A Publication of the
Center of Civil Law Studies
Paul M. Hebert Law Center
Louisiana State University

Bicentennial Series
Volume 3

ROBERT ANTHONY PASCAL:
A PRIEST OF RIGHT ORDER

Edited by

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Baton Rouge
2010
Center of Civil Law Studies
Paul M. Hebert Law Center
Louisiana State University

Bicentennial Series

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A Series created on the year of the Bicentennial of the Louisiana Civil Code (Digest of 1808), to promote publications on the civil law of Louisiana and its interaction with other legal systems.

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Volume 3. – Robert Anthony Pascal: A Priest of Right Order
Edited by Olivier Moréteau
2010 (Center of Civil Law Studies, LSU)
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Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes.¹

¹ Digest 1.1.1. “Anyone may properly call us the priests of this art, for we cultivate justice and profess to know what is good and equitable, dividing right from wrong, and distinguishing what is lawful from what is unlawful; desiring to make men good through fear of punishment, but also by the encouragement of reward; aiming (if I am not mistaken) at a true, and not a pretended philosophy.” Translated by Samuel P. Scott. 2 The Civil Law 209 (1932).
An Introduction to the
Life and Work of Robert A. Pascal

Olivier Moréteau*

The essays gathered in this volume are the fruit of decades of reflection by a very unique scholar whose life covered most of the twentieth century and who is still active in the twenty-first.

Primarily intended as homage to a Professor who marked generations of students and tried to preserve the essence of the civil law of Louisiana, this book has grown into much more. The Editor, in his capacity of Director of the Center of Civil Law Studies at the Louisiana State University (LSU) Law Center, feels under the duty to keep alive anything in the Louisiana civil law tradition that may serve the State’s legal community and its citizenry in the present and in the future. The civil law is a living heritage, part of Louisiana’s identity, which keeps on evolving. Robert Pascal’s publications are part of it. Bringing the best of it to the eye of the public is a contribution to the present and the future of the civil law in Louisiana and beyond.

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In recent years, Robert Pascal had established a list of his Writings about Law that was published in Volume 1 of the Journal of Civil Law Studies, in December 2008, with the papers of the Civil Law Workshop, Robert A. Pascal Series, Revisiting the Distinction Between Person and Things. Having visited some of these writings, I had the idea to publish a selection of his best essays. I asked Professor Pascal to make a selection, which we discussed and amended, until an advanced stage of the editing process. Though this was a very cooperative project, at every point of the editing process, Professor Pascal insisted that this was to be the Editor’s book. As Editor, I assume full responsibility for the selection, the way articles are arranged, and also for writing the present Introduction.

All texts are published without any change, “as is,” the way they appeared at the first publication. I asked Professor Pascal to write a short headnote for every article, to place it in the context of the time. Agustín Parise, Research Associate at the Center of Civil Law Studies, is to be commended for his careful editing. By respect for the author, for his work and opinions, I refrained from any interference in the substance of the text. There has been no cut and no addition to the materials that had been published before.

A Priest of Right Order is more than a collection of the most representative essays of a great civil law scholar known for the consistency of his thought. It is the self-portrait of a man who devoted most of his life to the teaching and study of the law. He is remembered fondly by those who were impressed by his uncompromisingly refusing any foul arrangement that might sacrifice the dignity of man on the altar of illegitimate profit or the satisfaction of private interests of a lesser value. Professor Pascal taught his students to be priests of good order or right order, echoing a sentence that appears in Justinian’s

Corpus Juris Civilis (Digest 1.1.1.). Coined by Ulpian, the phrase suggests that lawyers may be described as priests (sacerdotes) for cultivating justice and professing to know what is good and equitable, dividing right from wrong and distinguishing what is lawful from what is unlawful. The full sentence is printed as an epigraph to this book, and the Editor is of opinion that A Priest of Right Order best describes the man, his teaching, and his scholarship.


A Man of Principle

Part One opens with Recollections of a Life Studying and Teaching Law, which counts for a third of the volume and is the only piece in the book never published before. Robert Pascal’s personality transcends every page of it. Like self portraits painted by great masters such as Rembrandt or Van Gogh, it avoids self-complacency and depicts with humility defects and failures as much as positive traits of character, by clear and precise strokes. At the end of the reading, one is permeated with the impression of distant intimacy with a master, revealing his soul and yet keeping under silence everything that would be too personal or could hurt anyone. A man true to himself and to

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2 Book Two of the Louisiana Civil Code is entitled: “Things and the Different Modifications of Ownership.”
others, *un juste*, to put it in French, Robert Pascal’s native language. Recollections reveals how Professor Pascal’s immense legal and philosophical culture, his mastery of several languages, and the depth and clarity of his views won him the esteem and admiration of the great masters of comparative law active around the middle of the twentieth century: Ernst Rabel, Max Rheinstein, John P. Dawson, and Hessel Yntema in Ann Arbor; Tulio Ascarelli, Gino Gorla, and Giovanni Pugliese in Rome; Henri Batiffol, and René David in Paris; and later, Paul A. Crépeau in Montreal, who offered him a professorship at McGill that he decided to decline. Robert Pascal never had this touch of vanity that helps propelling masters into great masters, stars into superstars, at least in the eye of others.

Professor Emeritus Robert Anthony Pascal started his academic career at the time of Roscoe Pound, whom he witnessed inaugurating the LSU Law Building in 1938. He then was a law student at the Loyola Law School in New Orleans and served during the summer as a Research Assistant at LSU. Robert Pascal is far too modest to accept being portrayed as a living legend, but may be referred to as a living memory: few law schools having passed their centennial, like LSU in 2006, can claim to have within their walls a faculty member who has been on Earth nearly as long as the law school. In addition, he started working with the Louisiana State Law Institute, during the first year of its creation, on the Compiled Edition of the Louisiana Civil Codes. He later became a consultant to that Institute on trust law revision, an area of jurisprudence where his thoughts are at the forefront. He also taught and, as this book reflects, produced significant writings on conflict of laws, family law, matrimonial regimes, civil and Anglo-American legal science, and philosophy of law.

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3 He grew up in New Orleans in a family of French descent, and is a true Créole in the original sense of the word.
AN INTRODUCTION

In 1940, he was the first person ever to be awarded a Master’s degree in Civil Law at LSU. He practiced law in New Orleans for one year, and in 1942, added an LL.M. from the University of Michigan Law School. His academic activity was interrupted briefly by the events of World War II. At the end of the war, he joined the LSU law faculty. In spring 1951, he taught trusts law at the University of Chicago. In 1951–1952 and in 1963–1964, he was a Fulbright lecturer and taught U.S. private law and comparative law at the University of Rome, in Italian. In 1955, he was made full professor at LSU and never left, even after his retirement in 1980, keeping offices as a Professor Emeritus. With the Bicentennial of the Louisiana Civil Code, many remembered his tournament with a professor from Tulane, Professor Pascal rightly insisting that the Digest of 1808 was Spanish in substance and French in form—a “Spanish girl in French dress,” as he later commented in his Tucker Lecture at LSU, Of the Civil Code and Us, reprinted in Part Two of the present volume.

The author of this Introduction has the privilege of meeting and exchanging views with Professor Pascal on a daily basis. He read many of his works and offers A Summary Reflection on Legal Education, reprinted in this volume, to his first year law students as a reading to open the Legal Traditions course. In his Summary Reflection as in other writings, Professor Pascal makes his vision of the law very clear. He sees the law as the specification of right order for the common good, and

4 His response to Professor Rodolfo Batiza (Robert A. Pascal, Sources of the Digest of 1808: A Reply to Professor Batiza, 46 Tul. L. Rev. 603 (1972)) is not reprinted in the present volume. Though citing many excerpts from the Batiza article (Rodolfo Batiza, The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance, 46 Tul. L. Rev. 4 (1971)), and also the introduction by the then Dean of the Tulane Law School (Joseph Modeste Sweeney, Louisiana Civil Code of 1808: Tournament of Scholars Over the Sources of the Civil Code of 1808, 46 Tul. L. Rev. 585 (1972)), it would not be fair to reproduce it without the reply of Batiza (Rodolfo Batiza, Sources of the Civil Code of 1808, Facts and Speculations: A Rejoinder, 46 Tul. L. Rev. 628 (1972)).
codification as its best formal expression. His comment on the
secularization of law and science in the past five hundred years is
connected to the evolution of philosophical and religious thought and
reflects the findings of philosophers, theologians, and historians of
western societies.

His strong preference for the civil law and its codification comes
from the fact that it gives a comprehensive vision of what the law is and
makes it accessible and predictable to lawyers, judges, and laymen.
Robert Pascal is one who believes that civil codes are a suitable form of
legislation for the United States, to make the law more easily accessible
to the citizens. He is not the first one to endorse this view. For example,
the legislature of the State of New York adopted the Civil Code that
David Dudley Field submitted in 1865, and had the governor signed the
bill rather than veto it, many states might have adopted a New York-like
civil code based on the French and Louisiana models. The point is not
pure history: the Field code inspired the California Civil Code and with
the Uniform Commercial Code, the United States keeps proving that the
common law is not incompatible with codification.

The writer of this Introduction, also a civilian by training, cernently agrees and endorses a citizen-centered conception of law
making, in which the legislator is morally required to be reasonable in
its enactments.5 He also remains a great admirer of the basic tenet of
the English common law—“law is right reason”—and its ability to discover
the law in a constant search of consistency through the facts of cases,
always accepting, though reluctantly, that what was once declared may

5 Olivier Moréteau, The Future of Civil Codes in France and Louisiana, 2 JOURNAL
OF CIVIL LAW STUDIES 39 (2009); and Olivier Moréteau, A Summary Reflection on
the Future of Civil Codes in Europe, in FESTSCHRIFT FÜR HELMUT KOZIOL 1139 (P.
Apathy et al. eds. 2010).
later be overruled.\textsuperscript{6} The traditional approach of the common law, often to be distinguished from modern American and sometimes English practice, does not question Professor Pascal’s recognition of fundamental principles, nor his opinion that the law cannot be limited to what is termed positive law.\textsuperscript{7}

Robert Pascal is a philosopher as much as he is a jurist. He articulates his philosophical conception of the law in every article he writes. All men exist ontologically as a community of mankind under God. Being a community, they are obliged morally to respect each other and to live and to act cooperatively with each other for the common good. Such philosophy does not ground human society on a social contract made by men who lived in a state of nature, and decided by rational self-interest to voluntarily give up some freedom in order to obtain the benefit of political and legal order.

Robert Pascal fully accepts that the specification of right order must be done under criteria that vary with a particular society. Respect for the human person is a constant norm, but differences in history, culture, education, climate, environment, and the availability of natural resources may generate or demand variations in different legal systems. His approach to the law is philosophical, not religious. With due care, his vision of the law may be transferred to other human societies in different parts of the world.

Professor Pascal clearly and honestly defines his vision of what the law is and relies on human reason more than on experience: at first sight, he may seem at the antipodes of Holmes’ statement made on the opening page of \textit{The Common Law} (1881) that “The life of the law has


\textsuperscript{7}As Robert Pascal recognizes in \textit{Natural Law and Respect for Law}, reproduced at the end of Part One.
not been logic: it has been experience,” which may explain an uneasy
dialogue with common law scholars. He does not deny the value of
experience but views it as a guide, in common law and civil law alike. As
a legislator, he knows he would have to accept political compromise,
but as a teacher he has to stand for what he views as right order, and
direct the student’s mind to improvements dictated by the common
good.

Robert Pascal is of opinion that something need not be
empirically demonstrated to be considered true. He belongs to a family
of many philosophers and jurists who acknowledge that the very
essence of things cannot be demonstrated by empirical evidence. In
that sense, much like theology, law as he and I see it is a dogmatic
discipline, much like theology, based on the axiomatic existence of a
nature of things that is metaphysical in essence. Such nature of things
cannot reside ultimately in what is posited by man or an assembly of
men, as the positivist disciples of Austin or Kelsen would claim. Such
positivist view might otherwise legitimate Nazism, communism, or some
selfish abuses of capitalism, wherever based on or favored by enacted
laws. The fact that he does not doubt or question his axiomatic vision of
right order does not make him an anti-intellectual fundamentalist but a
man who relies on moral judgment.

The later part of the twentieth century has been an age of
extreme individualism. The development of human rights prevented the
advent of pure relativism, even where human rights serve individualism.
In such a context, moral speech, even where based on a sound and solid
philosophical basis, is found disturbing and is rejected, sometimes
violently. What is left of good morals parades under the colors of
human rights. No person of reason would challenge the fact that there
is something sacred in every human being, even if this sacred dimension
cannot be demonstrated empirically. People who believe in human
rights should be open to Professor Pascal’s speech and agree that there
is such a thing as human dignity that justifies some limits to rights even when posited by enacted laws and generates duties that are moral in essence.

Robert Pascal initiated a golden age at LSU, when he taught Institutions of Law, featuring the history and structure of both civil and common law, this during the first semester of the first year, the great philosopher Eric Voegelin then teaching Jurisprudence in the spring semester. This was in the 1950s. In the years 2000, Western Legal Traditions are taught to all first year students in the fall semester, but regrettably, Jurisprudence has long ago been relegated as elective.

Robert Pascal’s personality also permeates a short note, actually a letter to the editor of The Advocate, Baton Rouge’s daily newspaper, entitled Punishment, Pardon, Parole. This is not meant to be an addition to an abundant academic literature on a topic in which Professor Pascal never specialized. It is the reaction of a man of Catholic faith, who happens to be a law professor, to the spirit of vengeance which dominates the way criminals are treated in Louisiana. These two pages may be read as a tribute to his wife Doucette, who passed away in January 2009, after spending many years of her life doing volunteer work to improve the condition of inmates and making sure they would have access to culture, education, and spiritual solace.

A third essay entitled Natural law and Respect for Law concludes Part One, opening with the following words: “In the era of Christendom, natural law, whatever its variations in the minds of the philosophers, always denoted the law of God addressed to man as a free-willing creature and obligatory for him to the extent he could discover it through use of his intellectual faculties. Man used his intellect and judgment speculatively to ascertain the will or plan of God and practically to discover how he might conform to it by obedience
and cooperation.” A footnote cites Thomas Aquinas. Wolfgang Friedman of Columbia praised Pascal for this Essay, published in the *American Journal of Comparative Law* in 1967. In six pages, it gives a full survey of Roman law, the common law, and the civil law after the time of codification, showing how the shift from natural law to natural right generated a move from judges or legislatures declaring the law to their making the law, leading to a positivistic approach. “Stripped of the support of the personal moral obligation of obedience, law ceased to enjoy, and indeed to deserve, the respect required for its effectiveness.” Law became an instrument of power. Of course power cannot be the criterion of law. But rather than recognizing the personal moral obligation to obey the law, one puts the emphasis on the rule of law and on the search for legislative policy, called “policy science” by the Author. Pascal concludes that “two major contributions of natural law thought to the positive legal order have been, first, the principle of cooperation among the agencies of the law in the finding and specification of law and, secondly, the personal obligation of the subject to obey the law. When these two factors are lacking, the legal order soon suffers loss of respect and efficacy.” Well, it is hard to prove the contrary.

Professor Pascal keeps telling me that there is nothing new in this article. Well, this may be true. However, making the point so clearly whilst embracing the entire western legal traditions since the dawn of Christendom, all this in a few pages, shows much more than intellectual mastery. It proves that scholarship can be an art. Like other chapters of this book, it is to be read both for the substance and for the form: all could serve as a model in doctrinal and in legal writing classes.

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8 See infra, *Natural Law and Respect for Law*, at 101.
9 *Id.* at 109.
10 *Id.* at 111.
A Man of Vision

Part Two of the book gathers three essays that, in the opinion of both the Author and the Editor, are the major contribution of Professor Pascal to the knowledge and future of the law. Legal education, the Civil Code, and trusts come as three panels of a triptych and it is no surprise to see the Civil Code as the central part of the altarpiece. These three contributions appear in the reverse order of publication, actually to be read starting with education and ending with trust devices, often used to organize property rights beyond the limits of human life.

A Summary Reflection on Legal Education is the product of a life-long thinking process. Robert Pascal has witnessed the evolution of legal education in the United States over at least three quarters of a century. He deplores a growing disrespect for the legal order, demonstrating how legal education contributes to what the Editor is tempted to call a culture of selfish interests. His thesis is that legal education contributes to the phenomenon. Students are trained as legal technicians, they are educated to “think as a lawyer,” through the study of cases. The inconvenience of the case method is that is does not invite for an overall vision of what the law is but tends to endorse Justice Cardozo’s view that “the law never is; it is always about to be.” This culture of legal uncertainty makes for a world where a lawyer must be consulted on all important matters and where it is way too often necessary to litigate in order to assert what the solution is.

Codification of the law is proposed as a first remedy. Without denying the importance and usefulness of codification in the American context, this may not be the most convincing part of A Summary Reflection. After all, there are many areas in the common law where the law appears as settled and where predictability equals that to be found in a codified system. On the other hand, there are many issues in codes or in legislation where, because of vague or general language,
adjudication is the only way of asserting what the law actually is, with limited certainty since court decisions are not technically binding precedents.

The second remedy, rightly presented as more important than codification, is to make certain that lawyers-to-be are required to have had a liberal education before starting law school. How else can they understand “that people are not mere individuals, but members of a community of mankind, morally obliged to respect and cooperate with each other for the common good”\textsuperscript{11}? One should make sure, before students enter law school or at a preliminary stage in law school, that they get a philosophical and historical perspective of the nature and purpose of the law, its moral foundations, and the moral obligations of lawyers in its application and, where applicable, improvement.

