor causes or increases his insolvency by failing to exercise a right, the obligee may exercise it himself, unless the right is strictly personal to the obligor. For that purpose, the obligee must join in the suit his obligor and the third person against whom that right is asserted.⁷⁹

According to companion comments, Louisiana's new regulation of the oblique action expressed a principle that the redactors of 1825 thought too obvious to require formulation.⁸⁰

75. LA. CIV. CODE art. 1985 (1870).

76. *Id.* art. 1991. For an illustration of the principle of the article, see *Succession of Henican*, 248 So. 2d 385 (La. Ct. App. 1971).

77. The following illustrates typical pre-revision judicial reaction to an assertion of the oblique action: "We are not persuaded to employ this action expressly and intentionally omitted from the Code of 1825 and used only a few times in our jurisprudential history." *North Forest Homeowners' Ass'n, et al. v. Homecraft Corp. et al.*, 407 So. 2d 450, 454 (La. App. 1 Cir. 1981). I am grateful to Mr. Gregory Grimsal, for having called this opinion to my attention.

78. Gregory Grimsal, *The Oblique Action*, 54 TUL. L. REV. 699 (1980).

79. LA. CIV. CODE ANN. art. 2044 (2012).

80. *Id.* art. 2044 cmt. a.

This rationale for filling a gap in the original civil code seemed to be belied by the fact that an “obvious principle” had virtually eluded the Louisiana legal community for nearly two centuries. To help the legal community to overcome its reticence in the face of the innovation, it would have been preferable to note that regulation of the new oblique action enlarged by analogy the creditor rights authorized in former article 1985 and that it was compatible with analogous creditor claims in bankruptcy.

Although the comments accompanying the new regulation of the Louisiana oblique action do not refer to Argentine law, the latter was likely an unacknowledged influence. Argentine article 998 formulated the oblique action:

If the debtor has not renounced by his act vested rights, but has waived powers, by the exercise of which he might have been able to improve the state of his fortune, the creditors may cause his acts to be set aside, and avail themselves of the powers waived.⁸¹

The phrase “strictly personal” in article 2044 continued the standard “merely personal” in former Louisiana code article 1992.⁸² By incorporating into the regulation of the oblique action a standard of insolvency as a proxy for fraud, the current Louisiana provision seems to reflect inspiration of Argentine Civil Code article 1003:

The intention of the debtor to defraud his creditors by acts prejudicial to them, is presumed by his state of insolvency. The complicity of the third person in the fraud of the debtor is also presumed if at the moment of treating with him he was aware of his insolvent state.⁸³

As a proxy for fraud, a standard of insolvency also aligned article 2044 with a nationwide bankruptcy criterion long familiar in commercial practice.

3. CREDITOR'S PROTECTIVE MEASURES PENDING A CONDITION'S FULFILLMENT

The obligations revision introduced for the first time

81. Cód. Civ. art. 998 (1871).

82. “There are also rights which are merely personal, that cannot be made liable to the payment of debts” LA. CIV. CODE art. 1992 (1870).

83. Cód. Civ. art. 1003 (1871).

regulation of a creditor's protective measures in case of his insecurity. The obligations committee deemed such regulation salutary for a set of common circumstances. For example, in a contract for future performances (e.g. a contract for successive performances; a requirement or output contract), a party (here, for convenience, the creditor), entitled to either a payment or another performance, typically becomes anxious if he suspects that the co-contracting party (the debtor) may not perform punctually. Anxious to protect his interest in the contract, yet still hoping for the debtor's full performance, the creditor may initially adopt a wait-and-see approach. The creditor, instead of declaring a breach, may suspend his own performance, typically by withholding his delivery or payment beyond the date on which it is due. If the contract does not expressly authorize the creditor to suspend performance, the debtor might consider the suspension a repudiation or breach. At a minimum, the creditor's suspension of performance may provoke a controversy with the debtor. The former Louisiana Civil Code did not authorize the creditor's suspension of performance, but, based upon my experience, Louisiana transactional lawyers have routinely addressed the issue in their contracts to forestall a debtor's claim of the creditor's repudiation.

a. New Regulation of Creditor's Measures Pending Condition

In 1984, the obligations revision explicitly codified a creditor's right to suspend his performance in a variety of situations theretofore regulated by agreement.⁸⁴ For example, current Louisiana article 1771 provides that, "[t]he obligee of a conditional obligation, pending fulfillment of the condition, may take all lawful measures to preserve his right."⁸⁵

Located in the chapter on obligations subject to a term, companion Louisiana Civil Code article 1783 authorized a creditor's protective measures if she became insecure about the

84. This conclusion is implicit in the Expose des Motifs for the obligations revision. According to that source, "the revised articles change the law pertaining to situations involving security." LA. CIV. CODE ANN. Bk. III, tit. IV (discussing conditional obligations). Concededly, the expose could have stated crisply that a new regulation was being introduced, but the obligations committee resisted highlighting legislative novelties.

85. LA. CIV. CODE ANN. art. 1771 (2012).

debtor's fulfillment of an obligation subject to a term.⁸⁶

When the obligation is subject to a term and the obligor fails to furnish the promised security, or the security furnished becomes insufficient, the obligee may require that the obligor, at his option, either perform the obligation immediately or furnish sufficient security. The obligee may take all lawful measures to preserve his right.⁸⁷

According to companion comments for the Louisiana obligations articles, original UCC § 2-609 influenced current Louisiana Civil Code articles 1771 and 1783.⁸⁸ Original UCC § 2-609 provided:

If reasonable grounds for insecurity arise with respect to the performance of either party, the other party may demand adequate assurance of due performance; and until the party receives the assurance may . . . suspend any performance for which it has not already received the agreed return.⁸⁹

In solving the problem of a threatened non-performance, this UCC provision seems to create another problem. No criterion is supplied for assessing "adequate assurance." Assuming the contract has not provided clues to this criterion, there may be a dispute as to whether the aggrieved party's requested assurance is reasonable in both form and amount. If time is crucial, then the value of the contract can evaporate while courts reflect upon the meaning of "adequate assurance." At least the Louisiana provision has the virtue of accelerating the obligor's performance by cancelling the term. The Louisiana term "security" seems more concrete than "assurance," the latter of which could be understood as a clear email message rather than tangible collateral. But the Louisiana criterion of "sufficient security," like the UCC's "adequate assurance" is open to interpretation.

86. LA. CIV. CODE ANN. art. 1783 (2012).

87. *Id.*

88. *Id.* art. 1783 cmt. e.

89. See U.C.C. § 2-609 (2012), stating that:

A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

b. United Nations Convention on Contracts for the International Sale of Goods⁹⁰ a Likely Inspiration of Protective Measures For Insecure Obligee

Another likely influence upon Louisiana articles 1771 and 1783 was the Vienna Convention on the International Sale of Goods (CISG), ratified in 1980 by the United States Senate and signed by President Ronald Reagan.⁹¹ The Convention grew out of a decades long United Nations project that sought to codify an international regulation of sales that would level the playing field for financially weak countries in their negotiations with more powerful ones; without the CISG, the former were typically forced to accede to the applicability of the commercial laws of the latter. CISG article 71 bears many resemblances to UCC § 2-609, and its policies inspired the Louisiana drafters.⁹² The CISG rule is clearer and more detailed than its UCC counterpart. CISG article 71 provides:

A party may suspend the performance of his obligations, if after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness;

(b) his conduct in preparing to perform or in performing the contract

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.⁹³

The policy of CISG article 71 resembles that of both UCC § 2-609 and Louisiana articles 1771 and 1783. Indeed, the CISG provision specifies more precisely than its UCC and Louisiana cognates the nature of a breaching party's threat of non-

90. U.N. Convention on Contracts for the Int'l Sale of Goods (CISG), Apr. 11, 1980, 19 I.L.M. 668.

91. *Id.*

92. LA. CIV. CODE ANN. bk. III, tit. VII (2012).

93. U.N. Convention on Contracts for the Int'l Sale of Goods (CISG), Apr. 11, 1980, 19 I.L.M. 668, art. 71.

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performance. CISG article 71 should clarify our understanding of threatened breaches in contracts for successive performances as well as those contemplating specially fabricated items. But, because the article's scope is limited to sales of tangible movables, its guidance for commutative contracts in general is instructive, not binding. The greater generality of the Louisiana provisions probably results from their scope of application to all commutative contracts including sales.

c. Argentine Civil Code's Probable Influence Upon Current Louisiana Civil Code Article 1771

Westlaw Source references accompanying current Louisiana Civil Code article 1771 acknowledged the influence of both the Quebec Draft Code and the Italian Civil Code. Comparison of Louisiana articles 1771 and 1783 with Argentine Civil Code article 580 suggests that the latter likely influenced them. Tellingly, the Louisiana code articles track the language of Argentine Civil Code article 580, which states:

While the suspensive condition is pending, the creditor may adopt all measures of preservation necessary and permitted by the law to guarantee his interests and rights.⁹⁴

C. FILLING LEGISLATIVE GAPS BY REFERENCE TO THE LAW IN ACTION

Given enough time, gaps are bound to appear in any body of legislation. One hopes that the legislator will promptly fill the gaps, but the legislative machinery grinds slowly. As a result, legislative gaps are commonly filled by our recourse to academic doctrine, legislative history, case law, custom, and trade usage. Alongside custom and trade usage produced by interactions among clients in a specific line of commerce, the law as practiced can generate gap fillers for legislation. This likely explains a lawyer's reliance upon formularies that represent the collective wisdom of previous and current generations of lawyers. Asked why he has phrased a clause in a certain way, the lawyer might justify his formulation by reference to a celebrated drafter of his generation. Before the advent of Westlaw, lawyers often started research projects by consulting a fellow practitioner who was

94. Compare Cód. Civ. art. 580 (1871), with LA. CIV. CODE ANN. art. 1771 and art. 1783 (2012).

distinguished in a certain practice area.⁹⁵ Absent that personal contact, the lawyer might consult the explanatory footnotes in a formulary for case and code references.

