

**“OPENING THE BARBARIANS’ GATE” OR WATCHING THE BARBARIANS FROM THE
COLISEUM:**

A REQUIEM ON THE NOMOS OF THE LOUISIANA CIVIL LAW

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"By the advice of their protectors (the Romans), they (the Britons) now built a wall across the island from one sea to the other, which being manned with a proper force, might be a terror to the foes whom it was intended to repel, and a protection to their friends whom it covered. But this wall, being made of turf instead of stone, was of no use to that foolish people, who had no head to guide them."

GILDAS, DE EXCIDIO ET CONQUESTU
BRITANNIAE (Trans. J.A. Giles).

In their original form, they were watched by very few spectators who had to squeeze in against each other, pushing and jostling, straining and craning their necks to get a look at the bloody action being played out before them. These rough congregations, in which the spectators quickly planted themselves wherever they could find a place with a decent view, contained the seeds of the great spectacles of later years. They were primitive showcases for fighting and nothing more, and were certainly not prepared or stage managed in the manner that would later become commonplace....

It was not long, however, before seats were added and hired out to spectators who were thus afforded a little more comfort as they watched each pair of gladiators fight...

ALAN BAKER, THE SECRET HISTORY OF ROME'S
WARRIOR SLAVES 8-9 (2002).

Abstract

Comparative Law tends to focus on the differences and similarities present in different legal systems. Such analysis has led some to conclude that a third legal system has appeared in the West and in particular in Louisiana. The idea of a mixed jurisdiction, they claim, combines certain elements of Civil law and Common law into a hybrid system. This article challenges the supposition that a legal system's core identity can be of a mixed nature. Rather, this article suggests that the proper way a legal system should

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be viewed is through its normative values as depicted in the narratives the system spawns – a *Nomos* that directs the purveyors of the system towards the sources and identity that the system enchants. Focusing primarily on Louisiana, Part I of this article describes three normative elements that narratives tell about the Louisiana civil law: its frenchness, its distinctiveness, and its dependency on a Code. Part II then tells two narratives that demonstrate how these narratives are revealed, even when they are not completely accurate. Part III challenges the readers to inhabit the *nomos*.

Part I

Institutional Identity Versus *Nomos*

There is a story in human history that the barbarians sitting on the verge of civilized society shaped human innovation.¹ That, as uncivilized “tribes” threatened the parameters of the modern world, society had no choice but to innovate and repel the advances of chaos or themselves be infused with the chaos that the barbarians brought. The Mongols, the Huns, the Gauls, the Celts, the Galics, the Turks, and the Germans each were the driving force requiring societies on the other side to get better or disorganize.

There is a similar story told in legal communities in two variations. In law (at least law in the Western Legal Tradition) one is trained primarily as a civilian or as a common lawyer. The narrative is therefore told as either one of passive virtues (we stand at the gate and allow the other to influence our own legal tradition) or one of aggressive resistance (we stand aloof and reject the others as antiquated or barbaric given our predisposition). To be sure there is no natural affinity between the two. And it is undeniable that systems do from time to time borrow from one another, despite the

¹ See generally, WILLIAM MCNEIL, PURSUIT OF POWER: TECHNOLOGY, ARMED FORCE, AND SOCIETY SINCE AD 1000 (1982).

perception that each remains superior to its counterpart.² Such is the premise behind comparative law.³ The more politically friendly version tends to suggest a developing third family of legal tradition known for the combination of civilian and common law themes; that jurisdictions are becoming multi-traditional, mixed, or “bijural”.⁴

The danger in creating a “new legal tradition” from the relics of traditions is it tends to devalue the traditions that supposedly have been combined. So, when Palmer writes that “because of their double genetic makeup mixed jurisdictions must appear

² See e.g., Paul G. Mahoney, *The Common law and Economic Growth: Hayek might be right*, 30 J. LEGAL STUD. 503, 506-07 (2001) (arguing that the common law is more predictable than the civil law system because of its respect for precedents and the power of its appellate courts); Pierre LeGrand, *John Henry Merryman and Comparative Legal Studies: A Dialogue*, 47 AM. J. COMP. L. 3, 58 (1999) (Pierre LeGrand in a dialogue with John Henry Merryman explains the preference one has for either civil law or common law theory).

³ “There does not exist in the modern world a pure judicial system formed without exterior influence.” ARMINJON, NOLDE, & WOLFF, *TRAITÉ DE DROIT COMPARE* 49 (1950) (Trans. in VERNON PALMER, *LOUISIANA: MICROCOSM OF A MIXED JURISDICTION* 4 (1999). The observation that one system of law derives essentially from the institutions that can be attributed to it (or in Palmer’s case a combination of certain institutions) ignores the truism that comparative law cannot be simply reduced to an evaluation of similarities and differences: such analysis ignores relevant social, political, moral and economic values that more proximately determine the legal course of a jurisdiction. See ALAN WATSON, *LEGAL TRANSPLANTS* 4 (1974). In that sense, Merryman’s conclusion that legal “traditions” are more appropriately considered over legal systems” reflects the well thought out conclusion that law tends to reflect “deeply rooted, historically conditioned attitudes about the nature of law, the role of law in society,” about the institutions of the law, and about how law is to come about. See JOHN MERRYMAN, *THE CIVIL LAW TRADITION* 2 (1969).

⁴ Vernon Palmer has written the most in this area. See VERNON PALMER, *LOUISIANA: MICROCOSM OF A MIXED JURISDICTION* (1999) (collecting essays from various fields to illustrate the tension that exists in a “mixed jurisdiction”); *THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION* (2005) (a collection of essays by palmer relating to Louisiana’s dual nature through time and various code reforms); *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* (2001) (Palmer’s *Magnum Opus* on mixed jurisdictions). Of Course, Palmer is not alone; The 2003 edition of the Tulane Law Review collected numerous articles for a symposium entitled 2003 First Worldwide Congress on Mixed Jurisdictions.

anomalous (and unclassified) when compared to one of their two parents,”⁵ he tells us that the two traditions cease to exist in the shadow of the third. Said another way, the “new legal system” becomes an orphan, unsure whether its institutions and enabling devices derive from one system or another. Thus in the same way that comparative law runs the risk of exaggerating the origins of differences,⁶ creating a new legal family where there really is none risks isolating legal systems to the point of losing tradition. To be sure, Louisiana has never thought of itself as alone in the sense that Palmer would suggest that it is; it has also never thought of itself aligned with the various lists of other “mixed jurisdictions” opposed to being aligned by civilian values.⁷

Instead, like other legal systems that share legal traits between multiple systems, it has continued to consider itself characterized by a dominant persuasion – Louisiana is a Civilian jurisdiction. This is not surprising; legal systems continue to retain a dominant

⁵ See Palmer *supra* note ____, at 7.

⁶ See Alan Watson, *supra* note ____, at 4:

Comparative law cannot be primarily a matter of drawing comparisons. Those who would disagree with this proposition proceed from one of two starting points. They may start from an individual legal problem they consider to be the same in more than one jurisdiction and examine the legal response to it. As one scholar has put it, “The fact that the problem is one and the same warrants the comparability. Or they may take a branch of law, say Contract, and investigate in detail the differences and similarities of the individual rules. But it is very doubtful if the comparisons are justifiable in academic terms as comparative law, whether the starting point is the legal problem or the branch of law. Variations in the political, moral, social, and economic values which exist between any two societies make it hard to believe that many legal problems are the same for both except on a technical level.

⁷ Palmer’s family of “mixed jurisdictions” includes South Africa, Scotland, Louisiana, Quebec, Puerto Rico, The Philippines, and Israel. See PALMER, *WORLDWIDE*, *supra* note ____.

legal tradition that is unmitigated, though phenomenon appears that does not derive from the dominant tradition. Said slightly differently, there is a *nomos* to legal traditions in much the same way that there is a *nomos* to specific legal cultures – an aura that transcends the institutions that make up the tradition. That *nomos* includes the stories we tell about ourselves -- the ways we perceive our institution interacting with others, and the insulation of our traditions against the traditions we deem contrary or destructive to our own.

It also includes hints that recognize the corpus of the dominant tradition as being superior to the secondary tradition;⁸ simply put, we prefer the legal institutions we grow familiar with. I remember my first year torts professor reminding us civilian students that the Barbarians in our class (the common law students) were indeed engaging in

⁸ See Legrand, *supra* note ____, at 58.

PL: As you yourself observe, there is, despite the deficits you identify, a feeling among many civilians that the civil law tradition is "superior" to the common law. Why this sentiment? Would it suggest that there is less receptivity toward alterity in the civil law than in the common law?

JHM: I came to this conclusion by reading the work of civil law lawyers. There are passages making it very clear that they find a sophistication in the civil law that they do not see anywhere else. They regard the common law as relatively crude and undeveloped. If you accept their idea of what constitutes superiority--the emphasis on hard-edged concepts, system, abstraction, and all that--I see what they are saying.

PL: Have you encountered the same feeling of superiority in your common law colleagues vis-à-vis the civil law?

