

Dessiner la société par le droit

Mapping Society Through Law

*Sous la direction de
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Editor*



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MAPPING SOCIETY THROUGH LAW: LOUISIANA CIVIL LAW RECODIFIED

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Everything ages. Some things (red wine, cheese) improve with age. Others (cream, flowers) do not. Still others, while they may lose utility with age, particularly when compared to newer versions of themselves, nevertheless take on a distinct value. Yesterday's astrolabe or compass becomes today's collectible. Civil codes and maps seem both to fall into this third category. The techniques for measuring land improve, or its ownership or its nationality changes; a map of the land must be updated in light of the improvements and alterations.¹

Likewise, the rules and relationships of society change. A civil code that attempts to represent and regulate them must also change and adapt so as to remain connected to them.² At a point in time difficult to specify, the

¹ A map is "a drawing or other representation that is usually made on a flat surface and that shows the whole or a part of an area (as of the surface of the earth or some other planet or of the moon) and indicates the nature and relative position and size according to a chosen scale or projection of selected features or details (as countries, cities, bodies of water, mountains, deserts)." Merriam-Webster Third New International Dictionary (Unabridged) (verbo *map*) (online edition). French sources have similar definitions. "Représentation à échelle réduite de la surface totale ou partielle du globe terrestre." Petit Robert V "carte" (CD-ROM 2001). Because one does not map law or society or society through law in the way this definition suggests, the use of this word or similar words, such as draw or sketch, intends no more than a visual image that may portray law, society, or the connection between them in a useful fashion. In constructing another sort of map, one gathers individual instances or events across a geographical field. In comparative law, this process was famously employed by Rudolf Schlesinger in his common core project. R. SCHLESINGER, *The Formation of Contracts: A Study of the Common Core of Legal Systems*, (1968). With this method, a hypothetical case is posed to a group of legal scholars from numerous jurisdictions and the results analyzed. The connection between the common core method and mapping is made by J. GORDLEY, "Mapping Private Law", in M. BUSSANI, U. MATTEI (ed.), *Making Private Law: Essays on the Common Core Project*, 27-37 (2000). Professor Gordley is also concerned with the tension between case-based and code-based systems, but not with the problem of the role of caselaw within a code-based system, which is the theme of this article in part 4, *infra*.

² A code in general is "a coherent body of texts that systematically treat all the rules that relate to on matter." A civil code in particular takes as its "calling" (*vocation*) to govern (*régir*) all of civil law, including family law. Further, one distinguishes between true codification (*codification réelle*) that is born of a movement to reform the law and formal or administrative codification, which unites texts touching a single matter but without modifying the substance of the rules. A formal codification is also known by the term digest (*compilation*). CORNU, Gérard, *Vocabulaire juridique*, 3^e éd., 1992 (verbo code, codification). The word "*vocation*" surely alludes to that

age of a code or a map renders it less a useful tool or instrument than an object of curiosity that belongs clearly to another epoch. When a map becomes obsolete, one draws a new one and either discards or archives the old. When a civil code becomes obsolete, one must decide whether to remake the code, to recodify. For maps, new techniques effectively free the new drawing from the constraints and limitations of the old. For civil codes, however, this is not the case. Unlike old maps, old codes refuse to retire to the wastebasket or the museum. The old code persists and constrains the new. Indeed, although one can imagine mapping some portion of the earth without looking at any earlier map of it, to recodify civil law necessarily implies beginning with the prior code (or codes, if another code antedates the immediately preceding code), even if only more surely to depart from them.

Sometimes, perhaps even usually, this effort to recodify runs into trouble. France is a notable example where a serious effort to recodify the civil law began not long after World War II³ but failed to produce a new, comprehensive text. Quebec's recodification went through difficulties of its own but emerged on the other side of them with a new Civil Code.⁴ Both France and Quebec, then, opted to re-draft and to re-adopt their Codes in a single piece of legislation and after thorough study and discussion. Louisiana, also, has gone through a process of recodification. Unlike France and Quebec, however, Louisiana has revised its civil law not as a whole but in distinct blocks.⁵ The pejorative term often used to describe the process is "piecemeal" recodification. Almost all of the 1870 Code has been revised.

pre-eminent enemy of codification, Savigny. See H. HATTENHAUER (ed.), *Thibaut und Savigny: Ihre Programmatischen Schriften* (2d ed. 2002). Savigny's essay, first published in 1814, is translated as *Of the Vocation of Our Age for Legislation and Jurisprudence* (republished by Arno Press 1975).

³ See R. A. PASCAL, "A Report on the French Civil Code Revision Project", 25 *Tul. L. Rev.* 205 (1950-1951).

⁴ 1991, c. 64 (18 December 1991) (eff. 1 Jan. 1994). Jean Pineau summarizes the process in *Le nouveau Code civil et les intentions du législateur* (Thémis 1999).

⁵ More recently, effective 1 January 2002, Germany enacted a substantial revision of the obligations provisions in its civil code. See P. SCHLECHTRIEM, *The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe* (2002) Oxford U Comparative L Forum at www.ouclf.iuscomp.org.

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That recodification is the main subject here. This article begins with a summary of the history of Louisiana civil codification, followed by an overview or small-scale map of the Code today. Then it analyzes one feature of recodification, an aspect of the putative spouse doctrine, using a large-scale map to do so. Next, the article describes an important criticism of the recodification, namely, that the Code is now no more than a digest of the civil law (the "Digest Thesis"). It then assesses that criticism in light of the recodification of the putative spouse rule analyzed earlier. The article concludes that even if the legislature had acted or were now to react as recommended by the Digest Thesis, little concrete change would result. A Code recodified inevitably plays a different role from a new one.

I. THE LOUISIANA CIVIL CODE: THEN AND NOW

In order to understand the recodification of the Louisiana Civil Code, it may be helpful to recall how, alone of all American states, Louisiana came to have such a code.

French explorers arrived on the American coast of the Gulf of Mexico in 1682. In 1712, the crown decreed that the Custom of Paris would govern the colony, and placed the colony effectively in the hands both of private interests and of a Superior Council. After failure of the private interests,⁶ the Crown assumed full control in 1731. In 1762, France transferred Louisiana to Spain. The latter, however, did not achieve effective control until 1769. Thereafter Spain administered Louisiana, perhaps more effectively than had France. Spain established its own system of government, replacing the Superior Council with a Cabildo or city council, and applying Spanish colonial law.⁷ Later, in 1800, Napoleon engineered the return

⁶ John Law of Scotland obtained from France a monopoly of Mississippi Valley business for his Company of the West, renamed the Company of the Indies. Wild speculation in the shares of this Company was followed by the inevitable crash, and this Mississippi Bubble burst, taking Law's fortune with it. "Mississippi Bubble" *Encyclopædia Britannica* from *Encyclopædia Britannica Premium Service*. <http://www.britannica.com/eb/article?eu=54309> (last accessed May 30, 2003).

⁷ See generally, H. BAADE, "Marriage Contracts in French and Spanish Louisiana: A Study in 'Notarial' Jurisprudence", 53 *Tul. L. Rev.* 1 (1979). Professor Baade studied the notarial sources from 1769-1808. Within New Orleans during this period, Spanish law was applied. But in the fourteen posts outside New Orleans, parties elected and followed the Custom of Paris.

of Louisiana to France, but his intentions in the Caribbean having been frustrated, he sold Louisiana to the United States in April 1803. The French flag went up over Louisiana for a few weeks in the fall of that year, being replaced definitively by the American flag by the end of the year. Louisiana had become an American territory.⁸

Now a part of the United States, Louisiana (then the Territory of Orleans) faced the question of what law would be applicable. Claiborne, the territorial governor, initially sought to bring Louisiana's legal system into the American fold. Indeed, for civil procedure, the judicial system, and criminal law, the old law gave way quickly to the new. The lawyerly inhabitants, however, succeeded in maintaining their private law and in keeping the common law out.⁹ Accordingly, in 1808 "A Digest of the Civil Laws now in force in the Territory of Orleans" went into effect.¹⁰ That Digest (which lawyers often referred to as a Code) remained in effect when the territory became a state in 1812. In 1817, however, the Louisiana Supreme

⁸ H. F. JOLOWICZ, "The Civil Law in Louisiana", 29 *Tul. L. Rev.* 491 (1954-1955). A. N. YIANNOPOULOS, *The Civil Codes of Louisiana, I The Louisiana Civil Code* xlv-lviii (West Pamphlet Edition 2002). S. HERMAN, D. COMBE, T. CARBONNEAU, *The Louisiana Civil Code: A Humanistic Appraisal*, 21-22 (1981). A. LEVASSEUR, "The Major Periods of Louisiana Legal History", 41 *Loy. L. Rev. (N.O.)* 585 (1996). The position of the new territory appears somewhat fragile in maps of the period as well as today's maps. See, e.g., P. J. KASTOR, "Motives of Peculiar Urgency"—*Local Diplomacy in Louisiana 1803-1821*, 58 *Wm. & Mary Quarterly* (2001), <http://www.historycooperative.org/journals/wm/58.4/kastor.html> (the maps appear between paragraphs 15 and 16 in this electronic version of the article) (last visited 17 May 2003). The strictly geographical aspects of codification will not be explored in this article. An example is J. H. WIGMORE, *A Panorama of the World's Legal Systems*, 1044, 1144-46 (1928) (1936 one-volume edition). See also J. GILISSEN, *Introduction historique au droit: esquisse d'une histoire universelle du droit; les sources du droit depuis le XIII^e siècle; éléments d'histoire du droit privé* (1979) (several maps of the spread of European legal systems in the world). *Les Systèmes juridiques dans le monde*, <http://www.droitcivil.uottawa.ca/world-legal-systems/fra-monde.html> (last visited 19 May 2003).

⁹ This was the major goal for the legal profession in place. As between Spanish and French law, opinion divides. Baade, for one, notes that the profession in New Orleans preferred French law, and in his view this preference influenced the substance and form of the Digest or Code of 1808. BAADE, *supra* note 6, 79 et seq (notaries of New Orleans "immediately" followed Custom of Paris after the Louisiana Purchase).

¹⁰ R. H. KILBOURNE, Jr., *A History of the Louisiana Civil Code: The Formative Years, 1803-1839*, 1-43 (LSU 1987) (hereinafter "KILBOURNE, A History").

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Court ruled so as to limit the effectiveness of the 1808 Digest: prior law not inconsistent with the Digest was still in force.¹¹ This confused the sources of law applicable to any case, as through skillful interpretation the civil law outside the Digest, chiefly the Spanish law, could be made relevant. But the Spanish sources were difficult to obtain and they were cast in a language not mastered by all lawyers. This problem was partially remedied by a translation of large parts of one of the most influential Spanish texts, the *Siete Partidas*, in 1820.¹²

The problem was more effectively remedied by the enactment of the Civil Code of 1825. That Code, in article 3521, included an express repeal of the "Spanish, Roman and French" laws in force at the time of the Louisiana Purchase.¹³ But article 3521 "repealed" the old law "in every case ... especially provided in this Code." Based on that phrase, the Louisiana Supreme Court held that much of the old law had indeed survived the enactment of the 1825 Code.¹⁴ The legislature responded quickly with The Great Repealing Act of 1828 that repealed "all the civil laws which were in force before the promulgation of the civil code lately promulgated."¹⁵ Initially, the Supreme Court accepted that "the whole body" of Spanish law that had survived enactment of the Digest of 1808 had now been repealed.¹⁶ Nevertheless, for that court it was one thing for the legislature to repeal legislation, "the positive, written, or statute laws," whether produced by itself or otherwise. But according to the Supreme Court the 1828

¹¹ *Cottin v. Cottin*, 5 Mart. (O.S.) 93 (La. 1817).

