INTRODUCTION—LOUISIANA CIVIL LAW: THE CINDERELLA OF AMERICAN LAW

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It has been said that Louisiana civil law is the most celebrated contribution of Louisiana to the American culture. Some people think that it is “the most important accomplishment in the history of American law in the sense of the relation it bears to the future direction of American law.” As the only mixed jurisdiction among the fifty states in the American union, Louisi-

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1. The late Professor Mitchell Franklin reached this conclusion more than 50 years ago. See Franklin, Book Review, 7 Tul. L. Rev. 632-33 (1933). In my opinion, it remains valid even today.

2. Id.
ana is in the enviable position of being able to draw upon the cultural heritage of two legal traditions—the civil and the common law. In Louisiana, the institutions of these two legal families exist side-by-side in an admirable state of peaceful coexistence. This coexistence enables students of comparative law to observe the relative merits of both systems. Because of this unique situation, Louisiana has emerged as the living laboratory for legal experimentation in American law. However, the fact that Louisiana’s civil law exists as a lonely island, surrounded by a sea of aggressive common-law influences, often means that the richness of the civil-law tradition is not fully recognized in the other forty-nine states.

Anyone who examines Louisiana law closely will find that it is a marvelous example of what can be achieved through a careful transplantation of legal ideas. It blends the best elements of both the civil- and common-law traditions. Both of these constituent elements of Louisiana law exist against the backdrop of a uniquely American phenomenon—United States constitutional law. The result of this confluence of two legal traditions can be truly described as a mélangé parfait. The common-law element of Louisiana law is the same common law that prevails in the other forty-nine states. This common law is a constitutionalized version of the common law of England. Even though the civil-law elements of Louisiana law trace their roots to the parent systems of France and Spain, they have, to a considerable extent, been Americanized. In effect, it is constitutionalized civil law and, to that extent, unlike the civil law that continues to exist in France and Spain.

When I speak of Louisiana law, I am referring to neither individual statutes nor a mechanical aggregation of particular rules, but to an integrated system of many component parts. Louisiana law can be likened to a social organism that has an

3. There is considerable debate among scholars as to whether the drafters of the first Louisiana codification in 1808 drew from the French as opposed to the Spanish or Castilian sources. For an erudite argument of one viewpoint in this discussion, see Batiz, Origins of the Modern Codification of the Civil Law: The French Experience and Its Implications for Louisiana Law, 56 Tul. L. Rev. 477, 601 (1982).

4. Professors David and Brierley seem to have reached the same conclusion. In their view, “it is superficial and indeed false to see law as being only composed of the totality of [substantive] rules.” R. David & J. Brierley, Major Legal Systems in the World Today 19 (3d ed. 1985).
artificial soul, nerves, joints, memory, strength, reason and will. Thus, in the context of this analysis, Louisiana law means the whole machinery of justice in the State of Louisiana.

A microscopic examination of Louisiana law indicates that it is a synthetic phenomenon. It is a synthesis of five integral parts, which I would describe as the infrastructure,6 methodology,7 legal style,8 the particular rules of private law, and the particular rules of public law. The infrastructure and methodology of this law manifest strong features of the common-law tradition. The substantive rules of the public-law component of Louisiana law are similar to those that exist in the other forty-nine states. The legal style of Louisiana law, on the other hand, exhibits traits that are associated with both the civil-law and the common-law traditions. In effect, it is a hybrid legal style. The one aspect of modern Louisiana law in which the civil-law tradition is entrenched is droit civil, that is, that part of its private law which is embodied in the Louisiana Civil Code. Of the four basic codes,8 this is the one that has the greatest impact on the lives of the ordinary citizens of Louisiana. They are governed by it when they marry or divorce, enter into private contracts, bring or defend against an action in tort, buy, sell, or donate property,

5. For purposes of this analysis, the term "infrastructure" of Louisiana law refers to the structural foundations of the state's entire legal system. This notion encompasses three specific elements: legal institutions, the divisions of law, and the role assigned to the respective legal actors within the legal system. Any effort to understand the roles of the respective legal actors will, of necessity, include an analysis of the system of legal education. My examination of the Louisiana legal system leads me to the conclusion that the infrastructure of Louisiana law, in every major respect, follows the common-law tradition.