JHM: Of course, at least among American lawyers. But the values on which they hang their idea of superiority are completely different: there is the belief that the common law is more functional, more efficient, and so on. Having said this, I think that the feeling of superiority is stronger in the civil law. One of the things that bothers a lot of civil law lawyers about the common law is that they can not find it. They do not know where it is.

barbarism of the common law – fighting one another in courts to determine what the law was. We needed no contest of strength to know the law; we had the law and it was held in a central Civil Code – as sacred as the Bible and as wise as the ancients. Even now, as a scholar that engages more common lawyers than I do civilians, my mind often times wonders and visualizes the superior legal training I received versus the vile combat these poor fellows must engage in on a regular basis. It is the vision of the noble savages battling for the law, as the civilized world sits smugly, watching their efforts, while holding the cannon in its hands – the precious Civil Code.

But even by my description of the smugness that derives from certain preference judgments within the civilian and common law traditions, *thenomos* begins to be revealed. Some have suggested that the civil law suffers from a superiority belief.⁹ In Louisiana, in recent years, that belief has come under siege. The perceptions that the Louisiana Civil Law has much to learn from its common law neighbors, at least within certain legal fields, seems to be growing in popularity. But much of this discussion has also become diluted. Instead of focusing on systems, the analysis has turned towards institutions within systems. We don't say the civil law system is superior. Rather, we now talk in turns of the superiority of civil law property systems, the sales code, or family law.¹⁰ Let me give two examples from the recent past.

⁹ See John Henry Merryman, *THE CIVIL LAW TRADITION* (1969); see also *supra* note 8.

¹⁰ Of course, historic reasons could account for this distinction. Joseph Dainow noted the following:

The Civil Law in Louisiana is not the whole legal system but only those parts contained in the Civil Code, namely the law of persons and the family, property successions, and donations, obligations and the various private contracts (most important of which are sale and lease), the security devices of pledge and suretyship as well as privileges and

At the 2002 Tucker Lecture, my friend Kathy Lorio asked the question “is Louisiana’s civil law archaic or prophetic.”¹¹ It seems that during the drastic changes to the Louisiana law of successions in the 1990’s,¹² the Reporter for the Louisiana Law Institute developed the obnoxious habit of referring to certain institutions as “Archaic,” ultimately memorializing that commentary in the official comments to the Code.¹³ Comments such as these annoyed the persons that saw the civil law, not as archaic, but as a timeless system that defined persons, their property, and their transactions. Kathy was one of those persons and wrote passionately about civil law institutions that could be

mortgages, plus the acquisitive and liberative prescriptions.

In a civil law country, the so-called civilian method of thinking and the civilian techniques are considered as characterizing also the nature and development and interpretation of other areas of that country’s legal system...

Joseph Dainow, *The Planiol Treatise on the Civil Law: French and Louisiana Law for Comparative Study*, 10 AM. J. COMP. L. 175, 176 (1961).

¹¹ Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century*, 63 LA. L. REV. 2 (2003).

¹² I call the move drastic, not as a negative connotation, but because of its breadth and scope. The changes to the laws of successions and donations in the 1990’s were certainly dramatic, as seen by the amount of law review crescendo that the changes wrought: *see.g.*, Cynthia Ann Samuel, *The 1997 Successions and Donations Revision: A critique in honor of A.N. Yianapoulos*, 73 TUL. L. REV. 1041 (1999); Katherine Shaw Spaht, *The New Forcd Heirship Legislation: A Regrettable “Revolution,”* 50 LA. L. REV. 409 (1990); Katherine Shaw Spaht, *The Aftermath of the “Revolution,”* 51 LA. L. REV. 469 (1991); Katherine Shaw Spaht, *Forced Heirship Changes: The Regrettable “Revolution” Completed*, 57 LA. L. REV. 55 (1996); Katherine Connell-Thouez, *The New Forced Heirship in Louisiana: Historical Perspectives, Comparative Law Analyses and Reflections upon the Integration of new structures into a classical Civil Law System*, 43 LOY. L. REV. 1 (1997); Ronald J. Scalise, *The Chaos and Confusion of Modern Collation: A Critical Look into an institution of Louisiana Succession Law*, 75 TUL. L. REV. 411 (2000); *see also* Kathryn Venturatos Lorio, *The Changing Face of Forced Heirship: A New Louisiana Creation*, in Palmer, Louisiana *supra* note ____, at 181.

¹³ See LOUISIANA CIVIL CODE ARTS 941 official comment (); 951 official comment (); and 1616 (). The summary of archaic provisions is provided by Mr. Nathan in his *Introduction to the New Louisiana Law of Successions in THE CIVIL CODE* (2003) . Additionally, the law of partnership article summarizes the retention of provisions deemed archaic at various times and circumstances.

deemed as more contemporary than ancient. During that same event, Professor Patrick Martin of Louisiana State University stood up and addressed the audience and proudly proclaimed in effect, “I believe that the rest of the nation could learn from the Louisiana Civil Law approach to property.”

Kathy’s approach and (Professor Martin’s on a larger scale), focused on the institutions of the civil law to show they have a place in the dialogue of law. Their comments were to this effect: “The Civil Law is superior because x manifestation is better than the common law Y.” This rubric seems misplaced to me, though I sympathize with their reactions. Exchanging the corpus of the tradition for the institutional preference compromises the essence of the civilian tradition itself. It says, in effect, the institutions instead of the inherent characteristics of the Civilian Tradition (the *nomos*) become more definitive towards the civil law tradition. Kathy (and others) are asking what does it mean to be a civilian jurisdiction in tension with its common law surroundings. And one answer to that question is that being civilian means looking civilian. That is, we know we are a civilian jurisdiction because we have institutions like forced heirship and community property among other things that can be derived from our civilian heritage; our imagination has become confined to a rubric that says “we are what we look like.”

Taken as a simple statement “we are what we look like” is a truism, correct and timeless; it forms the basis of what this article is about – we really are what we look like, or rather, we are what we imagine that we look like. I want to suggest that being civilian is less about institutional appearance and more about the *nomos* of the civil law. That is, the civil law is not definable by institutions, as institutions are temporary place holders within the tradition. Rather, like so many other things, the Louisiana Civil Law is

defined usually by the perceptions we draw regarding what we “should look like.” Mere institutional appearance on the other hand does not tell us what to do with legal innovations that have no root in either the civil or common law traditions. And for this reason, an institutional appearance cannot be the basis for locating a tradition, though it can be an identifier. Let me state this using the forced heirship example. One could argue from the forced heirship debate that the civilian tradition was well thought out, designed to protect family, and was a built in mechanism to limit dependency on the state for maintenance of individuals; accordingly, its deep rooted tradition in Louisiana and the French Civil Codes is justified by the policy reasons that support its continuance.¹⁴ One could also, plausibly argue today, that the transmogrification of forced heirship from a guarantee of family legacies to a protection for minor children and incapacitated adults is now the commodity of the civilian tradition on forced heirship because it serves the purpose of protecting vulnerable persons while preserving the individual autonomy of choice.¹⁵ Both are sound policy arguments that warrant deep and sober reflection. The former, though carries an intrinsic quality of tradition that seems out of place when evaluating legal policy.

Moreover, the civil law tradition cannot be reduced to simply a distinction that we have statutes and codes. Let me provide another example. In 1962 the Louisiana Supreme Court adopted a new methodology for deciding torts negligence cases, called the Duty Risk Analysis.¹⁶ The traditional civilian analysis requires a showing of “fault”

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¹⁶ The Court began its Duty Risk Analysis trend in a case called *Dixie Drive it Yourself v. American Beverage Company*, 242 La. 471, 137 So.2d 298 (1962). A recent case, *Pepper v. Triplet*, 864 So.2d 181 (La. 2004) (creating a doctrine of strict liability that is

before delict liability attaches.¹⁷ The duty risk analysis therefore splits the elements required to prove fault into four distinct elements – cause, duty, breach and damages – and engages in a policy analysis in evaluating their application.¹⁸ One might well conclude with Professor Vernon Palmer that this is merely a wolf in sheep’s clothing; though the conclusion may retain a civilian root – fault – its antecedent (the breach of duty) is purely an American common law innovation.¹⁹

What Palmer brushes by, however, is the type of analysis undertaken by judges applying this Duty Risk Analysis. Indeed, the analysis undertaken by judges is a policy

an amalgamation of civil law and American tort law). The duty risk analysis was spawned by policy oriented academics such as Wex Malone and Leon Greene. Leon Greene, *Rationales of Proximate Cause* 11-13 (1927); Wex Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363 (1970).

¹⁷ See La. C.C. art. 2315 (“Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”).

¹⁸ See Timothy J. McNamara, *The Duties and Risks of the Duty Risk Analysis*, 44 LA. L. REV. 1227, 1233-34 (1984):

The general consensus is that six identifiable socioeconomic considerations influence the decision of whether the defendant owed a legal duty to a particular plaintiff not to create this specific risk of harm by the precise conduct which the court has already concluded was a cause in fact of the plaintiff’s injuries. Obviously, there is interplay among these factors as the judge ponders his decision. As a practitioner, the writer wishes that every judge would tape these six considerations to his wrist like a quarterback so that, when he has a visceral feeling as to who should win, he can at least check off each of these elements to determine exactly why he approves the position of one side or another and at the same time make sure he has not overlooked an important consideration. These six factors are: (1) ease of association, (2) administrative considerations, (3) economic considerations, (4) moral considerations, (5) type of activity, and (6) precedent or historical considerations.