¹² *Las Siete Partidas* (L. Moreau Lislet & Henry Carleton trans., 1820).

¹³ Article 3521 of the 1825 Civil Code read: "From and after the promulgation of this code, the Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretence that their provisions are not contrary or repugnant to those of this Code." LOUISIANA LEGAL ARCHIVES, Vol 3, Part II, *Compiled Edition of the Civil Codes of Louisiana 2039-2040* (1942) (hereinafter "*Compiled Civil Codes*").

¹⁴ *Flower v. Griffith*, 6 Mart. (N.S.) 89 (La. 1827).

¹⁵ 1828 La. Acts, No. 83. A. N. YIANNOPOULOS, *The Civil Codes of Louisiana, I The Louisiana Civil Code* xlv, at liii (West Pamphlet Edition 2002). See also, J. DAINOW, "The Louisiana Civil Law", in *Civil Code of Louisiana: Revision of 1870 with Amendments to 1960* xv, xxii-xxvi (2d ed. 1962).

¹⁶ *Handy v. Parkinson*, 10 La. 92, 99 (1836).

repealer could not affect the “principles of law... established or settled by the decisions of the courts of justice” under the old law.¹⁷ The practical effects of this qualification appear not to have been substantial. The tension between legislation and caselaw, however, continues as a theme of contemporary recodification.

In large measure, then, the 1825 Code and explicit repeal attained the goal sought. Louisiana civil law achieved substantially complete expression between the covers of a single book.¹⁸

The 1825 Code was in force through the Civil War. During Reconstruction, the Louisiana legislature enacted the Civil Code of 1870. For a long time, it was accepted that the 1870 Code was no more than the 1825 Code, shorn of the relatively few provisions dealing with slavery and of the French text.¹⁹ More recently, it has been argued that the institution of slavery was more deeply worked into the fabric of the 1825 Code and thus its removal was not a minor operation.²⁰ An unmistakable difference, however, was that the 1870 Code, unlike the 1825 Code or the 1808 Digest, was published in English only, without the French text.²¹

After the enactment of the 1870 Code, the economy and the culture of the nation as a whole and of Louisiana in particular enjoyed and endured enormous changes during the decades preceding and immediately following World War I. It is clear that these changes put the law of the Civil Code

¹⁷ *Reynolds v. Swain*, 13 La. 193, 198 (1839).

¹⁸ This state of things was not so clear at the time. See KILBOURNE, *A History*, *supra* note 5 at 161-64 (Louisiana judiciary continued to resist the legislature’s “positivistic program”).

¹⁹ V. PALMER, “The Death of a Code—the Birth of a Digest”, 63 *Tul. L. Rev.* 221, 248 and note 78 (1988) (the 1870 Civil Code a mere “re-enactment” of the 1825 Code) (citing A. N. YIANNPOULOS, *The Civil Codes of Louisiana, The Louisiana Civil Code* (West pamphlet edition 1988) at xxvii. The text of the introductory essay continues to make the same point. A. N. YIANNPOULOS, *The Civil Codes of Louisiana, I The Louisiana Civil Code* xlv, at liv (West Pamphlet Edition 2002) (1870 Code “substantially” the 1825 Code). The legislation that put into effect the 1870 Code amended and re-enacted the 1825 Code. PALMER, *Death of a Code*, at 249 and note 42 (citing Act No. 97, 1870 La. Acts 131).

²⁰ A. N. YIANNPOULOS, “Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913”, 53 *La. L. Rev.* 5 (1992).

²¹ In case of conflict or translation errors, the Supreme Court ruled that the French text of the 1825 Code controlled. *Phelps v. Reinach*, 38 La. Ann. 547 (1886).

under serious pressures. For example, the change in language habits (initially a cultural shift only later reflected in statute²²) undermined the civilian character of the legal system. The use of English in education and the media accompanied a decline in the use of French. For the practicing lawyer who did not master French, this decline put French doctrine out of reach.²³ It also made the use of English authorities more attractive to monolingual English-speaking lawyers and judges. There were other pressures in addition to language. Practice techniques were borrowed from outside the state. Frequently, those techniques were based on institutions not recognized in the Civil Code, and were perceived as deriving from the "common law" even when based on statutes from other jurisdictions.²⁴ Beyond these influences from the practice of law as such, Louisiana lawyers also adopted more powerful techniques from the common-law tradition. From equity, the concept of estoppel became familiar to Louisiana lawyers. The common

²² R. K. WARD, "The French Language in Louisiana Law and Legal Education: A Requiem", 57 *La. L. Rev.* 1283 (1997) (under 1921 La. Const. art. 12, §12, "the general exercises in the public schools" were to be "conducted in the English language").

²³ Once, the story goes, a noted New Orleans lawyer was arguing a case in the Supreme Court, using French doctrine as part of his argument. Justice Provosty asked him whose translation he was using, and the lawyer responded nervously that he was translating the text at sight. Provosty is reported to have said, appreciatively: "Marvelous!" Whatever the charm of the story, it shows that the skill was atypical already. Provosty himself used French sources with ease, as his opinions testify. That ability also became exceptional. In recent years, while Justice Barham often relied on French authorities in his opinions and later in his practice, he himself does not read French. In 1901, the governor appointed Olivier Otis Provosty to the Supreme Court to fill a vacancy. In 1908, he was elected to a full twelve-year term. In January 1922, he was appointed Chief Justice following the death of his predecessor. He retired at the end of that year, and died in August 1924. L. THOMAS III, *LeDoux: A Pioneer Franco-American Family*, 262-64 (1982).

²⁴ Oil transaction forms were based on the law of other states that recognized, for example, alienation of such minerals in place. Such devices eventually were rationalized as mineral servitudes and mineral royalties, then expressed in an organized fashion in the Mineral Code. 1974 La. Acts, No. 50, La. Rev. Stat. 31:1-215. See generally, J. M. McCOLLAM, "A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code", 50 *Tul. L. Rev.* 732 (1976). The American common-law real estate transaction known as "bond for deed" arrived in much the same way. La. Rev. Stat. 9:2941-2948 (2002). The chattel mortgage was also an import from outside the state, this time of statutory origin. See generally, H. S. DAGGETT, *Louisiana privileges and chattel mortgage* (LSU 1942).

law of tort was highly influential. Even the common-law notion of *stare decisis* gained acceptance.²⁵

The net effect of these influences, together with the existence only of a Civil Code in comparison to the classic five codes of the French system, led one professor to claim in 1937 that Louisiana had become a common law state.²⁶ That claim led to a spirited article defending the civil law in Louisiana.²⁷ That defense is sometimes seen as the beginning of a renaissance of the civil law in Louisiana.²⁸ But well before those articles appeared, Louisiana law schools were giving more than lip service to the civil law and to Roman law in their faculty hiring, in their curricula, and in their scholarship.²⁹ This occurred at a time when legal education in the univer-

²⁵ A. N. YIANNOPOULOS, "Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913", 53 *La. L. Rev.* 5, 25 (1992).

²⁶ G. IRELAND, "Louisiana's Legal System Reappraised", 11 *Tul. L. Rev.* 585 (1936-1937).

²⁷ H. S. DAGGETT, J. DAINOW, P. M. HEBERT, H. G. MCMAHON, "A Reappraisal Appraised: A Brief for the Civil Law of Louisiana", 12 *Tul. L. Rev.* 12 (1937-1938).

²⁸ M. E. BARHAM, "A Renaissance of the Civilian Tradition in Louisiana", in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 38, 39-40 (J. DAINOW, ed. 1974).

²⁹ In 1931, Mitchell Franklin noted that the Tulane Law Review had created a "new section devoted to comparative law." There would be a "select board of editors" for the section "chosen from the law faculties" of Harvard and Tulane. He was the Tulane representative. The three members of the Harvard Law School Faculty were James Bradley Thayer, Walther Hug, and Gordon Ireland. "In this way the Review makes even more secure its unique place as the organ of comparative law in America." Franklin also noted that Ireland earned an A.B. in 1901 and an A.M. in 1902, and LL.B in 1905 from Harvard. He had also earned an S.J.D. from Yale in 1926. M. FRANKLIN, "Editorials", 6 *Tul. L. Rev.* 99 (1931-1932). Ireland served as assistant professor of Latin American law at Harvard, 1929-32. Ireland occupies an odd spot in the story of Louisiana civil law. He is sometimes presented to the Louisiana law student, somewhat jocularly, as a sort of villain in the state's legal history. At the time he published this article, he was a professor of law at Louisiana State University Law School for two academic years, 1935-37. According to an article Ireland published in 1944, "The *Jus Postliminii* and the Coming Peace", 18 *Tul. L. Rev.* 584 (1943-1944), he was a visiting professor of law at Catholic University of America in 1944.

Following Franklin's Editorial, Tulane Law School Dean Rufus C. Harris wrote that three of the four new members of the faculty had expertise in either Roman, civil, or comparative law. A new course in the "Civil Law of Legacies" had been added to the curriculum. In addition, Harris noted that Franklin's course, "Civil Law Precept and

sity was still a relatively new phenomenon on the national scene. At a relatively early point, then, Louisiana legal education opted to commit to the civil law as its hallmark.³⁰

The Louisiana legislature's actions during the same decade seem allied with those of the academy. The legislature chartered the Louisiana State Law Institute (the "LSLI" or the "Law Institute") in 1938.³¹ The role of the LSLI was to provide research that would suggest avenues of reform of the law generally. With regard to the civil law, the Law Institute was to provide "studies and doctrinal writings" so as to aid an understanding of the "philosophy" on which it is based.³²

At about the same time, Louisiana legal scholars were calling for a "comprehensive revision" of the Code.³³ These early recommendations envisaged a revision of the Code as a whole. World War II, of course, inter-

Method,' was being expanded (Franklin had joined the school the previous year). Harris added, "It has been found to be of great importance to the legal profession in Louisiana to know the extent of the Romanist background of its legal system and also the technique of its use as it applies in general to the use of legislation and codified law." He also noted that the new Master of Civil Law degree was already enjoying success. *Id.*, at 101-102.

³⁰ The scholarly ambitions for the civil law at this time were high. A major participant in the academic revival of the civil law wrote that the Civil Code was "Louisiana's most important contribution to an American culture" and that other states would look to it when they also took up codification to escape the "chaos" of the common law. M. FRANKLIN, "Book Review", 6 *Tul. L. Rev.* 632, 632-33 (1933). Tulane was not alone. The first article of the Louisiana Law Review was a paper delivered by a noted former Harvard law school dean for the dedication of a new building at the Louisiana State University Law School. R. POUND, "The Influence of the Civil Law in America", 1 *La. L. Rev.* 1 (1938).

³¹ The statute now governing the Louisiana State Law Institute is La. Rev. Stat. Ann. Sec. 24:204(7).

³² F. ZENGEL, "Civil Code Revision in Louisiana", 54 *Tul. L. Rev.* 942, 943 (1979-1980).

