EASON-WEINMANN LECTURE

The Common Laws of Europe and Louisiana

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It is generally thought that the concept of common law has had one, or possibly two, exemplifications in European legal history. The law known as the common law has had pride of place in the Anglo-American world; the law known as the ius commune has occupied a similar place in the world of civil law. There has been only grudging recognition by each of the other, as common law. Yet European legal history can also be seen more inclusively as a history of multiple common laws, each radiating out from major centers of population and influence in Europe, and extending well beyond Europe. Louisiana can thus be seen as a place of confluence of common laws, where the droit commun, the derecho común, and the common law exercise ongoing mutual influence, in the manner of common laws.

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Louisiana is an interesting place. There is the music, which is rich; there is the food, which in my experience is still richer; and there is the law, which is perhaps richest of all in terms of historical diversity and ongoing controversy. My own jurisdiction, Quebec, is privileged in having received two of the great legal traditions of the western world, French law and the common law. Louisiana, however, is richer still in enjoying a triple European legal heritage, derived from French law, Spanish law, and the common law. In describing Louisiana law in this way, in terms of French law, Spanish law, and the common law, I

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think I am reflecting the accepted version of the nature of Louisiana law.

In what follows, however, I want to suggest another means of conceptualizing Louisiana law, as suggested by my title, in terms of a confluence, or coming together, of common laws, and I emphasize the plural form of this expression. I will be arguing that there has been, in western legal history, not a single common law—the common law, as it is usually designated—nor even a duality of common laws—the common law and the ius commune (now being revived in some measure in Europe)—but rather a multiplicity of common laws. Europe has thus known, to name only these, the common law, the ius commune, le droit commun, el derecho común, il diritto comune, and das gemeine Recht. These common laws spread outward, in constant interaction with the particular laws they encountered and with one another, from major centers of trade and influence in Europe. So to explore this understanding of Louisiana law, as a confluence of common laws, I must first step away from Louisiana and back to Europe, before attempting to deal with Louisiana’s rich legal heritage.

In doing so, I have two broad objectives. One is to improve our understanding of European legal history. This may appear presumptuous for a non-European, but European law and legal history are too important in the world to be left . . . to Europeans. European views are also inevitably in some measure Eurocentric, so the rest of the world, in a postcolonial era, has important things to say about the history of legal developments in Europe and their effect in the world. The second objective is to improve our understanding of transnational legal phenomena. We increasingly live in a time of transnational law, yet our understanding of law is still profoundly impressed by nationalist conceptions of law. The ancient notion of common law may be of great utility in understanding transnational legal phenomena, and notably the ongoing process of reception of laws. Let me therefore turn first to common laws in European legal history.

I. COMMON LAWS IN EUROPEAN LEGAL HISTORY

What can it mean for a law to be common? Roman lawyers appear to have initiated the expression, but they were not terribly interested in the underlying concept. They used the expression to indicate either a law common to all humanity—a nice thought but

1. See H. Patrick Glenn, A Transnational Concept of Law, in THE OXFORD HANDBOOK OF LEGAL STUDIES 839 (Peter Cane & Mark Tushnet eds., 2003).
beyond their immediate concerns— or to indicate simply the civil law itself, where it was not subject to any of its own exceptions. There was thus a common law of wills in the ius civile, as well as exceptions in the case of wills drawn by soldiers. Common law is here simply the general decree, and both the common law, in this sense, and the exceptions to it, are part of a body of law derived from a single source. One could quite properly speak of the law, with no qualifying adjective. There is here no notion of a duality or multiplicity of laws, or of the relations of different legal traditions.

Commentators have thus seen Roman law as lacking any specific or technical sense of common law. In particular, the notion of common law was not used as a means of adjustment or reconciliation with the different laws encountered by the Romans in their territorial expansion. They did invoke the notion of the ius gentium in resolving disputes within Roman institutions when a non-Roman was involved, but this really involved only the extension of those parts of Roman civil law judged capable of application to non-Romans. This was done essentially in commercial matters, though not in matters of family law or successions; or where Roman law was highly formalistic or ceremonial, or where the Latin language played an important role. There was therefore no active engagement on the part of Roman lawyers with foreign law, or even any necessity of knowledge of it, in the generation of the ius gentium. Beyond Roman law and Roman legal institutions, local law simply survived, largely unheeded by

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2. See J. Inst. 1.2.1 ("All peoples who are governed by laws and customs use law which is in part particular to themselves, in part common to all men. . ."). The text, from the early sixth century A.D., adopts language used in the earlier Institutes of Gaius (second century A.D.). See H.F. Jolowicz & Barry Nicholas, Historical Introduction to the Study of Roman Law 104-06 (photo. reprint 1996) (3d ed. 1972) (discussing the Greek influence and indiscriminate use of the expressions natural law and ius gentium).

3. See Dig. 29.1.20 (Julian, Digest 27) (indicating instances nevertheless of application of "general law"); see also Francesco Calasso, Introduzione al diritto comune 48 (1970); Helmut Coing, Europäisches Privatrecht: Älteres Gemeines Recht (1500 bis 1800) 89, 90 (1985).


6. See generally Max Kaser, Ius Gentium 5 (1993); Peter Stein, Roman Law in European History 12 (1999) (illustrating instances of exclusive Roman law that were not part of the ius gentium, or the customary law of commerce with people outside the Empire).

7. See Kaser, supra note 6, at 5.
Roman lawyers and Roman doctrine. There was therefore a multiplicity of laws in the Roman Empire, but apparently clear boundaries between them, based on concepts of Roman citizenship and Roman judicial administration. It is unlikely that things were as precise as this, but so one is led to believe.

Eventually Roman citizenship was extended throughout the empire, so uniformity was the means of resolution of multiplicity. A poet, Prudentius, sang his praise of this way of thinking in the fourth century: “To curb this frenzy God taught the nations everywhere to bow their heads under the same laws and become Romans... A common law made them equals and bound them by a single name, bringing the conquered into bonds of brotherhood.” Common law is here, again, in the sense of the general Roman decree, but this law remained for the Romans simply the ius civile. It was to become known as a common law only much later and amongst different peoples. Other ideas of commonality are thus possible.