1. RIDDLES, PARADOXES, AND ENIGMAS: SIMULATIONS AND COUNTER LETTERS

Between the law in the books and the law in action, a radical incompatibility produced legislative gaps in the regulation of simulation and required bold innovation. Companion comments for simulations and counter letters hinted that the drafting effort called for a comprehensive and stable regulation of simulation: “Though [the institutions] have long been common in practice, they are not systematically defined in the Louisiana Civil Code of 1870.”⁹⁶

To a legislative bricoleur, the last comment hints at a fragmentary portrait of an institution; like stones piled up at an archeological dig, clues to the institution’s structure lie scattered about the code. To manage their frustration amid the ruin, practitioners have turned themselves into bricoleurs and developed individualized solutions through custom and practice. But these improvised solutions have a catch—having tailored special documents for each of her clients, a lawyer-bricoleur is unsure whether her improvisations are sound. Concerned with maintaining client confidences, she resists discussing her drafting solutions with colleagues who might challenge their validity in a future controversy.

To American lawyers who enjoy considerable latitude in preparing agreements, it might seem routine to tailor instruments for individual clients and even for individual transactions. But a civilian’s habitual attachment to nominate contracts⁹⁷ may prompt her to seek a relatively high degree of consistency in locutions for transactional forms. Furthermore, Louisiana civilians, unlike lawyers in large commercial states

95. Two of the finest practitioners who generously shared their wisdom and experience with colleagues were Joseph Bologna, long a professor of real estate at Loyola, and his counterpart at Tulane, Leonard Rosenson, my mentor in practice thirty-five years ago. Cicero Sessions, a master of procedural law, for many years was known as a coach for newly appointed federal judges.

96. LA. CIV. CODE ANN. art. 2025 cmt. b (2012).

97. On nominate and innominate contracts in Louisiana jurisprudence, see generally Herman, *Detrimental Reliance in Louisiana Law*, *supra* note 10, at 728-32.

such as New York, are eager to preserve a united front in structuring a particular kind of transaction because they anticipate that their counterparts in other states, seeking to divide and conquer, will not invest the time needed to understand the chosen structure. Surrounding counter letters and simulations, taboos, superstitions, and charges of illegality further complicate a lawyer's drafting task. In a metaphorical sense, the code's original fragmentary regulation required the reporter to perform re-constructive surgery without the advantage of a patient's before and after images. Propelled by intuition and imagination, the reporter is challenged to cobble together from legislative bric-a-brac a comprehensive regulation in the books and to align it with solutions dominant in practice.

2. COMMENTARY AS EVASION

Some revision comments may seem misleading. Others can be downright evasive. Drawing inspiration from Hans Christian Andersen's legend of the child who realized the emperor had no clothes, we can decipher the comments if we candidly acknowledge their evasive character. Such comments might take one of several forms depending upon the specific features of a particular institution. For example, Did an institution exist exclusively in the law in action without a counterpart in the law books? Did the original legislation partly hint at the institution's structure, without systematically developing it? Did the institution exist originally in any form in Louisiana law, either in the books or in practice?

Let us consider, for example, the following: "[T]his article . . . is new, but it does not change the law. It reproduces the substance of prior article X"⁹⁸ (author: or principles implicit in prior article Y; or a solution consistent with prior article Z). Many practitioners would become impatient with such oracular pronouncements. Bedeviled by the companion comments, a judge might wonder in what sense a rule could be "new," yet not "change the law." I suggest that the term "law," as used in this phrase, denotes something more abstract than a crisp black letter rule. Sometimes a companion comment clarifies reasons for denying that the new rule changed the law. For example, a comment⁹⁹ accompanying the regulation of simulation indicates

98. See, e.g., LA. CIV. CODE ANN. art. 2026 cmt. a (2012); *id.* art. 2027 cmt. a.

99. See *supra* note 96.

that the rule of law in question exists in the law in action.¹⁰⁰

As used in the just quoted comment, law seems to refer to neither a codified norm nor a jurisprudential rule. Gleaned from disparate articles and case law, the abstract structure that constituted simulation looms in the legal community's consciousness as a brooding presence; it has to be fleshed out through systematic legislative treatment. The companion comments for the regulation of simulation signal the institution's movement from background to foreground; its transformation from implicit to explicit; and from fragmentary and diffuse to systematically presented. Like other provisions noted earlier in this Article, the new regulation of simulation bears the unacknowledged imprint of the Argentine Civil Code.

3. SIMULATION

Despite the struggle of the bench and the bar to discover the practical operation of simulation and counter letters, these institutions, like a proverbial iceberg, long remained 90% submerged in the collective consciousness. Barely sketched in the original Civil Code, the institutions endured nearly exclusively as creatures of the daily law in action until 1984. Rarely discussed in law reviews, the two institutions sometimes prompted local politicians to propose their abolition on the misguided premise that they had an odor of corruption. *Au contraire!* Simulations and counter letters are legal as long as they are not used to defraud creditors.¹⁰¹ Furthermore, even if simulations and

100. LA. CIV. CODE. ANN. art. 2025 cmt. b (2012).

101. This is the consistent opinion of the jurisprudence. *See, e.g.*, *Matter of Zedda*, 103 F.3d 1195 (5th Cir. 1997) (stating that “[s]imulations are not uncommon in Louisiana; neither does their use imply anything negative or untoward”). *Id.* at 1195. *See also* Ronald Scalise, Counter Letter Committee Report for the Louisiana State Law Institute, March 13, 2009 (on file with author) (offering a recent treatment of simulations and counter letters).

Among practitioners, simulations and counter letters have many licit uses and likely turn up in every commercial law firm in Louisiana. Several wealthy prospective buyers, for example, wishing to negotiate an attractive price with owners of a tract, but, fearing that the owner would make unreasonable demands if their identities were disclosed, delegate to a trusted colleague of humble means but sterling credit the task of acquiring a tract for development. The wealthy purchasers deposit the purchase price into her bank account. Once the delegate has negotiated a reasonable price, the wealthy buyers deposit their respective shares of the price into the delegate's checking account, along with incidental closing fees. The delegate takes title to the tract in her own name, and the owners receive the price. The owners do not know the names of the actual owners. The delegate issues counter

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counter letters were outlawed, they would linger in the shadows beyond judicial scrutiny. Lawyers might discuss these institutions in hushed voices, but they would discuss them nevertheless.

The visible 10% of simulation and counter letters supplied little information for their comprehensive delineation. Rather, the few articles originally scattered about the metaphorical dig seemed mostly fact-specific corollaries coaxed from unstated major premises. This phenomenon could be seen, for example, in former Louisiana Civil Code article 2239, which announced a key principle: “[C]ounter letters can have no effect against creditors or bona fide purchasers; they are valid as to all others.” Lifted from practical context, the effects of former article 2239 were elusive.

The new regulation of simulations and counter letters located the principle of former article 2239 in the second sentence of article 2028, the fourth article in the regulation of simulation; the article's subordinate location likely implies the logical priority of the newly formulated principles in the three preceding articles. Further accentuating the enigmatic character of simulations, their evocations in terms of disguised donations betrayed the institution's association with transactions negotiated on friendly terms, not at arms length.

Modernized in 1995 as part of the sale regulation, current Civil Code art. 2464 provides a picturesque example of a transaction that does not result from the parties' bargaining: “The price [of the sale] must not to be out of all proportion with the value of the thing sold. Thus, the sale of a plantation for a dollar is not a sale, though it may be a donation in disguise.”¹⁰²

Linked with the regulation of simulations, former Louisiana Civil Code article 2444 also provided an example of a non-bargain

letters in favor of the wealthy purchasers that acknowledge their percentage interests in the tract; the counter letters covenant to transfer title to them at their request. In practice, the doctrine recognizes the recordation of the counter letter itself as the act of transfer without the delegate having to execute a new authentic act. Popular throughout the United States in other guises, a simulation may also be employed by parties who do not want to state on the public record the price paid for a tract, or perhaps other terms of their transaction. The recorded act states a different price, and their counter letter (or side letter, as it is sometimes labeled) acknowledges the true price.

102. LA. CIV. CODE ANN. art. 2464 (2012).

transaction:

The sales of immovable property made by parents to their children may be attacked by the forced heirs. As containing a donation in disguise if the latter can prove that no price has been paid, or that the price was below one fourth of the real value of the immovable sold, at the time of the sale.¹⁰³

Some of the mechanics of proof in former article 2444 were eliminated from its successor provision:

The sale of immovable property by parents to their children may be attacked by the forced heirs as a donation in disguise if those heirs can prove that no price was paid or that the price paid was less than one fourth of the value of the immovable at the time of the sale.¹⁰⁴

a. The Law in Action Seen Through a Fragmentary Regulation of Simulation

Traditional figures in Spanish and French law, counter letters and simulations have endured continuously in Louisiana practice since the colonial era.¹⁰⁵ In principle, a simulation consists of a written declaration of a fictitious transaction at odds with a transaction the parties have truly intended. Depending upon their goals, the parties may encapsulate their true intentions in a counter letter; the parties may record the counter letter if, after the date of the fictitious public transaction, they wish to annul their fictitious transaction or reveal its details.