6. The term "methodology of law" refers to the principles of reasoning relating to the discovery and application of the rules of law to specific factual situations. This notion includes the elements of sources of law, principles of judicial reasoning, judicial style, and the respective laws of procedure (civil, criminal, and administrative) and evidence. This element of Louisiana law is also solidly anchored in the common-law tradition.

7. "Legal style" refers to the distinctive expression of the general principles and concepts that are employed within the legal system. Here I am referring to the carefully crafted legal fictions that are used to flush out the ideological (social, economic, and political) premise of the law in question. These philosophical principles exist at a higher level of abstraction than particular rules of substantive law. In this analysis the term "legal style" closely follows what Professors Zweigert and Kotz refer to as "the style of legal families." 1 K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW: THE FRAMEWORK 87-67 (1977).

inherit or bequest property, or engage in almost any other private transaction. Thus, from the vantage point of the ordinary citizen, the civil law is the most important element of modern Louisiana law.

Although the civil law is the most dominant element in the daily application of the law, it is not the most significant factor in the taxonomy of Louisiana law. The real character of Louisiana law is not shaped solely, or even principally, by its civil-law rules. The true personality of Louisiana law emerges from a collage of the five integral parts listed previously. Within this assemblage of factors, civil-law rules are only a part. Nevertheless, it is this part of modern Louisiana law that is addressed in this Symposium.

At the present time, the Louisiana Civil Code is undergoing a piecemeal revision. Although the substantive rules in the Code derive from the laws of France and Spain, it is hoped that the law reformers will not close their minds to new ideas that, while anchored in the common-law tradition, could be imported into Louisiana law with a view to enriching it. One area in which Louisiana civil law is already a beneficiary of an idea that is imported from the common law is the law of contract, which has incorporated the common-law notion of promissory estoppel.

In an attempt to assist those individuals who are charged with the monumental task of redrafting portions of the Code, the Eason-Weinmann Center for Comparative Law at Tulane Law School decided to devote one of its annual colloquia to the

9. The debate among scholars is still raging as to the true character of modern Louisiana law. The literature on this subject is quite extensive. For a recent contribution to this discussion, see Yiannopoulos, Louisiana Civil Law: A Lost Cause?, 54 Tul. L. Rev. 830 nn.3-4 (1980).

10. Like Professors David and Brierley, I take the position that the substance of particular rules of law is not terribly important in the determination of the legal family to which a legal system belongs. Focusing on this question, David and Brierley noted:

The classification of laws into families should not be made on the basis of the similarity or dissimilarity of any particular legal rules, important as they may be; this contingent factor is, in effect, inappropriate when highlighting what is truly significant in the characteristics of a given system of law.

R. David & J. Brierley, supra note 4, at 20.

problems of the Louisiana Civil Code revision. The topic for the Colloquium, which was held on November 8-9, 1985, was “Reflections on the Civil-Law Tradition in Louisiana: Agenda for the Twenty-First Century.” The discussions were centered around three general topics: the law of property, the law of obligations, and the law of the family, matrimonial regimes, and successions.

The panelists at the conference were Professors Jean Louis Baudouin and Katherine Connell-Thouez of the University of Montreal, Professor Ulrich Drobnig of the Max-Planck Institute for Foreign and International Private Law in Hamburg, Professor Mary Ann Glendon of Harvard Law School, Professor Efrain González Tejera of the University of Puerto Rico Law School, Professor Jacques-Michel Grossen of the University of Neuchatel, Professor Boris Kozolchyk of the University of Arizona College of Law, Professor Christian Larroumet of the University of Paris II, and Professors Luther McDougal and Vernon Palmer of Tulane Law School. The moderators for the respective panels were Associate Dean Cynthia Ann Samuel, Professor Vernon Palmer, and Professor Athanassios Yiannopoulos. The coordinating moderator for the entire Colloquium was Professor Christopher Osakwe. At the time of this publication, only six of the ten papers presented at the Colloquium were available.