Maurizio Lupoi has given new historical prominence to the idea of common law by recently concluding that there was a “European common law” immediately subsequent to the end of the Roman Empire and which came to an end in the eleventh century. This European common law, however, was “totally different” from the ius commune that was to succeed it. It included legislation, canon law, and Germanic written and unwritten law, and was a common law because of “shared principia and regulae.” Here we see a third, and

8. See Michael E. Jones, The Legacy of Roman Law in Post-Roman Britain, in LAW, SOCIETY, AND AUTHORITY IN LATE ANTIQUITY 52, 55-56, 61-62 (Ralph W. Mathisen ed., 2001) (discussing the “vexed question” and stating that no record of local dispute resolution was found unless a case was referred “upward” to a Roman magistrate). See generally DAVID JOHNSTON, ROMAN LAW IN CONTEXT 11 (1999) (discussing the survival of local law); LUDWIG MITTEIS, REICHSRECHT UND VOLKRECHT IN DEN ÖSTLICHEN PROVINZEN DES RÖMISCHEN KAISERREICHS 8, 151 (1891) (same); JOSEPH MODRZEJEWSKI, DROIT IMPÉRIAL ET TRADITIONS LOCALES DANS L’ÉGYpte ROMAINE 383, 396 (1980) (same); ALFREDO MOREDECHAI RABELLO, THE JEWS IN THE ROMAN EMPIRE: LEGAL PROBLEMS, FROM HEROD TO JUSTINIAN 299, 305 (2000) (same); Lewald, supra note 5, at 617, 639 (same).


11. See id.

12. Id. One instance of commonality in European common law would be “[t]he right of a free man to apply to a judge whenever he wished and without delay.” Id. at 197. It should be noted for purposes of later discussion that while sources of this early European law were different, there was by now much knowledge of commonality and a tendency therefore to advance it. Lupoi refers to this as a “guiding principle,” and cites the movement of the writ
different, notion of commonality, consisting of substantive commonality found amongst laws recognizably different in terms of their sources and fields of application. There is a common core of substantive provisions. Yet the notion of laws common in substance was not to play a large conceptual role in the millennium following the Norman Conquest. It was rather a new concept of common law—that which Lupoi considers totally different from any that preceded it\textsuperscript{13}—that was to emerge from the circumstances of Europe during and beyond the Renaissance of the eleventh and twelfth centuries.\textsuperscript{14}

It appears to have been the spread of both Christianity and feudalism that generated the notion of common law that has most profoundly marked European and world legal history. Both Christianity and feudalism were expansionist; new souls and new lands were required, and to these forces were added those of the new commerce. So priests, knights, and merchants all found compelling reasons to push back the frontiers of the core area of European Christendom.\textsuperscript{15} The process was not so much intended to create colonies, within Europe, but to effect what has been called “cellular multiplication” of the cultural and social forms of the European core, a process not so much of differentiation and subordination (the Roman model) but of replication.\textsuperscript{16} A common church contributed much to this. In the process, the written forms of law that had been developing

from Frankish law to England through the Normans as indicative of the “open system” of European common law. \textit{Id.} at 317, 433. \textit{But see} R.C. \textsc{Van Caenegem}, \textit{European Law in the Past and the Future: Unity and Diversity over Two Millennia} 25-26 (2002) (doubting the level of commonality described by Lupoi). \textsc{Van Caenegem} describes the differences between feudal and allodial lands; urban and rural usages; and privileges, edicts, and customs of various places. \textit{Id.} For similar techniques in later law, leading to another version of “common law,” see \textit{infra} Part I.C.

13. \textsc{Lupoi}, \textit{supra} note 10, at 4.


15. \textit{See} Robert \textsc{Bartlett}, \textit{The Making of Europe: Conquest, Colonization and Cultural Change} 930-1350, at 5-7 (1993) (discussing religious expansion); \textit{id.} at 47-51 (discussing the territorial requirements of feudalism as “the demand of vassals for fiefs and the desire of lords for fighting men”); Douglass C. \textsc{North}, \textit{Structure and Change in Economic History} 132 (1981) (“[F]eudalism . . . led to a concomitant expansion of both population and economic activity . . . . A frontier movement developed.”). \textit{See generally} Peter \textsc{Brown}, \textit{The Rise of Western Christendom: Triumph and Diversity, AD 200-1000} (2d ed. 2003) (describing the process by which Christianity came to “hold the center”).

16. \textsc{Bartlett}, \textit{supra} note 15, at 306-07, 309 (“Travellers . . . would not be aware of crossing any decisive social or cultural frontier.”); \textit{see} Hans \textsc{Hattenhauer}, \textit{Europäisches Rechtsgeschichte} 267, 262 (2d ed. 1994) (discussing cultural penetration or fusion (“Durchdringung”) as opposed to conquest, “not by sword but by plough”).
could become "legal and institutional blueprints or models which were easily exportable and adaptable but also resistant." 17 These laws could become "vectors of expansion" that "could be set down anywhere and still thrive." 18

Legal horizons were thus capable of expansion, and the peripheries of Europe were in an ongoing dynamic state, as German urban laws formed a model for towns in eastern Europe; as Norman procedures were moved first into England, then into Wales; and as the fueros of Christian Spain were introduced into the towns of the Reconquista. 19 It became necessary to reflect on the relations between expanding laws, eventually known as common, and those they met in the process of expansion. A simple line between the two could not be drawn, as in Roman law, as the objective here was not separation but eventually, and in some measure yet to be determined, commonality. The conceptualization of these relations was to take centuries. In the meantime, the process of adjustment began rapidly to take place in the field. We are no longer in a time of prelude to medieval common laws, with earlier and differing concepts of commonality, but in a time of their rapid growth and expansion, now explicitly designated as such.