The following subsections seek to demonstrate the impact of a formerly fragmentary regulation of simulation upon the law in action as it existed principally before the revision of obligations.

b. Simulations Classified as Disguised Transfers and Non-Transfers

Simulations have traditionally fallen into two categories: (1) disguised transfers, i.e. those producing legal effects different from those declared in the public document, and (2) non-transfers, i.e. those producing no effects at all for the parties.¹⁰⁶ A

103. LA. CIV. CODE art. 2444 (1870).

104. LA. CIV. CODE ANN. art. 2444 (2012).

105. These institutions appeared in the Louisiana Digest of 1808 four years before Louisiana statehood. See Scalise, *supra* note 101.

106. Simulation is a contract, which “by mutual agreement, it does not express the

third party in good faith may derive rights from both categories of simulations.¹⁰⁷ If the parties have agreed to conceal the true terms of their transaction behind a simulation, the terms of their public document may be as varied as human imaginations. But the imagination is dampened to an extent by the fear that the transaction will be challenged if the parties have a dispute. Legally, the public or pretended document could provide almost anything. In practice, however, parties to a simulation routinely avoid unnecessarily improvising their documents; rather, their transaction takes the form of an onerous nominate contract (i.e. a sale, lease, or mortgage) specifically regulated in the Civil Code.¹⁰⁸ According to received wisdom, such a contract ought to discourage a title examiner's scrutiny of their transaction. By casting the simulated contract as an onerous contract, the parties likely reinforce a title examiner's conclusion that the transaction would not have diminished the transferor's estate because the parties have exchanged equivalent values. That determination would deflate a creditor's fraudulent conveyance claim in a bankruptcy proceeding or an action outside of bankruptcy. It is true that the passage of time (prescription may have run; memories may have faded) tends to reduce the prospect of a creditor's claim of financial harm stemming from the transaction. But, for a recent transaction, the title examiner's conclusion that the public act attested to an exchange of equivalent values would allay his concern of financial prejudice to a creditor.

c. Disguised-Transfer Simulation

A disguised-transfer simulation typically supposes a registered and public agreement in which a transferor declares inaccurately that he has sold an immovable to a transferee. Classically, the Civil Code requires mutual agreement on object and price and a sincere intention to effect their exchange.¹⁰⁹ Acknowledging the exchange, the transactional documents may

true intent of the parties." LA. CIV. CODE ANN. art. 2025 (2012). "A simulation is absolute when the parties intend that their contract shall produce no effects between them." *Id.* art. 2026. "An example of absolute simulation is an act whereby the parties make an apparent sale when they actually intend that the vendor will remain owner." *Id.* art. 2026, cmt. a.

107. LA. CIV. CODE ANN. art. 2026 cmt. c (2012).

108. *See id.* art. 1914.

109. *Id.* art. 2439 ("Sale is a contract whereby a person transfers ownership of a thing to another for a price in money. The thing, the price, and the consent of the parties are the requirements for the perfection of the sale.").

be defective because: (a) the recited purchase price may be derisory; (b) no price is paid even though the public act has declared that the seller has acknowledged receipt of the price; or (c) in a variation of (b), the ostensible purchaser ceremoniously delivers the ostensible vendor his check in the amount of the purchase price in plain view of the notary public and witnesses, and the vendor later endorses the check and deposits it into the purchaser's bank account. In any of these cases, the public sale may be recharacterized as another nominate contract, such as a donation, but it is usually a donation disguised as a sale.¹¹⁰

d. Forced Heirship

Before 1989, a Louisiana forced heir's inheritance rights enjoyed broad protection under the Civil Code. An heir typically challenged his ancestor's transfer to a third party in the context of the latter's succession. An aggrieved heir usually claimed that the ancestor's transfer was in reality a donation to a third party that impinged upon the legitime, that is, the fraction of the estate reserved for a forced heir. The heir's action, characterized in French doctrine as an "action en declaration de simulation," resembles the revocatory and oblique actions, in the sense that it grants rights to third persons not parties to a challenged transaction.¹¹¹ The action, invoked by a creditor seeking to satisfy a debt the transferor owes him, alleges a debtor's concealment of property to the creditor's prejudice. A forced heir's action alleges an unjust impingement of the ancestor's estate; he claims that the estate, reduced by the value of the gratuitous transfer, contains insufficient assets to satisfy the forced heir's claims. Alternatively, if the ancestor had actually preferred one heir over others by making a real donation, the aggrieved heirs could challenge the transaction and seek a reduction of the amount received by the preferred heir.¹¹² In a typical fact pattern, the ancestor continued to possess the transferred asset, although it stood in the transferee's name after the recorded transaction. By relying upon Civil Code article 2480, the attacking heir could shift to the transferee the burden of proving the reality of the sale. It is unlikely that the transferee

110. LA. CIV. CODE ANN. art. 1914 (2012); *id.* art. 2464.

111. *Id.* arts. 2036-38.

112. *See* Succession of Clark, 155 So. 2d 37, 39-41 (La. Ct. App. 1963).

could successfully carry that burden.¹¹³

To foil a forced heir's challenge, a lawyer typically would disguise the donation as a fictitious sale.¹¹⁴ According to wisdom among practitioners, if there were a sale, then the attacking heir's challenge would meet the argument that the transferor's patrimony was enriched by an equivalent value, thus foiling the aggrieved heir's claim of harm. In a disguised donation between parent and child, there would typically be no counter letter because the parties, concerned that another child could challenge the transfer, preferred not to arm the challenger with a counter letter that would enable her to set the transaction aside.

Around 1989, the Louisiana legislature narrowed the class of forced heirs to children under twenty-three years of age and children of any age who have a mental or physical handicap and are permanently incapable of caring for their person or administering their estate.¹¹⁵ This legislative measure substantially reduced the class of potential challengers of an ancestor's transfer based upon an impingement of the legitime, i.e. the forced share. As a result of this legislative change, creditors, rather than heirs, are today the likely challengers of simulations. Financial reverses suffered in the aftermath of Hurricane Katrina (2005), the subsequent collapse of the real estate markets, and the BP oil disaster in the Gulf of Mexico (2009) have likely increased the proportion of challenges filed by creditors rather than heirs.

113. "When the thing sold remains in the corporeal possession of the seller the sale is presumed to be a simulation, and, where the interest of heirs and creditors of the seller is concerned, the parties must show that their contract is not a simulation." LA. CIV. CODE ANN. art. 2480 (2012).

114. Among Louisiana real estate lawyers, this practice is fairly well known, but it would be highly unusual for the documents to declare their intention clearly. On the contrary, the lawyers and parties generally go through the charade, and a witness would not know it was a charade.

115. Louisiana Civil Code article 1493 (as amended in 1989) states: "Forced heirs are descendants of the first degree who have not attained the age of twenty-three years of any age who, or because of mental incapacity or physical infirmity are incapable of taking care of their persons or administering their estates." LA. CIV. CODE ANN. art. 1493 (1989). For background on the amendment of 1989, see Cynthia Samuel, *Letter from Louisiana: An Obituary for Forced Heirship and a Birth Announcement for Covenant Marriage*, 12 TUL. EUR. & CIV. L.F. 183 (1997).

e. Simulation To Shield Property from Transferor's Creditors; Non-Transfer Simulation

In a non-transfer simulation to defeat creditors, a transferor conveys an asset to a trusted third party who has agreed to shield the property from seizure by the transferor's creditors. Ideally the transfer should have occurred before any creditor has recorded her judgment against the transferor. If the judgment has been recorded before the transfer to the third party, the transferor's aim is frustrated because the judgment will follow the asset now standing in the transferee's name. For the transferor's aim to be fulfilled, no such judgment should have been recorded. In that event, the transferee acts as a trustee for the transferor's benefit. The counter letter declares that the transferee, in fact not having acquired ownership of the asset, will execute a public act promising to return it on the transferor's request. Unlike a trust, this non-transfer simulation does not insulate the asset from the transferor's creditors by establishing in the transferee a patrimony distinct from her personal estate. So far as third parties are concerned, the personal assets of both the transferee and the transferor are vested in a single patrimony. Hence, the transferee's creditors can attach the transferor's asset though it may stand in the transferee's name. In this circumstance, the transferor risks losing the property if her transferee is financially irresponsible or dishonest, for in this case the latter could suffer a personal judgment for her own debts while the asset stands in her name. Assuming that a seizing creditor of the transferor can produce a counter letter showing that the transfer had no reality and the asset's ownership remained vested in the transferor, then she will be able to seize the asset in the transferee's hands.

f. The Law in Action Rationalized by Recodification and Enlargement of Simulation

We have described simulations and counter letters as they existed before the enactment of the obligations revisions of 1984. Longstanding practices combined with the needs of commerce to assure that simulations and counter letters would endure on the Louisiana landscape, making the reporter's task to craft durable and predictable designs for the institutions. As we have suggested above, the original fragmentary regulation of simulation constituted a thin reed upon which to erect an entire legislative structure. The revision of simulation illustrated a

process of bricolage in which the reporter, recognizing the need for innovation, nonetheless incorporated many well-established elements so as to allay the legal community's suspicion of unwarranted innovation. It was hoped that a well-crafted regulation would instruct a lawyer without shocking him, largely confirming his fragmented conception of an institution.