The first paper, given under the general topic of the law of obligations, was an essay by Professor Jean Louis Baudouin, entitled Oppressive and Unequal Contracts: The Unconscionability Problem in Louisiana and Comparative Law. In it, he traces the history of the notion of the unconscionability of contracts in the laws of France, Louisiana, and Quebec. The essay begins with the assertion that unconscionability is a relatively new concept in law and that it has analogues in all legal systems, be they of civil-law, mixed, or common-law origin. The author informs us that in the French tradition of the early nineteenth century, the principles of autonomy of will and consensualism reigned supreme. Under this theory, man was bound because of his willful act, and he did not need to observe any particular formality to give his will a valid legal effect. Being an act of free will, it was by definition just and fair in its results and effects. To hold otherwise would require a demonstration that the contracting parties had either lost the ability or capacity to do the act or that consent had not been properly given. The judge had no power to revise, review, or change the terms of a valid contract because to
do so would be tantamount to a judicial distortion of the intent of the parties as originally expressed. Professor Baudouin further informs us that the successive Louisiana Codes of 1808, 1825, and 1870 and the Quebec Code of 1866 reflect this ideology at the level of the rules governing both formation and performance of contracts.

According to the author, only at a much later stage in the development of contract law did the concerns of justice and equity take the form of a more liberal approach to vices of consent in the area of formation of contracts. What is particularly remarkable about this development is that it was spearheaded by the courts. Under the guise of interpretation, the courts often either remodeled the contract to conform to an ideal of fairness or constructed it in a way that would be favorable to the oppressed party. This conduct reflects a great deal of judicial activism and creativity on the part of civil-law courts.

In the review of Professor Baudouin, the law of the twenty-first century should attempt to strike a reasonable balance between the conflicting ideals of respect for the autonomy of the parties and the justice of refusing to enforce unconscionable contracts. In this search for a new equity in contractual relationships, it must be borne in mind, the author admonishes us, that the general standards of the nineteenth century are now obsolete because they do not correspond to modern economic realities.

To guide the Code drafters in these matters, Professor Baudouin postulates the following guidelines. First, the modern code drafter must realize that a contract is no longer the self-inclusive and complete law governing the parties. Second, the architects of any modern code should take the position that a contract is only just and fair, and thus enforceable, if the court determines that it is. In the twenty-first century, the courts should be given a wide supervisory power to determine the good faith of the contracting parties. However, he concludes his essay with words of caution: As a matter of fundamental legislative policy, the ordinary contracting parties, apart from exceptional situations, should not be treated as minors. To do so would, in the long run, have the negative effect of transforming contractual relationships into a basically unstable reality.

The second essay on the law of obligations is by Professor Christian Larroumet. It is entitled Detrimental Reliance and
Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law. This is a fascinating comparison of contract theories in civil and common law. It opens with a definition of contract in the civil law. According to the prevailing civil-law theory, there are two elements in a contract: an agreement and a valuable object that is the basis of the agreement. By contrast, he tells us, at common law a contract is a promise that the law enforces. Implied in the latter notion is the principle that the law does not enforce all promises; a promise that has been performed is not a contract, and a promise that is gratuitous is not a contract because there is no consideration. He further notes that in common law there is not an enforceable contract if there is no intent on the part of the promisor to make a promise, even though the main requirement for an enforceable contract is not intent but consideration. Thus, he concludes, the law of contracts is quite different in common law than it is in the civil law.