The expression common law resurfaces in then contemporary documents at the end of the twelfth century. In Italy, Roman law is identified as the ius commune and no longer as the ius civile. 20 At almost exactly the same time in England, Richard fitzNigel wrote his Dialogus de Scaccario: The Course of the Exchequer, distinguishing between the law of the forest—dependent on particular legislation of the king—and what he described as the "Common Law of the realm." 21 This would not be the earlier Roman distinction between general rules and particular rules within a given corpus of law, but rather the first attempt in the common law tradition to identify a distinct and overarching source of common law, as opposed to distinct and particular sources of law, here in the form of legislation. By the end of the thirteenth century, the expression had become well-known in judicial language. A Roman expression thus begins to be adapted to the new circumstances of Europe.

17. See Bartlett, supra note 15, at 309.
18. See id. at 310.
19. See id.
20. See Calasso, supra note 3, at 104 (commune lege vivant).
A. The Nature of the New Common Laws

The concept of common law is thus preceded by the practice, and the practice is an infinitely varied process of adjustment of expanding laws to recalcitrant local, legal resistance, everywhere in Europe. It was thus a question, within existing structures, of whether the arrival of new settlers, new law, or both combined, could displace local forms of ordering. On the continent, the overwhelming initial response to this question was no. The most striking example, following the Reconquista in Spain, was the guarantee by Alfonso the First of Aragon of ongoing enjoyment of Islamic law by the Muslim subjects of the new Christian king. There was also little likelihood of legislative imposition of a new law elsewhere on the continent, and it is clear that the principle of personality of unwritten law and feudal law left very little normative space. The new common laws faced difficult initial tasks of insinuation. They were of diverse origin, though writing appears to have been essential to all of them. The unwritten law of the Saxons became mobile in recorded form as the Sachsenspiegel. Urban law, which had begun to be written in Italy by the mid-twelfth century, was transplanted to cities in search of renewal. In Spain, there were many legislative attempts, culminating with the Siete Partidas, to overcome local particularity. In England, the Norman and Angevin kings were remarkably cautious in their attitudes to existing law. William I ordered all to seek “the hundred and shire courts as our ancestors commanded,” and would have ordered that Aethelric, the deposed Bishop of Selsey, “a very old and learned man, should be brought to Penenden Heath in a cart to describe and expound the customary law of the Anglo-Saxons.” Close to a millennium later,

26. See generally Alan Harding, Medieval Law and the Foundations of the State 195 (2002) (describing William’s desire to preserve the old courts of shire and hundred and the law of his predecessors); Doris M. Stenton, English Justice Between the Norman Conquest and the Great Charter 1066-1215, at 56 (1964) (same); Frank I. Schechter, Popular Law and Common Law in Medieval England, 28 Colum. L. Rev. 269, 291 (1928) (describing William’s struggle with the local language in administering the old law).
27. Stenton, supra note 26, at 18; see also Frederick Pollock, The Expansion of the Common Law 37 (1904).
English law is still to the effect that "a local custom is recognised by the courts as taking priority over a general rule of common law if certain strict requirements are met." Moreover, the eventual royal instrument of common law in England did not provide any immediate menace to existing, substantive English law. It was rather a royal forum for litigation that was provided, or even perhaps simply a royal forum expanded slightly over its English predecessors, in which existing law could continue to be applied by sworn, or jurés, members of the population. There were many types of expanding laws, intended to be common in some measure, and all found it necessary to limit their commonality in the face of particular resistance.

The commentators on the new ius commune, that which was derived from Roman law, were instrumental in articulating the nature of the new type of European common law and its ongoing relation with particular laws, now recognizable and designated as iura propria. These could be in the form of local customary law, regional legislation, or most evidently urban legislation, as the vigorous new cities undertook self-regulation in ways uncountenanced by Roman law. All of these laws came to be recognized as privileges, as concessions or exceptions made in favor of particular groups or particular fields of law, allowing them to be excluded from the operation of the ius commune. We even owe our word privilege to this notion of private or particular laws (privatae leges). Once the theoretical possibility of a particular law, a ius proprium, was accepted, an entire field then opened of the means of conciliation of this new ius commune with its interlocutors, the multiple iura propria or particular laws of Europe. Interpretation was here of multiple laws, and a means of conciliation of them.

The concept of ius commune that emerged from these many debates was new and different from the notions of common law that had previously prevailed. Common law was no longer the general precept of a given law, or the law common to humanity, or substantive commonality found in different laws. It had become law common in relation to law that was particular, and it had to be designated as common law to distinguish it from the other, particular laws operative

in the same territory. It was, moreover, the particular law that prevailed in priority. The ius commune was therefore not binding law. It was never enacted as the positive law of European nation states and never somehow repealed in its entirety; it is even difficult to contemplate how this could occur.\footnote{See \textit{Van Caenegem}, supra note 12, at 137; Umberto Santarelli, \textit{Ius Commune e Iura Propria: Strumenti teorici per l'analisi di un sistema}, in \textit{STUDI IN MEMORIA DI MARIO E. VIORA} 635, 635 (1990). There were, however, attempts at repeal or prohibitions of citation.} The authority of authors, the main source of the ius commune, could not be somehow abrogated. They did not, moreover, give definitive opinions, advising only "saving a better opinion."\footnote{R.H. Helmholtz, \textit{The Ius Commune in England: Four Studies} 243 (2001).} As well, none of the content of the ius commune necessarily prevailed, though it had content that was available in case of need. So it has been referred to as a "subsidiary common law,"\footnote{Calasso, supra note 3, at 73. The notion of subsidiarity thus has a long history in European law. For contemporary manifestations, see generally George A. Berman, \textit{Taking Subsidiarity Seriously: Federalism in the European Community and the United States}, 94 COLUM. L. REV. 331 (1994).} though it is perhaps more accurate to think of it as \textit{relational common law}, law that only survives and functions in relation to the vigor of the particular law that has priority over it. These particular laws, moreover, are not autonomous or independent or exclusive, in spite of their priority. It is presumed that they will need supplementary assistance; the presence of that means of assistance, the common law, is constant in the functioning of the particular law. The application of a common law is thus often suspended in particular cases, but it will revive or reappear as the occasion demands. It may be useful to think of the Cheshire Cat.