¹⁹ See Vernon Palmer, *The Fate of the General Clause in a Cross-Cultural Setting: The Tort Experience of Louisiana*, 46 LOY. L. REV. 535, 566 (2000) (“in the formulation of the question of negligent wrongfulness, Louisiana is, as far as I can see, in the mainstream of American Common Law, not the Civil Law.”).

analysis – the very analysis that renders legislation superior to decisions and that undergirds the essence of a civilian approach to law.²⁰ The Duty Risk analysis begins with the Civilian requirement for fault, interposes the questions of duty and cause, and invokes a policy analysis in its solution. Palmer’s assumption that institutions “compare” and therefore assimilate misses the truly civilian work being undertaken by the Supreme Court.

The Louisiana Supreme Court’s use of the Duty Risk Analysis tracks several fundamental viewpoints by which Louisiana jurists view themselves. First, Duty Risk analysis starts and ends in the Code. Professor Crawford’s comments, noting the scarcity of code provisions in the area of delict emphasize that the judicial role is one of interpretation, first, last, and throughout:

The Codal texts governing delict are so spare and general that the court must as a practical matter write most of the tort law with its own pen, though it is done in the name of interpretation. The Civil Code requires the court to resort to justice, reason, and prevailing usages. Both Gény and Planiol support the theory that it is right and necessary for the court to resort to its own mind and conscious to write

²⁰ See WILLIAM E. CRAWFORD, LOUISIANA CIVIL LAW TREATISE: TORT LAW § 1.11 at 21 (2000).

According to strict civil law theory, legislation is the law and judicial opinion is only an interpretation thereof. The functional result of the axiom of jurisprudence constante is not unlike the function effect of the common law doctrine of stare decisis, which mandates the court to remain faithful to the earlier decisions that establish a rule of law. Under the Civilian notion, the interpretation of the legislation must also remain consistent.

I might also remind Professor Palmer that Louisiana judges are elected; many times their function is as much legislative as it is judicial. Of course, he might also remind me that so too are many common law judges. Nevertheless, the Louisiana judges certainly appear more willing to apply policy concerns to matters as Professor Palmer himself recognizes implicitly.

in detail the enormous superstructure of tort law that rests upon the codal texts.²¹

Second, the decision to move towards Duty Risk Analysis and away from proximate cause as a theory of liability indicates the state's willingness to be distinct in its legal institutions. In short, the Louisiana Supreme Court demonstrated that the State's identity as unique amongst its forty-nine sister states empowers, not limits its ability to interpret the state's law.

All of this goes to infer that “we inhabit a Nomos.”²² As Robert Cover famously “uncovered” for us in the 1980's, law's *nomos* is tethered to the narratives that are told about it:

A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos – narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves – a lexicon of normative action – that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power and privilege and in the critiques that may be leveled in the justificatory enterprises of the law.²³

Our Louisiana Nomos is distinct, its French, and it has a Code.

²¹ *Id.*

²² Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 5, 9 (1983).

²³ *Id.* at 9.

Our *Nomos* is distinctive from other states. The Supreme Court's willingness to part with its sister states in the area of proximate cause was empowered by a consciousness that embraced the uniqueness of Louisiana law. Without such a perception, our legal system would be civilian in name only, having shed any and all likenesses of our Civil Law system.

Our *Nomos* is French. The French connection in Louisiana has deep roots. Our first civil code was in French with an English translation.²⁴ Even if the original code contained a stronger Spanish influence, its French nature still transcended the document.²⁵ Moreover, the Louisiana law institute undertook three major translation projects of notable French Authors: in 1959, after nearly twenty five years of planning, the Law Institute produced in English, *Marcel Planiol's, Traité Élémentaire de Droit Civi*, titled simply as *Planiol Civil Law Treatise*.²⁶ Six years later, the institute unveiled its English Translation of Charles Aubry's *Cours de Droit Civil Francais*. Four years after that, it produced François Geny's *Méthode d'interprétation et sources en droit privé positif*.

The driving force behind these projects was a recognition that there was an intimate relation between Louisiana law and French law, even if not always exactly the same. The forward to the Planiol treatise states:

Louisiana, a civil law state, with a Civil Code based on the Code Napoleon, has relied heavily in the past upon the writings of the French legal scholars for the doctrinal interpretation and consistent development of a code of general law. Although one hundred fifty years have passed

²⁴ La. Civil Code (1808).

²⁵ Dainow, *supra* note ____, at 177.

²⁶ For a description of the process undertaken in approving the project and the obstacles, see Dainow, *supra* note, at 178.

since the adoption of the Code of 1808, Louisiana has produced no commentary on its Civil Code as a whole, and only a few of the subjects covered thereby have been discussed in any work that properly might be called a treatise. Within the last generation of Law Reviews which were established at the Louisiana State, Loyola, and Tulane Universities have done much to answer the need for objective discussions of the provisions of the Code in the light of their underlying philosophy and historical development. Nevertheless, the great wealth of material of this nature can still be found only in the French Commentaries. In the early days under the Civil Code these commentaries were, in effect, Louisiana doctrine, for the French language was then used to a very considerable extent by the legal profession. But with the passing of the years its use has continued to decline, as has likewise the number of Louisianaians sufficiently schooled in French to be able to avail themselves readily of French doctrinal materials. On the other hand, the succession of time has not lessened to any appreciable extent the importance of such discussions to the legal profession in Louisiana. Louisiana's law reports and other legal writings give ample positive evidence of how we can profit from the writings of the French, and there is no lack of evidence of a negative sort, that a more complete knowledge of such materials might have been a source of great illumination to us in many cases. Of the 2281 articles in the Code Napoleon, approximately 1800 are contained in full or in part in the Louisiana revised Civil Code of 1870. By far the greatest number appear in our Code without change in substance.²⁷

Finally, our Nomos is identified by our Code. The very first values we pass on to succeeding generations is the importance of the Code. The Code is important because it defines who we are, what we have, and how we use it. In the words of Colonel John Tucker, the Code is the

most important book in your library,... because it ushers you into society as a member of your parent's family and regulates your life until you reach maturity. It then prescribes the rules for the establishment of your own

²⁷ J. Denson Smith, *Forward*, in *PLANIOL, CIVIL LAW TREATISE* at 3 (1959).

family by marriage and having children, and for the disposition of your estate when you die, either by law or by testament, subject to law. It tells you how you can acquire, own, use and dispose of property onerously or gratuitously. It provide the rules for most of the special contracts necessary for the conduct of nearly all of your relations with your fellowmen: sales, loans (with or without security), leases, usufructs, and servitudes; and finally, all of the rights and obligations governing your relations with your neighbor and fellowman generally.²⁸

The Code prevented the Louisiana Law Institute from adopting the Uniform Commercial Code in 1967. It also required certain large scale revisions in 1870 following the most significant reclassification of persons and property in modern history: the mandated ratification of the Thirteenth, Fourteenth, and Fifteenth Amendment changed more than the state of race relations, but completely reorganized social relations and property regimes. In Louisiana, that reorganization started in the Code. The Code captivates our attention in Louisiana, perhaps because it is so logical. It is also a part of what identifies us as Louisiana Lawyers.

Principally, we know the Nomos and its features by the stories we tell. Law is as much about the stories that are told in the past – the formative narratives as it is about the hungering for the future – “the messianic yearnings.” In a certain sense then, Kathy’s title mentioned above is exactly right: the arcane institutions of the past are bright predictors for the future.

The narratives that are told tend to shape communities as well as legal norms. We don’t live in isolation from one another. Rather a communal character inures to people who share the same stories. No person is an island in a normative story – even those that chose to recluse from social standards do so within the context of a shared story – one

²⁸ John H. Tucker, *Forward in A.N. Yianapoulos*, Louisiana Civil Code, at XXI (2003).

they happen to reject but are still apart of. “The part that you or I choose to play may be singular, but the fact that we can locate it in a common ‘script’ renders it ‘sane’ – a warrant that we share a *nomos*.”²⁹

One obvious inference then is that the Louisiana Civil Law tradition does not exist in isolation from either its past or its future. Indeed a brief skimming of the latest Louisiana Law Review, Tulane Law Review, or Loyola Law Review, will provide undoubtedly an article in which the central theme is “ X law” is faithful to the civilian tradition and should be continued; or that same law is either unique to the point of embarrassment or to the point of supremacy and therefore should be changed to conform with the rest of the states/ maintained as better than the common law alternatives. We are constantly in the market of comparing the institutions we have against others dissimilar to us to decide whether the tradition is better served by change or by remaining the same.