The Editor has been trained in a civil law country where he taught the law during twenty-five years before coming to the United States. French students all take a course in philosophy during their last year in high school. They all take legal history and history of institutions during their legal studies. True, the system has its flaws and does not train ready-to-practice lawyers, leaving this task to bar schools and practitioners. However, trained civilians have a greater perspective and an overall view of where laws are coming from and where they may lead us to. They are not as effective as common-law trained lawyers at arguing in the detail, but some prove to learn that very fast when preparing for an LL.M. at an American law school or when moving to practice. Their ability in making a sound logical or moral argument has much to do with personality, character, education, and experience, but it cannot be denied that prior and significant exposure to philosophy, logics, and metaphysics helps a great deal.

\textsuperscript{11} See infra, A Summary Reflection, at 125-126.
The point is not to bar students having majored in mathematics and hard sciences from admission to law school. Their logical mind helps make them great lawyers. Professor Pascal’s idea of supplementing college education with a summer or early fall introductory course in legal theory or jurisprudence before starting law school is to be promoted, especially in a fast changing world facing huge challenges. Teaching Western Legal Traditions to LSU first-year law students, the Editor tries his best to invite them to think over the meaning of law and legal order and identify the philosophical origins and background of both the civil law and the common law. The assigned reading of Robert Pascal’s *A Summary Reflection on Legal Education* no doubt helps students to identify the problem.

The central part of the triptych is entitled *Of the Civil Code and Us*. The title reveals the intimate connection civil codes are meant to have with the citizens, at least in the Napoleonic way of making codes. The French Civil Code had been written in clear and intelligible style, avoiding technical words or jargon, in order to be readable by a citizen with a basic education. The Louisiana Civil Codes of 1825 and 1870 follow this model, which can be traced back to the Digest of 1808, much inspired in the form by the French *Code civil* of 1804 and its *Projet* of 1800. These documents may not have as systematic a structure as the German Civil Code (BGB) of 1900, which has the inconvenience of being usable by lawyers only, due to abstract language and the multiplicity of cross-references. The French and Louisiana Civil Codes and the many codes they inspired are remarkable by their simplicity of style and unsophisticated structure which make them “user friendly,” to use modern parlance. The essay presents and discusses the structure of the Louisiana Civil Code with a focus on its unity, clarity, and effort to eliminate ambiguity, praising the Code as it was prior to the revision by the Louisiana State Law Institute.
The Author then complains about the bulky publication of the Code, adding many features that make the Louisiana Civil Code difficult to read in its present publications by West Publishing. This problem has been remedied with the help of LSU Professor Alain Levasseur who in 2008 started to publish with LexisNexis a *Louisiana Pocket Civil Code*. It is indeed important for the public and students alike to be able to read the code without being distracted by extraneous information, as useful as it may later be for further research. The problem is the same in France and other civil law jurisdictions, some like Italy or Switzerland publishing both annotated and expurgated editions of their codes.

Professor Pascal strongly opposes the addition of unofficial titles to Civil Code articles and of comments on the occasion of their revision by the Louisiana State Law Institute. Each revised article is indeed followed with a commentary explaining the reason for the change, its extent (often mentioning that it does not change the law), doctrinal references, judicial decisions and so forth. The Editor knows the pros and cons of such commentaries in pre-legislative work, being a member of the European Group on Tort Law and thus co-drafter of the Principles of European Tort Law which include a commentary. He fully understands what Professor Pascal means when writing that he knows “from his own experience, in the seventies, as a member of the Council of the Louisiana State Law Institute, that often the objection that a proposed article did not convey its full intended meaning was countered with the decision to “take care of that in the comment.” He approves Professor Pascal’s judgment that “this is a sloppy way to write a civil code.” He has identified, teaching Obligations, a number of discrepancies between Code articles and comments and regrets that they are part of the bill when revisions are enacted by the legislature though declared not to constitute part of the law. This is confusing.
Comments should be published separately and be regarded as no more than information on legislative history.  

The substance of codes is discussed in the third section of the essay, “The character of the Louisiana Civil Code,” which may fairly be described as one of the best general discussions of the content of a civil code to be found in the world legal literature. It approaches the code as a whole and in relation with the philosophical principles on which it is based. Robert Pascal makes it clear that the Louisiana Civil Code is founded on the conception of natural law that still prevailed in Spanish law at the time of the Louisiana Purchase—human beings are members of an ontological community—and not the one that emerged from the Enlightenment in France and other countries: each person is an individual unrelated to others in a state of nature, capable of association and forming a society based on a social contract. The article numbered 21 in the Digest and both Civil Codes of 1825 and 1870 invites the judge to appeal to equity when positive law is silent, equity being defined as an appeal to “natural law,” “reason,” or “received usages.” The abandonment of the reference to “natural law” in the revision of 1987 (present article 4), allegedly because natural law “has no defined meaning in Louisiana jurisprudence” (so says the revisers’ comment, yet claiming that this does not change the law) indicates a move towards positivism, accentuated by several language changes made on the occasion of the revision. All language that has a moral connotation has been amended, and Professor Pascal notes the disappearance of “natural justice,” “good morals,” and a few others. This substitution of “modern usage” to traditional terminology conveys that nothing is right or wrong and that law cannot bind in conscience.

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12 Under the leadership of the Editor, the Center of Civil Law Studies will very soon publish online an easily accessible version of the Louisiana Civil Code, stripped of all editorial work such as revision comments, cross-references, or article headings.
The discussion goes through several institutions of the civil law to be found in Books I, II, and III of the Code, including negotiorum gestio and contract. Negotiorum gestio is one of the most powerful imprints of the philosophical principles permeating the civil law tradition. I will never forget the day when Professor Pascal asked me whether I started my Obligations course with negotiorum gestio: the question itself was like an illumination. I now discuss negotiorum gestio before starting contractual obligations and this is an important point.

LSU First year law students take Contracts in the fall semester and Obligations in the spring. Their brains are formatted to the common law concept of contract as exchange of promises, with the law encouraging parties to find their best advantage yet with mechanisms preventing fraud and protecting reasonable reliance and expectations. A brief study of negotiorum gestio helps them understand that they move from an individualistic system of competition to a legal culture that favors cooperation.

There is much to say and to comment over the substance of this rich and beautifully written contribution. It inspires my teaching and scholarship. It should inspire all those concerned with the future of our modern societies and the major problem of climate change. The choices individuals and politicians are facing are moral in essence. The planet is not in danger (it survived dramatic upheavals over the past million years) but mankind has no promising future without cooperation and more personal responsibility. Another gem of the civil law tradition is the standard of the bonus pater familias, or bon père de famille, or good family father. It may sound terribly chauvinistic at first sight and yet it is more powerful than the common law standard of the reasonable person, in that sense that it is future oriented and points to the welfare
of generations to come, and not to the preservation of immediate and selfish interests.¹³

Standards take us to the realm of fiduciary duties and the law of trust, discussed in the final article of the triptych. In On Trusts, Human Dignity, Legal Science, and Taxes, Professor Pascal recognizes some obvious advantages of trusts over some classical institutions of the civil law such as usufruct. The trust offers better protection of the ultimate owner in case of inadequate management of the property. Pascal had written on trusts and the civil law¹⁴ and may be regarded as one of the few civilians with a good and complete understanding of what may be regarded as a landmark in the common law tradition. Pascal does not suggest that the trust should not have been adopted in Louisiana. He knows how to analyze trusts functionally and how to adjust the mechanism to the civil law tradition. His article was a reaction to the revision of the Trust Estate Law that took place in Louisiana in the early 1960s. As an advisor to the Louisiana State Law Institute Committee in charge of the revision, he was anxious to define the private trust in terms compatible with the civil law and to give the beneficiary or his representative the right to modify or terminate the trust. He points out that under the generally accepted American rule and under Louisiana law, a trust may not be terminated by a beneficiary unless the settlor has given him the power to terminate it. The Louisiana Trust Code makes things worse, since “The consent of all settlors, trustees, and beneficiaries shall not be effective to terminate the trust or any

disposition in trust, unless the trust instrument provides otherwise.”\textsuperscript{15}

Robert Pascal describes these rules as “abusive because they violate the dignity of the human person.”\textsuperscript{16}

The Author rightly insists that American law sacrifices the beneficiary and his dignity by making it so difficult, often impossible, to terminate a trust:\textsuperscript{17} the beneficiary “should be allowed to decide for himself how he should live, and this living includes the use of wealth appropriated by or transferred to him for his use and benefit.”\textsuperscript{18} Of course Pascal accepts that this principle of self-determination is based on human reason and free will and cannot apply to persons deprived of capacity. However, he sees indestructible trusts as morally wrong, permitting “individual persons to be placed in partial and private economic dictatorships by other individual persons.”\textsuperscript{19} It is an American invention, English law permitting the termination or modification of the trust by agreement of all the beneficiaries. Under English law, judicial variation is possible when the beneficiary is deprived of capacity.

Professor Pascal tries to understand why and how Americans may accept such a state of affairs. He sees that politically speaking the settlors and trustees form a lobby whereas beneficiaries do not. He recommends that moralists, economists, and sociologists join lawyers in attempts to revise trust laws.

Another part of the essay attempts at giving a functional definition of trust stripped of the notions of “legal” and “equitable” interests inherited from the common law. Not only should the trustee

\textsuperscript{15} LA. REV. STAT. § 9.2028 (2010).
\textsuperscript{16} See infra, On Trusts, Human Dignity, at 175.
\textsuperscript{17} He is no longer a lonely fighter. See Michael McAuley, Of Hurricanes and Me, 39.1 NYSBA TRUSTS AND ESTATE LAW SECTION NEWSLETTER 15 (2006).
\textsuperscript{18} See infra, On Trusts, Human Dignity, at 175.
\textsuperscript{19} Id. at 187.
be called a “fiduciary” as it is under present law20 but beneficiaries should be recognized as “owners of the present and future interests in the property, subject to the trustee’s administration, management, and control under the terms of the trust”21 so that Louisiana law shows its ability to function as a “laboratory of comparative law,” adjusting common law tools to civilian concepts and needs. Nobody is a prophet in his own land: Quebec heard the message and France is presently struggling to adjust its new fiducie to present business needs. The Louisiana Trust Code may be in need of some revision, and Professor Pascal’s proposals should not be ignored.

Robert Pascal’s articles on trust show a true comparatist at work, for he also is a Man of Diverse Scholarship.

A Man of Diverse Scholarship

Part Three gathers three essays showing Professor Pascal’s familiarity with diverse areas of the law. Published thirty five or seventy years ago, all have some relevance to contemporary legal scholarship and practice.

Updating Louisiana’s Community of Gains gives a useful overview of matrimonial regimes in general and of the community of gains in particular. It addresses Louisiana law with ample comparative perspective. Community of gains is an area of the law where French and Spanish law differed and the drafters of the Digest of 1808 were not fully successful in reducing Spanish law in digest form. Based on the exegesis of the Louisiana Civil Code articles, the Author gives a full and clear account of the evolution of Louisiana law on the matter. The Spanish-law-inspired community of gains recognizes the wife’s

21 See infra, On Trusts, Human Dignity, at 193.
cooperative effort as wife, mother, and attendant to the family’s needs even where she does not contribute financially. The system was criticized since it left the community in the husband’s patrimony and it was subsequently reformed to put husband and wife on an equal footing. The Author carefully examines all problems and possible solutions and recommends a conventional regime giving each spouse full autonomy during the marriage and community benefits upon dissolution of the marriage. This comes close to the French regime of *participation aux acquêts*, combining separation of property during the marriage and the advantages of community when it comes to an end.  

In addition to the suppletive legal regime of community of gains applicable by default, French law offers a broad choice of conventional regimes ranging from full community to full separation. *Participation aux acquêts* is one of those and it is often recommended by notaries, especially when both spouses are active professionals. Germany has a comparable regime, also very successful. Professor Pascal’s suggestion remains a great option for Louisiana.

*Characterization as an Approach to the Conflict of Laws*, first published in 1940, is the earliest essay published in this volume. Like all others it is crisp and reads easily, and makes complex questions appear like easy ones. One can hardly believe it to be the work of a young scholar with limited experience. It reads like the work of a master and it is no wonder that it called the attention of Ernst Rabel, with whom the Author was to entertain a long friendship.  

Robert Pascal gives the clearest presentation of the problems central to private international law, discusses the leading doctrines of the time, and endorses Rabel’s views that comparative law is the key to solve the problem of characterization. Seventy years went by, and this still sounds like a

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22 *French Civil Code*, arts. 1569 to 1581. This regime was introduced on the occasion of the overall revision of matrimonial regimes in 1965 and reformed by Law no. 85-1372 of December 23, 1985.

23 See *infra, Recollections of a Life*, at 38.
needed call. Some progress has been made, for instance in the European Union, but Rabel's project remains largely unachieved. This essay should appear in the first section of teaching materials on conflict of laws and private international law.

The book concludes with a review of *The Italian Legal System* by Cappelletti, Merryman, and Perillo, presented as a classic. The Author discusses the arrangement of the chapters, wishing them to appear in an order fitting the Italian legal system rather than the one of the reader, presumed to be brought up in the common law. Should procedure be discussed before or after substantive law? The authors do it before, Pascal recommends after. This is a challenging methodological problem, a pedagogical dilemma. Do you meet the students and the readers at their departure point and transition to the system you want to visit or do you project them upfront to the logic of the system you study? The question is acute when you educate students already trained to a legal system into another one.

I am not sure Professor Pascal or I have a final answer to this question or the others he raises in his writings. But one thing is sure, I never regretted following a methodological recommendation by my new mentor at LSU. Every conversation with him is a learning experience, as will hopefully the reading of this book for many in Louisiana and the world over.
PART 1

A MAN OF PRINCIPLE
Recollections of a Life Studying and Teaching Law

The following Recollections have been based on my unverified memory. I know that my memory may not be accurate in every detail. This account of my life with the law was written originally so that my immediate family† might have a better understanding of what I stood for and what I tried to accomplish.

I. THE STUDENT YEARS

It was not until I was about to graduate from Jesuit High School in New Orleans that I thought seriously about what career I might pursue. Certainly, I intended to attend college, if at all possible—Jesuits, after all, was a college preparatory school. I did not have law study in mind at the end of my second year, however, for then I would not have abandoned the classics curriculum—with four years of Latin and two of Greek—for the then newly approved scientific curriculum with more natural science and mathematics. Indeed, in the last two years of high school I fancied I might like to try naval architecture, perhaps because I had constructed a large cypress skiff. By May 1933, however, a month

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† Previously unpublished.
† My wife, Marie Elina Cherbonnier; my son, Robert A. Pascal, Jr.; my daughter, Alice Elina Marie Pascal; her husband, George Edmond Escher; and their daughters, Lucile Escher, and Claire Escher.
before my graduation, I had experienced much pleasure and fair success in debating and thought this an indication I might do well as a trial lawyer.

My record at Jesuits was good enough to win a scholarship to either Loyola University or Tulane University. I chose to attend Loyola, where I majored in English and minored in History. Of course I also studied the full regimen in Scholastic Philosophy—Logic, Epistemology, Ontology, Theodicy, Cosmology, Psychology, and Ethics. At that time, Loyola ordinarily did not admit students to the A.B. (Bachelor of Arts) program unless they had studied Latin in high school for four years. After some discussion with the dean of the College of Arts and Sciences, however, I was admitted to the A.B. program on condition that I would demonstrate sufficient proficiency in a course in advanced Latin composition. I enjoyed the challenge and met it reasonably well. But I have regretted not having studied Greek. Nevertheless, I have had something of a liberal education, something I now consider essential for anyone who dares to immerse himself in the study of law as the art and the science of order in society for the common good and not be, as the Italians say, a mere causadice, or pleader of cases.

In my first three years at Loyola I never wavered from my intention to study law, but I gave little if any thought to it during that time. Then, in the Spring of 1936, events occurred that I believe were providential. I had heard from family members that one of my mother’s ancestors had received a Spanish grant to all that portion of Vermillion Parish east of the Vermillion River and all the shell islands in the bay, but had sold it all. I decided to try to find out whether all this land in fact had been sold or whether some yet remained available to the family. Accordingly, one day, seeing Dean Paul M. Hebert and Professor Joseph Dainow of the Loyola Law School strolling on the campus, I introduced myself and asked them how I might ascertain the Louisiana law involved. This led to Professor Dainow’s invitation to accompany him to
his office, where he produced a copy of the Louisiana Civil Code, introduced me to its plan and contents, and drew my attention to the articles on acquisitive prescription.

My examination of the Civil Code in the days that followed reassured me of my inclination toward the study of law. Here was a document detailing succinctly and clearly, in ordinary language, a plan of order for the ordinary life of persons forming part of Louisiana society, a document rational in its construction and conforming substantively to the culture of the people. Here was something worth studying.

The study of Louisiana civil substantive law (that part of Louisiana law detailed principally in the Civil Code) and its origins in the laws of Rome, France, and Spain became for me a passion. From my very first semester at the Loyola Law School I haunted the Civil Law Reading Room, studying Roman, French, and Spanish law, probably spending as much time on that as I did on my prescribed studies. I neglected all social life. No doubt this collateral study helped me to place Louisiana civil law in historical and philosophical perspective and to compare its substance and form to those of the Anglo-American law. One thing I discovered early on was that whereas the organization, form, and style of the Orleans Digest of the Civil Laws of 1808 and the Louisiana Civil Codes of 1825 and 1870 were much like those of the French Code Civil of 1804 and its Projet (or projected draft) of 1800, the substance of their provisions was more reflective of the Spanish civil law in force in Louisiana at the time of its acquisition by the United States.