\textbf{B. The Multiplicity of the New Common Laws}

The literature on the particular common law that was the ius commune is immense and filled with contradictions. Yet the literature in its entirety has had the major effect of concentrating attention on the ius commune as a relational common law (with all of the theoretical implications this implies) and as being the single, outstanding exemplar of such a relational common law. The most widely circulated image of European law for the last millennium has thus been that of a single, European ius commune (subject to particular iura propria), which came to an end with the national codifications in the nineteenth and twentieth centuries. The common law of England is thus often presented as a ius proprium (to the frequent fury of common law lawyers), or simply as an exception, a paradox standing outside the
general pattern of European law.\textsuperscript{33} It is this concept of a single, European ius commune that is now the object of major efforts of revival in the context of the present European Union.

There is, however, another image of European law that is possible to conceive, which is that of multiple, interactive common laws, each radiating out from major centers of population or influence, and each variously accommodating iura propria internal to each of them. This is a more complex, nonbinary understanding of European legal history, which would essentially deny the possibility of forcing all of European law into a single (monotheistic?) model of the one (major) and the many (minor). This hypothesis would explain resistance to the ius commune not simply as a result of local particularity, but as a result of the play and interaction of common laws of generally equal or comparable standing, a hypothesis that becomes more plausible when the ongoing overseas lives of the European common laws are considered. There would thus have been many iura communia in Europe in addition to the ius commune, notably those radiating out from the major centers of England, France, Spain, Germany, the Netherlands, and so on. European history of the first millennium has been best described not as an exchange between one overwhelming center and its periphery, but rather as a loosely spread constellation of centers, and the idea of multiple common laws in the second millennium therefore continues to acknowledge the essential diversity of European law and legal history.\textsuperscript{34}

It is impossible to make the case here for the multiplicity of common laws in Europe by examining them all, but let me take one example, beyond the common law and the ius commune, which is that of French common law, of evident importance in the legal history of Louisiana.

\textit{C. The Common Law (Droit Commun) Originating from France}

The French referred to their common law initially as a “droit commun coutumier,” and the expression “droit commun” can be found in France as early as 1262, less than a century after its emergence with

\textsuperscript{33} \textit{See}, e.g., Carbasse, supra note 29, at 279 (“England remains deliberately separate, fixed since the middle ages with a national law of a jurisprudential type, also called common law, a law common to all of England and which sees itself as absolutely distinct from that of the continent” (author's translation)).

\textsuperscript{34} \textit{See} Brown, supra note 15, at 16-17 (describing Europe as geodesic dome with interlocking modules, rather than as a large tent hung on a single pole).
the common law or with the ius commune.\textsuperscript{35} The expression may have been initially used only in the Roman sense of general precepts of a given law, but even at the end of the thirteenth century Beaumanoir is writing of “le droit qui est commun a tous ou roiaume [sic] de France,” i.e., a law which is common over the multiple customs of France.\textsuperscript{36} So there is a very early shift from the limited Roman sense to the notion of substantive commonalities, a common core, found amongst different customs. This reliance on a droit commun in France in no way declined in importance through the subsequent centuries and even became an increasingly important conceptual instrument. The slow process of redaction of the customs eventually gave rise to the possibility of their comparative study. “Families” of customs then became evident as commonalities were identified and there was talk of “la conférence des coutumes,” or bringing together and comparison of written customary laws.\textsuperscript{37} The great sixteenth-century names of French doctrine then took up the cause, and Du Moulin affirmed that “our customs are not municipal [or particular] laws. They suffice unto themselves and are our only common law.”\textsuperscript{38}

This French movement towards a common law is of interest in definitional terms, because it went beyond a type of archeological or anthropological process of determining that there were in fact commonalities, or a common core, amongst the customs, but went some distance in formulating an overarching synthesis of those commonalities for normative purposes. A relational and overarching common law thus emerged, expressed largely in doctrinal form, which would have left the particular customs intact to live out their respective lives and which would have prevented the ius commune from achieving the status of a common law in France.\textsuperscript{39} The passive

\textsuperscript{35} See Petot, supra note 4, at 422-23 (citing judicial decisions).

\textsuperscript{36} Id. at 417 (noting possible use of Roman notion and explaining Beaumanoir’s extension to substantive commonalities); see also JEAN-LOUIS THIREAU, CHARLES DU MOULIN (1500-1566), at 120 (1980). For the original, see PHILIPPE DE BEAUMANOIR, COUTUMES DE BEAUVIASIS (1899); see also THE COUTUMES DE BEAUVIASIS OF PHILIPPE DE BEAUMANOIR, at xxiii, xxix, xxxii (F.R.P. Akehurst trans., U. Pa. 1992) (1899) (referencing the debate on Beaumanoir’s use of the expression).

\textsuperscript{37} See CARBASSE, supra note 29, at 119.

\textsuperscript{38} Petot, supra note 4, at 413 (quoting DU MOULIN, COMMENTAIRE DE LA COUTUME DE PARIS, EPITOME TITULI I DE FEUDIS §§ 107-108 (1681) (author’s translation)); see JEAN BRISSAUD, MANUEL D’HISTOIRE DU DROIT FRANCAIS 158 (1898); Vincenzo Guizzi, IL DIRITTO COMUNE IN FRANCIA NEL XVII SECOLO, 37 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 1, 5 (1969).