An even more obvious point is that the *nomos* naturalizes its institutions. That is, the tradition can grow in ways that are different from its tradition but never without some symbolic glance towards it. So, the Louisiana Law Institute’s decisions to publish translations of the French treatises by Marcel Planiol, Charles Aubry and Rau, and Charles Geny indicate if nothing else a passive reflection that at some deep point the Louisiana narrative begins in French law; the substance of which some Louisiana scholars have contested, but whose normative power they do not cross. Nevertheless, the culture tells us that French sources are important even if the main body of the law reflects other cultures. The language variance has the same effect: despite the fact that the Civil Code was amended in 1973 to anglicize the third party contract, courts and lawyers still

²⁹ Cover, *supra* note _____, at 8.

refer to *stipulations pour autrui*, though I dare say not many speak French.³⁰ Similarly, in Louisiana we have *projets* that consider changes to the Constitution, not projects or reports. Thus, the *nomos* takes variations that otherwise would feel awkward and unstable, and incorporates them as if they were a natural part of the institution.

All of these factors tend to be worked out by the narratives that help shape the *nomos*. I offer two narratives that reveal the *Nomos*; there are certainly others. I chose these two because they represent the collision of institutions and ideals. The first is the narrative of the Code Noir and Louisiana slave law. The second narrative is the adoption of Article Nine of the Uniform Commercial Code in Louisiana. Both demonstrate elements of the *Nomos* and how we begin to formulate an identity as a civilian state.

Part II

Louisiana Narratives

1. Narrative No. 1 -- Louisiana Slavery and the Code Noir

Slavery came to Louisiana in the early eighteenth century, relatively later than the rest of North America. Louisiana was colonized by the French in the early seventeenth century. Reasons for the delay include the French preference for mining over agriculture; the preference for using slavery for building infrastructure; and the fact that the driving motivation for obtaining Louisiana was not economic but political: the French didn't

³⁰ See e.g., *Alexander v. Gary*, 924 So.2d 428 (La. App. 3d Cir. 2006); *Barnhill v. Remington Oil and Gas Corp.*, 918 So.2d 52 (La. App. 4th Cir. 2005); *Joseph Hospital Service Distr. No. 2 of St. Mary Parish*, 923 So.2d 27 (La. App. 1st Cir. 2005) etc.... Indeed, since 1990 fifty four cases have used the term *stipulation pour atrui* in the place of the anglicized "third party beneficiary contract."

want the British to have it.³¹ In fact, it was not until the Spanish gained the territory in 1763 did agricultural slavery begin to flourish in the colony.³²

Despite the fact that the French were not committed to agricultural development of the territory, slavery was still an institution desired by the French colonials. In 1704, the colonists in Louisiana began petitioning the government for the introduction of slave labor to clear the land.³³ With the introduction of large numbers of slaves into the territory, new laws had to be shaped to control the slavery system. Thus, in 1724, the *Code Noir* was introduced into the vast French colony.³⁴ The Code Noir regulated everything touching the institution of slavery, including religion,³⁵ nourishment and care,³⁶ control,³⁷ prosecution,³⁸ status,³⁹ seizure, and emancipation of African slaves. The

³¹ GRADY KILMAN, *SLAVERY AND FORCED LABOR IN COLONIAL LOUISIANA 1699-1803*, 10 (1972).

³² France claimed the Louisiana territory in the late seventeenth century, and held the territory until the end of the Seven Year's War. Then, in 1763, France ceded to Spain the vast territory -- first by secretive agreement, and then officially in the Treaty of Paris. King Louis XV informed the Superior Council by letter dated April 21, 1764 of the ceding of the Louisiana Territory to Spain. FRANÇOIS-XAVIER MARTIN, *HISTORY OF LOUISIANA* 92-93 (1882).

³³ *Id.*

³⁴ The 1724 Code Noir was specific to Louisiana, though its antecedent was a 1685 Codification designed for French Possessions in the West Indies. See Vernon Valentine Palmer, *The Origins and Authors of the French Code Noir*, 56 *LA. L. REV.* 363, 367 (1995); Hans W. Baade, *The Gens de Couleur in Louisiana: Comparative Slave Law in Microcosm*, 18 *CARDOZA L. REV.* 535, 541 (1996).

³⁵ See Code Noir arts. 2-5; *id.* art. 11. The author in a previous piece described the relation of the *Code Noir* to the revolutionary atmosphere surrounding the territory. In that piece, notable cases applying the articles of the Code Noir are cited. See Marc L. Roark, *Louisiana Colonial Slavery Law – Revolution, Property and Race* (Copy on file with Author).

³⁶ See Code Noir arts. 18-21.

³⁷ See Code Noir arts. 25-28.

³⁸ *Id.*

³⁹ See e.g., *Re Indian*, 4 *La. Hist. Q.* 355 (1729) (“Petition for emancipation: ‘Duplesis, settler at Natchitoches, holds a ‘kind of will’ ... by late François Viard, who freed an osage woman slave and reserved 100 pistoles in behalf of her catholic

Code Noir remained the central piece of slavery legislation even after the French lost control of the territory.⁴⁰ It is this code – the *Code Noir* – that became the lasting legal force behind the slavery laws. Like the civil code’s “ushering” of persons into society, the *Code Noir* specifically exempted a certain class of persons from society,⁴¹ and directed their affairs in much the same pattern as the Civil Code.

The Code Noir was introduced into the Louisiana territory in 1725. Over the course of one hundred and fifty years it was altered and amended regularly but continued to maintain the corpus of its organization. For example the initial *Code Noir* was divided into seven parts: Religion; Clothing and Nourishment; Police; Crimes and Punishments; Witnesses, Donations, Successions, and Actions; Legal Seizures, Slaves as Movable Property; and Grants of Liberty.⁴² When a new “black code” was desired, the drafters turned to the former *Code Noir* as a model.⁴³ While retaining many of the substantive provisions of the previous *Code Noir*, the new code was divided into two primary sections: (1) general provisions; and (2) crime and punishment.⁴⁴

instruction....Attorney General approves emancipation... but the black code forbids cash legacies to a slave.”).

⁴⁰ The Code Noir was revested in 1769, after O’Reilly assumed control of the territory. Hans W. Baade, *The Spanish Law of Slavery in Spanish Luisiana 1769-1803*, in THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY: THE SPANISH PRESENCE IN LOUISIANA 1763-1803, Vol. II 371 (1996) (citing AGI, *Santo Domingo, Leg. 2543 f. 195* (available on microform from Loyola University, New Orleans)).

⁴¹ While the Civil Code told persons how to own property, the Code Noir specifically exempted slaves from property ownership. In the Code Noir, the slaves were the property. Thus its regulations were not empowering but rather inapplicable. Both codes regulated marriage and children.

⁴² See Palmer, *Authors and Sources of the Original Code Noir*, in Palmer CODIFICATION, *supra* note ____, at 121.

⁴³ See John T. Hood Jr., *A Crossroad in Louisiana History*, 22 LA. L. REV. 709, 711 (1962).

⁴⁴ Compare 1725 Code Noir with 1806 Code Noir, in 1 LISLETT’S DIGEST 100-132.

Both versions of the Code Noir were designed to provide owners of slaves with direction regarding every aspect of a slave's life. The code's purpose was holistic; that is, it meant to treat every aspect of slavery by reference to a single compendium of laws. But the stories we tell about the *Code Noir* demonstrate that it was as much a civil code of slavery as it was a collection of laws.

While the fact that the compendium of laws regulating one area were encompassed in one complete code certainly suggests a similarity to the civil code,⁴⁵ the use of the Code Noir as a source for the later civil code of 1806 serves as more compelling evidence of its civilian character, regardless of how modest that role was. Amongst other sources, the Code Noir served to create a source of instruction for the territorial reorganization of its laws and structure.⁴⁶ Previously, the Code Noir served as a source for the infamous O'Reilly's Code under Spanish Provincial rule.⁴⁷

The decision to include provisions into a code is a matter of contemporary judgment, reflecting the currents of the time. But the decision whether such inclusions reflect faithful decisions are issues of reflection that appear most contestable from afar. Notably, no one contends or contended that the *Code Noir* was anything but a civilian extension to the law of slavery. From its structure to its sources, the civilian character transcends the Code Noir.

⁴⁵ See David Gruning, *Codifying Civil Law: Principle and Practice*, 51 LOY. L. REV. 57 (2005).

⁴⁶ 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, 1073 n.13 (2003). In addition to the Code Noir, other sources included were the Las Siete Partidas, Febrero, the Institutes, Blackstone, Justinian's Digest, Curia Philipica, Gaius, the Fuero Real, the Ordinances of Bilbao, and local Louisiana statutes.

Id.

⁴⁷ Vernon Palmer, *French Connection supra* note ____, at 1155.

What we do debate, however, is whether the Code Noir's sources are purely French or reflect other traditions. As we discussed above, this transcends through language and institutions that have long since left the ordinary usage of social construction, but which retain significance in the legal identity of the state. Nowhere is this story more contested than with regards to the nature of slave laws in Louisiana. That is, no one contests that the laws were civilian; rather, the issue that has been debated is a question of which civilian character: French, Spanish, or Roman.