My ecstasy over my Civil Law studies, however, did not extend to the study of Anglo-American Law. What drudgery I found that to be! The basic Anglo-American law, being for the most part unwritten (that is, un-enacted as legislation) and incomplete, it was to be discovered by reading the opinions of judges rendered in preceding controversies,
extracting with trepidation such rules and principles as might be judged to underlie them, and extending these by analogy to cover previously un-judged and unforseen circumstances of life. My judgment on the Anglo-American law was swift: the law of a people too unintelligent or too lazy to abstract its principles and rules and state them in code-like legislation did not deserve serious study. And I gave it very little. As a result, my grades in Louisiana civil law courses usually were quite good, but those in Anglo-American law courses were sometimes less than satisfactory. Of course my neglect of Anglo-American law studies was not wise. My deficiencies had to be overcome by serious private study later in life.

It annoyed me, too, that, possibly in part because the law school accrediting agencies insisted that all law, including Louisiana civil law, be taught by the case method, many professors of Louisiana civil law subjects attempted to make the analysis of Louisiana civil law decisions the principal method of civil law instruction. For me, the law was principally legislation and recognizable custom. Decisions interpreting and applying the legislation or custom were to be appraised as good or bad and were not to be deemed binding in future cases, even those with indistinguishable facts. The civil law, after all, being the principles and rules declared expressly by the representatives of the people (legislation) or implicitly by the people themselves through their repeated actions (custom), nothing judges or scholars could say could change it one iota. Some Loyola law professors understood that. Some, however, used case collections as the best and latest expression of the law and paid relatively little attention to the legislation itself. In courses taught by the latter I did less well than in those taught by professors who had a better appreciation of codified law and the proper role of the judiciary in relation to it.

Toward the end of my second semester at Loyola I allowed my Anglo-American courses, and those civil law courses being taught by the
case method, to be neglected a bit in order to participate in an appellate moot trial sponsored by the Saint Thomas More Law Society. The question involved the proper interpretation of the Civil Code’s articles on offer and acceptance. It proved to be a challenge for me. The articles, introduced in the Civil Code of 1825, did not seem to have readily identifiable textual or substantive sources and made little sense to those schooled in the more familiar Anglo-American law. My fellow student advocate and I did reach and propose an interpretation that seemed reasonable and tenable, but we lost the case. The judges—Paul M. Hebert, formerly Dean at Loyola and then Professor of Law and Dean of Administration at LSU, and Professors Antonio E. Papale and Leon Sarpy, as I remember, nevertheless seemed impressed enough with our efforts to urge us to continue to research the question.

I alone was able to continue the research. It took all my time during the summer of 1937, but it was successful. I was able to discover that the scheme of the articles did have precedent in the Prussian Landrecht of 1751. I wrote a paper explaining it all in law review comment form, but did not attempt to have it published. The only law review in Louisiana at that time was the Tulane Law Review and, assuming that law reviews published only the writings of students at their sponsoring institutions, I did not submit the comment to its editors.

Of course, I did give a copy to Professor Dainow, who, spending the summer elsewhere, nevertheless had been interested enough in the project to correspond with me about it. Then, when Professor Dainow moved to the LSU Law School and was given charge of establishing the Louisiana Law Review, he asked my consent to publish it in Volume I, Issue 1, of the Review. That was in the fall of 1938, when I was yet a student of Loyola. The comment became the basis of instruction on offer and acceptance under the Louisiana Civil Code in all Louisiana law schools and remained so until the publication of Professor Saúl
Litvinoff’s *Treatise on Obligations*. It was the basis, too, of my becoming a friend of Professor Mitchell Franklin of the Tulane Law School.

My second year at the Loyola Law School was very eventful for me. In spite of my continuing neglect of Anglo-American law studies in favor of those in Louisiana civil law, in the spring of 1938, at the end of the first semester, my third in law school, I was informed by Dean James Thomas Connor, in his office and in the presence of other faculty members, that the faculty considered my ability to study and do research in codified law, and my ability to express my findings orally and in writing, to be such that, were I to pursue graduate studies elsewhere, it would be their intention to offer me a position on the Loyola faculty. You can imagine my astonishment. I had not ever thought of teaching. But I was pleased, both with the trust and confidence placed in me and with the prospective life itself. I assured Dean Connor and the others of my interest.

Later in the spring of 1938 it became clear that Professors Dainow and McMahon would join Dean Hebert at the LSU Law School. Dean Frederick Beutel had resigned the LSU deanship and Dean Hebert had assumed the position. I was informed that the Loyola faculty had communicated with Dean Hebert and the LSU faculty with a view to having the LSU Law School institute a Doctor of Civil Law (D.C.L.) program for which I would be the first candidate.

At about the same time, in April 1938, the then not-quite finished new LSU Law School building on Highland Road, to be named *Leche Hall* after Louisiana’s Governor Richard Leche, was to be dedicated. Dean Roscoe Pound of the Harvard Law School gave the dedicatory address, speaking on *The Influence of the Civil Law in America*. Pound stood in the portico at the front of the building, between the two central columns, and I stood in the sun with the rest of the audience on the broad steps before and below him, straining to
hear, for there was no amplification. For me it was a notable occasion. Pound’s address was published in the fall of 1938 in Volume I of the Louisiana Law Review at page one.

In May 1938 Professor Dainow informed me he was moving to Baton Rouge in June, that a Louisiana State Law Institute was being created, that he had agreed to prepare a Compiled Edition of the Louisiana Civil Codes under Institute auspices, and that he wished me to join him for the summer at the LSU Law School as a research assistant for the project. I did so. Professor Dainow on the first day asked me to prepare a suggested format and it was accepted. Working full time that summer and part time while in my third year at Loyola, I completed the preparation of the Preliminary Title and Books I and II of the Civil Code for the Compiled Edition. Other research assistants, including Carlos Lazarus, later a member of the LSU law faculty, James Bugea, later a member of the Loyola law faculty, Margaret Smith Zengel, a Tulane graduate, and several others did the work on the long Book III of the Civil Code. The entire work was published in 1940 and 1942 as Volume 3, Books 1 and 2, of the Louisiana Legal Archives.

[Perhaps it would be well to record here the financial aid given the Compiled Edition project by the LSU Athletic Department. I had been hired as of June 1938 to be a research assistant for the Louisiana State Law Institute, but the Institute did not have legal existence or a budget until later that summer. My first month’s salary was paid with a Louisiana State University check marked “From the Athletic Fund.”]

The summer of 1938 at LSU turned out to be for me much more than a summer job as a research assistant. I had more contact with faculty members than I had expected, socially as well as professionally, was included in some discussions about the formation of the Louisiana Law Review, and was invited to attend the banquet celebrating its inauguration, even though I was yet a student at Loyola. No doubt that
invitation was extended to me because my comment on offer and acceptance under the Louisiana Civil Code was being published in Volume I, No. 1.

At the end of the summer of 1938 I returned to New Orleans and completed my third year at Loyola. On the whole it was uneventful academically. A pleasant experience was having a course in Louisiana successions taught by Mr. Arthur Peters, a very old practitioner, who simply analyzed the Civil Code articles, interpreting one with the others, and only occasionally citing a good or bad decision to read if we wished. He was able to cover the entire subject matter with ease in the allotted time and the students could believe they had learned the essentials well.

On the other hand, my class in taxation proved absolutely meaningless to me. It was taught by then young Professor Vernon Miller, a man of sterling character, but one who had taken too seriously the realism of Karl Llewellyn, under whom he had studied at Columbia, and Jerome Frank. He never voiced an opinion on any question of law, always stating that the law in any instance would be what the judge would say it was and that that would depend not only on the legislation (if any) and previous decisions, but on the judge’s disposition that day, his digestion, his restful or sleepless night, and so on ad infinitum. When the exam time came I knew no tax law. The only thing I could do was imitate the professor. So I began every answer with “It all depends” or something similar and wildly imagined all kinds of factors that might influence a judge’s judgment. The result? My examination answers were posted on the bulletin board with a note from Professor Miller urging other students to imitate the style. Professor Miller, after some years at Loyola, went on to become dean of the law school at the Catholic University in Washington, D.C.
I returned to the LSU Law School in June 1939 as a research assistant for the Louisiana State Institute, this time to prepare an index to the Compiled Edition of the Louisiana Civil Codes. The two other research assistants on the project were Carlos Lazarus and James Bugea.

Before arriving at LSU I had been informed by Dean Hebert and Professor Dainow that the members of the LSU Board of Supervisors had been polled and had agreed to institute the Doctor of Civil Law degree at their next regular meeting in August 1939. But in July 1939 LSU University President James Monroe Smith took flight to Canada in the attempt to avoid arrest and prosecution for having pledged University securities to secure a private loan to buy commodity (some say whiskey) futures. The Southern Association of Colleges and Secondary Schools, the University’s accrediting agency of the time, immediately put LSU on academic probation and forbade the authorization of new degree programs. As a result I was not able to register for the Doctor of Civil Law program and was forced to register for the already established Master of Civil Law (M.C.L.) degree. My program of study, settled at the Law School before President Smith’s departure, remained the same, except for a substitution of a mere thesis in the place of the more demanding D.C.L. dissertation. The M.C.L. was awarded to me in June 1940. I believe I was the first person to receive it.

During the year of M.C.L. studies I enrolled in only one formal course, that in Jurisprudence, given by Professor Thomas Cowan, who emphasized the social mission of law. Then I conducted two research studies, one in the Conflict of Laws and one in the law of Acquisitive Prescription under the Louisiana Civil Code, both supervised by Professor Dainow. Acquisitive Prescription became my thesis topic, but the Conflict of Laws research was much more interesting to me and my paper on Characterization as an Approach to the Conflict of Laws was
published in 1940, as a comment, in Volume III of the Louisiana Law Review.

During my year of graduate work at LSU, Loyola orally firmed up its offer to me of an Assistant Professorship on my being awarded the M.C.L. Loyola, of course, had been informed early on that I would not be awarded the D.C.L. because of the Southern Association’s refusal to allow LSU to institute the degree; but, knowing that, the Loyola law faculty, the Jesuit Law School Regent, and the then President of Loyola University had all agreed to the proposal. My contract was to be year to year at the starting honorarium of $2500. That was not a bad figure. New attorneys with LL.B. degrees were being given only $900 per year in the practice and one with a Tulane LL.M. was being offered $1800 by a large law firm. I looked forward to beginning my teaching career.

In April 1940, however, Father Percy Roy, S.J. became President of Loyola University. He refused to honor the commitment to pay $2500 for the academic year to one without a Doctorate, offered me $1800, and asked me to notify him of my decision within a week. I told Father Roy I would consider his offer, but probably would not accept it.

Professors Dainow and McMahon and Dean Hebert, all former Loyola faculty members, were astonished the Loyola administration would not abide by the original agreement, and so were Dean Connor and other members of the Loyola faculty. Professor McMahon then told his former law partner, Frank S. Normann of the New Orleans firm of Normann and Rouchell, of the affair and Normann and Rouchell then immediately offered me a position as an associate of the firm with a guarantee of $2500 for the first year. I accepted it and notified Father Roy and Dean Connor.

No sooner had my decision reached Dean Connor and the Loyola law faculty than they appealed to the Loyola Board of Trustees, who agreed that Loyola should stand by its commitment to me. Dean
Connor, accompanied by Professors Antonio Papale and Leon Sarpy, then called on me at the Maison Française at LSU, where I was residing, and urged me to ask Normann and Rouchell to release me so that I might accept the Loyola offer. This, of course, I refused to do, for then I would have been going back on my word. Besides, during the preceding week I had come to believe that possibly the events had been providential and that the practice was the place for me. I went to Normann and Rouchell determined to be a good practitioner.

Within six months, however, I became certain the practice was not for me and so notified Normann and Rouchell. My relationship with both Frank Normann and Harold Rouchell had been very good and remained so even after I notified them of my decision to apply for graduate studies with a view to entering the teaching profession. I learned much from them and my experiences while with them and I did believe my prospects with them to be good, but I just did not like dealing with clients.

Once more Professor Dainow came to my aid. He recommended that I apply to the University of Michigan Law School for admission to their S.J.D. (Scienciae Juris Doctor) program in Comparative Law, to study under Professor John P. Dawson, and for one of their newly inaugurated W. W. Cook scholarships. I have no doubt that it was through Professor Dainow’s persuasion that Michigan accepted me for graduate studies and awarded me a Cook scholarship in spite of my poor record in Anglo-American Law at Loyola.

On my way to Ann Arbor by Greyhound bus I had a stay of a few hours in Chicago. I decided to visit the Northwestern University Law School where Professor Dainow had studied and where Professor Wesley Newcomb Hohfeld of Analytical Jurisprudence fame, and Professor John Henry Wigmore, the maker of modern evidence law, had taught. Walking through the building, I saw Professor Wigmore, already
retired, sitting in his office. I introduced myself and we spoke for an hour, he showing much interest in my proposed study at Michigan and in my ideas on the Conflict of Laws. Perhaps I should add that, had it not been for Professor Wigmore’s most highly rational approach in his *Student Textbook* on Evidence, I would not have passed the course at Loyola. As presented, it had bored me no end, even though evidence is logic, and logic fascinates me.

My graduate committee at Michigan was composed of Professor Dawson, chairman, and Professors Edgar Durfee and Burke Shartel. From the beginning it had been clear that I would be doing research under Professor Dawson and soon, because of his own interest in the subject, it was decided that my research would be in the law of unjust enrichment in French, German, and Anglo-American law. Of course it was to be expected he would be chairman of my committee. Professor Durfee no doubt was named a member because of his expertise in the Anglo-American law of Restitution. Possibly Professor Shartel was named a member of my committee because it was believed that someone with my scholastic philosophy background should be exposed to behaviorist thought.

All graduate students—we were ten, as I remember—were required to enroll in Professor Dawson’s Seminar in Comparative Law and Professor Shartel’s Seminar in Jurisprudence. Dawson’s Comparative Law was much easier for me than it was for my fellow graduate students, for none of them had ever studied any legal system other than the Anglo-American. But I gained very much from the seminar, for Professor Dawson’s insights into Medieval and Modern Civil Law were truly remarkable. On the other hand, Professor Shartel’s Jurisprudence Seminar, being restricted to Dewey-type behaviorism, offered me nothing substantive, for he rejected both metaphysics and revelation as sources of criteria for order in men’s lives and thus denied the possibility of an ontologically based moral order to serve as the
criterion for the legal order. Practically every session of the seminar turned into a debate between Professor Shartel and me. My fellow students often were more spectators than participants. Although I never looked forward with pleasure to a Shartel seminar session, the experience was good for me, forcing me to test my philosophical and religious convictions at every moment.

The research on unjust enrichment was tedious and boring, not because of the subject, but because of the method of reporting demanded by Professor Dawson. A comparison of principles and rules and their application was of secondary concern to him. He was interested primarily in a comparison of results reached under similar fact situations in the different systems, regardless of the legal bases assigned. The similarity or dissimilarity of principle, institution, and rule were unimportant to him except to the extent one or the other proved a “better” way of reaching the solution. It is true, for example, that a lawyer with a fact situation that he would resolve under “contract” rules in his own system might find his best remedy in “tort” in another system and so would be well advised not to restrict his research in the other system to remedies under “contract.” Similarly, a situation calling for results under the German rules on unjust enrichment would not have been resolvable in the same way under the French Code Civil of 1804, for that Code did not have rules on unjust enrichment, and unjust enrichment situations were being resolved in France through a deliberate mis-application of the rules of la gestion d’affaires (negotiorum gestio). Similarly, the “fact-indexing” of legal solutions undoubtedly is a useful preliminary in efforts toward law reform and unification of laws. But, perhaps because I always abhorred the “word index” approach to legal research, the reading of innumerable decisions in different legal systems based on similar facts to tabulate results and index them on a fact situation basis seemed to me contrary to my conviction that law should be expressed in terms of legislation announcing abstract principles and rules to be applied to concrete
situations. Of course, to an Anglo-American realist jurisprude, as was Professor Dawson, fact-orientation came most naturally.

Much more pleasant and educationally enriching for me at Michigan were my informal, extra-curricular, associations with Professors Ernst Rabel and Hessel Yntema.

Professor Rabel, once professor of Roman Law in Munich and later in Berlin, and Director of the Kaiser Wilhelm (now Max Planck) Institute for Foreign and Comparative Law there, had come to the United States to escape Hitler’s wrath. Under American Bar Association auspices he settled first at the University of Chicago Law School to attempt a new Restatement of the American Conflict of Laws. Finding that task impossible, he moved to the University of Michigan Law School as a Research Associate and began writing his four-volume *The Conflict of Laws: A Comparative Study*. On my first day at Michigan I noticed the name Ernst Rabel on the door of the study next to mine. This excited me greatly, for I had reported very favorably on his work in my comment on *Characterization in the Conflict of Laws*, written during my graduate year at LSU and published in Volume III of the Louisiana Law Review. I knocked on the door and, hearing “enter,” went in. Professor Rabel at first seemed annoyed at the interruption, but I introduced myself. Then he said “Your name is Pascal? Did you write this?” and held up the issue of the Louisiana Law Review that was lying on his desk, opened at my comment. When I said “yes” his demeanor changed and he asked me to sit down. In the course of the year we developed a close friendship and I read and discussed with him much of the manuscript for Volume 1 of his *Comparative Study*. I learned much from him.