³³ MORRISON, "The Need for a Revision of the Louisiana Civil Code", 11 *Tul. L. Rev.* 213 (1937). C. J. MORROW, "Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation" (pts. 1 and 2), 17 *Tul. L. Rev.* 351, 537 (1943). C. J. MORROW, "Current Prospects for Revision of the Louisiana Civil Code", 33 *Tul. L. Rev.* 143 (1958). C. J. MORROW, "An Approach to the Revision of the Louisiana Civil Code", 23 *Tul. L. Rev.* 478 (1949) (substance of address delivered to the LSLI in 1949). A. N. YIANNPOULOS, *The Civil Codes of Louisiana, I The Louisiana Civil Code* xlv, lvi (West Pamphlet Edition 2002).

rupted progress, but in 1948 the legislature charged the LSLI "to prepare comprehensive projects" for the revision of both the Civil Code and the Code of Practice.³⁴ After systematic study and planning, the Louisiana *Code of Civil Procedure* replaced the *Code of Practice* in 1960.³⁵

The revision as a whole of the Civil Code itself, however, stalled. Although a formal decision seems not to have been made, nevertheless the strategy adopted by the Law Institute was to recommend enactment of portions of the Code as they were revised.³⁶ Furthermore, particular portions of the 1870 Code confronted serious challenges. In some cases, the judicial application of federal constitutional norms threatened the Code. This was the case notably with matrimonial regimes. Such vulnerable portions of the Code, unless revised quickly, would face virtually certain judicial rejection on constitutional grounds.³⁷ In other cases, business or economic pressures pushed for quick enactment of up-to-date legisla-

³⁴ F. ZENGEL, "Civil Code Revision in Louisiana", 54 *Tul. L. Rev.* 942, 943-44 (1979-1980).

³⁵ For a critical account of the revision of the law of civil procedure, see K. A. LAMBERT, Comment, "The Suffocation of a Legal Heritage: A Comparative Analysis of Civil Procedure in Louisiana and France—The Corruption of Louisiana's Civilian Tradition", 67 *Tul. L. Rev.* 231 (1992) (reliance on federal code of civil procedure regretted).

³⁶ F. ZENGEL, "Civil Code Revision in Louisiana", 54 *Tul. L. Rev.* 942, 950 (revision fragmented into "numerous separate projects" each with distinct reporters and advisory committees). Zengel was quite critical of this approach. J. TUCKER, "Tradition and Technique in the Modern World: the Louisiana Experience", 25 *La. L. Rev.* 698, 718 (1965) ("incremental legislative enactment" employed). Tucker was more optimistic about the revision process.

³⁷ Louisiana's community property regime used to favor the husband as head and master of the community. The revision of Book III, Title VI "Matrimonial Regimes", eliminated that bias. 1979 La. Acts No. 709 (eff. 1 Jan. 1980). "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." La. Civ. Code art. 2346. The same effect occurred, though with more limited changes in the Code, regarding the rights of illegitimate children with respect to the estates of their parents. R. A. PASCAL, "Louisiana Succession and Related Laws and the Illegitimate: Thoughts Prompted by *Labine v. Vincent*", 46 *Tul. L. Rev.* 167 (1971). Removing illegitimacy did not require the major surgery that removing slavery did. Under article 880 of the current Civil Code, property devolves to "descendants, ascendants, collaterals" and spouses in intestate succession. Article 880 replaces article 886 & 887 of the 1870 Code, which referred to "legitimate heirs" and to "lawful" ascendants and descendants.

tion.³⁸ Wholesale changes in social attitudes likewise could not be ignored by the legislature while awaiting comprehensive reform of the Code.³⁹ Such external pressures thus worked against the deliberate pace of Code revision in Louisiana, giving additional impetus to revision block by block. Piecemeal revision may therefore have come about for several reasons, but come about it did. The process of revision, of block-by-block recodification, is now nearly complete, as will be shown in the next section.

II. THE CODE AS SMALL-SCALE MAP – ZOOMING OUT

When one reduces its scale, a map takes in more territory and eliminates detail. A measure on the map—a centimeter—represents a large distance (say one hundred kilometers). One pulls back, one zooms out.⁴⁰ To the extent one eliminates detail, though, one inevitably distorts or falsifies the object portrayed. Yet unless detail is sacrificed, no design or map is possible. Reducing scale, then, is a key technique in drawing or mapping, and it both represents and distorts. It may represent *by* distorting.⁴¹ Our

³⁸ The Mineral Code is a good example, at Title 31 of the Louisiana Revised Statutes, sections 1-215. 1974 La. Act No. 50. See generally, J. M. MCCOLLAM, "A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code", 50 *Tul. L. Rev.* 732 (1976).

³⁹ Social pressures also militated in favor of the reform of the Code's provisions on matrimonial regimes. Less controversially, family economic or estate planning needs exercised pressure in favor of adoption of legislation on trust law, leading to adoption of the Trust Code not long after the Code of Civil Procedure was enacted and well before the flurry of revisions to the Civil Code of the middle and late 1970s.

⁴⁰ Users of Mapquest or similar programs will understand the technique. See www.mapquest.com.

⁴¹ B. DE SOUSA SANTOS, "Law: A Map of Misreading. Toward a Postmodern Conception of Law", 14 *J. Law & Soc'y* 279, 283 (1987). In addition to scale, Santos also lists projection and symbolisation as aspects of mapping that may represent or distort. Santos refers to a Borges story in the latter's *Dreamtigers*, in which a map is made on a scale of one to one, which therefore comes to duplicate reality. He also mentions the work of Harold Bloom, such as *A Map of Misreading* (1975) (strong poets systematically "misread" their true poetic predecessors). Coincidentally, Santos himself cites Perelman for the proposition that "classical thought favored spatial metaphors, modern thought has favoured temporal ones," and then suggests "that postmodern thought will return to spatial metaphors." *Id.*, at 297. Perelman in fact has a more complex view. He sets the classical preference for "spatial analogies" off against

initial pass at the Code currently in effect—the “2003” Code—perforce takes place in terms of the Code of 1870.⁴²

A. *Code structure: the lay of the land and how the map has changed*

The 2003 Code maintains the structure of the 1870 Code. That Code used the three-book structure, typical of the French codification tradition. The 1870 Code also included a short Preliminary Title, which the 2003 Code maintains. In continuing this format, the Law Institute ignored suggestions from within the Louisiana legal community to reconsider that structure.⁴³ It also ignored the example of later codes, such as those of Germany (five books), Italy (six books), the Netherlands (seven books), or Quebec (ten books). On the other hand, once the decision had been made or the practice adopted to revise the Code block by block, the prospect of re-structuring the whole was rendered significantly more difficult, probably impossible. Indeed, if the 2003 Code formally has a four-book structure (plus a preliminary title), with Conflicts of Laws occupying the new

the modern preference for the “dynamic,” not the temporal as such. C. PERELMAN & L. OLBRECHTS-TYTECA, *The New Rhetoric: A Treatise on Argumentation* §85 (*How Analogy is Used*), 390-91 (1958) (1969 translation by J. Wilkinson & P. Weaver).

“Map scale refers to the size of the representation on the map as compared to the size of the object on the ground.” Charts for ocean navigation are small-scale indeed, where one linear unit of measure on the map corresponds to five million units on the sea. “In general, large scale means inch-to-mile and larger, small scale, 1:1,000,000 and smaller, leaving the intermediate field as medium scale. As with most relative terms, these can occasionally lead to confusions...” *Encyclopedia Britannica*, v. map, www.britannica.com, (last visited 16 May 2003).

⁴² The idea of seeing codes as maps or of mapping codes is not new. M. CAPPELLETTI, J. H. MERRYMAN & J. M. PERILLO, *The Italian Legal System: An Introduction* (1967) (hereinafter “CAPPELLETTI, *Italian Legal System*”). Chapter 6 devotes a section to the “geography” of each book of the Code, whose “topography” is a product of its “geology”. *Id.*, at p. 229. Others have referred to the “architecture” of the Code, using a three-dimensional image. S. HERMAN, D. COMBE & T. CARBONNEAU, *The Louisiana Civil Code: A Humanistic Appraisal* 8 (1981).

⁴³ S. HERMAN & D. HOSKINS, “Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations”, 54 *Tul. L. Rev.* 987 (1979-1980). Professor Herman also played an active role in the revision of the law of obligations as associate reporter of the Law Institute drafting committee. Professor Saül Litvinoff served as reporter.

fourth book, this is in no small part due to the ease of adding a comparatively small number of articles toward the end.⁴⁴

Substantially all of the Code has now been revised. To map this state of affairs, it may suffice to show the portions of the Code still awaiting revision in each book rather than list all the titles that have been revised to date. The unrevised portions appear below. And several of these are near completion (lease and transaction & compromise, for example). Others are actively being revised in committee (e.g., loan). Some could justifiably be repealed; arbitration, for example, is the subject of extensive uniform legislation, enacted in Louisiana.⁴⁵ Similarly, the field of pledge is largely occupied now by the Louisiana version of Article 9 of the *Uniform Commercial Code*.⁴⁶ Of the unrevised portions, *inter vivos* donations and lease represent the bulk. Other portions are already vestigial.⁴⁷

⁴⁴ The conflicts articles were enacted as part of Book I, where the original few articles on conflicts were situated, and then these new articles were transferred by the LSLI into a new Book IV. The legislature has delegated to the Law Institute the authority to make such formal changes, in fact a minor example of recodification *à droit constant*, that is, without modifying the law. There is no suggestion that the change was unauthorized; nor does it indicate a decision by the Louisiana legal community or the legislature to remake the structure of the Code.

⁴⁵ Rules governing arbitration appear in the Digest of 1808, Book III, Title XVII, page 441, Of Compromises or Arbitration / *Du Compromis* (thirty-five articles). Even though the legislature adopted the Uniform Arbitration Act, La. Rev. Stat. 9:4201 et seq., the Civil Code provisions on arbitration, which are of a more general character, sometimes make their way in the jurisprudence. See, e.g., *Mt. Airy Refining Co. v. Clark Acquisition, Inc.* 470 So.2d 890 (La. App. 4th Cir.1985) (citing La. Civ. Code arts. 3099, 3101 & 3104, scope of authority of arbitrators included claim of fraudulent inducement).

⁴⁶ Although Article 9 of the *Uniform Commercial Code* may be the most detail-oriented collection of rules this side of legislation on taxes, it has odd gaps. For example, it relies on the notion of estoppel for key rules in certain contests between competing secured creditors. See pre-revision section 9-208 and revised Article 9 (effective in Louisiana, 1 July 2001), sections 9-210 & 9-625(g) & comment 6, "Estoppel." Nor does it take a position on pawn by a non-owner (creation of a perfected security interest in goods by possession).

⁴⁷ Domestic arbitration has been largely governed by uniform law, as mentioned above. The substance of the law of Respite is governed by the federal Bankruptcy Code. While it is theoretically possible that Congress might repeal that law—after all there was no federal bankruptcy law in place for long periods of American legal history—that possibility is very remote. Any material not preempted by the bankruptcy act (perhaps article 3094 on the effect of remission of debt by some of the creditors)

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Preliminary Title (complete)

BOOK I:

Title VII. Parent And Child

Chapter 5. Of Parental Authority

Title VIII. Of Minors, Of Their Tutorship And Emancipation

BOOK II (complete)

BOOK III

Title II. Donations

Chapter 5. Of Donations Inter Vivos (Between Living Persons)

Chapter 7. Of Partitions Made By Parents And Other Ascendants Among Their Descendants

Chapter 8. Of Donations Made By Marriage Contract To The Husband Or Wife, And To The Children To Be Born Of The Marriage

Chapter 9. Of Donations Between Married Persons, Either By Marriage Contract Or During The Marriage

Title IX. Of Lease

Title X. Of Rents And Annuities

Title XII. Of Loan

Title XIII. Of Deposit And Sequestration

Title XVII. Of Transaction Or Compromise

Title XVIII. Of Respite

Title XIX. Of Arbitration

Title XX. Of Pledge

Title XXI. Of Privileges

BOOK IV (complete)

Once these final pieces have been completed, a sequential renumbering is certainly possible. Renumbering the articles would restore something of the sense of order desired in a Code. On the other hand, renumbering would come at a price. A reader becomes accustomed to a numbering system and learns content in connection with the number that designates it.⁴⁸

might be transferred to the section of the Code on remission of debt. Book III, Title III, Chapter 6, Section 4.