The essay then moves on to a discussion of the meaning of consideration in the common law of contract. This analysis is prefaced with the statement that the English definition of consideration may differ slightly from the American definition. Regardless of how one defines consideration, the author thinks that the common-law concept of consideration is quite different from the civil-law concept of cause. A preeminent difference is that, unlike consideration, cause is not a part of the definition of a contract, but is instead a requirement for the validity of a contract. In his view, even though there is no contract if cause is lacking, civil-law systems make no distinction between promises that are unenforceable and promises that are void or voidable. The civil law is concerned only with the validity of contracts. Thus, in the civil law, the only limitations on the enforceability of promises are the requisite elements of validity. In other words, in contrast to the common law, the concept of cause is not included in the definition of enforceable promises.

12. Professor Larroumet's statement that in civil law there is no contract if cause is lacking may be in need of some qualification. The statement is correct as it relates to French law and, most probably, to all other laws that are based on the French model. It is certainly not correct with regard to German law or to the Germanic subfamily of laws within the civil law. In German law, cause plays virtually no part in the law of contracts. See K. Zweigert & H. Kötz, An Introduction to Comparative Law: The Institutions of Private Law 69 (1977).
In his essay, the author discusses other notable differences between cause and consideration.

This is followed by an illuminating discussion of the triple notions of cause of contract, cause of obligation, and consideration. The author points out that, although common-law consideration does not mirror the civil-law doctrine of cause, there are some similarities between the two, particularly between cause of obligation and consideration. By contrast, consideration and cause of contract have nothing in common.

The section of Professor Larroumet's paper dealing with the common-law notion of promissory estoppel traces the history of the doctrine. He views promissory estoppel as a substitute for consideration to the extent that promissory estoppel avoids injustice to a promisee who has relied upon a promise that is unenforceable because of a lack of consideration. A cornerstone of the doctrine of promissory estoppel is the judicial discretion in allowing recovery to the promisee. Because gratuitous promises are enforceable in the civil law, in a case in which the common law would invoke promissory estoppel, the civil law directly enforces a gratuitous promise as a real contractual relationship between the promisor and the promisee. In other words, Professor Larroumet tells us, promissory estoppel is unknown to the civil law.

Professor Larroumet goes on to argue, however, that the civil law has no functional need for the concept of promissory estoppel. That may be true for French law, but it is certainly not true for German law. Professors Zweigert and Kotz, two leading German comparatists, have applauded "the excellent idea of promissory estoppel," which they think "may be useful in enforcing informal gratuitous promises where the promisee, as the promisor might well have foreseen, has altered his position to his detriment in justifiable reliance. This is a good idea well worth adopting, and the German courts could adopt it without waiting for legislation." In their study of German contract law, Zweigert and Kotz note that "German law has to resort to tortured reasoning in order to deal with" situations that are admirably handled by the common-law concept of promissory estoppel.

13. Id. at 71.
14. Id. at 70.
pel. I think that Professor Larroumet ought to reconsider his views on this question. I submit that French law suffers from the same deficiency as does German law, and it could benefit as well from the importation of the notion of promissory estoppel. Louisiana law came to this realization.\footnote{For an insightful discussion of the role that promissory estoppel can play in a civil-law system, see M. Mattar, 2 Promissory Estoppel: Theory and Practice—A Study in Detrimental Reliance as an Independent Basis of Liability in American Law 445-500 (1986) [unpublished doctoral dissertation available from the Tulane University School of Law Library]. For a thought-provoking examination of the entire issue of detrimental reliance in Louisiana law, see Herman, Detrimental Reliance in Louisiana Law—Past, Present, and Future(?): The Code Drafter’s Perspective, 58 Tul. L. Rev. 707 (1984).}

The first paper on family law is the contribution by Professor Katherine Connell-Thouez, entitled The Family in Contemporary Civil Law—Comparative Developments in Alimentary Obligations and Parental Authority. In her thought-provoking article, Professor Connell-Thouez challenges the conventional wisdom about family, marriage, spousal responsibilities, and alimentary obligations. She begins with the assertion that, in the civil law, the family has traditionally been defined in relation to marriage, the institution of marriage has provided an official and immutable structure for joining couples, ostensibly for life, to bear and raise children, and marriage creates rights and obligations, which are owed between spouses and between parents and children. She notes, however, that the legal significance of marriage has changed radically, especially within this century.