Professor Hessel Yntema, born in Michigan of Dutch stock, also showed much interest in me. He had been a member of the non-teaching Jurisprudence faculty at Johns Hopkins University and came to Michigan on that experiment’s discontinuance. Legal philosophy, legal
theory, and the Conflict of Laws were his real interests. He was a man oblivious of time. Most of his work was done at night. Sometimes he would come to my study at 10 or 10:30 p.m. and remain there perhaps as late as 4 a.m. Our conversations, always about legal philosophy or the conflict of laws, were numerous. Once, when we had talked to 2 a.m., I mentioned I should like to excuse myself to get some sleep before my 8 a.m. seminar with Professor Shartel. He laughed loud and said, “Skip Shartel’s seminar. You’ll get more benefit from talking with me.” And that was that. We talked until 4 a.m. But I attended the seminar. Professor Yntema was a learned and capable man and I profited from the many sessions with him.

I might note here that it was while I was at Michigan that I first became aware of people who failed to distinguish between objective and subjective guilt. Professor Yntema’s chief research assistant was a well educated Dutch lawyer of Jewish origin. Yet she really did not understand how a person of objectively evil action or orientation might be innocent and guiltless subjectively because of unavoidable ignorance. I suppose the attitude is really Calvinist and Lutheran, both believing in the absolutely corrupt nature of human beings since the fall, the Calvinists in predestination from eternity, and the Lutherans in salvation by grace, regardless of one’s actions in life. I have never understood how anyone could so believe.

The Japanese attack on Pearl Harbor occurred December 7, 1941, while I was at Michigan. That did not alter my studies and I was able to complete the year, but not the dissertation. Michigan awarded all of us graduate students the LL.M. degree in June 1942.

Before leaving Michigan I received a letter from the Army Judge Advocate General’s Office offering me a commission as Captain in the JAG Reserve if I would agree to take charge of establishing a library on European Law in the JAG office in Washington. I responded immediately
in the affirmative, filling out (pro-forma, I was told) and enclosing the required application form. Dean Hebert had already taken charge of the JAG’s division on industrial contracts and I am certain it was he who had recommended me for the post.

Within a week, however, I received a message from the JAG saying it had had no notice of my being twenty-six years of age, that the position called for a captaincy, and that a captaincy could not be given one coming from civilian life unless he was thirty years of age. Next thing I knew the position was offered to Professor Dainow, again presumably on Dean Hebert’s suggestion, and he accepted it.

Having been awakened to the possibility of a commission from civilian life, I applied to the Air Corps JAG office, but learned that thirty was the minimal age there too. The Navy, Marine Corps, and Coast Guard JAG age requirement was twenty-eight. Being defeated in my attempt to obtain a commission for legal service, I applied for the Navy V-7 line officer training program, but was rejected because my eyes tested only 20/20 and 20/25, not 20/20 in both, and because my slight malocclusion might interfere with my chewing hard tack were I in a lifeboat after a disaster. Such were the peace-time regulations yet in force. Finally I applied to the Coast Guard for 120 day training leading to a commission as Ensign for general duty. The Coast Guard accepted me and I trained at the Coast Guard Academy for 90 days and then, for thirty days, aboard the USS Danmark, a square-rigged sailing ship “borrowed” from the Danes. We sailed up and down Long Island Sound, experiencing temperatures as low as 17 below zero Fahrenheit, but not climbing the rigging to furl and unfurl sail if the temperature dropped below 8° Fahrenheit.

On being commissioned, I and ten other new Ensigns volunteered for service in the Tenth Naval District, which included the entire Caribbean area, for we had been trained in anti-submarine
warfare and that was where the German submarines were at the time. On our arrival at District Headquarters in San Juan, Puerto Rico, the Coast Guard Chief of Staff showed much aggravation, for he did not know how to assign us to duty fighting submarines, the Coast Guard District having only one anti-submarine vessel and that being fully manned. Finally he gave us a half-hour to write one-page accounts of our pre-Coast Guard educations and careers. No sooner had he read my resumé, listing my three degrees in law, my familiarity with Civil Law, and my one year of practice, than he burst out of his office declaring I was being assigned as Assistant District Coast Guard Law Officer for the Tenth Naval District. The District Office needed a Legal Officer with knowledge of Civil Law, that prevailing in Puerto Rico and other places in the Caribbean. I was twenty-seven and a half at that moment, and only an Ensign, but being assigned to a post I could have had directly out of civilian life with the rank of full Lieutenant if only I had been twenty-eight. Then, six months later, the District Law Officer having been transferred, I became the District Law Officer. In spite of my new position and responsibilities, however, I was not promoted beyond the rank of Lieutenant, junior grade, because my commission was for general service and a general service officer, according to regulations, could not be promoted twice without sea-duty.

My duties in San Juan provided me with valuable learning experiences. Not only did I render legal opinions on U. S. vessel inspection and navigation laws and regulations and have supervision and review of all Coast Guard military justice in the Caribbean, but also I had charge of the wartime program of giving legal assistance to all Coast Guard personnel in the District. Our personnel came from most parts of the United States and its territories and many were stationed in places where English, French, Spanish, and Danish law still prevailed. They had legal problems at home and where stationed. The practice was replete with conflict-of-laws problems. In addition, occasionally I sat on
Admiralty boards, passing judgment on fault or negligence in instances of minor collisions and the like.

There were three events in my life in the Coast Guard in Puerto Rico that I must mention. The first was my only experience as a defense attorney in a criminal trial. A Coast Guard enlisted man was to be tried by a Navy court martial on the charge of assault of a Marine with a deadly weapon (a knife) with intent to kill. He asked me to defend him and I considered it my obligation to do so.

The accused and many Army, Navy and Coast Guard enlisted men had been in one of San Juan’s many establishments selling alcohol and providing facilities where the men might encounter women of doubtful virtue and take advantage of their ready availability for intimacy. When bells and sirens sounded the curfew hour, there was a great rush from the second floor to the first and someone stepped on the heel of a drunken Marine. The Marine, accusing a Coast Guardsman of inflicting the injury, began to exchange punches with him, all while surrounded by the Marine’s companions. After a moment the Marine was seen to be bleeding and a cry went up that he had been stabbed. At that Navy Police intervened. Several knives were found on the floor. The Navy Police arrested the Coast Guardsman they believed had fought with the Marine, an investigation followed, and the alleged attacker charged.

The report of the Navy investigation contained the testimony of five eye witnesses, all from the Navy or Marine Corps, each giving an account of events, but each describing the accused differently. For one he was tall, for another short and stocky; for one he was very dark, for another he was medium dark; for yet another he was light colored and freckled. Not believing that a Naval Court Martial would consider a stabbing justified as self-defense in a fist fight, I came to the conclusion that the best defense might lie in showing an insufficient identification
of the accused as the attacker. When the trial opened and the Court called for the accused to stand, five Coast Guardsmen stood up; each one corresponding in appearance to one of the five descriptions of the attacker to be found in the investigative report. To the astonished Court I explained that the only question in the trial was as to the identity of the attacker. Unless the witnesses, testifying out of the presence of each other, could select the real accused from the five, I argued, there could be no conviction. We argued the point daily for two weeks, after which the Court ruled against my defense, saying that the trial rules required the accused to present himself. I filed an exception to the ruling and the trial proceeded.

The Naval Judge Advocate serving as prosecutor was a Reserve Lieutenant Commander who had been the Attorney General of one of our Western States. During a recess in the proceedings I entered the head (Navy parlance for restroom) and, while in a stall, heard the prosecutor coaching the victim, showing him a knife, and telling him to make certain he could describe it when asked to do so, in order that the Court could believe his testimony when the knife was produced. Now, no one but the unidentified offender had ever seen the stabbing and no one else but he knew which of the knives found on the floor, if any of them, had been used. On cross-examination I called the attention of the court to the coaching I had heard in the head, and the victim’s testimony identifying the knife was stricken. But nothing was said to the prosecuting officer, at least in my presence.

Of course, once the Court forced the self-identification of the accused, the witnesses had no trouble in testifying he was the attacker. He was convicted. I appealed to the Judge Advocate General of the Navy in Washington. The response was to the effect that the irregularities of the trial were insufficient to warrant a reversal of the conviction, for undoubtedly he was guilty. I informed the convicted accused of his right to appeal to the U.S. District Court, but he declined the opportunity,
saying, for the first time, that he was guilty and would serve the prison sentence. I, of course, had never asked him if he was guilty, believing it my duty to defend him whether guilty or not, and obligated in that defense only to test the evidence produced against him and make certain all proceedings were according to law.

At the end of our conversation, the Coast Guardsman, to my astonishment, produced a spring-blade knife, said it was the weapon he had used, and gave it to me. I do not know how he managed to have it with him on that occasion. I accepted the knife and used it for years in fishing and bird hunting.

The second incident I wish to mention is my attempt to have an order of the Secretary of the Navy declared invalid. The Secretary's order forbade a person under the jurisdiction of the Navy in an overseas area to marry without the permission of the Commandant of the Naval District. A Coast Guardsman had been convicted of violating that order. The conviction came to me for review so that I could advise the Coast Guard Commandant for the 10th Naval District, my immediate superior, whether he should affirm the conviction or reverse it. My memorandum explained that the Secretary of the Navy had no authority under the U. S. Constitution or federal law applicable in U. S. territories to forbid marriage to one in the service. The Coast Guard Commandant was delighted and reversed the conviction, citing and attaching my memorandum. The Commandant and his fiancée, after all, were both in residence in Puerto Rico, trying (unsuccessfully) to get the Naval Commandant’s permission to marry. The case went up to the Commandant of the Coast Guard in Washington, however, and shortly afterwards he, while not seeking to reinstate the conviction, reprimanded the District Coast Guard Commandant for daring to question an order of the Secretary of the Navy, his superior officer, and added that nothing in the Constitution or federal legislation forbade the Secretary of the Navy to issue such an order. This was new law to me.
The third event was my first opportunity to teach a class in any subject. After a year in San Juan without sea duty, I and my similarly situated fellow Coast Guard officers were ordered to attend a refresher course in navigation at the Navy’s Tenth Naval District Headquarters. A retired Navy Captain was the instructor. During the first class, the Captain stated “this is Napier’s diagram. The Navy insists I teach you about it, but it doesn’t give you any information you can’t get elsewhere.” I thought it did and in open class I told the Captain what it offered that nothing else did. He was nice enough to agree I had taught him something. After class, he asked me into his office and we chatted about my previous study of navigation and piloting at the Coast Guard Academy. The next day I received orders to report to the Navy District Commandant to take over the class in navigation. It was the first, but not the last time in my life, that I became an expert by appointment. I assume the Navy Captain returned to a more leisurely life.

My father died unexpectedly in November 1944. Shortly thereafter I requested a transfer to New Orleans to be able to attend to family matters. I was entitled to a transfer to continental United States because I had spent more than two years in the Tenth Naval District, then considered a combat zone. In March, 1945, Coast Guard Headquarters in Washington honored my request in part by assigning me to Chicago to head the law office there. That legal office was concerned mainly with anti-German sabotage matters. When Germany surrendered I recommended that the office in Chicago be closed and its affairs transferred to the District Coast Guard Office in Cleveland, as in peacetime. Washington agreed and rewarded me—for I was yet a general officer in the Reserve, not one commissioned for legal duty—with a transfer to the USS Callaway “somewhere in the Pacific.” I arrived in San Francisco one day after the ship had come in for repairs, she having suffered extensive damage from a Kamikaze attack.
The Captain of the Callaway, one of a group of eight assault transports, designated me ship’s secretary, in which capacity I had possession of the war plans, prosecutor of offenses triable aboard, and officer in charge of the Combat Information Center. For a second time I became an expert by appointment. Fortunately those under my command were well-trained technicians. It was my introduction to Loran and Radar.

In late July the ship was loaded with 5500 men and small landing crafts to take them ashore at Osaka, the most heavily mined harbor in Japan. In that proposed landing I was to make certain eight of those landing crafts made round trips to shore and back, with men, supplies, and the wounded, until the operation was over or I had been incapacitated. Fortunately for us, on the day before we were to sail, the first atomic bomb was dropped on Hiroshima. The next day orders were changed to land as occupation forces. We sailed to Pearl Harbor on the first leg of our journey.

As we were entering the harbor, I received orders from Washington to report to the District Coast Guard Office in Honolulu to take charge of decommissioning CG shore stations in the Pacific. Within a week I ascertained the CG wished to decommission only those stations that had been established on formerly enemy-occupied territory. That meant I had nothing to do, for no legal obligations had been incurred by placing stations on land taken from the enemy. My report was accepted and I was told I could return to the States and inactive duty anytime I could get transportation, a time estimated to be six months. Fortunately for me, several days later a Naval transport docked in Pearl Harbor to load service personnel to take to San Francisco. The personnel officer aboard was none other than the former District Coast Guard Legal Officer in San Juan, under whom I had served in the first six months there. I was added to the ship’s officer complement and sailed to San Francisco in a stateroom. Within a few
hours of arriving in San Francisco I was on terminal leave. My thoughts turned to seeking a law faculty position.

From San Francisco I traveled to Ann Arbor to find out what the faculty there knew about the opportunities for would-be law teachers. Their recommendation was that I should contact Frederick Beutel, then new at Nebraska and attempting to rebuild the faculty. I did that and, being invited to do so, proceeded to Lincoln via day coach with open windows. The travel from Omaha to Lincoln was in morning daylight and I recall not seeing anything but waving corn until Lincoln appeared as if from nowhere. The offer from Dean Beutel was good and his faculty promised to be a stimulating one. He already had hired Felix Cohen and Thomas Cowan, both jurisprudes. But the prospect of living on an island in a sea of corn was not too appealing to me. I decided to contact Dean Hebert, if at all possible, before making a decision.

Dean Hebert had arrived at LSU on October fifteenth and I visited him on October sixteenth. Within twenty minutes, as I remember, in my presence, he had telephoned the few members of the LSU law faculty then in Baton Rouge and also the University President signifying his intention to hire me, and I became, without more ado, an Assistant Professor at the LSU Law School. Such was the authority of the Dean and President in those days. I have been a member of the LSU law faculty ever since, active until 1980, and Professor Emeritus since then, occupying an office, publishing occasionally, and enjoying many of the privileges of the professorial position without its obligations.

II. The Teaching Years, 1945-1980

My duties—and opportunities—as an active faculty member began November 1, 1945. The semester had begun in September and it was too late for me to take charge of a course. Accordingly, I was able to
devote all my time to preparing to teach the courses that would be my responsibility in the second semester, beginning in February.

When conversing with Dean Hebert on my first arriving at LSU, he had said the Conflict of Laws would be one of my permanent courses, it being his intention to relieve Professor Dainow of it so that he could concentrate more on Louisiana civil law. Nothing could have delighted me more, for I had a passionate interest in the subject and I knew it very well. Thus preparation to teach this course was easy and pleasurable. My second course, however, was to be in Louisiana Civil Procedure (called Code of Practice I, if I remember correctly). Preparation for this course was much more difficult for me, for even though the Louisiana Code of Practice was its base, at Loyola it had been taught by the case method and for that reason I had given minimal attention to it. One of the students in that class was Albert Tate, Jr., a recent Yale LL.B., who later, as a judge and as a justice on the Louisiana Supreme Court, became very well known for his knowledge of Louisiana civil procedure. Perhaps he learned something from me. More likely, he experienced the need for much private study.

At the end of that first semester of teaching (the second semester of 1945-46) I had two sets of four-hour all-essay exams to read and grade, all hand-written. I graded the exams by first reading all “question one” answers, etc., then by reading each exam as a whole. I compared the scores for each grading and, if there was a serious discrepancy, read the answer again. The process took me six weeks. Astonishing to me was the low level of grammar and exposition of all but a relatively few students. Obviously few had had the advantage of attending a good high school.

That second semester of 1945-46 was memorable in other ways. As that semester began Dean Hebert called for a re-examination and improvement of the curriculum. I was named a member of the
curriculum committee. One aim dictated by Dean Hebert was that to relieve Professor Harriet Daggett of some of her courses in Louisiana civil law subjects so that she could concentrate more on a book on Louisiana succession law. The consensus of the committee was that she should be relieved of the course in Louisiana Family Law. This much displeased Mrs. Daggett and, faculty meeting after faculty meeting, she asked for a delay in coming to a final vote on the matter. Finally, after many fruitless meetings, I moved the question. The motion passed. Mrs. Daggett seemed crushed. All others seemed relieved the episode was over. The committee and Dean Hebert agreed that Family Law should be taught by Professor Dainow.

Not long afterwards, Dean Hebert walked into my office saying that he had written Professor Dainow, who at the time was in Germany as one of the staff assisting U.S. Supreme Court Justice Robert Jackson in the prosecution of the Nuremburg War Trials, and had received an answer. Professor Dainow had indicated that unless he could retain the Conflict of Laws course he would resign from the faculty. Dean Hebert did not want to lose him and indicated he would have to ask me to teach Family Law instead of Conflicts. I agreed, but with disappointment, for I had envisioned a life teaching Conflicts as well as areas of Louisiana civil law.

Again I was to be an expert by appointment, for my only exposure to Family Law had been in my first year course at Loyola, ten years before. To make matters more difficult, Dean Hebert asked me to prepare a course-book on the subject, for Mrs. Daggett’s materials were out-dated. This burden came twenty-three days before I was to go to the University of Michigan for the summer. I prepared the book by writing instructions on 5 x 8 index cards and leaving it to a young secretary to find the materials, to excerpt them according to my instructions, and to cut stencils and mimeograph it all. She succeeded, with the assistance of other secretaries and library help, but I was told
later that she broke down in tears almost every day. This mimeographed book served its purpose, but I moved quickly to prepare better materials.