⁴⁸ Indeed, research suggests that it is in fact easier psychologically to learn durably two items connected in this way than it is to learn an item or several items in isolation.

Renumbering might be done title by title, as in the Digest of 1808. This would avoid throwing off the sequence when the next batch of legislative changes inevitably occurs.⁴⁹ Sequential renumbering of the whole would also imply that the Code had been revised as a whole and approved simultaneously, implications that would be false and that title-by-title renumbering might not create.

Merely showing what remains to be done gives an incomplete image. Left open is the question of the fate of the material in the 1870 Code that has been removed. Some, of course, has simply been deleted.⁵⁰ But in many cases portions of the 1870 Code have been placed elsewhere in Louisiana legislation. To show them simply as missing from the Code itself would give an incorrect impression. Matters are more complicated than that.

The beneficiary of the largest quantity of transfers is probably the text known as the Civil Code Ancillaries.⁵¹ By following the same structure as the Civil Code, the Ancillaries house matter that complements the Civil Code and organizes it in parallel with that text. This makes it easier to match the two sets of provisions when they must be construed together. Sometimes, such matter is regulatory in character. Thus, the Ancillaries contain numerous "housekeeping" rules, which to the Louisiana lawyer seem out of place in a Civil Code for several reasons. First, they are of insufficient importance and would not usually be capable of generating other rules; they cannot be *féconds en conséquences* in the sense Portalis famously intended. They are rather the ends of the process of reasoning from the Code. Second, such rules are more likely to require frequent adjustment, just because of their detailed character and their proximity to the application of legal norms in practice. And frequent amendment detracts from stability. One might call these two motivations purism and pragmatism, respectively.

The Civil Code Ancillaries, however, have attracted some matters that do properly belong in the Civil Code itself. Some of these rules in the

⁴⁹ Numbering the article of each title separately would also remind the user where a particular article fits in the Code and might avoid misapplying the rules of articles out of context (at least, unintentionally).

⁵⁰ The head-and-master rule under the former matrimonial regimes of the 1870 Code is an example.

⁵¹ Title 9 of the Louisiana Revised Statutes, "Civil Code—Ancillaries."

Ancillaries that *are* fundamental in character are located there for reasons practical, political, or both. For example, the Louisiana legislation on trusts is in the Ancillaries, where it is called a trust "Code."⁵² Notwithstanding its placement in the Ancillaries, trusts are basic for any lawyer planning a client's estate or handling many, if not most, testate successions. Trusts are also used for *inter vivos* transfers, to receive the proceeds of insurance policies, for retirement benefits, or a combination of these functions. Thus, trusts are as important as the rules governing donations mortis causa within the Code itself. From the perspective of their importance, then, inclusion of them within the Code itself would make sense and certainly would not be shocking. And there are other civil law jurisdictions with a mixture of common law institutions that have taken this path.⁵³ At the time of the enactment of the legislation on trusts in the early 1960s, there was still some spirited opposition to trusts as not belonging in a civilian system at all. The placement of trusts in the ancillaries seems due thus to both politics and pragmatism.

More recently, the enactment of covenant marriage also occurred through a combination of an amendment to the Code itself and enactment of rules in the Ancillaries that make clear how covenant marriage is to operate.⁵⁴ In addition, rules in the Ancillaries also describe the duties of various public officials with respect to covenant marriage, and it is gener-

⁵² Legislation recognizing and regulating trusts was initially adopted in the 1930s, modelled on the first Restatement of Trusts of the American Law Institute. Governor Huey Long had the legislature repeal it, hoping to annoy his political enemies in banking. A more comprehensive statute was adopted as the Louisiana Trust Code. La. Rev. Stat. 9:1721 et seq. See generally, D. GRUNING, "The Reception of the Trust in Louisiana: The Case of *Reynolds v. Reynolds*", 57 *Tul. L. Rev.* 89 (1982)

⁵³ The Quebec Civil Code does so. Book Four: Property; Title Six: Certain Patrimonies by Appropriation; Chapter II: The Trust.

⁵⁴ Covenant marriage entered the law via 1997 La. Acts., No. 1380, §3 and 1999 La. Acts., No. 1298, §1. The articles on no-fault divorce were rendered inapplicable to covenant marriages. La. Civ. Code arts. 102 & 103. The Ancillaries now include the administrative requirements and suggested documentary forms of a covenant marriage. La. Rev. Stat. 9: 272-275.1. Such a marriage also requires counseling (either religious or lay-professional) before the marriage and during times of "marital difficulties." La. Rev. Stat. 9: 273(2)(b). Spouses in a covenant marriage may not secure a six-month no-fault divorce, but may secure one based on two years living separate and apart. La. Rev. Stat. 9: 307A (5). They may also seek a divorce for fault. La. Rev. Stat. 9: 307A (1)-(4) (adultery, felony, abandonment, abuse).

ally thought that such instructions to functionaries do not belong in the Code itself. Doubtless, political concerns also weighed in here. The proponents of covenant marriage claimed not to wish to undo no-fault divorce entirely, but merely to provide an alternative for those couples who would choose a stronger commitment to marriage from the outset so as to enable them to resist an easy and quick no-fault divorce later in the marriage when the challenges of a common life present themselves, as they inevitably do.⁵⁵

Sometimes material that would naturally be found within the Civil Code is judged *too* important for inclusion either in the Ancillaries or in the Civil Code. A good example is The Children's Code.⁵⁶ The Children's Code has a distinct designation within the Louisiana Revised Statutes, where it follows the principal codes of Louisiana law: the Civil Code, the Code of Civil Procedure, the Code of Criminal Procedure, and the Code of Evidence. It contains an enacted Preamble in its first substantive article, article 101, which merits reading:

The people of Louisiana recognize the family as the most fundamental unit of human society; that preserving families is essential to a free society; that the relationship between parent and child is preeminent in establishing and maintaining the well-being of the child; that parents have the responsibility for providing the basic necessities of life as well as love and affection to their children; that parents have the paramount right to raise their children in accordance with their own values and traditions; that parents should make the decisions regarding where and with whom the child shall reside, the educational, moral, ethical, and religious training of the child, the medical, psychiatric, surgical, and preventive health care of the child, and the discipline of

⁵⁵ A cursory survey of the academic literature suggests that American law professors oppose covenant marriage by a substantial margin. Nevertheless, the legislators of Arizona and Arkansas have followed Louisiana's example and several others are weighing the option. For access to the literature, see C. E. BRUMMER, "The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?" 25 *U. Ark. Little Rock L. Rev.* 261 (2003). The Louisiana legislation was drafted by Katherine Shaw Spaht, professor of law and former Vice Chancellor of the law school at Louisiana State University. See her "Louisiana's Covenant Marriage: Social Analysis and Legal Implications", 59 *La. L. Rev.* 63 (1998). Professor Spaht was also the Reporter during the revision of the articles on marriage, including article 96 of the Code, discussed below.

⁵⁶ The Children's Code, 1991 La. Act No. 235, eff. 1 Jan. 1992.

the child; that children owe to their parents respect, obedience, and affection; that the role of the state in the family is limited and should only be asserted when there is a serious threat to the family, the parents, or the child; and that extraordinary procedures established by law are meant to be used only when required by necessity and then with due respect for the rights of the parents, the children, and the institution of the family.

This is further evidence that the conceptual identification between family and Book I of the Civil Code is nearly gone.

Business and commercial law also left (or stayed out of) the Civil Code. Perhaps the chief reason for this was that Louisiana did not adopt a commercial code on the French model during the nineteenth century.⁵⁷ Nor did Louisiana follow Italy's example and make a deliberate decision to embrace commercial law in its title on Obligations.⁵⁸ Once the Uniform Commercial Code was in place, all but the provisions on sales and leases were enacted by the legislature.⁵⁹ Corporate law took a slightly different path. The 1870 Civil Code in Book I, Title X, did contain several articles

⁵⁷ Edward Livingston had proposed both a commercial code and a criminal code, along with the *Code of Practice* and the Civil Code of 1825. The commercial and criminal codes were rejected.

⁵⁸ CAPPELLETTI, *Italian Legal System*, *supra* note 36, at 225-28, 446-47 ("commercialization of the private law"). By comparison, the use of commercial law in the 2003 Louisiana Civil Code is eclectic and unsystematic. On the other hand, Title VII, Sale, Chapter 13, Sales of Movables, is commercial in character and relies on commercial law solutions. For example, this Chapter begins with article 2601, clearly influenced by *Uniform Commercial Code* 2-207 (battle of the forms).

⁵⁹ La. Rev. Stat., Title 10, Commercial Laws. For example, *Uniform Commercial Code* Article 3 on negotiable instruments was enacted as Chapter 3 of the Louisiana Commercial Laws. 1974 La. Acts No. 92. The enactment of Article 9 on secured transactions in movables took several more years. Because of that, when it finally did become law in 1990, 1988 La. Acts No. 528; 1989 La. Acts No. 135, Louisiana benefited from intervening technological advances for recording and searching security interests. Louisiana likewise enacted revised Article 9 quickly. 2001 La. Acts No. 128, effective 1 July 2001, in accordance with the expectations of the National Conference of Commissioners on Uniform State Law. See generally, J. A. STUCKEY, "Louisiana's Non-Uniform Variations in U.C.C. Chapter 9", 62 *La. L. Rev.* 793 (2002).

on corporation law. Highly abstract, now repealed,⁶⁰ they had long since been supplanted by a modern business corporation law.⁶¹

Thus the current 2003 Code, now nearly complete, maintains the structure of the 1870 Code, but quite a lot of content has been stripped from it. The next two sections of this article describe and attempt to map the way the content of the current Code is distributed.

B. A rough count

The articles of the Code still number from 1 to 3556, as under the Civil Code of 1870. Not all of the numbers correspond to legislated text, however. Of 3556 articles, 513 have been repealed, 227 are "blank," and 125 are "reserved."⁶² This means that 865 of the current article numbers are assigned no text at all, or roughly 25 per cent. The percentage is rough because there are quite a few articles that have been inserted in the Code. So that the insertions do not disturb the numbering of the rest, a decimal point and numeral have been added. In Book I, there are few such insertions, and they appear not to have survived. Thus, one finds that article 136.1 was created and then repealed, leaving a blank. Book II has a few insertions, such as articles 493.1 & 493.2. In Book III one finds articles 3497.1 and 3501.1. As in Book I, some of these also are blank or repealed. Thus, article 3498.1 is now blank. There is an article 3501.10, but 3501.1 is blank, and there are no articles 3493.2-3493.9. The pattern is not elegant.

The causes for this state of affairs are several. At various times during the life of the 1870 Code, the legislature has made changes. After simply deleting an article, there was no thought of renumbering the entirety. Even after moving a substantial quantity of articles out of the Code, the practice

⁶⁰ 1987 La. Acts, No. 126. Article 443 had been repealed by 1942 La. Acts, No. 43, §2. Article 447 was demoted to the Ancillaries in 1987. La. Rev. Stat 9:1051.