The crux of the story requires a brief description of the historical facts relating to the transfer of the territory from France to Spain and then back to France again. France claimed the Louisiana territory in the late seventeenth century, and held the territory until the end of the Seven Year's War.⁴⁸ Then, in 1763, France ceded to Spain the vast territory -- first by secretive agreement,⁴⁹ and then officially in the Treaty of Paris.⁵⁰ King

⁴⁸ FRANÇOIS-XAVIER MARTIN, HISTORY OF LOUISIANA 92-93 (1882). The Seven Years War, also called the French and Indian War pitted France against Britain primarily, but also involved Spain, the American Colonies, and the Native Americans.

⁴⁹ See Preliminary Act of Cession between France and Spain ("Treaty of Fontainebleau"), November 3, 1762, Fr.-Sp., 42 CONSOL. TREATY SERIES 239, 241. Scholars have offered several viable reasons for French cession of Louisiana to Spain include the unloading of an economic drain from the French economy, the compensation for Spanish loss of Florida in the Seven Years War, and even a pre-orchestrated bargain for exchange for Spain's alliance against Britain in the same war. See Author S. Aiton, *The Diplomacy of the Louisiana Cession* in THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY: THE SPANISH PRESENCE IN LOUISIANA 1763-1803 VOL. II, 23 (1996).

⁵⁰ See *Definitive Treaty of Peace Between France, Great Britain and Spain, Signed at Paris* ("Treaty of Paris"), February 10, 1763, GB, Fr. & Sp., 42 CONSOL. TREATY SERIES 279, 324. Interestingly, the Treaty of Paris does not cede Louisiana to Spain directly. Rather, the treaty's significance is the securing of France's possession in Louisiana to validate the earlier transfer by the Preliminary Act of Cession between France and Spain. The Treaty of Paris only draws a line of separation in the Americas between French and British possessions. *Id.* §VII, at 325-26.

Louis XV informed the Superior Council by letter dated April 21, 1764 of the ceding of the Louisiana Territory to Spain.⁵¹

On March 5, 1766, the first Spanish Governor, Don Antonio de Ulloa, arrived in New Orleans and established Spanish provincial rule.⁵² Ulloa maintained French political structures, even issuing his orders through the French Commandant Phillip Aubrey. Those that resided in the territory, particularly those of Creole descent,⁵³ feared that the new Spanish Administration would bring a complete denial of their rights as colonists.⁵⁴ Additionally, the French colonists felt betrayed by their King as mere pawns of politics. The French colonists envisioned not only the present loss of country but the potential loss of property.⁵⁵ Gayarre, a Louisiana historian, summarizes succinctly the French Colonial apprehensions of this transfer:

⁵¹ See Letter from King Louis XV, King of France to Mr. D'Abbadie, Governor of Louisiana (April 21, 1764) *translated and reproduced in* CHARLES E. GAYARRE, A HISTORY OF LOUISIANA: FRENCH DOMINATION Vol. II, 109 - 111 (3d Ed. 1882).

⁵² Gilbert C. Din, *Spaniards, Planters, and Slaves* 36 (1999).

⁵³ At the time, Louisiana was composed of persons from Creole, English, and Spanish decent. Indeed, the territory identified itself as French, though its people were from varying nationalities. See CHARLES GAYARRÉ, HISTORY OF LOUISIANA : THE SPANISH DOMINATION VOL. III 185 (1882).

⁵⁴ Note that King Louis XV, somewhat presumes this inference in his Letter to Mr. D'Abbadie and reassures the colonists that their property rights are secure. See Letter from King Louis XV:

I hope that the titles of the inhabitants to their property shall be confirmed in accordance with the concessions made by the Governors and ordaining commissaries of said colony...hoping moreover that his Catholic Majesty will be pleased to give his subjects of Louisiana the marks of protection and good will which they have been made more effectual, if not counteracted by the calamities of war.

Id. at 185.

⁵⁵ See CHARLES E. GAYARRE, *supra* note 9, at 113. Gayarre summarizes succinctly the French Colonial apprehensions of this transfer:

As Frenchmen, they felt that a deep wound had been inflicted on their pride by the severing in twain of

As Frenchmen, they felt that a deep wound had been inflicted on their pride by the severing in twain of Louisiana, and the distribution of its mutilated parts between England and Spain. As men, they felt the degradation of being bartered away as marketable objects; they felt the loss of their national character and rights, and the humiliation of their sudden transformation into Spaniards or Englishmen without their consent. As colonists, as property owners, as members of a civilized society, they were agitated by all the apprehensions consequent upon a change of laws, manners, customs, habits and government.

Thus, in 1768, six hundred plantation owners and merchants sent a petition to the Superior Council asking that Governor Ulloa be expelled from the territory, and that certain rights and liberties be restored.⁵⁶ Governor Ulloa was removed, and, at least temporarily, the colonists believed that repatriation was in their future. Those hopes were short lived. Spain responded by replacing the removed Governor Ulloa with Governor Alejandro O'Reilly. O'Reilly acted swiftly to punish insurgents and restore Spanish rule. One of the first acts of Governor O'Reilly was to replace the French legal structures with a visibly Spanish presence.⁵⁷ Specifically, O'Reilly dissolved the Superior Council believing it to be a tool of the colonists towards insurrection.⁵⁸

Louisiana, and the distribution of its mutilated parts between England and Spain. As men, they felt the degradation of being bartered away as marketable objects; they felt the loss of their national character and rights, and the humiliation of their sudden transformation into Spaniards or Englishmen without their consent. As colonists, as property owners, as members of a civilized society, they were agitated by all the apprehensions consequent upon a change of laws, manners, customs, habits and government.

⁵⁶ *Id.*

⁵⁷ See Gustavus Schmidt, *Ordinances of Don Alexander O'Reilly*, 1 LA. L. J. 1 (1841) (translating three orders of Governor O'Reilly relating to the substitution of French Law

From the start, the Spanish were viewed with disdain by French settlers who continued to resonate more with the *mère patrie* than they did with their colonial governors.⁵⁹ O'Reilly's punishment of the insurrectionists of 1768 didn't ease the tension as French-Louisianians referred to him as "Bloody O'Reilly," a practice that continued long after his rule as Governor ceased.⁶⁰ But just as French citizens did indeed prefer the mother country to Spanish provincial rule, those feelings were clearly more nationalistic. Indeed, the Spanish did more to assist colonists in creating a viable Louisiana economy. And Spain was sensitive to the French people's desire for their mother country as long as that sensitivity did not spread to insurrection. A 1779 and 1782 trade *cédula*, which permitted direct commerce between France and Louisiana seemed to placate French citizens and temper reactions against the Spanish.⁶¹

Relating to slavery, O'Reilly continued the enforcement of the Code Noir, expressing "admiration for [the Code's] "wisdom and piety."⁶² The question that has been debated most recently is whether the Code Noir continued a French version of rule or whether it was supplanted by a Spanish version. A follow-up question seeks to uncover the normative value of the Code Noir.

for Spanish Law and structure, enacted and published in French November 25, 1769); *see also* KATE WALLACH, *BIBLIOGRAPHICAL HISTORY OF LOUISIANA CIVIL LAW SOURCES ROMAN, FRENCH, AND SPANISH* 67 (1955).

⁵⁸ Hereinafter, the article will refer to the Superior Council simply as "the Council."

⁵⁹ Ernest R. Liljegren, *Jacobinism in Spanish Louisiana*, 22 *LA. HIST. Q.* 47, 49 (1939).

⁶⁰ *Id.* at 47.

⁶¹ *Id.*

⁶² Hans W. Baade, *The Spanish Law of Slavery in Spanish Louisiana 1769-1803*, in *THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY: THE SPANISH PRESENCE IN LOUISIANA 1763-1803*, Vol. II 371 (1996) (citing AGI, *Santo Domingo, Leg. 2543 f. 195* (available on microform from Loyola University, New Orleans)).

To the first, Hans Baade has pointed to several provisions of Alfonso el Sabio's *Siete Partidas*⁶³ that, though sharing a common Roman heritage, did not enter the French Code Noir of 1724.⁶⁴ For example the *Siete Partidas* included a provision that declared slavery as contrary to "natural reason."⁶⁵ Similarly, under traditional Spanish law, "slaves were entitled to file complaints of cruelty against their masters," and were entitled to judicial sale when cruelty was established.⁶⁶ Baade points to these early provisions as a source of more favorable treatment towards slaves by Spanish law than French; indeed, citing to the *Informe*, Baade notes that the Spanish perceived that in "modern times, slaves received 'incomparably milder' treatment in Spanish overseas possessions than in the American colonies of France, England or the Netherlands" built around a "more

⁶³ Literally translated the "Seven Departures," the *Siete Partidas* was compiled in 1265 by King Alfonso X, and governed peninsular Spain. See Dylan O. Drummond, *The Rule of Capture in Texas -- Still so misunderstood after all these years*, 37 TEX. TECH L. REV. 1, 31 (2004). See also David Grunning, *Mapping Society through Law: Louisiana Civil Law Recodified*, 19 TUL. EUR. & CIV. L.F. 1, 4 (2004) (discussing the role of the *Siete Partidas* in the Louisiana Civil Law tradition).