Some time later I began to realize that Mrs. Daggett might have come to view the curriculum discussions and the eventual assignment of Family Law to me as part of a plan on my part to capture the course. Nothing could be further from the truth. Yet, her contacts with me remained superficially cordial.

In teaching Family Law I had my first sample of student religious prejudice. One day I explained that the Louisiana law on marriage and separation from bed and board, as found in the Digest of 1808, was practically identical with that of the Spanish law in force in 1803, and that this Spanish law in turn was almost identical with that of the Canon Law of the Catholic Church at the time. After class fifteen or sixteen of the students complained to Dean Hebert that I was trying to teach them Catholicism!

The two months at Michigan in the summer of 1946 were spent trying to work up fervor for my dissertation under Professor Dawson, but I am afraid it was a loss of time. The war years had erased my memory of much I had done and my notes and LL.M. thesis were not sufficient to refresh it.

In 1947 I again was made an expert by appointment. Part of the curriculum reform of 1946 had been the institution of a course in Anglo-American real property. Someone, from Columbia University, I believe, had been hired to teach it. Twelve days before the class was to begin, this Professor X told Dean Hebert that his wife’s newly diagnosed illness forced him to change his plans. Dean Hebert then asked me to teach the course. I told him I had not studied Anglo-American real property, that I knew there was such a thing as a fee simple, but did not know what it was. Dean Hebert responded that he had full confidence in me and that
I had all of twelve days to master the subject. I taught the course eighteen times before giving it up. The three first efforts were hard on me and the students. I believe I was adequate to the task after that.

In 1948, being assigned to teach the course entitled Agency, I decided I would design the course around the Civil Code’s articles on mandate, introduce the students to differences in the French, German, and Italian Civil Codes, and compare and contrast it all with the treatment of the subject in Anglo-American law. I prepared a mimeographed course-book on the subject. Some of my influential colleagues must not have been sufficiently impressed with the effort, however, for, after two years, I believe, the faculty decision was to let Professor Milton Harrison teach a course in Agency with an ordinary Anglo-American course-book as its basis. Today, however, law faculties in Ontario, Quebec, and New Brunswick are, in many subjects, moving in the direction I had taken in the Agency course and my understanding is that the LSU law faculty now is considering doing the same.

In the fall of 1948 it was my task to prepare a problem for the final appellate trial in the Robert Lee Tullis Moot Court Competition. I prepared a “Widow of Malta” situation, as it is known in Conflict of Laws literature, one designed to make the participants realize that in the Conflict of Laws the characterization of the problem often must transcend the normal categories of the legal systems involved. Research in foreign law as well as in Louisiana and Anglo-American law was required. The briefs were simply superb. I sent copies of them to Professor Max Rheinstein in Chicago and to Professor Albert Ehrenzweig in Berkeley. Both found the briefs extraordinarily good. Each included them in his teaching materials. In 1949 Professor Rheinstein accepted an offer to come to LSU as a visiting professor teaching courses in the Conflict of Laws and Comparative Law. While here he told me he had accepted the invitation because he wanted to see the law school that could produce students capable of the research and effort required to
prepare such briefs. I should add that at that time it was forbidden to
moot court participants to get research or writing aid from anyone.

Professor Ernst Rabel came to the LSU Law School as a guest
lecturer in the spring of 1949. His five lectures on the Private Laws of
Western Civilization were well received and printed in the Louisiana Law
Review, Volume X, in 1949-1950. I was able to be with him often during
this time.

The summer of 1949 proved to be very beneficial for my
professional future. I had gone to the University of Michigan Law School
once more to attempt to complete my dissertation. Again the project
bored me no end. During the summer, however, Michigan organized
and hosted a conference on World Peace Through Law, I think it was
called, and it provided me with the opportunity to meet notable
acadmic figures from Europe. Among them were Avvocato Mario
Matteucci, Secretary-General of the International Institute for the
Unification of Private Law (UNIDROIT), domiciled in Rome, Professor
Henri Battifol of the University of Paris, and Professor Ronald Graveson
of Kings’ College, University of London, the latter two extremely well
known doctrinaires of the Conflict of Laws. All three of them and I had
meals together daily for the three weeks of the conference and of
course other contacts. At the end of the conference Matteucci invited
me to attend the First International Congress on the Unification of
Private Law to be held in Rome and to be sponsored by his Institute,
and to be his house guest for as long as I wished. I accepted the
invitation.

In the fall of 1949, Professor Max Rheinstein organized and
chaired, at the University of Chicago Law School, a conference on Family
Law to which fifty persons from the United States, Canada, Latin
America, and Western and Eastern Europe were invited. I was one of
those from the United States. My knowledge of French stood me in
good stead at the conference, for its official languages were English and French. Not only was I able to participate in either language, but I was called upon to translate into French or English what the translators for the Russian participants had put into English or French. It was common opinion that the Russians understood and spoke English very well, but insisted on the translations so as to give them more time to consider what they wished to say next. Then, too, just before lunch on the final day, Professor Rheinstein asked me to prepare and deliver a summary of the talks and observations at the conference. I had less than three hours to recall the papers and discussions of several days, but I was able to give a creditable account of two hours duration. On my completing the summary, Professor Jan Limpens of Brussels, chairman of the last session, exclaimed “Quelle formation vous avez du avoir!” Once more I was glad to have had rigorous training by the Jesuits in memory, analysis, criticism, and exposition. I could not do a similar thing today.

In the early summer of 1950 Marie Elina Cherbonnier, known more familiarly as “Doucette” Cherbonnier, and I became engaged to marry. I proceeded, nevertheless, to go to Italy, France, and England for the summer as I had planned. In Rome I was a house guest of the Mario Matteuccis and attended the First International Congress on the Unification of Private Law. Being in the Matteucci home at this time enabled me to meet many Italian and other European academicians who came to pay respects to Matteucci in the days before and after the Congress.

While attending the Congress I made some remarks on the manner of integrating private trusts in civil law legislation that, for whatever reason, seemed to please a number of persons who heard them, including Professor Max Rheinstein and Professor Tullio Ascarelli, the latter of whom held the chairs in Comparative Law in Ferrara and Sao Paulo. Professor Ascarelli shortly afterwards sent me in Baton Rouge several of his books and later an occasional article. No doubt
Professor Ascarelli was the most famous Italian comparatist at that time. Another experience at the Congress was being elected to serve, and serving, as chairman of the session on the Unification of Oriental Canon Law, a project in which Pope Pius XII was very interested. This was in the Aula Magna of the “Angelicum,” the Dominican Pontifical University, situated on the Via Panisperna, directly opposite the Villa Aldobrandini, the home of UNIDROIT. Presiding at some event held in the Angelicum was pleasing to me, for it was there that the famous Garrigou-Lagrange delivered his lectures on philosophy. Finally, I should like to say that the Holy Father delivered a lecture to us at the Vatican on the Unification of Law. After the lecture, the Holy Father walked among us and spoke to each of us individually, using the language of the delegate if he knew it, and most often he did.

On leaving Rome I went to Paris for two months, being a tourist largely, but also visiting often a first cousin of my father, who lived in Neuilly, and her husband and family. Among the things I remember of those visits was the excitement of one of her grandsons, then ten years of age, when telling me that he was going to begin studying Latin the next year and that he hoped he would be able soon to converse in Latin with his father and uncle. Colonel John H. Tucker, jr., and his wife were spending the summer in Paris and I saw them occasionally.

After Paris, I went to London to attend the Fourth International Congress of Comparative Law. One of my memorable experiences there was meeting Dean Roscoe Pound of Harvard while we were registering at Gray’s Inn and then conversing with him as we walked to Lincoln’s Inn for the first session. It was also my pleasure to see again Professor Ronald Graveson of King’s College and to have lunch with him at the Empire Club.

Doucette and I were married in Gretna, Louisiana, on February 3, 1951, the coldest day there in recorded history. There were a few
days left before the beginning of the second semester and we had planned a very short honeymoon. Shortly before the wedding, however, I received a telephone call from Professor Max Rheinstein, acting on behalf of his dean, Professor Edward Levi, inviting me to come to the University of Chicago Law School as Visiting Assistant Professor for the spring quarter. Dean Hebert agreed to a leave without pay and I accepted. I was to teach the course in Private Trusts. Professor George Gleason Bogert had retired and a replacement had been hired, but at the last minute had indicated he could not report until the fall quarter. Professor Rheinstein knew I had had very little exposure to the law of trusts, but emphasized his confidence in my ability. Perhaps my few words at the UNIDROIT Congress in Rome in the previous summer were more meaningful to him than I had thought.

The University of Chicago Law School was indeed a challenge, but I managed. While there, in late March or April, I believe, I received two important letters on the same day. One was from the Fulbright Office in Washington, saying I would be invited by the *Istituto Italiano di Studi Legislativi* at the University of Rome to give a year of lectures on the Private Law of the United States and that the Fulbright Office would finance me if I accepted. The other was from Professor Salvatore Galgano, Director of the Institute, making the invitation provided I agreed to lecture in Italian. I replied accepting the invitation, indicating I knew no Italian at the moment, but would learn the language and deliver my lectures in it. Professor Galgano accepted that. Professor Max Rheinstein had recommended me on Professor Galgano’s request that he suggest someone for the position.

After finishing the quarter at Chicago, Doucette and I returned to Baton Rouge for the summer, where I taught in the summer school and began to study Italian. I enrolled in the Berlitz School then in New Orleans for two four-hour tutoring sessions per week for ten weeks, doing so on the GI Bill. My tutor was a twenty-one year old man who
had migrated from Rome less than a year before. In September we proceeded to go to Italy by Italian steamer and I was able to practice Italian on it for more days than expected, for we got caught in a hurricane and were thirteen days at sea.

Once in Rome and settled in our apartment—the second floor of a fine villino in the Via Guattani, off the Via Nomentana, not far from Mussolini’s Villa Torlonia, which we located with the aid of the very helpful Fulbright Office in Rome. We called on Professor Galgano. Then, within two weeks we were off to the Università per Stranieri in Perugia, to study Italian for a month, all while being housed, wined, and dined at the very pleasing Albergo La Rosetta at Fulbright expense. That being completed, we returned to Rome and I began writing lectures in Italian. It was not until spring that I was comfortable lecturing extemporaneously.

During this time I received an invitation from Professor Fillipo Vassali, Dean of the Facoltà di Giurisprudenza, and lunched with him and eight of his faculty members at the Casa Valadier, in the Borghese Gardens, at the top of the Pincian Hill. He was a splendid host.

My lectures were to begin in December. I was to have about fifty students. Unknown to me, however, until I received a copy of the invitation that had been sent out by Professor Galgano, I was to give a formal “Inaugural Lecture.” Even then I did not realize what the size or composition of the audience might be. As it turned out, the lecture was in the Aula Magna with over four hundred in attendance, among them the Magnificent Rector of the University of Rome, the Praeside (Dean) of the Facoltà di Giurisprudenza, the American Ambassador, Fulbright personnel, and professors from many of the Italian law faculties, each of whom introduced himself after the lecture and gave me one of his books or other writings. Of course Doucette was presented a bouquet. After that, however, my lectures were in a small lecture room just
accommodating the students enrolled in the course. The only fanfare then was being preceded to the lecture room by a bedele striking the marble floor with his staff. The students were extremely polite, standing at attention as I entered and until I asked them to be seated, even if I had begun the lecture before doing so. And they never laughed at any mistake in my spoken Italian, or ever would be on my right if we walked anywhere together. They were most anxious to learn. They did not skip my lectures very often, and occasionally eight or ten walked to my home with me to continue a discussion while on the way. Fortunately Rome’s sidewalks are wide.

I must mention one of the students in that class, Giuseppe Bisconti. He was twenty years of age at the time and somewhat ashamed to admit that until then he had managed to learn only five modern languages well—his Italian and French, Spanish, German, and English. His accent and intonation in each of them was impeccable. He slept only four hours each night, exercised twice each week in a gymnasium, and every second Sunday engaged in mountain climbing. He spent the rest of his time studying.

In 1955 Bisconti came to the LSU Law School. By that time he had mastered Portuguese and Russian. Here he established an enviable record and graduated with an LL.M. The next year he attended the University of Michigan Law School. Then he returned to Italy to become the Assistant of Professor Ascarelli, who had just become Professor of Comparative Law and Director of the Institute of Comparative Law at Rome. Within two years, however, Professor Ascarelli died and was replaced by Professor Gino Gorla, who let Bisconti go to appoint one of his former students as his assistant. Bisconti then decided to abandon his hope for an academic career and enter the practice. He became one of Italy’s most esteemed international practitioners. A few years ago he was President of the International Bar Association, engaging in, among other things, many human rights activities in Africa. He has offices in
Rome, Milan, and New York and serves on the Board of the Southwestern Legal Foundation. LSU has not given him sufficient recognition.

The year 1951-52 in Rome proved very enjoyable for us. With a live-in tutofare (a maid who does everything) Doucette could live as a Roman lady. In the previous year I had been elected a corresponding member of UNIDROIT and on my arrival I was given use of a most elaborate office in the Villa Aldobrandini, the home of UNIDROIT—marble floor, red damask walls, painted vaulted ceiling, empire furniture. I worked there daily on my lectures and profited from its very fine library and contact with its capable personnel. The only disadvantage was the total lack of heat even on the coldest days. I found myself wearing an overcoat, wool scarf, and felt hat as long as no one else was there. Home was a little better, heated from 9 a.m. to 5 p.m., except when the communist janitor, who at first did not approve of our living there because we were Americans, would let the coal run out without notifying us.

Our social life was very good, primarily because of our association with Avvocato Mario Matteucci and his wife, and with Mircea Moscuno, a member of the UNIDROIT Institute staff, once Romania’s Ambassador to the Vatican, and his wife, who remained permanently in Rome after the Soviet domination of their country. To indicate the multi-language character of the social events we sometimes attended, I will say that one evening at the Moscuno’s home I heard a guest ask “what language are we speaking tonight?”

Shortly after our arrival in Rome UNIDROIT held its annual meeting and it was the occasion for renewing some acquaintances I had made in 1950, notably that of Professor René David of the University of Paris, Director of the Institute of Comparative Law there, and formerly, in his younger days, Assistant Secretary of UNIDROIT for legislative
jurisdictions using French or English. Later in the year he invited me to give a lecture at his Institute and I did so. Knowing that French students were not as polite as Italian students or as forgiving of mistakes in their language by foreigners, I had prepared my lecture meticulously and intended to read it. When I approached the lectern with the manuscript, however, Professor David reached over and grabbed it, saying, in French, “Pascal, you don’t need this. You speak French like a Frenchman.” But, speaking French after speaking only Italian for seven months, on three occasions I used an Italian word instead of the French. The students laughed each time. No Italian would have done so. After the lecture Doucette and I had lunch at the house of Professor David and his wife, herself a well known historian of Scots law. During the same week we also had lunch with Professor Henri Battifol, of Conflict of Laws fame, whom I had come to know well in Ann Arbor in 1949, and Mme. Battifol and their children, in their home.

After Paris Doucette and I visited London for a week, as tourists. One highpoint was being given a grand tour of the Middle Temple by an elderly barrister, bowler on head, and cane in hand, of whom we had asked directions on Fleet Street, and the Librarian of the Temple. Another was meeting a young barrister on a train going to Oxford, he with top hat in hand to attend a wedding, and his acting as guide for us all day at the University.

Also in the spring of 1952, I was invited to lecture on Characterization in the Conflict of Laws at the University of Pavia. Professor Rodolfo DeNova of Pavia, well known in the field, extended the invitation to me after reading my comment on the subject in Volume III of the Louisiana Law Review. The lecture was held in the amphitheater used by the physicist Volta when he was at Pavia. It was well attended.
Ludovico Bentivoglio, a young Italian avvocato of good family who had a degree from Yale and who was a collaborator at UNIDROIT, had wanted Doucette and me to be his guests at his home in Pavia. Having the impression he was destitute and not wanting to put him to any expense, we had declined the invitation. When we visited at his home for tea, however, we saw how palatial it was and realized we had been mistaken about his financial resources.

Also in the spring of 1952, I was invited by the Bar Association in Naples to give a lecture there. Doucette and I were extremely well received and the lecture was well attended.

Shortly before I returned to Baton Rouge I received notice that I had been promoted to Associate Professor with tenure. By that time I had taught classes for five years at LSU, for one quarter at Chicago, and for one year in Rome. Perhaps the fact I had been invited to lecture both in Chicago and in Rome without my having sought either invitation and the fact some of my Rome lectures were being published in book form by the Institute for Legislative Studies (under the title Diritto Privato Statunitense) contributed to my promotion.

The principal event of 1952-53, in terms of my personal satisfaction, however, was the faculty’s agreeing to modify the curriculum, in accordance with my suggestion, by instituting two new compulsory courses for the first year. In the first semester the course entitled Institutions of Law introduced the students to the broad outlines of the historical development of the Roman and Anglo-American families of legal systems and to the principal substantive civil law institutions of each. This course was my privilege and my responsibility. In the second semester the students were exposed to lectures in Jurisprudence given by Professor Eric Voegelin of the Government Department at LSU. In the institutions part of my course (roughly the latter two-thirds) the substantive institutions of the Roman
family of legal systems were studied by examining those of the Louisiana Civil Code and comparing and contrasting them, where fruitful, with those in other modern civil codes of Roman, or primarily Roman, character, notably those of France, Spain, Italy, and Germany. The Anglo-American law part of the course covered the Common Law Writs and their extensions, the growth of Equity, the hardening of law and equity with the rise of the English Parliament, and the emphasis on substantive rules and the lessening of procedural concerns with the advent of fact pleading. Professor Voegelin’s course was a survey of the historical record of man’s awareness of the ontological sources of order for humans and, therefore, of the ontological criteria for law, together with the manner in which these criteria for order could be given specification in legal principle and rule while respecting the knowledge and culture of the people and the material, economic, and environmental conditions in which they lived.