⁶¹ La. Rev. Stat., Title 12, Corporations and Associations, Chapter I, Business Corporation Law. The material in this chapter had been in place in the Revised Statutes of 1950 and was itself revised in 1968. It was much influenced by the Model Business Corporation Law.

⁶² The methodology here was quick and dirty. In general, the search function of my word processing program was used to count instances in computer constructed lists. Eventually, a better count might be done, but this suffices for the present purposes.

was maintained. Thus, at the time of the enactment of the Code of Civil Procedure in 1960, some 215 articles were either moved to that Code from the Civil Code or were simply repealed.⁶³ Later, once the revision process was underway in earnest, new titles often produced fewer articles. After all, the length of the 1870 Civil Code was due in part to numerous didactic articles that were incorporated in the 1825 Code. One of the purposes of the revision was to remove such didactic provisions. During the revision of other portions of the Code, fewer articles were used to treat the same matter. Thus, for example, after the revision there was no need of numbers 825 through 869 in the law of property.⁶⁴ In the revision of the Book III, Title IV, Conventional Obligations or Contracts, articles 2058-2291 are blank (with the exception of two outright repeals), or 233 articles.

C. *Picturing the Code*

Moving from the overview and rough count of the Code, an image can begin to take shape. Simply enumerating the books of the Code adds no information.⁶⁵ Listing them in a column is a beginning:

Preliminary Title
BOOK I Of Persons
BOOK II Things and the Different Modifications of Ownership
BOOK III Of the Different Modes of Acquiring the Ownership of Things
BOOK IV Conflict of Laws

One may add another piece of information, the number of articles within each book.⁶⁶ The pattern reflects (apart from new Book IV) the pattern of the 1870 Code. As Books I and II are about equal in number, one could adjust the size of the entire line for Book III—making it almost

⁶³ 1960 La. Acts, No. 30. "More than three hundred articles were repealed in 1960 alone when the Louisiana Code of Civil Procedure was enacted." A. N. YIANNPOULOS, "Louisiana Civil Law: a Lost Cause?" 54 *Tul. L. Rev.* 830, 842 n. 66 (1979-1980).

⁶⁴ 1977 La. Acts, No. 169 & 170 (accounting for 46 articles).

⁶⁵ See, e.g., E. R. TUFTE, *The Visual Display of Quantitative Information* (1983) and *Envisioning Information* (1990).

⁶⁶ A simplifying assumption is used: all articles are counted, even those repealed or blank or reserved, as well as articles to which subparts have been added. No claim to accuracy is made here.

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seven times larger—but that would make the map awkward. One can achieve the substantially the same effect—deliver the same “information”—by adjusting no more than the size of the font for part of the line. Ordinary maps do this by putting the names of more populous cities in bold, but without making the size of the type strictly proportionate. The existence of even a very modest Preliminary Title or a short new Book IV on Conflicts communicates something about the Louisiana Code: its past, its distance from the French Code, perhaps even its “American” character.⁶⁷ But the image should most of all convey that Book III is vastly larger than the others. Combining these ideas, one can show the relative importance of each Book of the 1870 and the 2003 Codes with a simple device of varying the font size, but not in strict proportion. Finally, one can combine

Civil Code of 1870 (original numbers of articles retained)			Civil Code of 1870 (as revised 2002 to reflect elimination of articles)		
	Preliminary Title	23		Preliminary Title	14
Book I	Of Persons	424	Book I	Of Persons	242
Book II	Things and the Different Modifications of Ownership	422	Book II	Things and the Different Modifications of Ownership	374
Book III	Of the Different Modes of Acquiring the Ownership of Things	2687	Book III	Of the Different Modes of Acquiring the Ownership of Things	2190
			Book IV	Conflict of Laws	34
TOTAL		3556			2854

⁶⁷ The geographical analogy seems apt for another reason. If on a political map one adjusted the size of the labels of the cities according to population, the adjusted label would obscure smaller towns. In Louisiana, New Orleans so adjusted might obscure the town of Carencro; in Quebec, Montreal might obscure the town of Trois-Pistoles. This would render the map less useful and would hide something of the culture of both state and province. Mapping (or drawing) techniques are freely distorted in order to maintain such information.

the map of the 1870 Code and of the current Code and obtain a rough image of the change in relative importance of the component parts of the two Codes.

This map first helps show that an overall reduction has occurred. Second, it shows the relative importance of Book III in the 1870 Code and its reduction in size in becoming Book III of the 2003 Code. Nevertheless, although the importance of Book III has diminished from the old to the new code, its conceptual dominance of the Code continues. This continues to be a Code about exchange.⁶⁸

The Code thus remains one based on the essential ideas of the bourgeois or business revolutions of the 18th and 19th centuries. The Code defines who the actors are (persons), what those actors can acquire (things and rights in things) and how the actors may acquire things.⁶⁹ Of course, by maintaining the same overall structure, the revised Code carries forward some of the awkwardness of the 1870 Code. For example, Book III still includes matrimonial regimes, which more logically belong in Book I. Current society simply does not view marriage as a mode of acquiring the ownership of things in anything like the way Louisiana society did in 1808, 1825, and even in 1870. Likewise, Book III still houses the basic rules on delictual and quasi-delictual liability; again, it seems strange to describe a tort as a mode of acquiring the ownership of things.⁷⁰ The same criticism can be leveled at successions and donations, which within the family are methods not so much for acquiring as for the transferring or distributing the ownership of things. An additional book might suitably welcome successions and donations—in which case trusts could at last return from their exile in the Civil Code Ancillaries and be codified together with them in the same place.

⁶⁸ The diagram offers support to those who hold that the three-part structure is essentially intact. Others do consider it “gone.” A. N. YIANNPOULOS, *The Civil Codes of Louisiana, I The Louisiana Civil Code* xlv, lvii (West Pamphlet Edition 2002).

⁶⁹ See generally, J.-L. HALPÉRIN, *The Civil Code*, Chapter 3 “A Property-Owner’s Handbook,” 37-50 (2000) (D. Gruning, trans.). As a corrective to broad claims about Codes enacting an ideology, see J. GORDLEY, “Myths of the French Civil Code,” 42 *Am. J. Comp. L.* 459 (1994).

⁷⁰ Both of these examples are raised with respect to the French Civil Code by K. ZWIEGERT & H. KÖTZ, *An Introduction to Comparative Law* 93 (3d ed. 1999, translation by T. Weir), *Einführung in die Rechtsvergleichung* 91 (3d ed. 1996) (structure of the French civil code “plainly unsatisfactory”).

This small-scale view of the Code, then, suggests that it remains primarily concerned with arms-length or commercial exchanges. The example to be discussed in the next section, however, deals not with an aspect of the overhaul of Book III (housing most exchange transactions) or even of Book II (governing things and rights in things), but an aspect of that other, very much older variety of exchange found in Book I: marriage.

III. THE CODE AS LARGE-SCALE MAP: ZOOMING IN

When one *increases* the scale of a map, the same centimeter represents less of the earth: instead of one hundred kilometers, ten kilometers. By the same token, such a map portrays proportionately less of the object, a part of which is magnified. This section takes a close look, then, at a single feature of the 1870 Code and the problem that its recodification presented. That problem occurs in a classic situation: a marriage that is absolutely null but that is contracted in good faith by one of the parties. The piece of the problem to be dealt with here is whether there must be a ceremony *at all* in order for the doctrine to benefit a party in good faith. The answer of the new Code to this relatively simple question is blurred.⁷¹

A. *A Drive to Mississippi at the turn of the century*

Marriage remains the basic, perhaps the privileged, legal means of association in the Louisiana Civil Code. Much criticized, even maligned, it hangs on. There are many reasons for this, not the least of which is the endurance in Louisiana of a view of the family deeply rooted in religions that stress the sacred quality of the marriage ceremony.⁷²

⁷¹ As will be apparent, the purpose of this article is not to give an exposition of the civil law of absolutely null marriages, nor to undertake a comparative analysis of this particular feature of them. The purpose instead is to observe the relationship between caselaw and Code in Louisiana on that question. It may well be that the solution or compromise that Louisiana adopted here is unsatisfactory in part because little research of a comparative nature appears to ground the revision. Or perhaps the present situation would have occurred in any case. Discussion of the question would require a separate study.

⁷² The major religious groups still emphasize marriage. Louisiana remains predominantly Catholic. The influence of southern Protestantism is also strong, especially in the northern part of the state that was not settled by French Catholics. For the influence of southern Judaism in Louisiana, see B. BAIN, *Sha'lom Yall* (documentary film 2002).

A staple of family law courses in Louisiana is *Succession of Marinoni*, which recognized the civil effects of an absolutely null marriage although there had been no ceremony at all. It is not only a good tool for teaching a portion of the law of marriage but also for showing how the Civil Code now provides a peculiar sort of guidance in such matters.

The year was 1900. The man involved was a socially prominent lawyer in New Orleans. The woman involved was a young Italian immigrant, an orphan, seventeen years old, with a rudimentary command of English. The man proposed marriage to her; she accepted. He and she, accompanied by another woman acting as chaperone, drove to the courthouse in Harrison County, Mississippi.⁷³ The man entered the courthouse and, using affidavits the woman had executed, procured a marriage license. He emerged from the courthouse, marriage license in hand, and told the woman and the chaperone that he and the woman were now man and wife. The two lived together for a time and a daughter was born.

The woman eventually learned the truth. She and the man appear to have arrived at a sort of compromise, including the payment of a sum of money to her. They parted. More than ten years later, the man married. Fifteen years after that marriage, he and his wife adopted a child, a son. Not long thereafter, the man died.⁷⁴

B. The Litigation: Of absolutely null marriages and good faith

After the death of the man, the daughter sued to be recognized as his forced heir. Initially, she alleged that her father and mother were validly married in Mississippi in a common law marriage.⁷⁵ The case went eventually to the Louisiana Supreme Court; the decision was against her.⁷⁶ The

⁷³ A map of this journey can be easily retrieved, courtesy of Mapquest.

⁷⁴ See generally, L. THOMAS III, "LeDoux: A Pioneer Franco-American Family" (1982). In 1916, Ulisse Marinoni Jr., married a daughter of Justice Provosty, *supra* note 14. The adoption occurred in 1930, the death in September 1931. *Id.*, at 265, 273-74.

⁷⁵ A common-law marriage is a valid, informal marriage, which requires intent to marry, cohabitation as husband and wife, and "holding out" as such. *Black's Law Dictionary* (ed. B. A. GARNER, 7th ed 1999) (v. marriage) (noting recognition of same in fourteen states and the District of Columbia). The term has a different history and different significance in England and Scotland. D. M. WALKER, *The Oxford Companion to Law* 253 (1980) (v. common-law marriage).

⁷⁶ *Succession of Ulisse Marinoni, Jr.*, 177 La. 592, 148 So. 888 (1934).

daughter sued a second time, alleging that her mother and father had contracted an absolutely null marriage, as to which her mother had been in good faith, that is, reasonably believed she and the man were married and that she was the man's wife when the daughter was conceived. Accordingly, the second suit alleged that the civil effects of the marriage flowed to her, the daughter, making her the legitimate child and therefore forced heir of her father.⁷⁷ The case again reached the Supreme Court.

The first hurdle for the daughter was a strictly procedural one: *res judicata*, as to which the court ruled in her favor.⁷⁸ The substantive hurdle was the absence of any ceremony whatsoever. Article 90 of the Civil Code of 1870 applied. It stated:

⁷⁷ *Succession of Ulisse Marinoni, Jr.*, 164 So. 797, 183 La. 776, 784-85 (1936).