Unlike the original articles on simulations, which seemed no more than corollaries of implicit first principles, the new regulation of simulations was anchored in explicit principles and definitions. For example, current Louisiana Civil Code article 2025 states: "A contract is a simulation when, by mutual agreement, it does not express the true intent of the parties. If the true intent of the parties is expressed in a separate writing, that writing is a counter letter."¹¹⁶

Regulating absolute simulations, current Louisiana Civil Code article 2026 provides: "A simulation is absolute when the parties intend that their contract shall produce no effects between them. That simulation, therefore, can have no effects between the parties."¹¹⁷

Current Louisiana Civil Code article 2027 defines relative simulations:

A simulation is relative when the parties intend that their contract shall produce effects between them though different from those recited in their contract. A relative simulation produces between the parties the effects they intended if all requirements for those effects have been met.¹¹⁸

Current Louisiana Civil Code article 2028 provides: "Counter letters can have no effects against third persons in good faith."¹¹⁹

Companion comments for the current simulation regulation seem to exhibit evasive patterns like those identified earlier.¹²⁰ This evasive style may be instructively contrasted to the directness of comment e accompanying current Louisiana Civil Code article 2028.¹²¹ Unlike comments suggesting an archetypal

116. LA. CIV. CODE ANN. art. 2025 (2012).

117. *Id.* art. 2026.

118. *Id.* art. 2027.

119. *Id.* art. 2028.

120. *See supra* notes 106-110.

121. LA. CIV. CODE ANN. art. 2028 cmt. e (2012).

institution prevalent in legal practice rather than the books, comment e was securely anchored in specific facts and statutes.

Article 2028 eliminates the reference to the rights of forced heirs that was introduced into Louisiana Civil Code article 2239 (1870). The reasons for that amendment are unclear. Whatever its purpose, the amendment has had almost no impact on the jurisprudence since it was enacted.¹²²

The style of this explicit comment is characteristic of comments that alert readers to a specific change to a rule in the books, rather than the law in action. It should leave little doubt about a new rule's legislative purpose.

g. Former Louisiana Civil Code article 2239 and Current Louisiana Civil Code article 2028 in Light of Practices Involving Simulations

Without context, the effects of former Louisiana Civil Code article 2239 and current code article 2028 are murky. This seems to be the case because the shadowy structures of simulations and counter letters required exegesis. Like former Civil Code article 2239, current article 2028 contemplates a real or pretended transfer, effected to shield the property from creditors. The comments might have been clearer if they had noted a crucial chronology—the rule assumed that the execution of the counter letter predated the creditor's seizure—yet it was unrecorded at the moment of the seizure. The counter letter may indicate that the transaction was either a donation (i.e. a disguised transfer or a relative simulation), or that the transfer had no reality at all (i.e. a non-transfer or absolute simulation).

In either hypothetical simulation, a third-party creditor may know of the unrecorded counter letter. But her knowledge does not deprive her of the status of a good faith acquirer. That status endures even if the transferor, hoping to halt the seizure, or tardily, to divest the transferee's title, now records her theretofore unregistered counter letter. The transferor has foolishly jeopardized her interest in the transferred property by vesting title in a financially irresponsible transferee.

122. LA CIV. CODE ANN. art. 2028 cmt. e (2012). For the evolution of Louisiana's policy of forced heirship, see the comments accompanying LA. CIV. CODE ANN. art. 1493 (2012).

Former Civil Code article 2239 and current Civil Code article 2028 also contemplated recordation of a counter letter before a third party creditor or a good faith purchaser acquired an interest in the property.¹²³ The recordation of the counter letter puts the third party on notice and cuts off her good faith status. The terms of the counter letter bind both the transferor and the transferee and have priority over a third party's tardily recorded interest. Curiously, parties who initially could not have been trusted to tell the truth on the public record, notwithstanding their sworn declarations before a notary public, are presumed by long tradition to have redeemed themselves by telling the truth the second time around in their counter letter. Paradoxically, a counter letter recorded before a later-filed judgment binds a judgment creditor although she had no reason to check the public record when she filed her judgment. Bound by the public record, which now reflects both the original sham transaction and the counter letter, a transferee's purchaser and mortgagee suffer the subordination of their rights according to the stipulations in the counter letter. Nevertheless, a third party can demand damages from the original parties to the transaction. If she prevails, then she may be in a position to execute promptly her new money judgment against the asset in question.

h. Inspiration for Regulation of Simulation

Comments accompanying the new simulation articles credit the influence of the Italian Civil Code's regulation of simulation.¹²⁴ However, the Italian Code does not explicitly distinguish absolute simulations from relative simulations; nor does the Italian Code explicitly regulate counter letters, though it contemplates effects of secret acts confected by the parties. Following a previously identified pattern, the Argentine Civil Code seems a charming inspiration for the Louisiana regulation of simulation. Argentine Civil Code article 989 provides:

Simulation is present when the juridical character of an act is concealed under the appearance of another act, or when the act contains clauses that are not sincere, or dates which are not true, or when rights are constituted or transferred thereby to interposed persons, other than those for whom they are really constituted or to whom they are

123. LA. CIV. CODE art. 2239 (1870); LA CIV. CODE ANN. art. 2028 (2012).

124. LA. CIV. CODE ANN. art. 2025, cmt. c (2012).

transferred.¹²⁵

Argentine Civil Code article 990 states: “The simulation is absolute when a juridical act is celebrated which is not real in any respect, and relative, when employed in order to give to a juridical act an appearance which conceals its real character.”¹²⁶ Thus, the Louisiana revision seems to have continued the absolute-relative distinction found in Argentine law.

i. Relative simulation in Argentine Civil Code?

Argentine Civil Code article 994 regulates counter letters to a greater degree than its Louisiana counterparts. Especially noteworthy is the conscientious judicial approach to an apparently simulated transaction:

When there is a counter instrument [counter letter] regarding the simulation signed by either of the parties, the purpose of which is to avoid the simulated act, whether the simulated act was . . . unlawful, . . . explaining or restricting the previous act, the judges may take cognizance of both the counter instrument and the simulation, if the counter instrument does not contain anything opposed to the prohibition of the laws, or against the rights of a third person.¹²⁷

An experienced lawyer can intuit the issues of proof and procedure characteristic of a simulation action, but this Argentine provision deftly guides the inquiry of the judge.

D. REVISION OF SALES: MOVABLES

In earlier sections, provisions of the Argentine Civil Code sometimes functioned as legislative prisms through which one could view the Louisiana Civil Code. Looking through the Argentine prisms, we identified influences of the original Louisiana Civil Code upon the more recent Argentine Code and speculated about the latter’s unacknowledged influences upon current Louisiana articles. If, in looking at these influences, the metaphor of a prism seems useful, then the present section may be seen as a hall of mirrors that reflects continuities between the

125. Cód. CIV. art. 989 (1871).

126. *Id.* art. 994.

127. *Id.* art. 990.

UCC and the Civil Code. One such continuity, the “hub-and-spoke” pattern, is a classical feature of civil codifications that also figures into the UCC.¹²⁸ Also evident are the patterns of kinship among the UCC, the revised Louisiana Civil Code, and the Vienna Convention on the International Sale of Goods (1980).

1. ROLE OF SUPPLETIVE AND IMPERATIVE TERMS IN CIVIL CODE

A civil code modeled upon the French Civil Code typically classifies contractual terms as either imperative or suppletive. “Imperative” elements are indispensable to a valid contract; these elements determine the contract’s place in a taxonomy of nominate contract types. For example, the nominate contract of sale requires an object and a price that the parties must truly intend to exchange.

According to the Louisiana Civil Code, the sale, in addition to specifying an object and a price, is affected by a certain number of non-disclaimable (i.e., imperative) norms such as good faith. In addition to such imperative terms, the Civil Code supplies suppletive terms for contracts. The legislation inserts these terms into a contract when the parties have failed to agree on them. For example, if the parties have been silent on warranty protections, then the Civil Code’s suppletive provisions add certain warranty regulations to the contract. In a general way, the Louisiana Civil Code’s suppletive terms are invoked as supplements to the expression of the contracting parties’ wills.

2. HUB-AND-SPOKE PATTERN ASSOCIATED WITH SUPPLETIVE-IMPERATIVE DISTINCTION

Associated with the hub-and-spoke structure of a civil code are a traditional distinction between suppletive and imperative terms, on one hand, and a taxonomy of nominate contracts on the other. The three features contribute to the code’s concision and systematic interpretation. Visualized as a wagon wheel, the code’s contract regulation consists of a central hub and numerous spokes. The hub constitutes a repository of norms and rules applicable generally to all contracts, irrespective of particular features that classify it as one specific nominate contract. The

128. See *infra* notes 132-40 and accompanying text.

contents of the hub may vary from one civil code to another,¹²⁹ and the hubs may take different forms. For example, the Swiss legislator separated his code of obligations from the nation's civil code and has treated the former as a hub for the latter.