Under the above program, therefore, the students first were introduced to the history and structure of the fundamental institutions of the substantive civil law portions of the Roman and Anglo-American derived legal systems and then afforded the opportunity to become aware of the necessity and basis of a moral foundation for law if it is to be respected as the plan of order for the common good. I do not believe there was a better first year law program in the United States. Both Voegelin and I were satisfied of that. I do believe my Institutions course was quite adequate, but it could not be compared to Voegelin’s in depth and breadth. His immense erudition and understanding had been made evident in his Walgreen Lectures at the University of Chicago in 1950, published in 1951 as The New Science of Politics.

But the program soon came to an end. The Institutions course was offered five times, in the fall, from 1953 through 1957. Voegelin’s course was offered only four times. It was not offered in spring 1958 because in February of that year Voegelin left LSU to accept three
positions at the University of Munich: Professor of History, Professor Political Science, and Director of the Institute of Political Science. Immediately after his departure the faculty voted to shift both courses to the third year as electives, a decision that in a practical sense effected their elimination. It is my belief this action merely reflected what the faculty would have done even if Voegelin had not left LSU. It is true there had been some discontent among the students. Some did not like courses they thought to be too far removed from everyday “usable” law. Some did not appreciate that Voegelin’s course was mainly by lectures and outlines distributed by him. And my classes required the students to use the library too much, my then not having the time to prepare course-book materials in those pre-word processor (and even pre-magna-typewriter) days. Besides, as I have been led to believe, some of my “enlightened,” skeptical, and, agnostic colleagues seemed to find the courses “too Catholic,” even though I had little opportunity to stress religious or theological matters in my course and Voegelin was a Lutheran. Perhaps a significant factor was that a son of one of my faculty colleagues had not received a satisfactory grade in my course. The first year program was returned to a more prosaic plan, leaving the students with no foundation for study. But that pleased those members of the faculty who believed each student should make his own analysis, synthesis, and evaluation of the mass of material thrown at him. Confusion was good for the student, too many thought.

Yet about four years later, as I remember, there was a movement to create two new courses for the first year, one an Introduction to the Louisiana Civil Code and the other an Introduction to Common Law. The faculty spent considerable time detailing the content of each course. Even after that the decision to adopt or reject these courses was delayed because of the opposition, for unstated reasons, of certain senior members of the faculty. Then, finally, one of them, he whose son had not done well in my course, moved the adoption of the proposed courses provided I, Robert Pascal, would not teach either. The
motion passed. *Introduction to the Civil Code* became a regular part of the program, but in time it was re-named *Louisiana Civil Law System*. The *Introduction to Common Law* was taught for the first time by a visiting professor who ignored the faculty outline and used a course book on *introduction to the study of law* that stressed case-briefing—a matter I consider a high-school type exercise. It was not an introduction to the Common Law. In later years Professor Hector Currie taught the course.

Now back to 1953. Besides immersing myself in the *Institutions of Law* course, I turned my attention to private trusts. I had taught trusts law in Chicago in the spring of 1951, before going to Rome, and now there was much interest in the Anglo-American institution on the part of bankers, who wished to create more trust business, and among those attorneys representing wealthy clients wishing to imitate their Anglo-American neighbors in the estate planning and tax avoidance possibilities of the trust as found in Anglo-American jurisdictions. Thus, I prepared and published in 1953, in volume XIII of the *Louisiana Law Review*, an article entitled *Some ABC's about Trusts and Us*, not taking sides on the issues involved, but seeking to point out the advantages and disadvantages of trusts, their consistency and inconsistency with fundamental principles of good order evident in the Louisiana Civil Code, and suggesting that we should consider well what we should do. The article was well received generally, even by my Anglo-American colleagues. It was the first of my writings which I consider institutional studies.

In the mid 1950’s the Louisiana State Law Institute began to revise the State’s law on trusts. Progress was slow. Sometime in 1959 Dean Paul M. Hebert and John H. Tucker, jr., President of the Louisiana State Law Institute, approached me together and asked me to accept a position as *Consultant (to the Institute) on Trusts*. In that position I was to sit with the Reporter and his four-member Advisory Committee,
advising and helping them in every way I could, but I was not to have a vote. The purpose of this restriction, I believe, was to avoid embarrassing the Reporter and his Advisory Committee. Obviously, however, Hebert and Tucker had not been pleased with their work.

My principal efforts were to try to get the Reporter and his committee to accept two recommendations: to define the trust in terms compatible with our civil law—which meant avoiding the Anglo-American definition, one explainable only in terms of Anglo-American legal history—and to give the beneficiary of age and sound mind, or the legal representative of an incompetent beneficiary, the power to modify or terminate the trust, possibly subject to judicial authorization. This is the rule in England, the origin of the trust. Both of my efforts failed. Some members of the Institute’s Council—the body with final power—allegedly were fearful of the first proposal because they thought it might prejudice the tax advantages of the trust, even though the U. S. Internal Revenue Service saw no such danger. Others thought using the Anglo-American definition would make it easier for out-of-state attorneys to understand our law and give our attorneys and judges the advantage of being able to use Anglo-American treatises and literature. Most members of the Council objected to the second proposal because, under the existing U. S. tax legislation, the trust income would be taxed to the beneficiary rather than to the trust itself and—even more importantly for many—they wished to enable trust settlors to control the trust assets and income after the establishment of the trust and indeed beyond their deaths. My position, of course, was that no one with an economic benefit should be free of tax thereon simply because it was in trust and, secondly, that it was an insult to human dignity to permit one person to transfer an asset to another capable person and deny him the right to control it, for whatever reason.

Some Council members told me privately that they had agreed with my proposals, but had not voted for them because they
represented banks or other clients who wanted them to vote against my proposals. I am afraid this happens often enough on the Institute Council. Although the Institute was created to provide a body of persons more informed than most legislators and less likely to be as corrupt as some often are, the effort has failed. It is a sad commentary on the legal profession and, especially, those academics who collaborate with the Institute Council’s bad decisions for personal advantage.

Because I could not in conscience collaborate with the Institute in the preparation of a trust law that denied the beneficiary the right to modify or terminate the trust, I resigned my position as Consultant and explained my thoughts on trust law reform in an article entitled Of Trusts, Human Dignity, Legal Science, and Taxes, published in 1963 in Volume XXIII of the Louisiana Law Review. John Tucker, President of the Institute, criticized me severely, publicly calling me a traitor to the Institute, he and many members of the Council believing firmly that one who collaborates with the Institute and fails to agree with its decisions nevertheless must support them as his own. This is nonsense for anyone with responsibility to the public, and most emphatically academicians, who must always profess only what they believe to be true so that the public may have confidence in their teachings.

When the Louisiana State Legislature convened in 1964 to consider the Law Institute’s proposed new Trust Code, I sent every representative and senator a copy of my article. It accomplished nothing.

The years between 1952 and 1963, between my return from Rome and my departure for Rome once more—of which I shall say more later—were filled with a variety of events I wish to record. The first thing I must mention is my promotion to full professor in 1955, in spite of the majority of the faculty’s disapproval of the Institutions and Jurisprudence first year program.
Some of the faculty, however, must have continued to be dissatisfied with my tendency to evaluate the law’s fitness for its purpose in the various courses I taught. One day, sometime after my promotion to full professor, a faculty member came to my office, claiming to have been appointed spokesman for several unidentified others, to tell me “things would go better for me” if I were to “stop preaching Catholicism so much.” This puzzled me, for I did not recall any recent event or incident which might have prompted the faculty members involved to take this action. I do not recall my response, if any I gave, but I did not let the event change anything I was doing.

On reflection, however, I have come to wonder whether the “warning” might not have been prompted by my conduct of a seminar in Soviet law. I offered the seminar in response to a request of a number of students who had been exposed to me and to Voegelin in their first year and who had come to develop considerable interest in the fundamental principles of different legal systems. I was, once more, an expert by appointment, for my readings in Soviet law had been meager up to that time. The American course books on Soviet Law were not satisfactory, in my opinion. There were, however, in English translation, several manuals on Soviet Law by Soviet authors and the very, very perceptive and splendidly organized Le Droit Soviétique by Professor René David. Although few of the students knew French well enough to read it profitably, I was able to make it the backbone of my presentations. I stressed the consistency of Soviet law with atheistic communist thought, its utter inconsistency with a Christian view of man, and the similarity of many Soviet governmental and procedural institutions to those of the Roman Catholic Church. Could this have excited my anti-Catholic colleagues? I do not know.

If not all of my colleagues at the LSU Law School were pleased with the thrust of my courses, however, some good word about them must have gotten to the Loyola Law School. Be that as it may, in March
1958, I was invited to participate in a Round Table Conference on Natural Law sponsored by the St. Thomas More Society there. My presentation was too long, but in spite of that it seems to have made a good impression. Then the Philosophy Club at Loyola invited me, in December 1959, to present a paper on Soviet Law. I emphasized, as I had in the Soviet Law Seminar at LSU, the logic of the Soviet organization, principles, and rules if one accepted their materialistic premises and noted the similarity in many instances between the formal structure of Soviet law and that of the Roman Catholic Canon Law. I have never sought publication of this lecture, even though I consider it one of my better institutional studies.

By 1960, certainly, I was offering a Seminar in Comparative Law and this required me to compare the theoretical foundations of different legal systems. In addition, for some years I had been a member of The Monograph Club, a group of professors from varied disciplines at LSU, where philosophy and sometimes even theology were discussed. I felt the need to read many works on the Catholic Church’s Index of Forbidden Books and to be able to make reading assignments in them to my students. Accordingly, I wrote to Archbishop Joseph Francis Rummel, Archbishop of New Orleans, whose jurisdiction at the time included Baton Rouge, for permission to read anything myself and to be able to have my students read such works as I thought they should for my courses. Archbishop Rummel was most understanding and forwarded my letter to Rome. In about two months the New Orleans Chancery received a document from The Holy Office of the Inquisition (now renamed The Congregation for the Doctrine of the Faith) signed by Cardinal Ottavianni, its Prefect, giving me permission to read anything “not professedly obscene” and giving me the faculty to dispense my students from the obligations of the Index with regard to readings assigned by me in my courses. Monsignor Charles Plauché, Chancellor of the Archdiocese of New Orleans, telephoned me the news, but refused to deliver the document to me because it gave me more faculties than
the Archbishop himself had. He did not even want to show the
document to the Archbishop. He did not want to offend him. He assured
me, however, that I could consider myself free to read anything, but
asked me not to inform my students of my faculty to dispense them
from obligations of the Index or to use it. He suggested I simply assign
them the readings I thought required for the course and let them seek-dispensation if they raised the issue.

Twice in later years I asked Monsignor Plauché to deliver the
document to me. The first time he ignored my request. The second
request was made after the Catholic Diocese of Baton Rouge had been
carved out of the Archdiocese of New Orleans. Monsignor Plauché then
told me he had sent the whole file to the Diocese of Baton Rouge. A
thorough search has been made in Baton Rouge by the Vicar General of
the Diocese, but the document has not been found. I assume Chancellor
Plauché destroyed it. Such was the personal regard he had for the
feelings of Archbishop Rummel, who, I suspect, would not have been
offended at all. All of this ceased to matter by 1965, for Vatican Council
II abolished the Index of Forbidden Books.

In the late 1950’s Dean Blythe Stason of the University of
Michigan Law School paid a visit to the LSU Law School. I had some time
to visit with him privately. He knew I had not completed my dissertation
for the S. J. D. and suggested I do so. I explained my distaste for the
project as conceived in 1940 and he agreed I might change the proposal
to one more to my liking. This would be simple he thought, because
John P. Dawson had moved to Harvard, Edgar Durfee had died, and
Burke Shartel had retired. Shortly afterwards he appointed a new
committee consisting of William Burnett Harvey, a professor of
jurisprudence, comparative law, and restitution, unknown personally to
me, chairman, and Hessel Yntema, the only other member.
I proposed as topic of the dissertation the incompleteness of a legal system without the institution of negotiorum gestio. That was approved. When I submitted the first two chapters, however, Professor Harvey wrote to me that my attempt to critique a legal system on the basis of philosophy, as I had done in those chapters, was impossible because, according to him, the philosophy of a legal system was determinable and discoverable only from an examination of the law itself. If I persisted in my plan, he emphasized, I could not expect approval of the dissertation. I do not know whether he was simply mistaking legal theory for legal philosophy, for the certain can be discovered only from the law itself, or whether he simply denied the validity of philosophical endeavor. Certainly those who deny the validity of philosophical thought often use the term legal philosophy in place of legal theory. I suspect he was a logical positivist. Whatever the case, I decided not to pursue the dissertation. I did not want to participate in a Shartel-like seminar by correspondence. The S. J. D. would not give me more knowledge and I was already a full professor with tenure with interest in other things.

Shortly thereafter Professor Max Rheinstein invited me to contribute an article to be included in a book of essays in honor of Professor Ernst Rabel. I accepted and used some of my dissertation research to produce an article on Unsolicited Action on behalf of Others in American and English Law in which I asserted the philosophical incompleteness of those laws because of their failure to recognize negotiorum gestio. But, the article finished, I wrote Rheinstein that I would not be making a contribution after all. I did not say why. Actually I had not thought my article sufficiently good to honor a person of the accomplishment of Ernst Rabel. Later I was very sorry I had done this, both because the book of essays contained items I thought much inferior to mine in concept and in depth and because, as I learned later from Rheinstein, it had pained Rabel very much. Later on, in 1960, on reevaluating the article, I let it be published in a volume in honor of
Filippo Vassalli, the Praeside (Dean) of the Facoltà di Giurisprudenza in Rome at the time of my 1951-52 visit there. Unfortunately, some years later I did not accept an invitation to contribute an article to a volume of essays in honor of Edgar Bodenheimer, whose treatise I had used in teaching jurisprudence and with whom I had had some personal contact and correspondence. Again, I had not believed myself sufficiently capable to do him proper honor. I regret that decision too.

In 1958 Professor Walter Richardson, Boyd Professor of History at LSU and a prominent member of the South-Central Renaissance Conference, in charge of the Conference’s 1959 program to take place at the University of Houston, asked me to prepare a paper for the Conference on The Changes in the Roles of Common Law, Equity, and Statute in the Stuart Century. I did so and delivered it. It was published in 1960 in Volume 46 of the Rice Institute Pamphlet. I learned much English legal history preparing the paper and became more convinced than ever that one cannot understand well the formal composition of Anglo-American Law unless he knows its historical development in some fair detail.

It was sometime in the early 1960’s that I began teaching Jurisprudence, or the Philosophy of Law. I was not sufficiently learned to teach the course once taught by Voegelin and gave a survey of thought ancient and medieval and modern, using Clarence Morris’ collection of excerpts in his The Great Legal Philosophers. Armed with Cardinal Ottavianni’s dispensation from the obligations of the Index, I was able to read more deeply in the originals. My effort in the course was always to have the students ascertain the premises of the various philosophers and to appraise them. In those days the classes were rather well attended, for the curriculum required all students to select one or more courses of more cultural value than the bred-and-butter kind. Jurisprudence was one of them.
In 1962 I received an invitation to return to Rome for the academic year 1963-64. Professor Gino Gorla, the successor to Professor Tullio Ascarelli as Professor of Comparative Law and Director of the Institute of Comparative Law at the University of Rome, wished to organize a series of seminars for Continental graduates in law who wished to prepare themselves for work in Anglo-American law. Once more, the Fulbright Office would finance my year abroad. Of course I accepted. Doucette was more than anxious to be a lady again and it was an opportunity to provide a taste of another culture for our children, Robert, Jr. and Alice, then 9 and 7 years of age.

The main group offering the seminars consisted of Professor Gorla himself, Professor Giovanni Pugliese of Rome, a Romanist, Consigliere Giovanni Longo of the Italian Corte di Cassasione (or Supreme Court), who later became its chief justice, Professor John Henry Merryman of Stanford University, and me. For shorter periods Professor Barry Nicholas of Oxford and a professor from South Africa also participated. My responsibility was for three areas: the “mixed-law” situation in Louisiana; the law of agency in English and American law, comparing and contrasting it with the law under the French, German, and Italian Civil Codes; and the basics of English and American property law, both real and personal, including future interests. Professor Merryman led the group in a study of the Anglo-American trust. Professors Gorla and Pugliese concentrated on the law of sales. All professors knew English well and Professor Gorla wanted to have all discussions in English for the benefit of the students, all of whom knew some English. Thus the sessions always began in English, but most often they ended in Italian.

The Italian students were good, but they astonished me by their ignorance of the French and German civil codes, for the Italian Civil Code of 1807 was a copy of the French and their Civil Code of 1942 combined French and German elements. Their legal education had been
limited to current Italian law as if it were the only law ever to have existed anywhere. Until after World War II the American law schools were similarly parochial, except in Louisiana, where we have stressed both the Romanist and the Anglo-American traditions.