⁷⁸ The court on original hearing held that the daughter's second suit was barred by this rule. The court on rehearing, though, changed its view: it held that the first case claimed "an alleged valid legal marriage" in Mississippi but that the second case alleged instead a marriage contracted in good faith, "a putative marriage", and sought the civil effects thereof. Hence, the "cause of action [was] not the same in the two suits" and the second one could go forward. *Id.* at 790. In *Marinoni*, the court recognized that the common-law rule on *res judicata* would have been against plaintiff but that the rule of article 2286 of the 1870 Civil Code, in effect here, was to the contrary.

The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

The rule is now changed, as Louisiana Revised Statutes, Title 13, § 4231 on *Res judicata*, shows:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

- (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
- (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
- (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

If this statute instead of article 2286 of the 1870 Code had governed *Succession of Marinoni*, plaintiff's second case would have been barred. The new rule is made less harsh in the case of actions arising out of the process ending a marriage. Thus, a suit for divorce does not preclude subsequent claims for periodic support (alimony), child support, partition of the community, or incidental matters. 13 La. Rev. Stat. §4232 B.

“As the law considers marriage in no other view than that of a civil contract, it sanctions all those marriages where the parties, at the time of making them, were:

1. Willing to Contract;
2. Able to contract;
3. Did [*sic*] contract pursuant to the forms and solemnities prescribed by law.”

The court ruled in her favor again.

The 1870 Code had two articles that dealt with good faith in this context, both cited by the court. Article 117 provided:

“The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith.”

And article 118 provided:

“If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor and in favor of the children born of the marriage.”

Thus, the civil effects of the absolutely null marriage would therefore flow to the daughter, finally recognized as forced heir of her father. As her mother held a belief in good faith that both the marriage ceremony and hence the marriage had occurred, her mother was a good faith putative spouse. And this despite the lack of any marriage ceremony at all.⁷⁹ Since 1936, there has been no other litigated case on this precise point.

The two articles relied on by the Court, articles 117 and 118, were taken verbatim from the 1825 Civil Code, where they were numbered 119 and 120 respectively.⁸⁰ They did not, however, appear in the Digest of

⁷⁹ This was the gist of the dissent of Justice Odom, who relied heavily on the twin requirements of consent *and* ceremony for the contract of marriage. *Id.*, at 816, citing La. Civ. Code (1870) art. 90.

⁸⁰ The French version of article 119 of the 1825 Code read: “Le mariage qui a été déclaré nul, produit néanmoins les effets civils, tant à l’égard des époux qu’à l’égard des enfans, s’il a été contracté de bonne foi.” The French version of article 120 of the 1825 Louisiana Civil Code read: “Si la bonne foi n’existe que de la part de l’un des époux, le mariage ne produit les effets civils qu’en faveur de cet époux, et des enfans issus du mariage.” *Compiled Civil Codes*, *supra* note 8, arts. 117 & 118, p 67.

1808, as the drafters of that Code pointed out. In the *Projet* of the 1825 Code, following the draft version of article 119, the redactors noted:

"On this point there is an omission in our code [the Digest of 1808] which must be supplied. It pronounces the nullity of marriages in certain cases, but it does not say what is to become of the children of a marriage declared null. This is provided for by the first law, tit. 13, part [sic] 4, to which these articles are conformable."⁸¹

Following the draft version of article 120, the drafters noted:

"We have added that the marriage declared null, produces also its civil effects in favor of the party who has acted in good faith. This disposition, taken from the French Code, is evidently equitable. For example, it would be contrary to justice and to good morals, that a man, already married, who should obtain a second wife by the promise of a donation, should not be obliged to pay it, in consequence of his marriage being null."⁸²






The history of these articles affords an opportunity to focus briefly on the methods of the drafters of the 1825 Code. These methods were eclectic. For example, the redactors indicated a gap in the 1808 Digest—the effects of an absolutely null marriage contracted in good faith on the legitimacy of the offspring of that marriage. They mentioned two possible sources to repair the gap: the *Siete Partidas* for one; the French Civil Code for the other. The French text of the 1825 Code borrows, with one insig-

⁸¹ LOUISIANA LEGAL ARCHIVES, Volume 1: A Republication of the *Projet* of the Civil Code of 1825, p. 10 (1937). The French version of this note reads: "Il y a ici une lacune qu'il est indispensable de remplir. Il prononce la nullité du mariage en certain [sic] cas, mais il ne dit pas ce que devienne les enfans d'un mariage déclaré nul. C'est à quoi il est pourvu par la loi 1 tit. 12 part. 4, à laquelle ces articles sont conformes."

⁸² *Id.*, at 10. One notes the frank connection between property (and its exchange?) and marriage. The French version of this note reads: "*Nous avons ajouté que le mariage, déclaré nul, produit aussi les effets civils en faveur de l'époux qui a contracté de bonne foi. Cette disposition, qui est puisée dans le Code Français, est évidemment équitable. Il serait, par exemple, contraire à la justice et aux bonnes moeurs, qu'un homme déjà marié, qui a obtenu une second[e] épouse par l'appât d'une donation, fût dispensé de payer, parceque son mariage est nul.*"

nificant change, the text of articles 201 and 202 of the *Code civil des français*.⁸³

One can map or sketch the pattern in the documents under discussion.

CN 1804		D 1808		LCC 1825		LCC 1870		LCC 2003*
201		—		119		117		96
202		—		120		118		
								

The map shows how the text “arrived” in the Code of 1870 and its connection with former texts. Yet it can tell us little about the thought process of the drafters.⁸⁴ Indeed, the diagram does not indicate the their care in citing two sources for the provisions: the French texts, which the redactor qualified as “equitable,” and the Spanish sources. A more artful diagram might show the possibility that the redactors in some meaningful sense

⁸³ Article 201 of the *Code civil des français* 1804 read: “Le mariage qui a été déclaré nul, produit néanmoins les effets civils, tant à l’égard des époux qu’à l’égard des enfants, lorsqu’il a été contracté de bonne foi.” Thus, article 201 of the *Code civil des français* differed only insignificantly from article 119 of the 1825 Louisiana Code and article 117 of the 1870 Code. Article 202 of the *Code civil des français* was identical to the French version of article 120 of the 1825 Code and article 118 of the 1870 Code. *Compiled Civil Codes*, supra note 8, arts. 117 & 118, p 67.

⁸⁴ Another influential type of map in this context is the genealogy, that is, the descent over long periods of time (several centuries) of a family of legal concepts. Certainly the best known example is A.-J. ARNAUD, *Les origines doctrinales du Code civil des français* (1969) (diagrams throughout, especially the inset near the end of the book). J. VANDERLINDEN, *Le concept de code en Europe occidentale du XIII^e au XIX^e siècle* (esp. post p. 49, *Tableau synoptique des manifestations de l’idée de code*). Professor Batiza also uses a sort of genealogical tracing, though he focuses on the texts themselves. See, e.g., R. BATIZA, “Origins of Modern Codification of the Civil Law: The French Experience and its Implications for Louisiana Law”, 56 *Tul. L. Rev.* 477, 596-600 (1981-1982) (tracing “representation” in article 894 of the 1870 Louisiana Civil Code back to Domat). Batiza’s writings and his whole approach elicited sharp rebuttals. For an example and for indication of the literature, see A. LEVASSEUR, *Louis Casimir Elisabeth Moreau-Lislet: Foster Father of Louisiana Civil Law* (1996).

drew on both the Spanish as well as the French texts. Nor does this map show that article 96 of the current Code also includes rules that deal with bigamy as a cause of absolute nullity (the rule is forgiving here) and a rule prohibiting recognition of same-sex marriages. Finally, the map does not attempt to show in what sense *Succession of Marinoni*—the caselaw—functions as a source of article 96 of the revised Civil Code.

C. *Revising the Code in light of Succession of Marinoni*

In 1987, the code articles on marriage were revised.⁸⁵ Evidently, the 1980s were a different environment in which to re-draft marriage rules from that surrounding the Digest of 1808, the Civil Code of 1825, or the Civil Code of 1870. Nevertheless, the revised articles adhere to the tradition. Current article 87 states: "The requirements for the contract of marriage are: The absence of legal impediment[;] A marriage ceremony[; and] The free consent of the parties to take each other as husband and wife, expressed at the ceremony." Comment (c) to the new article essentially tells the reader that the article means what it says. The comment informs us that the article's current wording is "intended to emphasize that the only essential 'formal' prerequisite to a valid marriage is a ceremony conducted in accordance with Article 91, *infra*." If the parties are married without obtaining a marriage license, the marriage is nevertheless still "valid." Likewise, according to Comment (d), the necessity of a ceremony "precludes the confection of common-law marriages" under Louisiana law, that is, simply by living together as husband and wife for a substantial period of time. Article 91 states that the parties "must" participate in a marriage ceremony officiated by a legally qualified third person and "must" be physically present at that ceremony. "The parties must participate in a marriage ceremony performed by a third person who is qualified, or reasonably believed by the parties to be qualified, to perform the ceremony. The parties must be physically present at the ceremony when it is performed."⁸⁶

⁸⁵ 1987 La. Acts, No. 886, §1 (amendment and re-enactment). Although Act 886 purported to amend and re-enact all of Title IV (containing 5 chapters) of Book I, in fact Act 886 did not affect Chapter 4 on Termination of Marriage. 1990 La. Acts, No. 1009, §1 (eff. Jan. 1, 1991) revised Chapter 4.

⁸⁶ La. Civ. Code art. 91.

Revised article 94 provides “A marriage is absolutely null when contracted without a marriage ceremony, by procuration, or in violation of an impediment. A judicial declaration of nullity is not required, but an action to recognize the nullity may be brought by any interested person.” The 1870 Code articles on Nullity of Marriages (articles 110-118) did not state that marriages that occurred without a ceremony (or by procuration) were absolutely null. So there has clearly been a change in the text of the legislation. Is there—insofar as marriages without ceremony are concerned—a change in the rule as applied, in the *law*? Revised Article 96 provides that the “civil effects” of marriage flow “in favor of” a party who contracts an absolutely null marriage “in good faith.” The article in full reads:

An absolutely null marriage nevertheless produces civil effects in favor of a party who contracted it in good faith for as long as that party remains in good faith.

When the cause of the nullity is one party’s prior undissolved marriage, the civil effects continue in favor of the other party, regardless of whether the latter remains in good faith, until the marriage is pronounced null or the latter party contracts a valid marriage.

A marriage contracted by a party in good faith produces civil effects in favor of a child of the parties.

A purported marriage between parties of the same sex does not produce any civil effects.⁸⁷

The definition of good faith, recognized in the doctrine and jurisprudence in the past, is not placed in the Code but remains in the comments, hence remains as a formal matter doctrinal, jurisprudential or both. Comment (d) states: “This Article is not intended to disturb the prior jurisprudence construing the term “good faith” in this context. The “good faith” contemplated by this Article is an honest and reasonable belief that there

⁸⁷ La. Civ. Code art. 96.

exists no legal impediment to a marriage.”⁸⁸ Nor was there a definition of good faith in the text of the 1870 Code.⁸⁹

Thus, the text of the new Code suggests that a marriage without a ceremony *may* produce civil effects in favor of a good faith putative spouse (not a real spouse) and hence in favor of a child of a marriage absolutely null for this reasons but nevertheless contracted in good faith. The text, however, does not state that it is possible to have a good faith belief that a marriage ceremony has occurred when in fact it has not. Nor does it say that it is impossible. The text does not say.