\textsuperscript{39} See JULIAN H. FRANKLIN, JEAN BODIN AND THE SIXTEENTH-CENTURY REVOLUTION IN THE METHODOLOGY OF LAW AND HISTORY 37 (1963); Jean-Louis Halpérin, L’APPROCHE HISTORIQUE ET LA PROBLÉMATIQUE DU JUS COMMUNE, 52 REVUE INTERNATIONALE DE DROIT
resistance of the droit commun was also accompanied by explicit prohibitions of the teaching of Roman law, and ferocious doctrinal opposition, notably in the work of Hotman. The overarching nature of the French droit commun was found in articulated maxims or general principles of customary law, recognized in many territories ("the seigneur must protect the rights of all of those under age," "death seizes the living") and in doctrinal writing. The Custom of Paris was also taken to be a synthesis of many other customs, a type of ideal custom against which others could be measured, and it was often the object of choice of law clauses, from as far away as Toulouse. It was said to occupy the same position as the law of Justinian in other jurisdictions, and its prestige grew with its reformulation and expansion in 1580. Given such a recognized common law, private laws or privileges and legislation came to be narrowly construed, and so the same interpretive principles emerged as those of the ius commune in relation to its iura propria. In 1747, just fifty-seven years before the codification of French civil law, and notably during the French regime in Louisiana, Bourjon published his treatise on "the common law of France and the custom of Paris reduced to principles." We are here clearly dealing with a relational common law, defining itself against and in relation to the particular customs, but the codification of 1804 largely drew an end to this development within France itself. Its continuation lay beyond the seas, so we must now return to Louisiana, which is a particularly rich example of the ongoing vitality of European-derived common laws in the world.


40. See Jean Gaudemet, Les Naissances du Droit 302 (1997) (explaining the prohibition of the teaching of Roman law in Paris in 1219, though it was authorized in Orléans in 1235); see also Guizzi, supra note 38, at 21; Thireau, supra note 36, at 92.

41. See Donald R. Kelley, François Hotman: A Revolutionary's Ordeal 179-204 (1973); see also Franklin, supra note 39, at 40 (calling Hotman "the most militant of the anti-Romanists").

42. Thireau, supra note 36, at 126 (author's translation).

43. See Gaudemet, supra note 40, at 176; 1 Olivier Martin, Histoire de la Coutume de la Prévôtée et Vicomté de Paris 26 (photo. reprint 1972) (1922).

44. 2 Émile Chénon, Histoire Générale du Droit Français Public et Privé des Origines à 1815, at 317-18 (1929).

45. See Petot, supra note 4, at 424-25 (discussing the French principles of interpretation); Thireau, supra note 36, at 1 (discussing du Moulin's position).

II. COMMON LAWS IN THE LEGAL HISTORY OF LOUISIANA

How is it possible to speak of multiple common laws in the world today, and notably in Louisiana, when it is generally agreed that the common laws of Europe came to an end in the nineteenth and twentieth centuries with the phenomena of nationalization of law, national codifications, and national stare decisis?47 Like the death of Mark Twain, these reports of extinction may have been exaggerated. They have certainly been Eurocentric.

A. Territoriality and Appropriation

How can national authorities appropriate unto themselves, and otherwise abrogate, a suppletive, nonbinding common law, largely expressed in nonstate sources? They have sought to do so through various devices, including abolition of prior law, enacting noncitation rules in respect of foreign sources, and generally constructing the idea of a complete national system of law.48 Yet it is inherent in the theory of the state and the territoriality of national law that legislation can have effect only within the territory in which the legislative authority exercises its power. If a common law has gone offshore, it is beyond the legislative authority of a particular state to eliminate it in its entirety. It can be made (apparently) to disappear, only within the territory of the appropriating state. So if common laws in a sense went

47. See COING, supra note 3, at 82 (viewing the era of codification as the end (Endpunkt) of common European legal science); Helmut Coing, The Roman Law as Ius Commune on the Continent, 89 L.Q. REV. 505, 515 (1973) ("[O]ne cannot deny the common background all these systems have."); see also Adriano Cavanna, Il Ruolo del giurista nell'età del diritto comune (Un'occazione di riflessione sull'identità del giurista di oggi), 44 STUDIA ET DOCUMENTA HISTORIAE ET IURIS 95, 98 (1978) (viewing codification as moment of "rupture").

48. See BERNHARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW 4 (1990) (discussing the prohibition of citation of doctrine or foreign authority); PATRICK MORVAN, LE PRINCIPE DE DROIT PRIVÉ 216-22 (1999) (discussing the French abolition of prior law in article seven of the Loi du 30 ventôse an XII (1804)); John W. Cairns, Comparative Law: Unification and Scholarly Creation of a New Ius Commune, 32 N. IRELAND L.Q. 272, 277-78 (1981) (discussing the actual necessity of abrogation of current law prior to codification); see also 1 EUGEN HUBER, SYSTEM UND GESCHICHTE DES SCHWEIZERISCHEN PRIVATRECHTS 65 (1886) (discussing nineteenth-century Swiss cantonal prohibition of foreign sources); Mario Ascheri, A Turning Point in the Civil-Law Tradition: From Ius Commune to Code Napoléon, 70 TUL. L. REV. 1041, 1046-48 (1996) (discussing the debate in France whether authorities other than those abrogated could still be referred to by judges, and noting the lack of any prohibition on citing authorities by counsel); Eugen Bucher, Rechtüberlieferung und heutiges Recht, 8 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 394, 428 (2000).
into hiding or hibernation in Europe, in the nineteenth century, there
remains the question of their survival overseas, beyond Europe.

Common laws within Europe resulted largely from the expansion
of European populations and the expansion of their laws, treated as
common in relation to the particular laws they encountered. It is often
thought today that the expansion of European peoples beyond Europe,
in the process of colonization, was driven by European states. So the
expansion would have been outward, from a base of a particular state,
and the law of that particular state would have been transplanted in
some measure into the colonies of that state. The time of colonization,
however, was generally not a time by which the European states had
taken shape, and certainly not in their present form. The tracing of the
boundaries of France, on the ground, began in the sixteenth century, in
a haphazard manner, and became systematic only in the eighteenth
century. Yet Cartier had arrived in what was to become New France
in 1534, and had been preceded by Spanish, or rather Castilian,
expansion in the south. La Salle arrived in what was to become
Louisiana in 1682, more than a century before the unification of
French law and the French state by the French Civil Code and before
many of the significant Ordonnances of Louis XIV.