UNIDROIT had again afforded me the fine office in the Villa Aldobrandini and, of course, we frequently saw the Matteuccis, the Moscunos, and, from time to time, other friends, lay and clerical. During the course of the year I was invited to give, and gave, lectures in Bari and Pavia. In Pavia, to do me honor, I was lodged in a cell in the College of the Guelphs.

In the spring of 1964 I participated in the sessions of the International Faculty of Comparative Law in Strasbourg, France, giving lectures in French on representation in French and American law and on Anglo-American property law and trusts, subjects covered in the Rome Seminars. I also repeated those lectures, in French, at the Mexico City sessions of the IFCA in the summer of 1965.

The Second Vatican Council was in session during 1963-64 and this led to once-in-a-lifetime experiences for Doucette and me. We occupied an apartment in the Via Archimede, across the street from the hotel where lived clerics attending the Council, including our then bishop, Robert E. Tracy, and our future bishop, the then Monsignor Stanley J. Ott. Bishop Tracy would drop over to see us occasionally, sometimes seeking our opinions on “interventions” he was to make at the Council. He was a very progressive, forward-looking bishop, dedicated to the proposition that the church was for the people, not the people for the church, and much given to freedom of religion and conscience. Through Bishop Tracy we met Archbishop Hallinan of Atlanta, his very good friend, who was similarly oriented in church matters. Monsignor (later Bishop) Ott, we knew very well, Doucette having known him from his birth and Doucette and I having represented
his parents at his ordination to the priesthood in Rome in 1951. All three of the above bishops are dead now, each a great loss to the people of the church and all who knew them.

Another once-in-a-lifetime experience awaited Doucette and me in connection with Vatican Council II. We were present in St. Peter’s for the promulgation of the Council’s first two Constitutions, on the Liturgy and Communications. We were seated not seventy feet from His Holiness, Paul VI—close in St. Peter’s.

In the fall of 1964 Professor Giovanni Pugliese, whom I had met in Rome the year before, came to the LSU Law School as a visiting professor and offered a course of lectures in Roman Law. His wife accompanied him. They were dynamic people.

Shortly after returning from Rome in 1964, I became interested in inquiring more into the Spanish origins of Louisiana’s civil law. As far back as 1941, Mitchell Franklin of the Tulane law faculty had made known that a copy of A Digest of the Civil Laws now in force in the Territory of Orleans (1808), with source notes on interleaves believed attributable to Louis Moreau Lislet, one of the Digest’s two redactors, was in the possession of the de la Vergne family in New Orleans. Subsequently, in 1958, both Professor Franklin and Professor Joseph Dainow wrote of these notes in separate items in the Tulane Law Review. Then, quite by accident, while researching in the Louisiana Room of the Hill Memorial Library at LSU in late 1964 or early 1965, I discovered another copy of the Digest of 1808, with notes in the margins apparently referring to the sources of its articles and seemingly very much in the hand of Moreau Lislet as found in his olographic will. I reported this in Volume 36 of the Louisiana Law Review in December 1965.

The discovery of the LSU volume increased my interest in pursuing further the sources of the Digest of 1808. Then, fortunately, I
met Louis Victor de la Vergne, then a Tulane law student attending the LSU Law School summer session and one of three brothers who owned the annotated interleaved copy of the Digest written about by Professors Franklin and Dainow. Through him I obtained permission to inspect the de la Vergne’s volume and to arrange for its reproduction by photographic process by the LSU and Tulane Law Schools. The republication was made in 1968 under the title: A Reprint of Moreau Lislet’s Copy of A Digest of the Civil Laws now in force in the Territory of Orleans (1808). (The de la Vergne Volume). Today it is usually referred to simply as “The de la Vergne Volume.” In my opinion, this “de la Vergne Volume” and the LSU copy of the Digest of 1808 constitute definite proof that the redactors of the Digest of 1808 considered their work a digest of the Spanish Civil Law in force in the Territory of Orleans in that year.

In the summer of 1966 Doucette and I vacationed in Spain for ten days on our way to Uppsala, Sweden, for me to participate in the Seventh International Congress of Comparative Law. We visited Madrid, Cordova, Seville, Granada, and Toledo. In Seville, whose people and architecture reminded me much of New Orleans, I spent some hours in the Archives of the Indies, where the records of the Spanish era in Louisiana are preserved.

My particular reason for attending the Congress in Uppsala was to deliver a paper in the session on The Contribution of Natural Law Philosophy to Positive Law. I entitled my paper Natural Law and Respect for Law, arguing that Natural Law promoted the principle of cooperation among the agencies of the law in finding and specifying the law and emphasizing the moral obligation of every person to obey the law, factors without which the legal order suffers loss of respect and efficacy. My paper and others of the Congress were published in 1967 in the American Journal of Comparative Law.
The paper and my comments during the Natural Law session seemed to receive solid approval from Wolfgang Friedman, of the Columbia University Law School, Chairman of the session, and I found myself being asked by Professor Friedman to accept nomination for the chairmanship of the session at the next Congress, assuring me of my election if I accepted. I did accept, but later Professor Friedman asked me to permit my name to be withdrawn from nomination. He explained that a law professor at the University of Uppsala had complained that it was an insult to the Uppsala law faculty, the host institution, not to nominate one of their number for the post. I withdrew my name, of course. I do not recall another instance of such petty vanity. [About two years later Professor Friedman was stabbed to death on the front steps of the Cathedral of St. John the Divine in New York City. His death was a loss to legal scholarship].

On leaving Uppsala by plane, Doucette and I found ourselves seated next to a young professor from the University of Montreal. Before attending the Congress, he had spent a year in Russia and before that some time in Ethiopia. He was Jean Louis Baudouin, who later came to LSU several times as a visiting professor. He and his wife became good friends of ours. Later Professor Baudouin became Law Reform Commissioner for Canada and then a judge of the Quebec Court of Appeal (Quebec’s highest Court), where he sits now.

The late 60’s and 70’s were filled with many challenges of various kinds. One was teaching Jurisprudence to the students graduating in 1967. There were about sixty-five in the class. About twelve of them had studied in the LSU Philosophy Department, then staffers heavily, if not entirely, by logical positivists, people who denied the validity of metaphysical enterprise, reduced philosophy to its negation, and simply sought to posit “policies” that enabled them to build a theoretical structure to satisfy the urge for a semblance of order or to exercise power. They were good students, intent on understanding
what I had to say, but at first unwilling to admit to themselves that their positivist orientation was in error. They asked me to invite one of their former philosophy professors to come to our class to give his argument for positivism. I refused, believing they had been taught well by me and that the confrontation that might develop would not be good for anyone. Then, without informing me previously, the students arranged for the professor to give his presentation in the Appellate Moot Court Room (now Auditorium) of the Law School and asked me to attend. I agreed I would. Also unknown to me, the students had plastered posters in other parts of the University advertising the event as a debate between the professor and me.

On the day announced, students and others half filled the room. The professor made a short presentation amounting to an assertion of the impossibility of knowledge other than the emperical, the resulting impossibility of moral judgments, and therefore the need to posit propositions to provide order or seek objectives. That ended, he asked if there were any questions. Silence prevailed until eventually I arose. After a few questions which forced the professor to admit that his posited proposals for order or action had no other basis than his personal and essentially selfish premises, I sat down. The session ended. From that day forward none in the class ever mentioned logical positivism. More than that, some of the (formerly) positivist group began to take interest in sound philosophy and in religion, one even entering a seminary for a while. One of them became and remains a very close friend who, though he has long surpassed me in philosophical and religious learning, continues to terminate his letters to me with “your student.” Reward indeed.

In October of 1966 Dean Hebert circulated to the faculty his Development Memorandum No. 1 in which he called upon each member of the faculty to offer his comments and suggestions for improvement of the Law School’s curriculum and activities. Dean
Hebert’s memorandum, thirty-six pages long, gave proof of much thought about the content of the courses, the order in which they might be presented, the need to compare and contrast civil law and common law substance and method throughout, and the need to relate law to economics and the findings of social scientists. Excellent as it was, however, I thought the memorandum failed to address the problems caused by the faculty’s diversity of opinion on the possibility of knowledge of objective criteria for order in the lives of human beings. If such criteria do not exist, or if we cannot know what they are, then law is merely the medium through which individuals or groups exercise power over others for reasons ultimately, if not immediately, essentially selfish. American law faculties and curricula certainly reflected this malaise, this vice of the soul, and LSU’s was not exempt. Students were not being presented with the principles and rules of a legal order intended to maximize the common good of all. They were, on the contrary, being coached, largely in courses of their own choosing, in the rhetorical manipulation of law as “value-free” “legal materials,” without respect for law as an instrument of good order, and without any attempt to present the law as a whole. I, on the contrary, believed, and yet believe, that objective criteria for human order are knowable, that the specified legal order must attempt to honor them, and that the whole of the legal order, at least in its essentials, and its critique to the best of our ability, must be communicated to the students. Hence, I wrote an extensive memorandum detailing my conception of law, the role of the professor, and the content of a proper curriculum for a Louisiana law school at that time.

Few members of the faculty responded to Dean Hebert’s Development Memorandum No. I. A Development Memorandum No. 2, on civil law studies, attracted more responses. In the long run, however, nothing significant was done. The idea that faculty members form a collegiate body collectively responsible for discovery, preservation, and dissemination of knowledge of the whole field of law did not form a part
of the LSU law faculty’s thinking. Most acted as individuals, interested in their separate fields alone. Few were interested in the attempt to formulate and implement a sound, rounded, integrated program designed to have the student understand the legal order as a whole and his obligation as a professional to foster that legal order. Even today the curriculum continues to emphasize rhetoric. It remains basically a vocational training curriculum rather than one appropriate for university studies.

In 1967 it was decided that the entering first year students (the class of 1970) should be given an orientation program featuring single lectures on the character and study of the Civil Law and the Anglo-American (or Common) Law. I was to give the former, Professor Wex S. Malone the latter. I decided my subject could be made clearer by comparing, at every opportunity, the history, principles, and methodologies of the two systems. When I completed my presentation and Professor Malone rose to give his, he complained to me that I was a “spell binder.” Later he accused me of attempting to poison the minds of the students against the “Common Law.” In the years immediately following, Professor Malone repeated his 1967 presentation, but other Civil Law professors were asked to deliver that on the Civil Law. Today everyone may judge the merits or demerits of my presentation, for it was published in 1999, twenty-two years after its rendering, in Volume 60 of the Louisiana Law Review.

Some of the students of the class of 1970, whether because of or in spite of the 1967 orientation program, later proved to be very interested in the reasons underlying the law. It was my pleasure to have a number of them elect a seminar in the Conflict of Laws which I offered in 1969-70. A prerequisite to the seminar was the diligent previous private study of at least one of the then popular student texts (“Hornbooks”) on the subject. As a result, I could concentrate on the appraisal of various Conflict of Laws theories, principles, rules and
practices and not have to expound the essentials of what currently was passing for good Conflicts Law. Four of these students later became professors of law at LSU and elsewhere, though two later left academia for the practice. Many in the class have remained good friends.

In the period of 1968 through 1973 I was invited to present lecture courses in the Honors Program in the College of Arts and Sciences at LSU. In 1968-70 the topic was *Law in the 20th Century*. There I was able to present a survey of the formal structures of the Roman Law systems, the Anglo-American Law, and the Soviet Law, the philosophical bases of each, Conflict of Laws principles and their bases, the problem of social and economic communities without a common legal system (e.g., the European communities at that time), and the problem of holding persons accountable for actions licit under the positive law applicable to them, but contrary to sound morals (e.g., the Nuremberg War Trials). In 1971-73 the course was on *The Growth of Law and Legal Institutions* in the Roman and Anglo traditions. Both courses gave me much pleasure. I have always believed in the study of law as the instrument of good order, stripped of the “vocational training” aspect prominent in law schools, to be a proper part of a liberal education. Indeed, in 1933 Robert M. Hutchins, a Yale Law School graduate and then president of the University of Chicago, delivered an address to the annual meeting of the Association of American Law Schools in which he emphasized that university law faculties should concentrate on teaching the nature, function, and criteria of law as a cultural phenomenon and leave all vocational training to schools organized by and taught by practitioners. I am much of that mind.

The Louisiana Bar Association held its annual meeting in London in 1971. As part of the scheme to facilitate tax-free paid travel on the continent (or so I suspect) for those attending the London meeting, in July, 1971, the Institute of Continuing Legal Education at LSU sponsored a program in Rome on *Continental Law and American Law–Insights and*
Contrasts. Professors Pugh, Yiannopoulos, and I, and Judge John T. Hood, Jr., of Lake Charles, gave the principal talks. Among the “Discussants” were Professor Giovanni Pugliese of Rome, who had been visiting professor at LSU in 1965, Avvocato Giuseppe Bisconti of Rome, and Avocat Raymon Jeanclos of Paris, the latter two LL.M. recipients from LSU in 1956 and 1957. Avvocato Bisconti made himself the host of a sumptuous dinner for all faculty and program participants at the fabled Ristorante Ranieri in the heart of old Rome. It was my last visit to Rome.

Shortly after my return from Rome, in September 1971, the Tulane Law Review published a special issue dedicated completely to Professor Rodolfo Batiza’s article and supporting data entitled The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance. [What Professor Batiza called the Louisiana Civil Code of 1808 is more correctly entitled A Digest of the Civil Laws now in force in the Territory of Orleans, but many others do the same.] In his article Professor Batiza claimed that eighty-five per cent of the French language texts of the Digest had been derived from, or substantially influenced by, French law texts, and this much is true. But Professor Batiza mistakenly assumed that this usage of French law texts, in whole or in part, in writing the Digest amounted to an adoption of French law. In so assuming he failed to recognize that the redactors of the Digest had copied French law texts only where they expressed Spanish law equally well, or supplemented it, and modified or rejected them where they did not, all in conformity with the Legislature’s mandate to prepare a statement of the Spanish civil law in force in 1808. To bolster his position, Professor Batiza even denied the validity of the notes of Louis Moreau Lislet, one of the redactors of the Digest, listing the Spanish law sources of the Digest’s articles.

Being outraged over this distortion of legal history, I wrote a reply to Professor Batiza. The Tulane Law Review published it in April
1972, but sandwiched it between two articles vainly struggling to refute my contention, one by Tulane’s Dean Joseph Modeste Sweeney and the other by Professor Batiza.

To this day the Tulane law professors and their followers have never admitted publicly, if at all, Professor Batiza’s error. Indeed, in 1981 three Tulane law professors, Shael Herman, David Combe, and Thomas Carbonneau published a book entitled The Louisiana Civil Code: A Humanistic Appraisal, in which the Batiza view was accepted and in which it was contended that the Digest of 1808 represented an adoption of French Enlightenment thought. Then, in 1993, Professor Herman wrote, under Louisiana Bar Foundation auspices, a book incorporating the same views, The Louisiana Civil Code: A European Legacy for the United States. My review of Professor Herman’s book appears in the Louisiana Law Review, Vol 54, No. 3. I will leave it to future generations to judge the merits of the controversy.

After the Viet-Namese War, LSU, with State Department sponsorship, undertook the task of helping the Viet-Namese to reform their laws. A new civil code was drafted and I was one of those asked to appraise it before its adoption. Similarly, I was asked by the Quebec Civil Code Reform Commission to serve as a consultant to the Committee on the reform of Quebec matrimonial regimes law. During this time, Professor Paul-André Crépeau of McGill, who was Director of the Institute of Comparative Law at McGill and also head of the Quebec Civil Code Reform Commission, asked me whether I would be willing to consider an offer to join the law faculty at McGill. My response was negative. Though I did believe a position at McGill would offer better opportunities for work on an international level, I knew the climate was one neither I nor my family could adjust to easily and, besides, we would be too far from our relatives in Louisiana, many of whom were in advanced age. For the same reason, I declined an invitation to be interviewed for the deanship at North Dakota. It was always a pleasure,
however, to attend meetings in Canada. In all I made four trips to participate in meetings in Montreal, Ottawa, and St. Andrews in New Brunswick.

In 1971 I obtained the faculty’s permission to experiment teaching the basics of Louisiana matrimonial regimes, successions, and donations in one three-semester-hour course. I long have believed that all students should be exposed to all major branches of the law, both public and private, domestic and foreign. Having all courses in the traditional method results in the students being too much immersed in a limited number of subjects and having no information at all about others. By having the full range of subjects covered in their essentials and limiting deeper study to some areas to be chosen by the students according to their likings or prospects in the profession, we could produce more roundly prepared students. I believe the course was a success, my being able to cover all essentials of all three subjects and the students demonstrating their understanding of them all. But the course much displeased Professor Carlos Lazarus, who regularly had taught successions as a four hour course, which he rarely completed because he tried to review an annually increasing number of decisions. The faculty, however, agreed with Professor Lazarus and I did not offer my course again. Most of the faculty, I believe, placed more emphasis on legal rhetoric and “in depth” coverage of portions of subjects than they did on complete basic instruction.

Professor Joseph Dainow retired in 1973. This gave me the opportunity once more to make the conflict of law one of my regular courses. His retirement, moreover, meant that he no longer could be one of the two faculty representatives on the Council of the Louisiana State Law Institute. Dean Hebert was astonished I wanted the appointment, thinking my experience with the Institute when I served as Consultant on Trust Law would have discouraged me from serving on the Council. But the Institute was beginning to revise the Louisiana Civil
Code and I wanted to attempt to bring my ideas to the project. Not only did I become a member of the Council, but I was appointed a member of the Institute’s committee on Matrimonial Regimes Reform. The experiences as a member of each, the Committee and the Council, proved to be most disappointing and discouraging.