Five comments accompany new article 96. Comments (a) through (d) deal with the innocent spouse in a bigamous marriage, that spouse’s continued good faith despite learning of the prior marriage, additional comment on good faith in the multiple simultaneous marriage context, a view on whether ignorance of one’s own marital status precludes good faith (yes), and good faith as a question of fact.

⁸⁸ Comment (d) cites *Jones v. Squire*, 137 La. 883, 69 So. 733 (1915), for this proposition, as well as *Smith v. Smith*, 43 La. Ann. 1140, 10 So. 248 (1891). The comment continues:

Such a good faith belief may arise from an error of law, as well as of fact. *Succession of Pigg*, 228 La. 799, 84 So.2d 196 (1955) (putative wife relied upon husband’s fraudulent divorce from first wife); *Funderburk v. Funderburk*, 214 La. 717, 38 So.2d 502 (1949) (putative wife relied upon null divorce obtained in a court of improper venue). Whether good faith exists is a question of fact dependent upon the circumstances of each case. *Succession of Chavis*, 211 La. 313, 29 So.2d 860 (1947). The jurisprudence has also held that good faith is presumed; that the burden of proof rests on the party who challenges its existence; and that any doubt as to the good faith of the parties to a marriage must be resolved in favor of the one who claims good faith. *Succession of Pigg*, supra; *Funderburk v. Funderburk*, supra; *Jones v. Squire*, supra. The spouse who is shown to have been a party to a previous undissolved marriage, however, bears the burden of proving that he contracted his second marriage in good faith. *Gathright v. Smith*, 368 So.2d 679 (La.1978).

⁸⁹ La. Civil Code (1870) article 117: “The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith.” La. Civil Code (1870) article 118: “If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor and in favor of the children born of the marriage.”

In litigation under the 1870 Code, good faith dealt primarily with a good faith belief (or the absence of such a belief) that one’s intended spouse was unmarried (either never married at all or if previously married validly divorced or the beneficiary of a (secular) annulment.

Let us focus on Comment (e):

This Article is not intended to affect the jurisprudence governing the question whether the parties to an absolutely null union need have gone through a marriage ceremony in order to be deemed putative spouses. The majority of the relatively few decisions that addressed that issue under the Civil Code of 1870 held that the use of the word "contracted" in Civil Code Article 117 (1870) evidence an intent on the part of the redactors of that code to make a ceremony a prerequisite to the application of the putative marriage doctrine. Succession of Rossi, 214 So.2d 223 (4th Cir.1968), cert. denied 253 La. 66, 216 So.2d 309 (La.1968); Succession of Cusimano, 173 La. 539, 138 So. 95 (La.1931). In the 1936 case of Succession of Marinoni, 164 So. 797 (La.1936), however, the Louisiana Supreme Court applied the putative marriage doctrine to confer legitimacy upon a child of a marriage that had never been celebrated. Finding that the child's mother had been a recent immigrant "ignorant of the laws and customs of this country" (id. at 804) at the time that her marriage with the plaintiff's father had been contracted, the court determined that the mother had acted reasonably in believing the assertion of her prospective husband that only a license was required for a valid marriage, and held that her resulting good faith, without more, had been sufficient to give rise to a putative marriage under Civil Code Articles 117 and 118 (1870). That holding could, in a proper case, form the basis for the application of the putative marriage doctrine to a marriage that was absolutely null under Article 94, *supra*, because contracted without a ceremony. The ultimate decision whether to follow Succession of Marinoni in preference to the two contrary cases previously cited, however, is left to the discretion of the court under this revision.

Presumably, the rule that Comment (e) finds attractive enough to merit preservation is this. When one party to a sham or non-ceremonial marriage persuades the other to believe—reasonably—that a valid marriage has nonetheless been contracted, then the civil effects of marriage will flow in favor of the innocent party and any child of the relationship. When the innocent party, however, learns the truth, that party is no longer in good faith and would need to seek a judicial declaration of absolute nullity post-haste. In addition, as a good faith putative spouse, the innocent party would be entitled to periodic support, one half of the community of acquets and gains accumulated during the (probably brief) absolutely null marriage. With this, it seems unlikely that any reader could find fault. In a "proper

case," if the facts of the *Succession of Marinoni* occurred again, or facts very close to them, a court might legitimately *apply* the "putative marriage doctrine"—we should say "the putative marriage rule" under Article 96 ¶1, since it is no longer merely a "teaching" or interpretation of the Code, it is unambiguously *in* the Code—and find a putative marriage even when it was "contracted without a ceremony."

This is a curious legislative technique. Plainly, comment (e) does the heavy lifting here. The curious language, though, is the following: "The ultimate decision whether to follow *Succession of Marinoni* in preference to the two contrary cases previously cited, however, is left to the discretion of the court under this revision." There are two possibilities, then. A court confronts facts that are identical to *Succession of Marinoni*, and that court either follows—applies—*Marinoni* or the court does *not* follow *Marinoni*. If the court follows *Marinoni* and accepts the invitation of Comment (e), one could say that article 94 means what it says: marriages contracted somehow without a ceremony (contemplated under article 94) are absolutely null and like other absolutely null marriages they can produce civil effects in favor of a good faith putative spouse. But if the court declines the invitation of Comment (e) and follows the "majority" of cases in the area, this produces an oddity. In that case, marriages contracted without a ceremony (to which article 94 refers) are absolutely null; but unlike other absolutely null marriages they cannot produce civil effects in favor of a good faith putative spouse. And if the Supreme Court reaches this second result, having used its "discretion" under Comment (e), article 94 (in part) is effectively moribund (unless resuscitated by a later more sympathetic Supreme Court).

The intent here is not to criticize this particular provision, but only to take note of the drafting technique employed. Informal discussions with participants in the drafting process of this article have suggested that the result here was a sort of compromise. Some members of the drafting committee or of the Council of the Law Institute favored outright recognition of *Succession of Marinoni*, and others opposed it. Both sides were satisfied (and no doubt dissatisfied) by the final sentence of Comment (e), at which point presumably they went on to discuss new article 97 and revised Chapter 3 on the Incidents and Effects of Marriage. The broader teaching of this problem, a self-contained one, is as to the technique of legislating, of codifying and recodifying, and what it tells us about the kind of Civil Code Louisiana now has.

This problem shows that the current Louisiana Code is one firmly anchored in the prior Code and the caselaw and doctrine that interpreted it. The re-codifiers have stayed quite close to the sources involved. In this, the re-codifiers of article 96 were quite consciously *not* changing “the law”—that is, the settled understanding that this kind of absolutely null marriage was equivocally established in the jurisprudence by a single decision of the Supreme Court. During the revision, the comments to many a revised article have begun by stating: “This article does not change the law.” Reporters, having experienced rejection of revised articles, may have grown more comfortable in the use of this phrase. Of course, it is problematic—if the words of the legislation change, the law changes. Legislators, among them not a few students of the several Reporters, have heard them in class mention the degree of freedom exercised in the use of this phrase. So that comment ordinarily is not taken at face value.

For article 96, the Reporter and the Law Institute might justifiably have sent the proposed revised article to the legislature with the same comment as to this specific point.⁹⁰ The recommendation was to “codify” neither *Succession of Marinoni* nor the cases with which it was inconsistent. On the other hand, the decision to *empower* the courts to resolve the dispute that the legislative process could not and to establish the *law* on this particular point, appears to be quite unusual.

There are, of course, a host of other interesting aspects to the revision of family law in Louisiana.⁹¹ The focus here is merely on the adequacy of the Code’s mapping of this particular association through law.⁹² In the context of the recodification of Louisiana civil law, this one issue—marriages that are absolutely null because without ceremony—has not been made clearer, although where the problem lies *is* clearer. As a practical matter, perhaps the point is a small one. No one would *plan* to have an

⁹⁰ In general, the comments to the revision of Book I, Title IV, Husband and Wife, are direct and sometimes are nearly conversational in tone. Once the revision is complete, it would be worthwhile to compare the styles of the comments in different portions of the revision.

⁹¹ Covenant marriage was mentioned *supra* at note 48 and accompanying text. The right of a concubine or unmarried life partner to recognition of marriage-like benefits, is another intriguing development. See *Blackledge v. Schwegmann*, 443 So.2d 1122 (La. 1984).

⁹² In addition to being a large-scale, magnified map, this may be yet another, distinct use of the concept of mapping.

absolutely null marriage.⁹³ On the other hand, the casualness or informality of adult marriage-like relationships (with households and children) make it more likely that the *kind* of problems involved may occur with more frequency than in the past when marriage mattered more. Now that marriage socially matters *less*, and concomitantly, now that illegitimate filiation as such offers less of a barrier to participation in the estate of one's parent, what we see in the Code is not a less-than-ideal handling of a burning social issue. Instead, we see several disparate understandings of a past when such disputes did rage, and we read an attempt in the revised Code to wrestle those understandings into a single set of articles and comments—without success.

In the final section of this article, the lessons of this recodification problem will be put in the context of the most prevalent line of criticism of the revised Louisiana Civil Code.⁹⁴

IV. THE REVISION CONTESTED

In 1988, an article was published entitled, *The Death of a Code: the Birth of a Digest*.⁹⁵ In this article, Professor Palmer argued that there are two ways repeal can occur in Louisiana law. First, repeal may be express, as when the legislature specifically names a particular piece of legislation and "repeals" it by using that word or another word equally unambiguous. Second, repeal may be implied or implicit, as when the legislature enacts new legislation that is so inconsistent with prior legislation that the old cannot continue to be applied without ignoring the new. In that case, the new legislation applies and the prior legislation has suffered implicit (or tacit) repeal.

Next, Palmer canvassed all of the legislation dealing with the revision of the Civil Code. He noted that the legislature in some cases had expressly

⁹³ Arguably, that was not even the case in *Marinoni*.

⁹⁴ For reasons of space, this section confines itself to an indication of a line of future inquiry.

⁹⁵ V. PALMER, "The Death of a Code—the Birth of a Digest", 63 *Tul. L. Rev.* 221 (1988). For a recent treatment of the Digest Thesis in the context of the revision of Book II, see J. A. LOVETT, "Another Great Debate?: The Ambiguous Relationship Between the Revised Civil Code and Pre-Revision Jurisprudence as Seen Through the Prytanian Park Controversy", *Loy. (N.O.) L. Rev.* (forthcoming).

repealed articles of the 1870 Code. In many other cases, however, the legislature used the formula "amend and re-enact" when putting blocks of the Code into effect. This, Palmer submitted, does not repeal the prior articles explicitly. To decide whether amending and re-enacting has worked an implied repeal, one must compare the language of articles of the revised code with that of articles of the 1870 Code. With sufficient lawyerly skill (and sufficient client interest), whenever the language differs one may legitimately argue during litigation that the prior law is still in effect. Indeed, when the prior law is not inconsistent with the revised legislation, the lawyer is in fact ethically obligated to present such arguments. Thus, according to Palmer, the 1870 code in large measure remains in effect, although in what precise degree this is the case can only be discovered as time passes and largely through the process of litigation.