⁶⁴ See Baade, *supra* note 12, at 368.

⁶⁵ See THE LAWS OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA, Part IV Title 21, at 581 (Trans. L. Moreau Lislet & Henry Carleton) (1820) ("Slavery is a condition and state of things established anciently by nations, by which men who were naturally free, are made slaves, and put under the dominion of others, contrary to natural reason."). See also Baade *supra* note 55, at 368.

⁶⁶ See SIETE PARTIDAS *supra* note 59, Law 6, at 584:

We likewise say that if a man be so cruel to his slaves, as to cause them to die of hunger, or strike or chastise them so severely with the whip, that they cannot bear it; they may then complain to the judge, who ought, in virtue of his office, to enquire into the truth of the facts, and if he finds them to be so, he ought to sell the slaves, and give the price to their master. And this ought to be done in such a manner, that the slaves shall never again come under the power or dominion of the person, by whose fault they were sold.

See also Baade, *supra* note 55, at 368

favorable ratio of freedman to slaves in Spanish possessions.”⁶⁷ As Spain gained control of the territory, some of these incidents became incorporated into the Louisiana slave laws. Baade argues that the Spanish laws of Castile soon replaced all law in Louisiana, including the Code Noir.⁶⁸ Baade’s contention is supported by Raphael Rabalais, who concludes, among other things that the early Louisiana Courts cited Spanish codes more than they did French codes, and cited French treatises more than they did Spanish treatises, cited Spanish statutes more than French statutes.⁶⁹ This approach was described fully by Professor Rudolfo Batiza in the early 1970’s.⁷⁰

The Baade/ Rabalais/ Batiza position is countered by A.N. Yianapoulos, who argues that the Spanish laws were less than enforceable against a resilient French population.

Nevertheless, there are indications of a strong attachment by the French population to its own laws and customs. Rather than adhering to the official Spanish legal system, the French population frequently settled affairs extrajudicially under French laws, customs, and usages. This state of affairs continued until the retrocession of the Louisiana territory to France on October 1, 1800, by the Treaty of San Idelfonso. France did not assume sovereignty

⁶⁷ Baade, *supra* note 55, at 368 (citing *Informe del Consejo de Indias Acerca de la observancia de la Real cedula de 31 de Mayo de 1789 sobre la educacion, trato y ocupaciones de los escalvos*, reprinted in J.A. Saco, *Historiade la Esclavitud de la Raza Africana en el Nuevo Mundo y en special en los Paises Americo-Hispanos*, 3 Vols (Habana 1938).

⁶⁸ However, consider a Louisiana Supreme Court opinion fifty-three years later which references the proclamation issued by Governor O’Reilly continuing the Code Noir’s effect in the territory. *See Beard v. Poydras*, 4 Mart. (O.S.) 348 (La. 1816) (“the French Law, called the Code Noir... was in force in this country. To establish this, a proclamation is produced, issued by Don Alessandro de O’Reilly, of the 27th of August, 1769, whereby it is continued in force.”).

⁶⁹ Raphael J. Rabalais, *The Influence of Spanish Laws and treatises on the Jurisprudence of Louisiana 1762-1828*, 42 LA. L. REV. 1485, 1504 (1982).

⁷⁰ *See* Rudolfo Batiza, *The actual sources of the Louisiana Projet of 1823: A General Analytical Survey*, 47 TUL. L. REV. 3 (1978).

until November 20, 1803. During the twenty-day period of French control, Pierre de Laussat, as colonial prefect for Napoleon, abolished the Spanish authorities and established a municipal government in Louisiana. There was not sufficient time to organize a new legal system; Laussat's only change in the law was the reintroduction of the French code noir and the repeal of the Spanish slave legislation. When the United States took possession of the Louisiana territory on December 20, 1803, the bulk of the preexisting laws were in force.⁷¹

Louisiana was a French Colony, with a French History. Of course what the citizens did and what the Government enforced are oftentimes different questions; would the Courts apply French law or Spanish law in the territory would seem to answer this debate.

Surprisingly, this did not seem to present the difficulty that one might expect. Palmer

notes:

O'Reilly had issued a proclamation that all proceedings in civil and in criminal matters would be according to the laws of Castille and of the Indies. By all accounts, this change of substantive law did not have a great impact because of the common origin, hence, the similarity of laws between Spain and France. As a consequence, no noticeable disruption occurred when the courts began applying the new body of laws. Nevertheless, O'Reilly issued a decree in 1769 abolishing French law. It provided that thereafter the laws in effect would be a compilation referred to as the "Code O'Reilly." It was a combination which borrowed from the Laws of the Indies, the Siete Partidas, and the code noir. Although there were occasional adjustments of the judicial structure and of the substantive laws of Louisiana over the period of Spanish rule which lasted some forty years, the basic form of the judicial system remained unchanged.⁷²

The sources of the laws may have been Spanish, but the colonial *nomos* was French.

⁷¹ A.N. Yianapoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 TUL. L. REV. 379, 382-83 (2003).

⁷² Vernon Palmer, *French Connection supra* note ____, at 1155.

There are principally two ways to address this narrative. One is purely historical, That is, the legal scholar can engage the texts, identify the provisions that seem most French, Spanish, or Roman, and argue vigorously that those texts create some institutional identity for the territory. This has been the primary means of debate to this point.⁷³ The Second way is to consider what that debate and the accompanying historical facts have to say about the nature of Louisiana law. That is, can there be a *nomos* inside this debate?

⁷³ Indeed both French and Spanish legal heritages derive from the Roman Civil Law system. See Hans W. Baade, *supra* note 55, at 371. Much ink has been spilled (on many many law review pages) regarding the debate whether the 1724 Code Noir reflected a Romanist tradition or was a French Caribbean innovation. I take the position that the Code Noir was a distinctly French scheme, but with distinct Romanist influences. Compare Palmer *supra* note 47 (distinguishing several points of Roman Law from the Code Noir); with Hans W. Baade, *The Bifurcated Romanist Tradition of Slavery in Louisiana*, 70 TUL. L. REV. 1481, 1485 (1996) (maintaining a Romanist influence on the Code Noir sources). See also Alan Watson, *The Origins of the Code Noir Revisited*, 71 TUL. L. REV. 1041, 1051 (1997) (conceding the sources as Non-Roman, but also reasserting certain Romanist influences). Nevertheless, the sources of the laws as French Colonial or Roman make little difference to the ultimate disposition of this article.

From that Roman system of law (which also legislated rules for slavery), both the French and Spanish laws regulating slavery were influenced substantially. For example, Judith Schaffer draws the obvious connection between the Roman law of redhibition and redhibition allowed under the Code Noir. See *e.g.*, ALAN WATSON, *ROMAN SLAVE LAW* (1987) & W.W. BUCKLAND, *THE ROMAN LAW OF SLAVERY: THE CONDITION OF THE SLAVE IN PRIVATE LAW FROM AUGUSTUS TO JUSTINIAN* (2000). Both Watson and Buckland's treatments of Roman law slavery provide detailed analysis of the Roman laws regulating the institution. Judith Kelleher Schafer, *Roman Roots of the Louisiana Law of Slavery: Emancipation in American Louisiana, 1803-1857*, 56 LA. L. REV. 409, 409 (1995) ("The most important survival of Roman law in the law of slavery in Antebellum Louisiana was the concept of redhibition."). Another aspect of Roman slave law transmogrified to the new world context was the notion of *Obsequium* or respect for one's former patron. See Justinian Digest 37:15.1-11. Though the tradition of showing respect to your former master is traceable to Roman ancestry, the practice was mutated to include respect for all white persons in the Code Noir of 1806. See Black Code art. 40 ("And it be further enacted that Free People of Color ought never to strike white people nor presume to conceive themselves equal to the white; but on the contrary that they ought to yield to them in every occasion and never speak nor answer to them but with respect under the penalty of imprisonment according to the nature of the offense.").

We have suggested that the *nomos* is identified by three factors. First the prevalence of a Code centric debate. For example, the fact that the Code Noir is in a structured Code certainly aids our argument. But even if it were not, other phenomenon warrant the same conclusion. So for example, one could draw the conclusion that the Code Noir's past, the confusion regarding what legal institution was dominant, and the need for order contributed to a Civil Code being adopted. Consider Roger Ward's argument:

Louisiana's decision to adopt a civil code was based on necessity. Because of its motley colonial past, Louisiana's legal system was actually an interesting amalgamation of Spanish and French law. The Spanish law in effect at the time of the transfer of the territory to the United States was composed of eleven different codes, containing more than 20,000 laws, with many conflicting provisions. Relatively few Spanish legal treatises were available to help Louisianians understand and interpret these laws. Likewise, remnants of French law such as the Customs of Paris, Ordinance of 1667, Royal Edicts, and the code noir were interspersed in the Spanish law governing the territory.⁷⁴

The Code Noir was certainly a part of this background – for better or worse.