European colonization beyond Europe was thus not later and
distinct from European nation building, but inseparably combined with
it, or even perhaps exactly the same process. It was possible to speak
of "[T]he Indian as Irishman" because the laws of both were being
encountered and dealt with, here by the English, in comparable
manner. They were both inseparable elements of the same process of

49. See Daniel Nordman, Problématique historique: des frontières de L'Europe aux
frontières du Maghreb (19e siècle), in FRONTIÈRES: PROBLÈMES DE FRONTIÈRES DANS LE
COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 76, 80-82 (Roderick Munday

50. JAMES MULDOON, CANON LAW, THE EXPANSION OF EUROPE, AND WORLD ORDER
267 (1998) (noting continuity between the Spanish Reconquista and the Spanish conquest of
the Americas: "This tradition ... formed a unifying theme in Spanish history"); see
BARTLETT, supra note 15, at 313-14 ("The European Christians who sailed to the coasts of the
Americas, Asia and Africa in the fifteenth and sixteenth centuries came from a society that
was already a colonizing society. Europe, the initiator of one of the world's major processes
of conquest, colonization and cultural transformation, was also the product of one."); JÉRÔME
BASCHET, LA CIVILISATION FÉODALE: DE L'AN MIL À LA COLONISATION DE L'AMÉRIQUE 254-55
(2004) ("[L]'élan qui conduit à la Conquête des Amériques est fondamentalement le même
que celui que l'on voit à l'oeuvre depuis le XIe siècle ... c'est la société féodale ... qui
pousse l'Europe vers le large"); David Thomas Konig, Colonization and the Common Law in
Ireland and Virginia, 1569-1634, in THE TRANSFORMATION OF EARLY AMERICAN HISTORY 70,
expansion outwards from European centers of authority and influence. States in Europe formed when the boundaries of other European political entities had been compressed to the maximum extent (uti possidetis juris) and some stability set in. The same outward pressure was occurring beyond the seas, where less resistance was to be found. Feudalism was now less important in the process, but religion, commerce, and Lockean ideas of property acquired through the expenditure of labor were alternative sources of motivation. When French law was unified in 1804, and the French state legally united, France had already acquired, and lost, a number of overseas colonies, including Louisiana.

European common laws were thus expanding overseas at the same time as they were expanding in Europe, and the territorial ambit of common laws simply spread outward, in the world, until limits of some kind were reached. The common laws of Europe therefore are not, by their nature, limited to Europe. Their commonality relates to particular laws beyond Europe as much as it relates to particular laws within Europe. This has major consequences for the idea of contemporary, transnational common laws. Because the common laws of Europe were extra-European in considerable measure, the measures of appropriation of them that were taken through the nationalization techniques of the nineteenth century were necessarily ineffective with respect to the worldwide dimensions of these common laws. European states, themselves coming later than the common laws, could appropriate only so much of them as could be arguably controlled. In the result, given floating, transnational common laws, appropriation of them by particular European states meant that they were placing themselves in the position of particular states with particular laws, or iura propria, in relation to them. Jhering was entirely correct in referring to the emerging pattern of “Landesjurisprudenz” (local or provincial jurisprudence) of exclusivist European state law, but the expression was not simply an epithet critical of overly national preoccupations, but an accurate description of the place which national laws conferred upon themselves in the broader cadre of ongoing, often worldwide, common laws. 51 The same is true, on a larger scale, of the contemporary law of the European Union. The pattern of relational common laws thus plays itself out again, this time with global dimensions, but it is always the same common laws that are operative and their overseas characteristics are exactly those of their European

characteristics. So particular European states, with their exclusivist laws, may see both a revival of common law upon which they are all based, from indigenous, historical, European sources (a common core), or they may see their sources of law supplemented by resort to extraterritorial sources of law, from within the same corpus of common law from which the state law was derived. This, too, is happening today.

These remarks, however, are general and abstract, so it would be wise to test them by what we know of the historical experience of European common laws in the world, and particularly in Louisiana. Again, let us use the French "droit commun" as an example.

B. French Common Law in Louisiana

Like the English, the Spaniards, and the Dutch, the people we know as French exported a great deal of law, and French-derived rules are now present in North America (in Quebec and Louisiana, though earlier in a much wider area), in many jurisdictions in Africa and the Middle East, in Pondicherry in India, and in some measure in southeast Asia. Again, however, that which accompanied French settlers was not the ius commune derived from Roman law but the relational droit commun of what was to become France. In the early 1600s in what is now Quebec, Champlain drew his will in the form of the customary law of Saintonge, his place of origin, and when the "diversity of customs" of northern New France was overcome by royal decree in the seventeenth century, they were replaced by the Custom of Paris, as representing the general, common law of the metropolitan territory. So also was the Custom of Paris received in Louisiana, from 1712, as the primary synthesis of French common law, and so also was its introduction meant to avoid what would otherwise be the diversity of French customary law. We often think today of the

Custom of Paris as a preliminary version of the Civil Code, but in France outside of Paris, and in its colonies, it was not seen as a definitive code but as a resource, a complementary or relational source of law, which necessarily yielded to local regulation of a more imperative character. In Louisiana, the Superior Council clearly exercised authority that did not meet with royal approval,\textsuperscript{54} and its judicial decisions have been described as relying “on a loose interpretation”\textsuperscript{55} of, or being “modelled after”\textsuperscript{56} the Custom of Paris. There were also major problems of noncompliance, which in some instances were even royally acknowledged.\textsuperscript{57} It was thus not simply a binding code that was received in Louisiana, but the Custom of Paris as representative of French common law in all its doctrinal richness. The Custom of Paris could not function as a binding code in either Quebec or Louisiana, as it was clear that it would yield to local circumstance and local exception. Life in North America was not what it was within the Paris basin.