The final step in Palmer's argument is that the revision of the 1870 Code has therefore turned the Civil Code of 1870 into a digest—the Digest Thesis. That is, the Louisiana Code, in his view, has lost the crucial characteristic of exclusivity.⁹⁶ Without an explicit repeal of the prior law, the revised Code is merely the place where one may begin legal research, just as with a digest; but one cannot stop there. The 1870 Code and the jurisprudence and doctrine interpreting it remain relevant sources of the law for deciding disputes and planning legal activities. One's research on a given issue will lead the reader immediately into the thicket of jurisprudence, of caselaw. This, he concludes, produces a "fragmentation"⁹⁷ uncharacteristic of the civil law.⁹⁸

⁹⁶ It seems that adherents of the Digest Thesis regret the incoherence of the current Code a bit less.

⁹⁷ V. V. PALMER, *On the 200th Anniversary of the Code Napoleon: Its Historic and Contemporary Influence on Codification in Louisiana* (forthcoming) (currently in part 5 of this article, *Diverse Comparisons Regarding Form, Structure and Style*).

⁹⁸ It is of interest that Professor Palmer enlists a set of diagrams that map the "three functional interactions" between the old and new articles: conflict (the new article only applies), synthesis (both the old and new apply and together create a new rule), and supplementation (the new Code has gap that the old Code covers). His summary of the three functions, however, seems to assert that supplementation includes synthesis, which in turn includes conflict. This would not be consistent with his text, so his visual logic is not that of a Venn diagram of sets and subsets. Palmer, *Birth of a Digest*, at note 91. For Venn diagrams, see entry for algebra, *Encyclopædia Britannica*, from *Encyclopædia Britannica Premium Service*, <http://www.britannica.com/eb/article?eu=120646> (last accessed May 26, 2003).

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The second part of the argument follows from the first. Further proof that the new Code functions as a digest is the nature of the connection between the text of the Code on the one hand and doctrine and jurisprudence on the other. In fact, this second argument is particularly critical of the role that a certain kind of doctrine plays, namely the comments that accompany each article of the revised Code.⁹⁹ For Palmer, the comments have taken on an improper role; they link the new Code to the caselaw that interpreted the old Code. Palmer finds six separate functions of the comments in this regard. They (1) illustrate the scope of a concept or rule; (2) show the continuity between the source article and the new article; (3) indicate that a jurisprudential ruling is the source for a new article; (4) reject or overrule a line of cases; (5) interpret the new text; and (6) establish a counterrule or exception at variance with the text.¹⁰⁰ Some of the six functions do not seem *a fortiori* controversial: illustrating the scope of a new article (number 1), connecting a new provision with an old one (number 2), or interpreting a new text (number 5). Likewise, indicating an intent to recognize ("codify") prior caselaw (number 3) or to reject it

⁹⁹ For each block of the recodified Louisiana Civil Code, the Reporter for that block (or the staff of the Law Institute at his or her direction) prepares background research materials that accompany draft articles during their initial discussion by the Reporter and his or her revision committee. By the time a draft of the block is ready for consideration by the Council of the LSLI, the Reporter has generally prepared comments to put the draft articles in context with respect to the prior law and to explain and justify the draft articles. During the process of debate, members of the Council make suggestions of changes to the draft articles. When there is a division of opinion as to the wisdom of the proposed draft or a suggested change, sometimes material is moved from proposed text into a proposed comment. By the time the Council has approved the proposed block, the Reporter has generally prepared an *exposé des motifs* that serves as a *précis* of the area of law covered by the block. (*Exposés* are not always prepared, however.) The approved package consisting of an *exposé des motifs*, the proposed text of the revision, and the comments on each article then go to the legislature; only the text itself becomes legislation and therefore is to enjoy the force of law. The comments are published in the standard unannotated edition of the Code. A. N. YIANNPOULOS, *I & II The Louisiana Civil Code* (West Pamphlet Edition 2002). As this edition is used in almost every civil-law course in Louisiana law schools, the role of the comments is reinforced. This soft-cover edition was published for the first time in 2002 in two separate volumes, the first of the Code and comments, the second of the Ancillaries, which also includes tables and indices. Publication of the comments in this so-called pamphlet edition has been the case since the early 1980s.

¹⁰⁰ PALMER, *Death of a Code*, at footnote 108.

(number 4) seem to be fairly ordinary functions of *travaux préparatoires*. These functions, however, do have the disadvantage of drawing attention away from the text down into details of application, with the risk that the revised Code will sacrifice an articulation of rules at a higher level of generality.¹⁰¹ On the other hand, it is clearly a problem when doctrine arrogates to itself the prerogative to establish rules and exceptions that contradict the text of the Code (number 6). Arguably, the comments discussed here¹⁰² form a separate, seventh category, namely, comments whose function it is to delegate to the courts the authority to resolve an issue that the recodification process confronted but could not resolve.¹⁰³

This second part of Palmer's argument, then, seems independent of the first, which depended on persuading us of the efficacy, or the lack of efficacy, of a particular formula by which legislation is enacted. The second argument depends as much on the behavior of the reader of the Code than it does on an enactment formula. If the readers of the Code—lawyers, judges, students, professors—misread it, this will transform the historical and traditional function of the Civil Code as a whole, according to Palmer.

Not surprisingly, because the Digest Thesis explicitly criticized not only the revision of the Code but also the working method of the Law Institute, it elicited strong reactions.¹⁰⁴ This article will not review the arguments for and against Palmer's position. Instead, perhaps the problem mapped out in this paper can suggest a different point of view. Perhaps the Digest Thesis is incorrect, as several have forcefully argued; perhaps it is correct. Assume for the moment that it *is* correct. Further assume that its

¹⁰¹ The dangers of this risk seem not to have overwhelmed the 2003 Code, though demonstration of support for this is outside the scope of this paper.

¹⁰² In part 4, *supra*.

¹⁰³ One might also argue that is another example of the sixth category. The Code creates a category of non-ceremonial marriages that are absolutely null; the comments would deprive only such absolutely null marriages of the effects of good faith. But it remains that the comments do not deprive them of this effect; the comments suggest that courts may legitimately do so.

¹⁰⁴ J. DENNIS, J. CUETO-RUA, D. GRUNING, S. HERMAN, V. PALMER, C. SAMUEL, & A.N. YIANNOPOULOS, "The Great Debate Over the Louisiana Civil Code's Revision", 5 *Tul. Civ. L. Forum* 49 (1990). J. C. CUETO-RUA, "The Civil Code of Louisiana is Alive and Well", 64 *Tul. L. Rev.* 147 (1989). V. V. Palmer, "Revision of the Code or Regression to a Digest? A Rejoinder to Professor Cueto-Rua", 64 *Tul. L. Rev.* 177 (1989).

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arguments persuade the legislature that it was in error in undertaking the revision block by block. And assume finally that the legislature in every case of defective revision (whether because of “amendment and re-enactment” or otherwise) of a certain block of articles explicitly repeals the former law. The legislature might await the completion of the piecemeal revision process to proclaim the Louisiana Civil Code of 2008, and in the Great Repealing Act of 2008 it might explicitly repeal the Civil Code of 1870. What result?

It seems clear that the work of understanding and applying that new Code would change little. The enacted Code is an authoritative text; Louisiana lawyers will not ignore it. They have been taught to heed legislation, especially *this* legislation, and will be so taught for the foreseeable future. Even if the 1870 Civil Code were expressly repealed, no lawyer attempting to understand new article 96 in a responsible fashion would ignore the cognate articles of the 1870 and 1825 Codes, or the *Succession of Maritoni*, or fail to note the *absence* of any other caselaw on point. The jurisprudence matters and the comments matter—lawyers have been taught this also, and their teachers have included the Reporters and other participants in the revision of the Code. There is no reason to expect that lawyers will not continue to read and interpret the Code using them. Their conceptual foundations may be unstable, but their pragmatic foundations are not. Outright repeal would not change that. We cannot, as Justinian did with the sources of his Digest, forbid citation of the sources of our recodification, even consigning them to the flames. If caselaw and the comments that attempt to make sense of it are given undue regard, perhaps that is because other elements of the civil law might be more efficiently exploited in the future than they have been in the recent past.

One unfortunate by-product of this focus on the caselaw of a single state interpreting a single Civil Code, however, is that an opportunity to link Louisiana with other related jurisdictions—civil law, common law, and mixed—may have been missed. This distance between Louisiana and similarly situated foreign jurisdictions need not go on indefinitely. Indeed, doctrine performed that role in the past, and perhaps it can again do so in the future.

CONCLUSION

In the introduction, this article suggested that a Code recodified plays a different role than a new one. This article has tried to show that this is true for both the small-scale overview and the large-scale, close view.

The small-scale overview suggests that for some time the new code will depend on and will be understood in terms of the old one. This would be so even if the legislature had explicitly repealed all the old articles as each block of the new code was enacted. And it is so because part of the act of understanding the gross structure of the new depends on having the old structure in mind. One can look at a contemporary map of Louisiana or Quebec and read what it conveys without having absorbed an understanding—without becoming capable of using—an old map that would have served a reader in the 18th century. Not so for the '2003' Louisiana Civil Code. While the revision remains unfinished, having the old in mind is necessary as a frame of reference for the new. Even after its completion, this article suggests the 1870 Civil Code will remain relevant.

For the close or large-scale map, the relevance of the 1870 Code is also clear. It shows the textual links from the current Code, back through the 1870 Code, the 1825 Code, and the 1804 *Code civil des français*, with an interesting skip of the 1808 Digest. Discussion of the large-scale view, shows the limitations of this approach for an understanding of the revised 2003 Civil Code. That is so because the new Code's drafters began with the text of the 1870 Code as interpreted by doctrine and by jurisprudence—especially the latter. The role of caselaw in civil law jurisdictions in the French tradition was de-emphasized in the past, though its role in that context is more frankly acknowledged today, even though it is not recognized as a true source of law.¹⁰⁵ Outside the French tradition, and particularly mixed jurisdictions that combine elements of the civil law and the

¹⁰⁵ An example may suffice. In the late 1980s and early 1990s, the legal status of surrogate mothers, or *mères porteuses*, was raging. I expected the machinery of French legislation to act quickly to decide what should be done. After all, France was the home, the temple, of legislation, in comparison to the chaotic swirl of caselaw. I shared my opinion with Professor Rubellin-Devichi, of Université de Lyon III (Jean Moulin) and directeur of the *Centre de droit de la famille*. She surprised me by saying that law reform agencies would not act precipitately and would give the courts the time to work through the intricacies of the issue, so as to inform the legislative process.

common law, the role of caselaw appears to be more frankly recognized.¹⁰⁶ It certainly is in Louisiana, and has been for some time. The recodification has been highly influenced by this fact, and the problem discussed in part 4 is an example of this influence.

What neither map shows is the strong emphasis on revision comments as a privileged form of teaching about the revised Code. Nor do they show what is perhaps more significant, the relative absence of influence, at least for the problem under review, of other doctrinal or comparative teachings.¹⁰⁷ Thus, the image produced suggests that the recodification may have turned in upon itself. There are good reasons, strong reasons, why this may have been so for the particular issue discussed here, reasons having to do with the controversial nature of the issue at hand that may have pushed other potential contributions into the background. Whether this phenomenon is representative of the Louisiana recodification as a whole is, of course, a distinct question.

¹⁰⁶ See, e.g., J.-L. BAUDOUIN, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec", in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 1, 10 et seq. (J. Dainow, ed. 1974). See also A. CHAMBORDON, "The Debate on a European Civil Code: For an "Open" Texture", in *The Harmonisation of European Private Law* 63 (ed. M. V. HOECKE & F. OST, Hart Publishing 2000) (noting the "jurisprudentialisation of the French Civil Code").

¹⁰⁷ This absence may be blamed not on cartography but on the cartographer. Is this something a map cannot show?