Given the profound changes that have taken place in the institution of marriage, the author tells us that the necessity for a fundamental re-evaluation of the family unit, in terms of both its goals and its structure, becomes increasingly compelling. She contends that the time has come to redefine the family in terms of its primary sociological function: the protection and care of children. She contributes to this reassessment in her essay, which provides an historical perspective on the family unit and the place and purpose that alimentary obligations and parental authority have occupied within this context.

The author opines that the traditional family has consisted of the guardian-father, the mother-nurse, and the property-child. The latter was viewed as a resource worthy of protection. As the guardian of all of these elements, the father had all the
decision-making authority. The author believes that, in view of our society's perceptions regarding inherent human needs and equal rights, we must redefine the family unit as consisting of two guardians of a precious resource, itself a human being possessing its own set of civil rights. The paper studies the comparative developments in the areas of alimentary obligations and parental authority by looking at two recent civil law models in the French Civil Code and the Civil Code of Quebec as they relate to suggestions for the revision of Book I of the Louisiana Civil Code.

A recurring question in any consideration of proposed reforms is the extent to which the court should be grated discretion to intervene in family matters. Professor Connell-Thouez looks at the question from three angles: should judicial intrusion be eliminated altogether or merely limited; is it beneficial to the spouses to have recourse to an arbitrator; and, is it beneficial to the child to have a conflict of authority resolved by the arbitrator?

She advocates the establishment of a new structure for parenting that she calls the regime of parental authority. The key elements of this proposal are spelled out in Part IV of her paper. Central to this scheme is the need to design the structure in such a way as to render protection of the child primary to the exercise of individual rights by the parents. She calls for the use of a contract listing the rights and duties of the respective parties—the parents on the one hand and the child on the other. The general principles of the regime would be immutable for the duration of the regime. However, the modalities could be modified by the parties by a formal agreement to be attached to the original contract.

The debate over the desirability and permissible scope of judicial discretion in the area of family law is continued in the probing analysis by Professor Mary Ann Glendon, whose article is entitled Fixed Rules and Discretion in Contemporary Family Law and Succession Law. This paper is devoted to the problem of the choice between fixed rules and discretion, particularly as it relates to any revision of those Code provisions dealing with family law and succession law. In these two areas, the choice between fixed rules and discretion involves not only the proper allocation of functions between courts and the legislature, but more importantly, the balance between official decision-making
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and private ordering.

The author admonishes Code drafters to examine the current state of the working partnership that exists between courts and the legislature and to rethink each situation in which there is a choice between establishing fixed rules and delegating discretionary power to a judge. In the view of Professor Glendon, the goal of this choice is to achieve the optimum degree of finetuning without losing coherence and predictability of reasonable certainty without losing flexibility. She prefers this centrist position because rigidity is the mark of primitive orders, and there can be no general rules that are valid for all cases.

Professor Glendon notes that property law has been, and continues to be, characterized by a high degree of strict interpretation while family law is characterized by more discretion than any other field of private law. She believes, however, that the choice between fixed rules and discretion is not readily discernible when the fields of property and family law intersect as they frequently do, especially when a family is dissolved by divorce or death. In the latter instances, she advocates what she calls a highly predictable discretionary system. This system would require the identification of the optimum degree of control over discretion in various typical situations. To those who might wonder whether such a system is attainable, Professor Glendon’s response is that such a clarification in principle is not beyond our reach. She concedes, however, that to achieve it would require a fundamental reorientation of the way we presently think about divorce law. Her carefully reasoned conclusion is that in these matters we need discretion to mitigate the severity of fixed rules.