By the time of their arrival in Louisiana, the French were accustomed to the adjustment of French law to local circumstances. In New France, even the expansion of European criminal law was the object of extensive negotiations with native peoples,\textsuperscript{58} while civil law was introduced essentially for French settlers and was extensively modified in the process. In what is now Quebec, the Custom of Paris was locally amended, even for its application in the French community, and the Code Louis of Civil Procedure went through a similar process


54. \textit{See Fernandez, supra note 53, at 2} (describing the unsuccessful attempt of Louis XV to prohibit local legislative discretion, since the Superior Council was “separated from direct royal interference by distance and lack of interest”).

55. \textit{Id. at 3}.


58. \textit{See Richard White, The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815}, at 52 (1991); see also Decree of the Superior Council of Quebec Subjecting Indians to the Penalty Carried by the Laws of France Concerning Murder and Rape (April 21, 1664), in \textit{Canadian Indians and the Law: Selected Documents}, 1663-1972, at 27-28 (Derek G. Smith ed., 1975) (indicating how submission to French criminal law was proposed as a counterpart to the prohibition of Frenchmen as “creditors of the Indians, from plundering and harassing them while in default of payment”).
of adaptation. Generally in French territories abroad, metropolitan legislation (becoming relational common law on its exportation) would be introduced into colonies only for French settlers and as was appropriate to do so, though it was also extended to local, indigenous elites ("protégés" or "protected persons") as a form of privilege, or even made available to an entire indigenous population as an option or form of renunciation of their prior law. The result was a clear duality of laws, as in Europe, with large parts of the colonial population French subjects though not French citizens in terms of the application of French law. Europeanization of the law in its entirety in French territories was "out of the question."

C. Louisiana's Other Common Laws

French common law in Louisiana thus necessarily functioned in the same manner as French common law did in France, i.e., as a relational, suppletive common law which yielded to local circumstance and authority. The same conclusion holds true for Louisiana's other common laws. The Anglo-American common law always yielded to local authority, in England and abroad, and its character as a common law was not derived from its source in case law, as commonly assumed today, but from its suppletive character, the underlying reality that it was a common law in relation to the particular law that would regularly displace it. Both of these laws had to be identified, hence the adjective common. In the United States, it should need no demonstration that English common law did not function as binding law, and constituted at most a potential resource, a supplement in case of need, to domestic normativity. The common law, moreover, went


60. See Wolfgang J. Mommsen, Introduction to European Expansion and Law 1, 5-6 (Wolfgang J. Mommsen & J.A. De Moor eds., 1992). Protected persons were often engaged in commercial activity with the French.


62. J.-L. Miège, Legal Developments in the Maghrib, 1830-1930, in EUROPEAN EXPANSION AND LAW, supra note 60, at 101, 103 (describing this phenomenon in the Maghrib); see also LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900, at 154 (2002) (discussing applicability of both French and "native" law to Africans and Asians in French territories); Michel Grimaldi, L'exportation du Code civil, 107 POVOIRES 80, 92 (2003) (discussing "citoyens français de statut local").

through a massive adaptation in the process of its exportation in the world, a process made much more visible by the recent publication of Jerry Dupont's *The Common Law Abroad*, with 1228 pages of bibliography drawn from the "world's twelve most complete law libraries," though referring to neither the case law, nor the experience of the United States.\(^{64}\) This immense literature, dealing with some five centuries of experience, is perhaps best seen as the common law counterpart to the equally vast continental literature on the adjustment of the *ius commune* to its *ius propria*. Recent historical writing, moreover, has recognized that there was no "one-way street" in the arrival of the common law, and that there was "a complex process of interaction to which the Europeans and the indigenous peoples, especially the small westernized intellectual elites in the colonial and semi-colonial territories, contributed in their own right."\(^{65}\) In this ongoing "hybridity," Upendra Baxi sees the colonial subject not as "passive recipient" of "high-colonial law" but as its "strategic critic and subverter... resisting, ambushing, waylaying, dis-orientating the mega-structures."\(^{66}\) Peter Karsten observes that "[s]ome Laws were scrupulously observed, others quietly ignored, still others, vigorously resisted."\(^{67}\) In the United States in particular, the common law was received only where it satisfied a "suitability" test; in England and abroad it was a suppletive source of law, a relational common law.\(^{68}\)

The common laws of Europe were not limited to those of the North. In *Castile* the *Siete Partidas* (Seven Parts or Books) was conceived in the late thirteenth or early fourteenth centuries under Alfonso X ("the Wise"), not as legislation, but as a book of teaching.\(^{69}\)

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68. This "suitability" test was clearest in the United States, where there was much formal reenactment of English law judged suitable. See Elizabeth Gaspar Brown, *British Statutes in American Law* 1776-1836, at 12-41 (1964). In the Commonwealth, the presumption was in favor of reception, and the test was more of "unsuitability" as a means of reversal of the presumption. See, e.g., Karsten, *supra* note 67, at 128 (addressing Canada, Australia, and New England); Glenn, *supra* note 52, at 272 (describing the presumption in Ontario).