A typical hub collects regulations on contract formation, vices of consent, and kinds of obligations. In the Louisiana Civil Code, the hub (Civil Code articles 1756 to 2314) collects the rules on contract formation, kinds of obligations (i.e. joint, several, solidary, indivisible, conditional, subject to a term etc.), cause, object, and general norms such as good faith.¹³⁰ Governed by a particular title, each nominate contract, appearing after the obligations provisions, occupies one or more metaphorical spokes, has distinctive characteristics, and often invokes by analogy the application of the obligations provisions.¹³¹ Nominated contracts have many common features because they are all anchored in shared norms and rules collected in the central hub.

129. For a survey of code structures available for consideration at the time of the Louisiana revision, see Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 989 (1980). This paper grew out of memoranda prepared for discussions of the future structure of the revised Louisiana Civil Code. On the hub-spoke structure, see generally Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337 (1994). American scholarship highlighted the hub-spoke structure after the UCC had been in use for some years. Scholarship was generated along with discussion about revising and expanding the UCC to include transactions it did not initially regulate. According to Nimmer, in a hub-and-spoke configuration general contractual norms would form the hub of Revised Article 2 (Sale). Depending upon how one stated the criteria for the hub provisions, the hub would include many current UCC Article 2 rules about contract formation and interpretation, supplemented perhaps by norms from the Restatement and other sources of commercial law. The spokes would contain rules applicable to particular contract types. *Id.* at 1387-88. For links between the UCC's hub-and-spoke structure and that of the Civil Code, see Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 437 n.99 (1996) [hereinafter Herman, *The Fate and the Future of Codification*].

130. LA. CIV. CODE ANN. art. 1967 (2012) (discussing detrimental reliance).

131. For example, according to current Civil Code article 2438, the first provision in the sale titles: "In all matters for which no special provision is made in this title, the contract of sale is governed by the rules of the titles on Obligations in General and Conventional Obligations or Contracts." LA. CIV. CODE ANN. art. 2438 (2012). Analogously, Louisiana Civil Code article 2669 fulfills the function of article 2438 in the lease titles. *Id.* art. 2669.

3. THE UCC HUB-AND-SPOKE ANCHORED IN CIVILIAN TRADITION

Imperial Roman jurists originated an elaborate taxonomy of nominate contracts. Generally, each nominate contract¹³² had distinctive remedial formulas that the Roman iudex relied upon in granting or denying relief to an aggrieved party. The Roman contracts continued into the Middle Ages, and many became lodged in modern civil codes beginning with the Code of Napoleon. The classification of nominate contracts, the suppletive-imperative distinction, and the hub-and-spoke configuration—all familiar features of the Louisiana Civil Code—constituted innovations in Karl Llewellyn's Uniform Commercial Code. With his code, Llewellyn sought to bring to contracts a systematic analysis and consistent thought patterns that a dominant case law method had not sufficiently stressed. Traditional American courses in contracts did not systematically explore a series of nominate contracts, nor did the courses typically distinguish nominate from innominate contracts. Instead, the courses frequently explored universal norms without distinguishing one contract from another. If the United States curriculum distinguished among contracts, the distinction lay in a contrast between gifts and bargains, and, perhaps, to a lesser degree, a contrast between formal and informal agreements. Separate courses might address contracts of agency, partnership, and suretyship; but these courses were not obligatory offerings, and they now seem vestigial. In any case, the case law method of instruction seems hardly to have recognized these contracts as different nominate contracts in a taxonomy of contractual archetypes.

4. "CIVILIAN" FEATURES OF THE UCC'S STRUCTURE

Along several dimensions, the UCC broke new ground in American legislative method and contract doctrine. Emblematic of an important methodological insight, the UCC, both explicitly and by analogy, codified characteristics of different kinds of contracts for the legal communities of the several states. The shared characteristics figured in a common fund of norms and created a generalized analysis of contracts. These norms were

132. For characteristics of nominate and innominate contracts under Roman law, see RUDOLPH SOHM, *THE INSTITUTES OF ROMAN LAW*, 294-96 (J. C. Ledlie trans., 1892).

supplemented by specialized rules that varied according to the nature of a specific contract in question.

UCC § 1-102 signaled links between the hub and various spokes.¹³³ “This article [i.e. § 1-102] applies to a transaction to the extent that it is governed by another article of [the Uniform Commercial Code.]”¹³⁴ Affected by a range of highly particularized rules (e.g. warranties, time and manner of delivery of goods) many of which appeared in UCC article 2, an archetypal sale of goods, as a specific example within a broad category of contracts, was also regulated by article 1’s general norms, such as good faith and reasonableness, as well as interpretive canons applicable to all contracts. From a civilian perspective, article 2, without using the term “nominate,” essentially regulated a nominate contract of sale of movables. The regulation of sales appeared alongside other spokes that affected agreements such as movable leases (article 2A), negotiable instruments (article 3), letters of credit (article 5), and secured transactions (article 9).

The battery of norms collected in UCC articles 1 and 2 made it resemble the general part of a typical civil code. A continental scholar may reasonably object that the UCC’s general part was more abbreviated than those of classic civil codes like the Louisiana Civil Code and the German Civil Code. Furthermore, the UCC did not use the term “general part,” though Llewellyn would surely have appreciated that institution as he prepared a doctorate in Germany. Indeed, the UCC’s distinctive voice and lexicon generally steered clear of civilian terminology, probably because its main drafter, Llewellyn, feared that unnecessary reference to European law, especially German law, could jeopardize his project.¹³⁵

133. See U.C.C. § 1-102 (2012).

134. *Id.* On nominate and innominate contracts in Louisiana jurisprudence, see generally Herman, *Detrimental Reliance in Louisiana Law*, *supra* note 10, at 727-32.

135. Llewellyn had studied German law and written a dissertation while in Germany. Advertising abundant German influences upon his thought (indeed he received the German Iron Cross for service) could have jeopardized his commercial code project among GIs returning from Europe. Ansaldi, *supra* note 13. Anxious to safeguard his project from sabotage by nativist elements during the aftermath of World War II, Llewellyn denied all German inspiration. Responding to the émigré scholar, Stefan Riesenfeld, Llewellyn told him the secret of his success had been to “[s]teal from everybody but never admit it. It would be the kiss of death.” Riesenfeld speculated that “[Llewellyn’s] attitude perhaps explain[ed] why [he] refrained from references to contemporary German writings and legal theories.” Herman, *The Fate and the Future of Codification*, *supra* note 129, at 407, 437 n.71 (internal quotations

The UCC's hub-and-spoke organization enabled lawyers and courts to analogize among various contracts, especially when the rules applicable to a disputed matter appeared mainly in the hub. A judicial practice dubbed the "spreading analogy of UCC Article 2"¹³⁶ invited the application of general UCC norms to transactions that the UCC did not expressly regulate. Llewellyn urged consistent use of a specialized lexicon of terms that would facilitate analogical interpretation. Akin to a general part, Article 1, as well as parts of Article 2 (Sales), identified principles that were to be read in *pari materia* with the UCC's titles on the sale of goods.

Under the pressure of commercial realities, UCC article 2 innovatively regulated sales concluded by an exchange of printed forms.¹³⁷ A by-product of assembly-line manufacturing, high velocity negotiations, and just-in-time inventory systems, contracts concluded by an exchange of forms had long bedeviled both lawyers and courts. This was so because the parties' negotiations, instead of being characterized by a traditional process of dicker and bargain over individual terms, turned into a documentary duel, in which each party's form sought to neutralize or cancel out terms of the other's document. According to the commercial doctrine that dominated mid-twentieth century thinking, a mirror image rule required a contract's formation to hinge upon a precise reflection of a seller's proposal in a buyer's acceptance. Strict application of the mirror image rule inevitably hindered formation of agreements, for, in reconsidering his

omitted). References to Riesenfeld, are from STEFAN RIESENFELD, THE IMPACT OF GERMAN LEGAL IDEAS AND INSTITUTIONS ON LEGAL THOUGHT AND INSTITUTIONS IN THE UNITED STATES, IN THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920 91 (ed. M Reimann).

136. Daniel Murray, *Under The Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971). UCC Article 2 long authorized analogical interpretation of its provisions. See, e.g., U.C.C. § 1-103 (2012). According to Comment 1:

The Uniform Commercial Code is drawn to provide flexibility so that, since it is intended to be a semi-permanent and infrequently amended piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in the Uniform Commercial Code to be applied by the courts in the light of unforeseen and new circumstances and practices. The proper construction of the Uniform Commercial Code requires, of course, that its interpretation and application be limited to its reason.

137. For evolution of U.C.C. § 2-207 and its jurisprudence, see generally Phillip A. White, *A Few Comments About the Proposed Revisions to UCC Section 2-207: The Battle of the Forms Taken to the Limit of Reason*, 103 COM. L.J. 471 (1998).

agreement, a party could always find inconsistencies among documents he had exchanged with the other party. Furthermore, the parties' imperfectly concluded agreement posed particularly vexing problems of interpretation and enforcement if they jumped the gun by beginning performance before settling all relevant duties.¹³⁸

To salvage an agreement from the wreckage of the parties' dueling forms, article 2 recognized that a contract consisted of a formation phase and a performance phase. The latter phase was fleshed out by reference to the parties' conduct as well as customs and usages dominant in their line of commerce.¹³⁹ Although such customs are traditional features of a lawyer's situational sense, these additional indicia of the party intentions require alignment between the law in the books and practical realities. Furthermore, UCC § 2-207 declared that an agreement concluded by an exchange of forms consisted of terms on which the forms agreed along with features of a default contract type that filled gaps in their expressed intentions.¹⁴⁰ From a civilian perspective, the use of a contract type, standardized in the legislation, evoked a practice familiar in continental regulation of contracts.