We have also argued that there is a perception of distinctiveness that exists in Louisiana. In the area of slave law, that norm has manifested itself towards making value weight judgments of which system was more humane. For example, consider Vernon Palmer's argument:

The one constant of barbaric laws is that they did not seem harsh to the barbarians. The Roman law of the talion--an eye for an eye, tooth for tooth, etc.--originally seemed equitable compared to the unlimited right of revenge that it superseded. The talion introduced for the first time the

⁷⁴ Roger K. Ward, *The French Language in Louisiana Law and Legal Education: A Requiem*, 57 LA. L. REV. 1283, 1302 (1997).

requirement of limited and proportionate response. The Code Noir which the French monarch introduced into Louisiana in 1724, was apparently a well-intentioned attempt to ameliorate the condition of slaves. As there were previously no controls governing how a master might treat a slave, certain elements of enlightened society regarded the Code Noir as humane and reformatory. Both the *lex talionis* and the Code Noir however, are victims of moral and historical relativism. These "improvements" will always be scorned for the inequity they presupposed rather than the incidental evils they suppressed.⁷⁵

At times, our *nomos* of distinctiveness has caused those on the outside to also laud our attempt to be human, in the face of owning humans. Consider Jonathan Bush's reading of the historical account: "There were also no systematic slave codes in the English colonies, in contrast to such other New World texts as the French Code Noir or the *Codigo negro caroleno* of Santo Domingo. In short, whatever the timing and extent of slavery in each English colony, at every step English colonial law seemed to take slavery more or less for granted."⁷⁶ However, ultimately, we simply weren't distinct enough:

The Louisiana code noir of Colonial times and the Black Codes of the eighteen sixties; the pre-Civil War denial of the vote to Negroes, even to wealthy and educated free men of color; the ebb and flow of Negro rights in the Constitutions of 1864 and 1868; the 1879 transfer of political power from police juries and the legislature to the Governor; the close election of 1892 and the 1896 victory for white supremacy; the grandfather clause and the complicated registration application form in the Constitution of 1898; the invalidity of the grandfather clause and the consequent resort to Mississippi's understanding and interpretation clause; the effectiveness of the white primary as a means of disfranchising Negroes; the invalidity of the white primary and the consequent need to revive enforcement of the interpretation test; the White

⁷⁵ Vernon V. Palmer, *The Many guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 29 n. 73 (1994) (citations omitted).

⁷⁶ Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial Slave Law*, 5 YALE J. L & HUM. 417, 422 (1993).

League and the Citizens' Councils; the Black League and the N.A.A.C.P.; the Battle of Liberty Place in 1874 and the Ouachita voting purge of 1956--these are all related members of a series, all reactions to the same dynamics that produced the interpretation test and speak eloquently of its purpose.⁷⁷

As one commentator of Judge Wisdom noted,

it was necessary to view the interpretation test as part of 'the State's historic policy and the dominant white citizens' firm determination to maintain white supremacy in state and local government by denying to Negroes the right to vote,' it was necessary to begin at the beginning. In the beginning, as Judge Wisdom aptly noted, 't here was, of course, no problem.' There was 'no problem' because 'the Code Noir, from the 1724 Code to Act 33 of the Territorial Legislature of 1806, disfranchised Negroes.' Surveying the constitutional developments embodied in the Louisiana Constitutions of 1812, 1845, and 1852, Judge Wisdom noted, with obvious pride in the history of his state, that the latter two were 'progressive and broadly democratic documents.' The Constitution of 1845 'did away with the tax-paying qualification for voters and established universal suffrage for free white males, regardless of wealth and literacy.' The Constitution of 1852 'introduced registration of voters, a progressive step many years in advance of most states.' Despite the presence in Louisiana of many free blacks, however, the franchise continued to be limited to white males:

Thus, from the Code Noir of 1724 until 1864, the organic law of the state ordained that only free white males could vote or hold office. This was in a state where there were thousands of free men of color. Many of these were well educated and owned slaves. Except for suffrage, they possessed the civil and legal rights of white citizens.⁷⁸

And then there are the times our distinctiveness and its purposes became brutally honest with one another – when our *nomos* became the source of our disappointment. Gayerre

⁷⁷ U.S. v. Louisiana, 225 F. Supp. at 380-81.

⁷⁸ Barry Sullivan, *In Tribute to John Minor Wisdom: The Honest Muse: Judge Wisdom and the Uses of History*, 60 TUL. L. REV. 314, 329 (1985).

reflects on the nature of the Code Noir in the sparsely inhabited territory of early colonial Louisiana:

This law is hard, but it is both wise and necessary in a land of fifteen slaves to one white. Between the races we cannot dig to deep a gulf. Upon the Negro, we cannot impress too much respect for those he serves. This distinction rigorously upheld even after enfranchisement, if the surest way to maintain subordination; for the slave must thus see that his color is ordained to servanthood, and that nothing can make him his master's equal.⁷⁹

Finally, the debate of sources demonstrates the importance of identity in Louisiana. We are not just civilian. We are French Civilian even when the sources of laws indicate otherwise.

2. *Narrative No. 2 – Revision of Security Rights*

In 1990, Louisiana joined the other forty-nine states by adopting the Article 9 Secured Transactions provisions into its commercial law. (Louisiana has since referred to the provisions as “Chapter 9” instead of Article 9 to “avoid confusion with the articles of the Louisiana Civil Code”).⁸⁰ This section, like the previous, is not a normative dialogue of the virtues of Article 9 or their counterweight. Instead, it’s a narrative, like the first, that exposes the norms of civilian culture in Louisiana law.

In 1967, the Louisiana Law Institute first considered what an adoption of Article 9 into the Louisiana Civil Law would look like. The report started like this:

In considering changes in Louisiana law the question constantly arises whether the change is consistent with the civil law. Yet there is little agreement as to what the term “civil law” means. Civil law was once defined written law,

⁷⁹ *Id.*

⁸⁰ See Henry Deeb Gabriel, *Louisiana Chapter Nine (Part One) Creating and Perfecting the Security Interest*, 35 LOY. L. REV. 311, 312 (1989).

but this definition is not helpful today because the common law probably contains more written words than the civil law. The volumes of reports and statutes that any common-law lawyer must use indicate that it too is written law. The essence of civil law then may be not that it is written but that it is written in codes, that is, that large areas of the law are regulated, at least in their broad outlines, by systematic statutes rather than by judicial opinions or fragmentary statutes. This in turn leads to a methodology or way of handling law which emphasizes the creativity of the legislatures and the interpretive or interstices-filling function of courts.

In accord with this analysis, it is tempting to say that the Uniform Commercial Code is a civilian document and the lack of system in the present Louisiana law of secured transactions involving movables is uncivilian. Louisiana may keep its uniqueness by being the only common-law state in the area of commercial transactions. However, another element should be introduced, namely that by civil law is often meant a system, the substance or at least the categories of which are descendents of Roman law. German law before the code of 1900, Roman law itself, and present South African law would be classified as civil-law systems though not meeting modern standards of codification. But even in the area of legal categories and substance it is often hard to say that one idea is civilian and another is not. The difference in substance between Roman law and French law today probably exceeds the difference between French and English law. There are also substantial differences between modern German law and modern French law. Further common law itself is permeated with civilian concepts that have either been arrived at independently or have been imported from continental law through the courts of equity and cannon law. Thus to ask whether a legal reform is consistent with civil law is at best a vague question.⁸¹

⁸¹ Harry R. Sachse, *Report to the Louisiana Law Institute on Article Nine of the Uniform Commercial Code*, 41 TUL. L. REV. 505, 505-06 (1967).

The report went on to describe the civilian roots of the then-current Louisiana security devices,⁸² what an article nine transition might look like,⁸³ and to recommend its adoption because of the structure of the Uniform Commercial Code, the fact that the devices do not differ greatly from traditional Louisiana law, and the commercial benefit of uniformity.⁸⁴ In other words, the institute attempted to cast Article 9 as a civilian text, or at least one that could be civilian with the right surroundings.⁸⁵

Ultimately, Article 9 was rejected for more than twenty years as “incompatible with the Louisiana Civil Code.”⁸⁶ Then, in 1988 on the urging of Louisiana’s commercial community, the Governor proposed the adoption of Article Nine and appointed William Hawkland to chair a committee for the preparation of appropriate

⁸² *Id.* at 506 (discussing Roman and French Law security devices in terms of the chattel mortgage); *id.* at 508 (discussing privileges and Louisiana codification); *Id.* at 511 (describing Louisiana secured transaction patterns).

⁸³ *Id.* at 514 *et seq* (describing the UCC provisions – mortgage, chattel Mortgage, pledge, conditional sale, bulk mortgage, and liens); *Id.* at 527 (“A one sentence description of the coverage of article 9 in Louisiana terminology would be the following: article 9 provides the basic rules for the creation, ranking, and enforcement of all conventional security devices in movables and regulates the sale of certain incorporeal movables such as accounts receivable. It does not purport to regulate non-contractual security rights, except as to ranking with conventional devices, or security rights in immovable property, except as to borderline cases. Another way to put it is that article 9 is an all-inclusive chattel mortgage, pledge and assignment of accounts receivable statute.”).