Though officially adopted in 1348, the *Ordenamiento de Alcalá*, which adopted the *Siete Partidas*, listed the other sources of law, notably the local fueros, which were to precede it in priority. From its inception, it thus functioned as a relational, nonbinding common law, and it was to retain this character in all subsequent statements of the hierarchy of laws in Spain and in Spanish possessions in the Americas. In the Hispanic new world, Castilian legislation was very visible, more so than the metropolitan equivalent in English or French colonies. El derecho indiano was thus a recognized corpus of Castilian law governing in principle all matters in the new world and extending to both public and private law. In spite of the prominence of legislation, however, there was no direct rule in the sense of extension of metropolitan law and administration to all populations of the new territories. It has been said that Spanish laws in the colonies “had a nearly imploring tone” and that the lack of Spanish coercive forces “brought about the adoption of a persuasive politics, dependent on argument and reconciliation . . . a soft political system.” The Castilian texts themselves acknowledged the need for ongoing recognition of local, particular law, the iura propria of New Spain. *The Recopilación de the Laws of the Indias* of 1680 stated expressly that the “laws and good customs” of the existing population were to be conserved and given effect, and this is recognized as stating practice from at least 1530. Spanish or Castilian law was therefore in general

70. Scheppach, *supra* note 69, at 61, 191.
71. See Jesús Lalinde Abadía, *Derecho Histórico Español* 129-30 (1974); Rafael Gibert, *Historia General del Derecho Español* 53 (1968); J. Javier Barrientos Grandón, *Historia del Derecho Mexicano: Del Descubrimiento Colombino a la Codificación* 203 (2000); Scheppach, *supra* note 69, at 202, 206-07. Spanish authors have explicitly designated the *Siete Partidas* as the derecho común. See Grandón, *supra*, at 199 (citing Juan de Matienzo in the sixteenth century, for whom the Spanish royal texts would be common law “equal to that of England”); Carlos Petit, *Derecho común y derecho castellano: Notas de literatura jurídica para su estudio (siglos XV-XVII)*, 50 TJUDSCHRIFT VOOR RECHTSGESCHIEDENIS 157, 169 (1982) (stating that Spanish doctrine of the sixteenth and seventeenth centuries was “near unanimous” in treating as common law).
a relational or suppletive common law in the Spanish colonies, and the *Si"iete Partidas* was explicitly designated as "common law" by Moreau Lislet and Carleton in their 1820 translation of it in Louisiana. 74

There is some question in Louisiana as to the official status of French and Spanish common laws during the French and Spanish regimes, a question linked to the difficulty in identifying formal, local instruments of reception and in determining their precise effect. 75 This is a largely a question, however, of determining the positive law of Louisiana, whereas it is a characteristic of common laws that they are not positive law. It is thus impossible to repeal or abrogate a common law, just as it is impossible to eliminate the Cheshire Cat. A common law is simply available, with whatever sources it uses, and may be called upon in case of need. It is persuasive, not binding, authority, and may be profoundly rooted both in the population and in judicial practice. 76 All of this is perhaps best illustrated by the role in Louisiana

74. L. Moreau Lislet & Henry Carleton, Preface to *The Laws of Las Si"iete Partidas Which Are Still in Force in the State of Louisiana*, at iii, xvii (L. Moreau Lislet & Henry Carleton trans., 1820) (citing Spanish author Murilo); see Rodolfo Batiza, *The Unity of Private Law in Louisiana Under the Spanish Rules*, 4 INTER-AM. L. REV 139, 151 (1962) (describing the *Si"iete Partidas* as the "primary source of law in the Americas, despite its supplementary character").

75. See, e.g., Palmer, supra note 53, at 1096-97 (discussing how Spanish law was never abrogated, though there is some agreement that French law was abrogated in 1769); Trahan, supra note 53, at 1022 (pointing out uncertainty as to whether there was a decree implementing Spanish law); A.N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in *Louisiana's Legal Heritage* 87, 88-96 (Edward F. Haas ed., 1983) (noting President Jefferson's refusal to accept Spanish abrogation of French law).

subsequently played by the Napoleonic Code. A code is generally seen as a complete and authoritative statement of the law of a given territory, and is usually seen as binding law. The droit commun of France would thus have come to an end, in France, with the enactment of the French Code in 1804. Yet in terms of the ongoing transnational French droit commun, which is effective in many parts of the world, the French Civil Code simply became a new and highly persuasive element in the life of this droit commun.

As the *Ordonnances* of Louis XIV became relational common law abroad, so did the Napoleonic Code, preceded in many instances by older French law but often capable of persuasion in the absence of prior French presence. Imre Zajay observed that French law and the French Civil Code played the part of a “droit commun” of Latin countries in the nineteenth century, even at the height of legal nationalism, and he was entirely correct in his conceptual description of the transnational, suppletive nature of the French codification.\(^77\) He was less accurate in limiting the phenomenon to Latin peoples, because the Code’s influence rapidly became a worldwide phenomenon, the effects of which are far from exhausted today. It profoundly influenced the Louisiana Digest of 1808 and the Code of 1825, and there has been a splendid debate in Louisiana as to the relative influence of French and Spanish sources in contemporary Louisiana law.\(^78\) This is exactly as it should be, because common laws influence, and do not bind, as indicated by the ongoing importance of doctrinal writing in their use.\(^79\) Influence, moreover, as the Louisiana debate indicates, is incapable of precise measurement or

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79. For a list of translations in Louisiana of classic French treatises (Planiol, Geny, and Aubry and Rau), see Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, 63 La. L. Rev. 1, 7 (2002).
determination. The same must be said of the ongoing and unquestionable influence of Anglo-American common law in Louisiana.80

III. CONCLUSION

The legal nationalism of the last two centuries has largely obscured the ongoing operation of the multiple common laws of the world. Nor has the dynamic of their operation been captured by taxonomic efforts of nineteenth- and twentieth-century comparative lawyers to categorize national systems into preestablished and fixed notions of legal families. The most important legal developments of the last two centuries have not taken place in the detail of national regulation, but in the large transnational movements in which ongoing, persuasive common laws have been most influential. As the Louisiana experience demonstrates, the influence of common laws cannot be precisely controlled, and the confluence of common laws cannot be avoided or eliminated where history has brought them together. In working with multiple common laws, Louisiana represents a microcosm of the world, in which the respective roles of various common laws are played out. This has been so in the last few centuries; it will still more evidently be the case in the future, as transnational forms of law become still more important than they have previously been. The notion of common laws appears to be as useful a concept for this process in the future as it has been in the past.