5. LODGED IN UCC ARTICLE 2, NORMS INSPIRED BY CONTINENTAL PRACTICE FILLED GAPS IN LOUISIANA CIVIL CODE'S REGULATION OF SALES OF MOVABLES

The early Louisiana Civil Code drafters, like their French counterparts, visualized immovable transactions in terms of a contract's two phases—formation and performance.¹⁴¹ The drafters seemed rather myopic in regulation of movable sales, as was the traditional Louisiana curriculum: Following an emphasis upon immovable transactions, Louisiana obligations courses neglected movable transactions. If a student desired a detailed understanding of the regulation of movable sales, she was advised to enroll in a general course about the UCC.¹⁴² In

138. For the mirror image rule and an example of judicial salvage of a contract that would have aborted based upon exchanged forms alone, see *C. Itoh & Co. v. Jordan Int'l Co.*, 552 F. 2d 1228, 1235-38 (Ill. App. Ct. 1977).

139. *E.g.*, U.C.C. § 1-303 (2012) (defining course of performance, course of dealing, and usage of trade).

140. U.C.C. § 2-207 (2012).

141. *See* 1 HAWKLAND U.C.C. SERIES 2-209:2 (2012).

142. Of course, if the student wished a detailed treatment of immovable sales, she would have found the Civil Code more helpful than the U.C.C.; the latter said almost

hindsight, the Civil Code's stress upon immovable transactions and the UCC's emphasis upon movable transactions were emblematic of their different historical eras and the realities of American law. The UCC's emphasis on movables (or chattels) was reinforced by traditional choice-of-law principles that protected each state's authority over interests in land lying within its borders. Furthermore, among the states, great variation in the regulation of real estate made it difficult to reach consensus on routine questions that arose in real property transactions.

Emblematic of patterns of early nineteenth century commerce regulated by the first Louisiana Civil Code, the sales titles reflected agrarian values in which sales generally concerned immovables, not movables. Over the next century and a half, business practices among merchants and consumers evolved rapidly; landed wealth found a rival in movable wealth, especially incorporeals such as stock shares in publicly traded companies and more recently, intellectual property. Meanwhile, the complexity of products made it increasingly difficult for a buyer to identify a product's defects and negotiate protections against them—the increased speed of manufacturing and globalized production were mirrored in high velocity contractual negotiation. Like their counterparts elsewhere in the United States, Louisiana merchants confronted a welter of negotiating tactics in chattel transactions executed along lengthening supply and manufacturing chains. As the companion comments for the Louisiana regulation of movable sales observed:

[T]here is a limit to what mending legislation and judicial interpretative ingenuity can do with a legislative scheme that no longer adequately serves' needs of the community. While it was becoming increasingly obvious that the Louisiana Civil Code articles on sales were insufficient to meet the needs of Louisiana citizens, legislative innovations in the area of sales, both in the United States and abroad made the agedness [sic] of the (Louisiana) sale articles . . . and the

nothing about mortgages and titles, and Llewellyn himself was avowedly skeptical about contract analysis based upon the concept of title. *See generally* Llewellyn, *supra* note 4; *see also* Stefan Riesenfeld, *The Influence of German Legal Theory on American Law: The Heritage of Savigny and his Disciples*, 37 AM. J. COMP. L. 6 (1989) (stating that the thought patterns of the modern common law legal architects and that of the Pandectists merged in Llewellyn's intellect).

urgency of their revision glaringly clear. Article 2 of the U.C.C. and the 1960 Convention on International Sales are recent legislative models providing realistic approaches to contemporary sales problems that stand in sharp contrast to the elegant, yet outdated provisions of the Louisiana Civil Code.¹⁴³

Until the reform of the Civil Code's sales articles, Louisiana law provided virtually no regulation of movable contracts and supplied no guidelines for an associated battle of forms. Although a traditional mirror image rule functioned reasonably for immovable transactions characterized by rigorous conformity between offers and acceptances, the speed at which negotiations proceeded made that same mirror image rule less helpful for controversies arising out of communications among merchants.

6. VIENNA CONVENTION ON INTERNATIONAL SALE OF GOODS AND UCC CONTRIBUTE TO NEW LOUISIANA REGULATION OF MOVABLE SALES

To fill the gaps in the regulation of movable sales, Professor Litvinoff and his committee drew inspiration from features of both the UCC and the U.N. Convention on Contracts for the International Sale of Goods (CISG).¹⁴⁴ Some of these features stemmed from rapidly globalizing continental practices. The UCC adapted traditional continental gap filling techniques and linked them with "supplementary" terms (UCC § 2-207 (3)).¹⁴⁵

143. Expose de Motifs to LA. CIV. CODE. ANN. Bk. III, tit. VII (2012).

144. See *supra* note 90.

145. The imperative supplementary dichotomy might crop up in unexpected places in the UCC. Without citing explicitly the term "supplementary" in U.C.C. § 2-207, a comment under U.C.C. § 2-403 dictated broad inclusion of supplementary principles into analysis of sale agreements:

[T]he policy of this Act (i.e. the Uniform Commercial Code) expressly providing for the application of supplementary general principles of law to sales transactions wherever appropriate joins with the present section (i.e. Section 2-403) to continue unimpaired all rights acquired under the law of agency or of apparent agency or ownership or other estoppel, whether based on statutory provisions or on case law principles.

U.C.C. § 2-403 (2012). See also *id.* § 2-207:83. For the supplemental character of general contract principles in a contract, see *C. Itoh & Co. v. Jordan Int'l Co.*, 552 F.2d 1228, 1237 (7th Cir. 1977). Debates over the permissible list of gap filler terms suggest that the legal community has embraced the imperative-suppletive dichotomy, despite disagreement about details. Some scholars would limit the list of gap fillers to explicit gap fillers while others argue for a broader list, including sections directing consideration of party conduct, to permit comprehensive interpretation of the parties' agreement. See, e.g., *PCS Nitrogen Fertilizer L. P. v.*

Interpretation of UCC § 2-207, case law, and doctrine recognized the signals of gap fillers in statutory phrases such as “unless excluded or modified”¹⁴⁶ or “unless displaced.”¹⁴⁷ Although American courts did not consciously link UCC supplementary terms and cognate suppletive terms in a civil code, the UCC jurisprudence recognized ways in which these terms fleshed out gaps in the parties’ expressions of will. The Louisiana Civil Code drafter, likely inspired by the longstanding function of suppletive terms in contract interpretation, seems to have adapted the UCC idea of supplementary terms in sales by exchange of forms. Put differently, analogical reasoning enlarged the “suppletive” terms identified in current Civil Code article 2602 to a new regulation of movable sales. The new article provided:

A contract of sale of movables may be established by conduct of both parties that recognizes the existence of that contract even though the communications exchanged by them do not suffice to form a contract. In such a case the contract consists of those terms on which the communications of the parties agree, together with any provisions of the *suppletive* law.¹⁴⁸

According to the legislative *expose des motifs* for Louisiana’s new regulation of sales, the UCC, which was influenced by certain continental drafting techniques, reciprocated continental influence by inspiring provisions in the Louisiana sale revision. Recognizing the risk that the mirror image rule might unnecessarily impede contract formation, Louisiana Civil Code article 2602 followed a norm that UCC § 2-207 had adapted from continental practice.

7. UPDATE OF UCC § 2-207

By adapting UCC patterns for movable sales, the Louisiana drafters gave us new problems of time and space. If UCC solutions were now to figure into the Civil Code, then the drafters also should have indicated the relevance for Louisiana lawyers of case law interpretations under the UCC from other states. Now that the CISG has become the law of the land by virtue of the

Christy Refractories L.L.C., 225 F.3d 974 (8th Cir. 2000).

146. *E.g.*, U.C.C. §§ 2-314, 2-316 (2012).

147. U.C.C. § 1-103 (2012).

148. LA. CIV. CODE ANN. art. 2602 (2012) (emphasis added).

Supremacy Clause of the U.S. Constitution, it is applicable to Louisiana transactions within its scope; *a fortiori*, these UCC insights are still more important. In regard to the time problem, the UCC relied upon by the Louisiana drafter continued to evolve after the revisions. The drafters did not clearly indicate the importance, if any, to be given modernization of the UCC itself. In other words, would Louisiana lawyers have to endure continuing isolation because the Louisiana revisions had been influenced by the original UCC, but not the UCC revisions or case law arising after the Louisiana revisions? Consider this last point by reference to UCC § 2-207.

A revised and updated UCC § 2-207, proposed after the effective date of the Louisiana sales revision, would have eliminated the word “supplementary.” Louisiana practitioners ought not ignore such changes because a merchant outside Louisiana would inevitably be guided by a later version of the UCC if her state has enacted it. This prospect would become a certainty if the parties concluded an agreement to be interpreted under another state’s law.

Fortunately, the idea of supplementarity of terms has endured in the UCC § 2-207. The UCC comments regard as contractual gap fillers general norms that may be incorporated under provisions of the UCC—mandatory, i.e. non-disclaimable, terms, characterized long ago by Llewellyn as “iron rules of public policy,”¹⁴⁹ including good faith, reasonableness, and unconscionability. By agreement the parties may renounce or modify other terms, such as warranties. But if their writings are silent on disclaimable items, then a court may check the UCC for directions on filling the contractual gaps.¹⁵⁰

IV. DESIGNING A SCORECARD: HAVE THE REVISIONS BENEFITED THE LEGAL COMMUNITY?

This question recalls the retort of the Chinese leader Zhou Enlai when he was reportedly asked by Henry Kissinger whether the French revolution was successful. Zhou’s answer: “It is too early to tell.” Assuming a more realistic, less coy answer were

149. Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 Tul. L. Rev. 1125, 1145 (1982) (citation omitted); 1 U.C.C. DRAFTS 370-72 (compiled by E. S. Kelly, 1984).