⁸⁴ *Id.* at 554 (“In other words, from a practical standpoint, the ten part division of personal property under the UCC is not far different from the fragmentation of movable property under the Louisiana Civil Code and Statutes. The terms represent concepts that people dealing in property will designate in one way or another.”).

⁸⁵ *Id.* at 521. Consider the strong emphasis on the Uniform Commercial Code as a “Code” in the civilian sense. “[The UCC] seems to be an embodiment of the civil law principle of the code as a source of law rather than the traditional common-law method in which a statute is considered an abrogation of an already existing law.” *Id.* at 522-23.

⁸⁶ COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS IN LOUISIANA: THE COMMERCIAL LAWS VI (Herzberger ed., 1974). *See also* David S. Willenzik, *Hawkland’s Handbook on Chapter 9 Louisiana Commercial Laws*, 51 LA. L. REV. 1143, 1143 (1991) (“the first time Louisiana seriously considered adopting Article 9 of the Uniform Commercial Code was in 1967-68 when the Louisiana Law Institute summarily rejected the UCC in its entirety as being contrary to Louisiana Civil Law tradition.”).

legislation.⁸⁷ Hawkland's committee found that four reasons justified adopting Article Nine into Louisiana law: the need for uniformity, the need to reduce transaction costs relating to obtaining security, the expansion of property types that would be classified as security, and providing a greater certainty between state and federal regulation.⁸⁸ Indeed, Hawkland has received much praise for "finally bringing to [Louisiana] Article 9 of the UCC."⁸⁹

Just as the Civil Law served as an analogue to justify Article 9's adoption by the Law Institute in 1967 (despite rejecting the whole), the Civil law would retain an influence over the version that Hawkland would introduce. For example, several provisions were changed from the "uniform" commercial code version that either reflected civilian traditions or that did not offend the civil code provisions already in place. Notably, the types of collateral were expanded while use of fixtures as collateral was significantly restricted.⁹⁰ These restrictions reflect a long-held tradition in Louisiana law that a security interest cannot be attached to something that is already a fixture. The change was necessary to honor not only notions of chattel mortgages present in the state, but also the very distinction between movable and immovable property that under gird the civil law property system in Louisiana.⁹¹ The alteration thus honored tradition and

⁸⁷ Gabriel, *supra* note __, at 313.

⁸⁸ *Id.*

⁸⁹ See Willenzik, *supra* note __, at 1143. Ironically, the same year that Louisiana finally adopted Article 9, a comprehensive revision of Article 9 commenced in the American Law Institute and the National Conference of Commissioners on Uniform State Laws. See James A. Stuckey, *Louisiana's Non-Uniform Variations in UCC Chapter 9*, 62 LA. L. REV. 793, 795 (2002).

⁹⁰ Stuckey, *supra* note __, at 796.

⁹¹ *Id.* at 830.

the Code while adopting a provision that mostly brings Louisiana into conformity with its sister states.

The Civilian story transcended the adoption of UCC article 9. First the Law Institute's initial report cast Article 9, not as a common law vestige, but rather as a provision that could be seen in common law terms. The fact that it was contained in a Code and contained a systematic approach certainly aided that distinction. The ease of transition from traditional civilian tenets (with French and Roman roots) also was a strong case. When Hawkland proposed his Article 9, the Legislature accepted its provisions because it was not offensive to certain tenets of the civil law tradition.

This is the essential narrative that could be told. It embraces the civilian approach to law. However, there is also a counter narrative. For example, consider one commentator who reviewing the Louisiana Adoption of Article 9, concedes the improvement, also notes that a part of the civilian character is lost:

Louisiana has adopted Article 9 of the U.C.C. That article is among the best-known pieces of private law legislation in the world, and needs no discussion here. I will confine myself to three observations. One is that it does not extend to immovables. The second is that it honours the publicity principle, in the sense that nonpossessory security rights cannot in general be "perfected" without registration (filing). To that extent it is superior, I would suggest, to the current Scots and South African law. The third observation concerns the attachment/ perfection contrast which is embedded in article 9. Is a "perfected security interest" a "real right?" Presumably it is. Is an "attached," but unperfected security interest a real right? That is more difficult. Either answer is a problem, for if it is a real right, how does it differ from a personal right? The whole point of a security right lies in its third party effect. Its effect "as between the parties" is really no effect, for all the debtors assets are in any case available to the creditor. As the Louisiana Civil Code provides "whoever has bound himself personally, is obliged to fulfill his engagements out of all

his property, movable and immovable, present and future.” The U.C.C.’s idea that there is something called “attachment” whereby a security interest takes effect as between the parties as distinct from “perfection” which involves third-party effect, seems dubious from a civilian standpoint. An outsider may wonder whether Louisiana considered this issue before it decided to adopt Article 9 of the U.C.C. No doubt the pressures on Louisiana to adopt the U.C.C. were comparable with the pressures on Scotland to adopt the floating charge.⁹²

The vision of the civil law’s interaction with the proposed article nine, in this commentators view is mediated by a failure to deal consistently with terms of attachment and perfection in the civil code’s notion of a property system. The narrative is thus construed as tale that creates more of a problem than a solution.

Shael Herman narrates the story in a more positive tone:

To promote harmony with its sister states, Louisiana has sometimes adopted, and then adapted, legislation from mainstream American law. [For example], even when Louisiana lawmakers have consciously preferred national uniformity over the state’s historical traditions, they have reached compromises between the two. Embedded in the working habits of lawyers and Courts, the Civil Code has assured that the mainstream American law at issue would bear a Civilian stamp. In the regulation of movable security, the Civil Code has remained a repository of solutions not expressly articulated in Article 9 of the U.C.C. As a gapfiller and a source of analogies for unanticipated cases, the Civil Code fulfills for Louisiana lawyers a role played by the general common law jurisprudence in the other states.⁹³

⁹² George L. Gretton, *Reception without Integration? Floating Charges and Mixed Systems*, 78 TUL. L. REV. 307, 331-32 (2003).

⁹³ Shael Herman, *E Pluribus Unum: The Paradox that Safeguards Louisiana’s Mixed Legal System*, 78 TUL. L. REV. 457, 461 (2003).

This vision of the Civil law in Louisiana then, according to Shael, is the preservation of a Civil Code that both “mediates the common law influence,” as well as translates the Common Law rubric into a civilian language. Thus, Shael notes

Following the nomenclature of the civil code, for example, Louisiana’s initial version of U.C.C. article 9 defined real estate as “immovable property and real rights therein,” personal property as “movable property,” tangibles as “corporeal” property, and intangibles as “incorporeal property.” Particularly important for the reformers case in favor of Article 9, its enactment did not require short-circuiting or abandoning the Civil Code, even for security devices regulated by the article. For example, the term possession in section 9-109 incorporated the phrase “civil possession as defined in Civil Code articles 3421 and 3431.⁹⁴

Article 9 was compatible with the civilian system, not just because it did not offend the Code, but because in key places it incorporated the code.

Both narratives demonstrate that being civilian means to a certain extent looking civilian, sounding civilian, and acting civilian. The Slavery narrative, though demonstrates the pervasive respect and admiration we have for a code. The Article 9 narrative in turn, demonstrates how the respect influences and defines the ways we approach legal innovation.

Part III

Why a *Nomos*

Inhabiting a *Nomos* is not an option. Recognizing our *Nomos*, its effects on the way we think about legal problems, and the consequences that come from such recognitions is a different story. My concern with creating new “legal families” is that it

⁹⁴ *Id.* at 466.

tends to ignore the valuable lessons we learn from self-recognition. Principally, the debate of French versus Spanish influence on the laws of Louisiana is not possible without a *Nomos*; our Court would be constrained against being unique amongst its judicial fellows; and our Code would be just another lengthy statute, with very little normative material, but just policy decisions by elected officials.

Instead a *Nomos* empowers a community to understand what it is, what it is becoming, and what it imagines it can be. As Robert Cover elegantly stated:

The great legal civilizations have, therefore, been marked by more than technical virtuosity in their treatment of practical affairs, by more than elegance or rhetorical power in the composition of their texts, by more, even, than genius in the invention of new forms for new problems. A great legal civilization is marked by the richness of the *nomos* in which it is located and which it helps to constitute. The varied and complex materials of that *nomos* establish paradigms for dedication, acquiescence, contradiction, and resistance. These materials present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited. To inhabit a *nomos* is to know how to live in it.⁹⁵

And so I return to the initial analogy I offered at the beginning of this essay, and ask, are we civilians standing on the walls, guarding our institutions from the encroaching barbarians. I say if we inhabit a *nomos*, we needn't worry about their vulgar institutions on our legal system. Our *nomos* defines itself so that the innovation brought by the "commoners" need not threaten our own institutional perception.

Likewise we needn't sit from the coliseum either, waiting to see which gladiator will win our praise. I say, if we inhabit a *nomos* the contests that we view as so

⁹⁵ Cover, *supra* note ____, at 6.

imperative towards defining who we are, actually don't define us at all. Our *Nomos* defines us. *La Fin!*