Professor Efraín González Tejera’s article, Mortis Causa Wealth Transfer and the Protection of the Family: The Spanish-Puerto Rican Experience, examines some of the dramatic socio-economic changes that have taken place during the last century in the succession laws of Spain and Puerto Rico. The historical linkage between these two jurisdictions in this matter is the 1889 Spanish Civil Code, which was brought to Puerto Rico in 1890 and, except for minor changes, remains in force there today. When the respective civil codes were promulgated, both societies were at radically different levels of economic development in comparison with their contemporary positions. These changes prompted a re-examination of the forms of property transfers having mortis causa effect. Thus, the author tells
us, the legal agenda for the twenty-first century in Puerto Rico must include a complete revision of the private law of that Commonwealth.

The essay moves on to an examination of the perennial debate over the social function of regulating mortis causa wealth transfers. The opponents of the traditional law of succession contend that the transfer of wealth through inheritance promotes laziness and idleness, leads to vice, and encourages frivolous consumption. By contrast, the proponents of the law of succession generally argue that the right to inherit effectively attends to the psychological and emotional needs of the testator. Faced with these extreme postures, the civil-law countries long ago adopted an intermediate position. They recognized the liberty to dispose by will, but applied several limitations. The civil law takes the position, therefore, that complete liberty to dispose of property is not essential to its enjoyment. Professor González Tejera questions, however, the adequacy of the law in the context of the twentieth century societies of Spain and Puerto Rico. He demonstrates this inadequacy quite vividly with his many examples.

His reasoned conclusion is that the preference for biological kinship in the archaic succession laws of Spain and Puerto Rico adversely affects women since there are now four times more widows than widowers in Puerto Rico. The time has come, he states, for Puerto Rico and Spain to join the Western trend and recognize larger successorial participation for the surviving spouse. He puts forward many details about his reform proposal. The author injects, however, a note of realism to his proposal: Despite the desirability of replacing the consanguinity requirement with the conjugal nexus, it is unlikely that the Puerto Rican Civil Code Revision Commission will adopt the Uniform Probate Code solution.

The concluding paper is by Professor Jacques-Michel Grossen and is entitled Comparative Developments in the law of Matrimonial Regimes. In this contribution, the author surveys the recent developments in the law of matrimonial regimes in many European and non-European countries. He refers to the law of matrimonial regimes as a confluence of many different branches of private law, notably the laws of property, family, social security, contract, and commercial law. In his view, it is a kind of legal minefield where persistent controversies abound.
Despite the enormous differences in the socio-economic positions of families in the various countries, Professor Grossen finds several common points in contemporary developments in the field of matrimonial property. He further notes that the rapidity and the universality of these reforms is striking. He pauses, however, to consider whether all the new laws that have been passed in recent years have met the expectations of the drafters. His response is that these laws have not been in existence long enough to enable us to judge their success. He does concede, nevertheless, that even without the availability of answers to these questions, these reforms are most welcome to the extent that they have abolished the discriminations that contemporary societies regard as intolerable.

He concludes his essay by pointing out some of the problems that continue to hinder effective implementation of even the most well-conceived laws governing matrimonial regimes. Thus, in the view of the author, any agenda for the twenty-first century must include the needs to further improve the regimes that have resulted from the current reforms, to clarify and harmonize the relationship of the matrimonial regime to other parts of the private law, and to find solutions to the unresolved problems.

One of the many advantages of comparative legal research is that it enables a state or country that is embarking upon a revision of its law to tap the experiences of comparable foreign jurisdictions for ideas. As we begin to revamp our Civil Code to meet the needs of the twenty-first century, we in Louisiana are fortunate to be able to examine the experiences of leading civil-law and mixed jurisdictions such as those represented at this conference. We are additionally blessed because we can also look to the experiences of our sister, common-law states. In return, we would hope that the rest of the Union will stop treating Louisiana civil law as the Cinderella of American law and show a greater willingness to consider some of the good ideas that emanate from our Civil Code. I am deeply grateful to the Tulane Law Review for allowing us to immortalize the brilliant contributions of these distinguished scholars at the Sixth Annual Colloquium of the Eason-Weinmann Center for Comparative Law.