150. *See supra* note 145.

required for the obligations revision, one might reply with this question: From whose vantage point are we to make the assessment? Concerning Louisiana's original Civil Code, we could say that it was a success because it has shaped the Louisiana lawyer's self-identification—the Civil Code is the key to the system's mixed nature.

For a revision of the original Civil Code, such claims of success are more difficult to support. The terms “success” and “failure” are unhelpful criteria for assessing the impact of the obligations revision over the last twenty-five years. Such an assessment perforce has limited goals because the data are limited to changes and refinements of law in the books—in the form of legislation, cases, and doctrine. There seems no reliable way to assess the revision's effects upon the law in action.

A. LIMITATIONS UPON REPORTER'S MANDATE

The reporter's primary mission was to update and streamline the pre-existing law in the books and, wherever possible, to align it with the law in action. He had no general mandate to deviate from policies embodied in the pre-existing law. Such deviations from policy lie within the province of the Louisiana State Law Institute. For example, the evolution of detrimental reliance in Louisiana jurisprudence and the Supreme Court's historical rejection of promissory estoppel required a policy decision to incorporate those doctrines into the revision.¹⁵¹ For this proposed incorporation, the staff of the Law Institute prepared a separate report and evaluation. Without explicit instructions to modify the code's definition of cause, it seems unlikely that the reporter would have proposed article 1967 in the form it ultimately took.¹⁵²

151. For an account of this evolution and the Law Institute deliberations on cause and detrimental reliance, see David V. Snyder, *Hunting Promissory Estoppel*, in *MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND* 304 (Elsbeth Christie Reid and Vernon V. Palmer eds., 2009). The author's disagreements with some of Professor Snyder's conclusions, appear in Shael Herman, *Odd Men In: The Fascinating Legal Kinship of Scotland and Louisiana*, 85 *TUL. L. REV.* 1145, 1173-77 (2011).

152. For policy considerations leading to incorporation of detrimental reliance into the Civil Code's definition of cause, see generally Herman, *Detrimental Reliance in Louisiana Law*, *supra* note 10.

B. FIELD RESEARCH: OF POLLS, POLL TAKERS, AND RESPONDENTS

Without reliable polls conducted by competent pollsters among practitioners willing to share their experiences, it is difficult to identify changes in practice that were prompted by legislative revisions. It is difficult even to identify the appropriate respondents among practitioners and judges. Obstacles to identification of respondents include the division of labor in law firms; their duty to maintain client confidences; their protection of valuable work products; and their geographic dispersion. Even assuming identification of cooperative respondents, it would be difficult to construct reliable questionnaires. Such questionnaires should enhance the prospect of studying the alignment of the law in the books with the law in practice, but the alignment is not assured. Among researchers, a meliorist impulse is likely to infuse questionnaires with hope for progress evidenced in an improved fit between the two spheres. Responsible questionnaires ought to be drawn neutrally so that a respondent may provide a balanced evaluation rather than applause or condemnation of the revisions.

C. VARIABLE STANDARDS ARE DIFFICULT TO DEFINE

Without reliably drawn questionnaires, our assessment necessarily remains at the level of case law, doctrine, and scholarship. Such an assessment would be unlikely to penetrate into the daily functioning of law in courts and law offices. Focusing upon case law, doctrine, and scholarship, let us assume that we have been impressed by a shift of focus or direction in post-revision cases arising from some new obligations regulation. We also have to decide upon the standards for measuring the change. Standards perforce vary in accordance with the vintage of a formulation, i.e. whether a particular locution, concept, or institution is new, on one hand, or modernized and updated on the other. Perhaps the revision aimed merely to streamline and sharpen a concept embodied in the original code articles; and for achievement of that aim, we might predict a minor shift in the direction of the jurisprudence. By contrast, for a newly introduced locution or concept, we would expect the post-revision jurisprudence to shift dramatically away from pre-revision jurisprudence. A new line of jurisprudence might begin to develop where none previously existed.

Lying midway between innovation and tradition, a third

category is signaled by a comment that a regulation is new but does not change the law. Such comments typically identify newly formulated ideas that constitute continuities of traditional principles. For example, the revision used the neologisms “relative simulation” and “absolute simulation.” These terms deviated from prior law, which typically evoked the term “simulation” without the modifiers—the doctrine and scholarship also disguised transfer simulations from non-transfer simulations. Though relative and absolute nullities also appeared in the pre-revision jurisprudence,¹⁵³ the specific neologisms “relative” simulation and “absolute” simulation did not.

At first sight, the neologisms may give a lawyer a sense of *déjà vu*. Instinctively she is likely to believe that she understands the new regulation. Judging that the neologisms are not completely novel, she may work them into traditional categories of relative and absolute nullities. *Déjà vu* may be at work here. Perhaps acceptance of these norms lies in the fact that they evoke original formulations embedded in mental habits. Whatever the reasons for their appeal, the fresh formulations must also be easy to recall because, like exhausted troops, the lawyers’ memories of formulations in earlier codes will be sent packing, as their replacements go into immediate active service.

D. DIFFERENT TRAJECTORIES OF LEGAL IDEAS

It is a truism that legal ideas have different trajectories; this is predictable for denizens of different habitats, and the habitat influences a creature’s coloring and adaptation. For example, an idea such as detrimental reliance, introduced into the Civil Code for the first time in 1984, can scarcely survive outside the courts; a plea of detrimental reliance is a trial lawyer’s tactic for salvaging some value from a contract suffering from a possibly fatal flaw. This is consistent with a traditional plea of estoppel as an affirmative defense in the Code of Civil Procedure.¹⁵⁴ Some lawyers would embrace detrimental reliance as a last resort when other theories have failed. In contrast, cause dwells in every obligation, irrespective of whether it is judicially enforced. In a further contrast, some historically popular judicial ideas are now thought to be dead letters. This is so because they arise in

153. See Scalise, *supra* note 101.

154. LA. CODE CIV. PROC. art. 1005 (2012) (discussing affirmative defenses).

controversies resolved by confidential arbitration proceedings. Judicial elaboration of many important issues has little chance to develop because parties are often sent to arbitration, a typically confidential and unreported process. Kept confidential by the arbitrator and the parties, key legal ideas linger in the shadows of controversies, making their impact difficult to assess.

A fourth category of intriguing legal ideas deserves to thrive, but it suffers from stunted judicial growth. Even assuming the parties litigate their dispute, some important ideas rarely crop up in reported cases. For example, simulations and counter letters are likely much more abundant in daily practice than the case law suggests. A supposed abundance of simulations in practice likely explains the reporter's appeal to practitioners for insights into these institutions. Furthermore, the institutions are difficult to coax into the open because the lawyers prefer settlement if a public hearing would cast a bright light upon their strategies for protecting clients.¹⁵⁵

Despite these limitations and qualifications upon our inquiry, perhaps we can discover evidence suggesting the extent of the legal community's acceptance of particular concepts and formulations. Assuming a controversy ends in a published judgment, we can easily find in the Westlaw databases judicial interpretations of code provisions and even briefs based upon the provisions. The incidence of the Civil Code terms indicates their appeal in legal argument, but not whether the arguments were correctly made and understood.

E. RECEPTION OF OBLIQUE ACTION

Characteristics of the new regulation of the oblique action commend it as a good candidate for assessing the penetration of the revision into the thinking of the legal community. The original code did not name the vestigial ancestor of the oblique action, lumping it instead with the revocatory action. Hence, the independent regulation of the oblique action represented an innovation. However, it also represented continuity because, by analogy, it expanded the narrowly tailored ancestor in original

155. To these categories may be added a fifth category of ideas lodged in judicial rulings that courts, for unarticulated reasons, decide not to publish. In the future, a fascinating study could be made of judicial reasoning lying behind these decisions not to publish case reports.

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article 1985.

Newly introduced into the Louisiana regulation of both actions, a standard of insolvency was expected to overcome resistance to its novelty. Because the insolvency standard echoed an insolvency standard in bankruptcy cases, the bankruptcy bar and courts were expected to facilitate the acceptance of the oblique action. Furthermore, to foreclose unmeritorious invocation of the oblique action, the new regulation denied the action to a creditor if he sought to enforce a purely personal right belonging to the obligor. Linked by an analogy to new regulation of different kinds of obligations, this “purely personal” limitation continued a standard recognized in both French doctrine and the limited regulation of the action in the original Louisiana code.

Despite these reassuring features of the new regulation of the oblique action, the lawyers and courts did not race to embrace it. Though from 1984 the code mapped out the basic features of the oblique action, the ground remained terra incognita until the monuments located on the map were matched with those occurring in practice. Early invocations of the new regulation likely puzzled judges who found scant jurisprudential guidance for the oblique action other than occasional decisions dating back to the nineteenth century.¹⁵⁶ Such pre-revision decisions, following the formula of original article 1985, focused narrowly upon an insolvent debtor's inheritance and recognized her creditor's right to the inheritance if her insolvent debtor failed to accept it.

Once the oblique action underwent a christening in 1984, the lawyers and courts quickly began to exhibit interest in it. On several occasions the claimants, out of an abundance of caution, coupled the oblique action with other actions. Fairly characterized as good lawyering, this tactic made it difficult to assess the impact of the new regulation—for it now permitted the judges summarily to dismiss the oblique action as an afterthought and beyond the plaintiffs' central arguments.

Though intrigued by the action, some courts, predictably diffident toward its application, satisfied claims based upon other theories of action. In *Taylor v. Babin*,¹⁵⁷ a plaintiff asserted an

156. See, e.g., *Tompkins v. Prentice*, 12 La. Ann. 465 (1857).

157. *Taylor v. Babin*, 2008-2063 (La. App. 4 Cir. 5/8/09); 13 So. 3d 633.

oblique action. The demand was rejected, mainly because the cited instances of judicial consideration before codification of the oblique action were limited to the specific facts recited in prior civil code article 1985.¹⁵⁸

Meanwhile, federal district court judges presiding in Louisiana, directed by established doctrine to apply state law to a broad spectrum of federal cases, charted their own paths in the terrain mapped by the oblique action. In 2007, for example, a United States district court rejected an oblique action on the basis that the plaintiff had not alleged defendant's insolvency, an indispensable element of the claim.¹⁵⁹

The oblique action's most imaginative and rewarding development seems to have originated in the province of Louisiana's federal bankruptcy courts. The obligations committee turns out to have accurately foreseen that the substitution of an insolvency criterion for fraud for both the revocatory and oblique actions would facilitate their reception. The committee's conviction was prompted by recognition that debtor insolvency provided an interface between federal and state proceedings for creditor protection.

Bankruptcy courts devote considerable attention to both state and federal regulation of creditor protection. The revocatory action has long had great allure for bankruptcy courts, whose regular work includes liquidation and reorganization of debtor estates for the benefit of creditors. Hence, it made sense to the obligations revision committee to piggyback features of the oblique action upon the revocatory action. In *In re Goldberg*, a bankruptcy trustee's strong arm action to avoid a real estate purchase allegedly made when a debtor purchaser was already insolvent, brought a wealth of scholarly insights into the oblique action's companion revocatory action.¹⁶⁰ Starting with the Roman Paulian action, the court ranged over the history of creditor protections and the function of insolvency in current federal bankruptcy law. More than any other post-revision decision that I have personally encountered, *In re Goldberg* has demonstrated the richness of foreign law for the evolution of Louisiana law.

158. Taylor v. Babin, 2008-2063 (La. App. 4 Cir. 5/8/09); 13 So. 3d 633, 638.

159. Acro-Tek Communications v. Comnet, LLC, No. 06-11162, 2007 WL 4162873 (E.D. La. 2007).

160. In re Goldberg, 277 B.R. 251, 273-84 (M.D. La. 2002).

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The decision also hinted at our impoverishment if foreign law were excluded from judicial consideration. By dovetailing federal creditor avoidance actions with the state revocatory action, the court provided a scholarly inquiry evocative of judgments rendered by the early United States Supreme Court long before the current Supreme Court exhibited allergies to foreign law. The court's opinion was also evocative of early Louisiana decisions anchored securely in comparative methods.¹⁶¹

Though *In re Goldberg* concentrated upon the revocatory action, its analysis of the insolvency criterion and role of bankruptcy law in creditor actions apply equally to the oblique action. The court also described the legislative reasoning lying behind the revision of 1984:

The law pertaining to the protection of creditors from the unjust deprivation of their rights through contracts made by their debtors was in dire need of reform. The articles of the 1870 code . . . were unduly complex and lacked necessary threads of consistency. Many . . . provisions were not useful in a modern setting, and federal bankruptcy law [which normally preempts state law in case of conflict between them] had made many of the provisions obsolete. The provisions of the 1870 Code on the giving of unfair preference to one of several creditors . . . fell within the scope of federal law. The basic principle established in the revision is that an obligee has the right to annul the results of the obligor's acts or omissions, made or effected after the right of the obligee arose, that cause or increase the obligor's insolvency. This principle substitutes the concept of an act of the obligor that causes or increases his insolvency or gives undue preference to another obligee, for the notion of an act in "fraud" of creditors. As used in the source articles, the word "fraud" was a technical term that did not necessarily connote bad faith. Furthermore, it had a highly subjective meaning. Through the above . . . situation, the test for availability of the revocatory action has been made an objective one; that is, whether or not prejudice to the obligee's right has been caused by the obligor's act. This criterion permits revocation of an obligor's act even if it is not done intentionally but

161. For background on these judicial methods, see generally Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257, 286-92 (1995).

through negligence.¹⁶²

This excursion into the recent evolution of revocatory and oblique actions likely renders anti-climactic the jurisprudential reception of other parts of the revision. One senses that many of the revisions, sparking the lawyers' sense of *deja vu*, landed in their tool boxes without comment. For example, the suppletive provision in article 2602 has been quoted in passing without judicial comment.¹⁶³ The innovative change of terminology in current article 1761 (contract to perform natural obligation is onerous) has been embraced as though it were *deja vu*.¹⁶⁴ Article 1921's principle of restitution after rescission has provided guidance for restitutionary relief in a variety of circumstances.¹⁶⁵ Without explicit reference to current Civil Code article 1921, its restitutionary principle has been linked imaginatively to a plaintiff's recovery of benefits in a redhibitory action.¹⁶⁶ In the department of imputation of payment, federal and state courts have contributed to an elegant and highly granular case law that would repay close analysis. Without noting deficiencies in the original regulation, the courts seem cheerfully to embrace the priority scheme in the articles. Comments accompanying the tender and deposit articles have prompted the courts to recognize the liberative effects of a tender provided it is accompanied by a payment or a deposit of the object.¹⁶⁷

F. RELATIVE AND ABSOLUTE SIMULATIONS?

Simulations have enjoyed a long career in Louisiana jurisprudence. Allowing leeway for false positives for the word simulation as denoting a facsimile, an imitation, or a product trial under man-made circumstances, perhaps over a thousand pre-1984 decisions used the term simulation as a legal term of art. I have not found any pre-revision references to relative and absolute simulations, although in various guises the cognate non-transfer and transfer simulations surely have figured in the

162. In re Lawrence Goldberg, 277 B.R. 251, 280 (M.D. La. 2002).

163. Lambert v. Ray Brandt Dodge, Inc., 09-739 (La. App. 5 Cir. 1/26/10); 31 So. 3d 1108, 1112.

164. Harvey v. White, No. 2009-2141, 2010 WL 3629598, at *7 n.8 (La. App. 1 Cir. 10/20/10); Bridges v. Bridges, 96-1191 (La. App. 3 Cir. 3/12/97); 692 So. 2d 1186.

165. See, e.g., Bowen v. Smith, 2003-0432 (La. App. 4 Cir. 10/8/04); 885 So. 2d 1, 5.

166. Holloway v. Gulf Motors, Inc., 588 So. 2d 1322 (La. App. 2 Cir. 1991).

167. Quality Mfg. Co. v. Direct Factory Stores, Inc., 540 So. 2d 419 (La. App. 1 Cir. 1989).

jurisprudence.¹⁶⁸ Interestingly, the leading Louisiana real estate treatise tersely describes absolute and relative simulations without suggesting a change in the law.¹⁶⁹ But it may be unwise to ask the lawyers and judges to evaluate changes that have gone unnoticed for about thirty years. A prudent lawyer, having noticed such a change, may have excluded it from his opinion letter regarding a specific transaction. But we can only guess at these circumstances, for the opinion letter, and its accompanying research, would be confidential communications for parties to the transaction.

V. CONCLUSION—CODA: PREACHING GOOD NEWS

Readers, whether devotees of the Civil Code or inquisitive bystanders, will by now have appreciated the essential points of this essay. Mystified by intensive exploration of foreign sources as inspirations for a law nominally classified as a United States statute, our audience outside the mentioned categories will likely have quit reading long before now. This fragmentation of the audience into initiates and outsiders is linked to the Code's challenge as it struggles to be understood by a self-absorbed American legal establishment uninterested in foreign legal heritages. The code's challenge also highlights the incoherence of the American lawyer's indifference. At all educational levels, enfeebled foreign language instruction combines with some United States Supreme Court justices' avowed hostility to the citation of foreign law to reinforce our insularity.¹⁷⁰ But it ironically co-exists alongside a veritable national industry dedicated to exporting American legal ideas and financial practices around the globe. One wonders how a recipient nation would react to these phenomena upon learning that the proposed exchange of laws is unidirectional, not reciprocal. For the Civil Code, the incoherence of the American position also has repercussions; the code revision offers an English language repository of insights into the experience of civil law concepts in

168. *E.g.*, *Owen v. Owen* classified the two categories as "pure simulations" and "disguised transfers", viewing the former as absolute nullities and the latter as relative nullities. *Owen v. Owen*, 336 So. 2d 782, 787 (La. 1976).

169. 1 LA. PRAC. REAL EST. §§ 8:57—58 (2d ed. 2011).

170. See Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, April 11, 2009.

collision with twentieth century civilian experience and American law.

The reciprocal influences between the Louisiana code and laws of other nations are old news. This point is already clear for initiates who constitute a choir of devotees. Yet behind the choir there looms a large United States audience nearly impervious to the good news of a kindred heritage and a sister state.