The Committee on Matrimonial Regimes Reform, in conformity with Institute practice, included academics and practitioners. Two of the practitioners, though prominent in their practices and in the Institute, had not had solid grounding in Louisiana civil law. One had studied at Harvard alone. The other had studied primarily at Yale, but also somewhat at a Louisiana law school. I thought they gave little evidence of basic familiarity with the Louisiana Civil Code. An example will suffice.

During the first meeting of the committee I had occasion to remark that “after all, each of several heirs is responsible for only his share of the obligations of the deceased at death.” This statement of rudimentary succession law brought forth immediate denial by the two practitioners, both contending that each heir was liable solidarily for (the whole of) the deceased's debts. Calling their attention to the articles in the chapter of the Civil Code on the payment of the debts of a succession produced such consternation that the Committee did not manage to return to its proper subject for almost four hours. Evidently they had never read the chapter and it may be that they had been guilty of malpractice. But other members of the Committee may have entertained the same misconception, for many remained silent on the issue. I had to wonder whether they understood matrimonial regimes law under the Code sufficiently well to be members of a committee charged with its reform.

Probably it is correct to say that the principal concerns of most members of the committee centered around two aspects of the community of gains as of that time: the position of the husband as “head and master” of the community of gains, which gave him sole
authority to administer its affairs and generally sole authority to encumber and alienate its assets, the wife’s consent being required in only specific legislatively provided instances; and the fact that whereas the wife’s creditors could reach only her separate assets for satisfaction, the husband’s creditors could reach both his separate assets and the community assets, rules that in effect treated the community of gains, until its dissolution, as part of the husband’s patrimony. No one could doubt that the feminist movement of the time, with its increasing feminine interest in emerging from the traditional career of a married woman as homemaker and child rearer and in entering upon careers outside the home and independently of her husband’s affairs, would dictate a reform in the two aspects of the community of gains mentioned above.

The feminist cry of the day, in every state with a community of gains, was for “equal management.” For me this was nonsense, for neither husband nor wife could be certain of the community assets he or she might control and the creditors of each would probably demand the consent of both husband and wife to every single credit transaction. One solution would be to abolish the community of gains, legislate a separation of assets and liabilities, and provide for an equalization of fortunes at the end of the marriage by matrimonial regime or succession law. A better solution in my mind was to keep the community of gains, recognize the right of each spouse to use any community asset, give each spouse control over the encumbrance and disposition of only those community assets acquired by him or her during marriage, restrict each spouses’ creditors to satisfaction from only those community assets acquired by that spouse and from his or her separate property, and, at the end of the marriage, combine all community assets and liabilities and partition them.

After two and one half years of wrangling in the original committee, in the Council of the Law Institute, in a second committee
appointed by the Council, and again in the Council, the Council approved a bill containing features essentially those I had proposed. The Council had come to realize that “equal management” was not feasible. The Louisiana Legislature’s House Committee on Civil Law and Procedure, however, rejected the Institute’s bill and asked the Institute to prepare one based on the “equal management” principle.

At the next meeting the Law Institute prepared to accede to the Legislature’s wishes. I suggested, argued, and moved that it not do so. The Institute had submitted its recommendation. As a body charged with submitting for enactment only such bills as it deems best for the common good, it should not act contrary to the conclusions it had reached after full study and debate. To do so would be to permit itself to become a mere legislative drafting bureau and to violate its statutory duty. My motion failed to pass. Perhaps the members of the Council feared a loss of appropriations if it refused the Legislature’s improper request. The matter being settled, I resigned from the Institute Council, not being willing to assist in drafting legislation I could not approve. Never thereafter did I participate in an Institute enterprise.

The bill finally approved by the Institute Council and enacted by the Legislature asserts a general rule of “equal management,” but the general rule is much restricted. The encumbrance and alienation of community immovables requires the act of both spouses. So do donations of value. Under the laws regulating banking operations, negotiable paper and assets represented by title, he or she whose name appears on the account, paper, or title alone may act. And furniture in the house may be sold by the spouse on the premises. But in one respect the “equal management” rule gives the wife power formerly enjoyed by the husband alone: that to borrow or purchase on credit, on one’s personal separate account or on the community’s account, without giving security, thus entitling the unpaid creditor to reach any
community asset for satisfaction. It is to be suspected that the rule has increased the incidence of divorce.

During the years of wrangling over matrimonial regimes reform, in the spring of 1975, Loyola invited me to give a one-semester course in the Louisiana Civil Code’s structure, principles, and institutions. This course delighted me. Students were not to be bothered with examinations and, of course, they were not to receive academic credit. The result was that only students truly interested in the Civil Code attended. Some Loyola faculty members attended and so did a few Tulane students and one of their faculty, Professor Alain Levasseur, who in 1977 joined the LSU law faculty.

My effort was to emphasize what the articles stated to be law and to note simply, without argument, what the jurisprudence and doctrine had said about it. In the course of doing so it became apparent to me that often the students, like those at LSU, had tended to seek the meaning of the Civil Code through jurisprudential and doctrinal opinion, rather than interpret the Code themselves and evaluate the jurisprudence and doctrine by their understanding of the legislation. There was an outstanding example. For years the judiciary had placed all heirs’ shares of a succession under administration if any one of them claimed benefit of inventory. There was, however, no basis for this in the legislation until the enactment of the Code of Civil Procedure in 1960. Before that time the only solution warranted by the legislation was to have a partition if one or more, but no all, of the heirs claimed benefit of inventory and then to subject to administration only the assets falling to those heirs who had claimed benefit of inventory. The class was astounded, but all recognized that the jurisprudential interpretations before 1960 and the Code of Civil Procedure’s provisions often unfairly operated to deprive those heirs, who wished to have in kind their shares of the specific assets left by the deceased, of the opportunity to have them, for the administrator could ignore those
heirs’ wishes. (In 1986, finally, legislation was enacted essentially returning to the scheme intended by the Civil Code. But the return to reason was not to last too long. Later legislation sponsored by the Louisiana State Law Institute seems to negate the legislation of 1986. Creditors’ ease of collecting and the simplification of succession practice for attorneys seem to have been given preference over an heir’s attachment to his share of the specific assets of the deceased.)

Two tragedies of 1977 were the deaths of dean Paul M. Hebert and Professor Joseph Dainow. To them both I owe my entry into law teaching and encouragement over the years. Professor Dainow had retired in 1973, but he had continued to attend faculty meetings and participate in meetings of the Law Institute Council (as a “senior member” of that body). Dean Hebert had not retired and died suddenly of a heart attack while arguing before the LSU Board of Supervisors for recognition of the Law School as a separate fiscal and administrative unit of the Louisiana State University system.

After the deaths of Hebert and Dainow I began to think of my own retirement. Although I was but sixty-two years of age, I realized that my energy level had begun to decrease and that I could not continue to put the same effort in teaching and writing that I had maintained through most of my years on the faculty. Fortunately for me and my family, however, I did not retire immediately, for by the time I retired in 1980, at age 65, LSU’s retirement plan had changed and I was able to claim both social security benefits and a retirement stipend from the Louisiana State Teachers Retirement program.

My last year of teaching, 1979-80, was a very satisfactory one for me. I had returned to teaching the first year course entitled Louisiana Civil Law System some years before and had acquired some recognition for it. Professors Alain Levasseur and Simeon Symeonides, who would teach the course in the fall of 1980, paid me a supreme
compliment. They suggested that I should teach all students entering the Law School in 1979, in two sections of roughly two hundred each, that each of them would attend all classes, and that they would prepare the examinations in the course and grade all papers. This was an offer I could not refuse. I enjoyed every class session and I believe that the students did so also. Returning alumni who were in those classes never fail to tell me they were in the course and how much they had appreciated the classes.

During the last class session, in the Law Auditorium, a “singing telegram” messenger burst into the room and sang his tune. That finished, he continued to stand there. On my suggesting that, having finished his song, he should leave, he exclaimed “Oh, there’s more.” At this point a belly-dancer entered the room. I quickly grabbed her arm, turned her around, and escorted her back through the door. Turning to the hushed and disappointed students, I reminded them I was conducting a class, not a spectacle, and proceeded with the class. After the class, a female student, a little older than most in the class, chided me for not letting the students “have their fun.” I replied to her that had I allowed the young belly-dancer to proceed she probably would have accused me of contributing to the degradation of women. She thought a moment and said “I believe you’re right.” From that moment she became very friendly.

A number of students from the Louisiana Civil Law System class enrolled in my class in Matrimonial Regimes in the first summer school session of 1980, the last class I was to teach before retirement. At the end of the class, the students presented me with a light blue and white tee shirt on which was superimposed the declaration, “I’m for pristine purity.” In the several years prior to retirement I frequently spoke of “the Civil Code in its pristine purity” (meaning before its contamination with poor amendments). No doubt this was the source of the words on the tee shirt, but I suspect the motivation for the shirt was my ejection
of the belly-dancer from the room a few months before. Another gift I received on that day was a hand-carved and hand-painted sculpture of a woodcock, the shooting of which had been and remains my favorite sport, done by a relative of the student who had chided me about ejecting the belly-dancer. These two gifts were the only ones I accepted from students in my thirty-five years of teaching. I believed these students had appreciated my efforts and had no thought of trying to influence my judgment in grading their papers.

In my last year as an active faculty member I was invited by the Tulane Law Review to submit an article to be included in an issue in tribute to Professor Mitchell Franklin, who had retired from the Tulane law faculty in 1967 and from the University of Buffalo Law School in 1974. My article, entitled The Sources of Civil Order according to the Louisiana Civil Code, was published in the commemorative issue, 54 Tulane Law Review No. 4, June 1980. I consider the article one of my better works. It was, at any rate, my swan song after a career of thirty-five years.

III. Retirement

It having been known for some time that I would retire from the active faculty at the end of June, 1980, the student editor of the Louisiana Law Review informed me the Review intended to dedicate an issue to me and include in it a short account of my career. That would have been welcomed by me except for the fact that the editor of the Review then asked me if I would “approve” of “Professor X” (who shall remain unidentified) to write the piece. Being afraid “Professor X” might be told I had been informed he would be asked and not wishing to put him in the position of being reluctant to refuse under the circumstances, I urged the editor not to do more than publish a picture
of me with a simple notation of my retirement. My wish was honored in the Fall 1980 issue of the Review.

At the time of my retirement I had hoped to do two things before I died. One was to write an exposition of the institutions and principles of the Louisiana Civil Code that would be meaningful to persons untrained in law, both those who were interested in the subject simply as a cultural phenomenon and those entering upon the study of law. The other was to compose a short monograph on the rational foundations for the delineation of the legislative and judicial jurisdictions among states or nations, a work by which the adequacy and fairness of existing “conflict of laws” rules might be judged. Neither intention was ever realized.

I had begun the Civil Code project early and had completed a number of chapters on the Code as enacted in 1870 and amended before 1960, the year until which the amendments had not been so destructive of the Code’s original design and so opposed to its underlying principles of good order. It was my plan to treat that as one part of the work and then, in a second, to discuss the amendments of 1960 and later. As time progressed, however, I realized that both the changes made in 1960, when so much of the Civil Code was modified and shifted to the new Code of Civil Procedure, and the revisions of the Civil Code by the Louisiana State Law Institute in the 1970’s and later, together with the new mode of publication with source notes, references to prior decisions, and “comments” on the intended meanings of the new texts, were such as would destroy any real hope for the preservation, much less the encouragement, of civilian methodology and sound principle in Louisiana. The Anglo-American legal methodology had triumphed over the Civilian. Under the circumstances, I lost all interest in any description and appraisal of the post-1960 Civil Code and realized that only antiquarians would read what I had prepared on the Code as it stood until 1960. It would have
little if any relevance for the present. I am neither an antiquarian nor a historian. I am interested in the present and the future. Thus I abandoned the project.

Two radical particular changes in legislation during the eighties and nineties demonstrated a significant movement away from the Spanish and Christian concepts, once so evident in our Civil Code, of the ontological community of mankind in general and of family solidarity in particular. The movement, of course, was toward the individualism of the post-industrial revolution Anglo-American law. The first change was the abolition of forced heirship, an institution which implicitly recognized property to be a family asset, rather than that of an individual alone, limiting one’s right to dispose of his assets gratuitously to persons not his descending or ascending heirs. Although the present law supposedly retains “forced heirship” in favor of first generation children under twenty-four years of age and certain incapacitated persons, it is not truly heirship, but a provision for lump sum alimony.

The second grave change, made possible largely by the abolition of forced heirship, is the extension of the power of the settlor of a trust to control who is to benefit from the assets placed in trust for possibly unlimited generations. With this change, begun in the Louisiana Trust Code of 1964 and augmented periodically, one may ignore his heirs and satisfy his hubris by controlling his assets long after his death, even if he cannot possibly foresee who will be his beneficiaries. Probably Louisiana law today exceeds that of any other jurisdiction in sanctioning this selfish pride. Money, or wealth, has become Louisiana’s golden calf. Ontologically based obligations among family members are ignored.

I do regret not having written my other planned monograph, on the philosophical bases of delineating the legislative and judicial jurisdictions of states and nations, before the Louisiana State Law Institute drafted its 1991 legislation on the subject, now added to the
Civil Code as its Book IV. Those articles reflect generally accepted American ideas on the subject, but they suffer from the general American positivistic attitude in law. Probably my ideas would not have prevailed, but I could have had the satisfaction of attempting to provide proper guidance.

There were, nevertheless, several bright spots for me in these twenty-one years since retirement. In May, 1982, the graduating class, all of whom had been enrolled as first year students in my fall 1979 offering of the course in the Louisiana Civil Law System, asked me to give the commencement address. I did so, most happily, but I am afraid they heard only what they had heard from me before: that they must be priests of good order, having always in mind that humans form a community under God and that it is their obligation to exercise their profession as attorneys, judges, or legislators in such manner as will preserve and augment the good of each and all.

In the summer of 1983, I was invited to address the Quebec Law Teachers, at their meeting in St. Andrews-on-the-Sea, New Brunswick, on “Louisiana’s Mixed Legal System.” Then, in 1987 or 1988, LSU Political Science Professor Ellis Sandoz, Director of the Eric Voegelin Institute at LSU, which he founded, asked me to edit Voegelin’s *The Nature of the Law* for inclusion in his in-progress republication in English of all of Voegelin’s works. The monograph had been written by Voegelin while teaching the course in Jurisprudence in the LSU Law School, but, because he left before its publication to assume positions at the University of Munich, it had never been published. I agreed to be an editor of the monograph only if Professor James Lee Babin, of LSU’s English Department, a philosopher, theologian, and literary giant who had studied all Voegelin’s works intensively, were to be co-editor with me. The volume, No. 27 of *The Voegelin Works* reprint, appeared in 1989.
Then, to my surprise and astonishment, in May, 1995 Loyola University in New Orleans conferred on me the degree of Doctor of Laws, *honoris causa*. I had always maintained close contact with the Loyola law faculty, some of whom were my former students at LSU. Yet I had never expected such recognition.

The last major event of my retirement was being asked to deliver the 1998 Tucker Lecture. The Tucker Lectures, annual affairs, celebrate John H. Tucker’s long involvement in Louisiana Civil Law study and reform and are sponsored by the Center of Civil Law Studies at the LSU Law School. I was quite astonished by the invitation, for over the years Colonel Tucker, as he was called, and I opposed each other in our views and recommendations. Nevertheless, I accepted the invitation and entitled my talk *Of the Civil Code and Us.* My effort was to give a summary of the changes made in the Civil Code’s format and underlying principles both before and after its reform or revision in recent years. I was extremely happy that the lecture hall was filled beyond capacity, that a number of those attending were from the Loyola and Tulane faculties, and that no one left before I had finished speaking. The lecture was published in the Fall 1998 issue of the *Louisiana Law Review*.

IV. SUMMATION

It is difficult for one to appraise accurately his overall success or failure in his chosen profession. Yet, reflecting on what I have written above, I am willing to make some observations.

First of all, I must acknowledge I have been more successful as a teacher than as a professor. I sought to expound law accurately and critically—the principal role of a teacher—and I believe that I did, but I have not succeeded in more professorial activities. Thus, I have not
succeeded in my attempts to improve the law school curriculum. Nor have I managed to encourage the bench and bar to be more faithful to civilian (codification) methodology. Nor have I been able to influence legislative changes for the common good. Nor have I left a major treatise on any subject.

Certain personal characteristics no doubt contributed to these failures. I have not been very tactful in presenting my ideas and in criticizing those of others. I tend to be literal, direct, and brutally frank. I have not been willing to compromise on matters of principle. Then, my firm convictions that truth is ascertainable, that both philosophy and revelation lead us to believe that humans exist ontologically as a community under God, and that this community is the basis of morality and law, enrage those who deny these truths and accordingly see both morality and law as non-morally obligatory social conventions under which all seek protection in the exercise of power for ultimately selfish reasons.

It is on my record as a teacher of law, then, that I must base what success I have had. I continue to believe I did teach effectively. Were I to have the opportunity to relive my life, I doubt that I would live it very differently.

V. Post Script 2001 - 2010

It would be inconceivable for me to allow the publication of my “Recollections” without acknowledging the intellectual stimulation and friendship offered to me in the years 2001-2010 by my colleagues Michael McAuley and Olivier Moréteau.

Michael McAuley, originally from Montreal, came to LSU in 2000. He is a man of remarkable classical education, culture, and
character; a true scholar, well-grounded in both Civil and Anglo-American law, with an ardent desire and ability to contribute to their appraisal and improvement. Unfortunately he is no longer at LSU. Academia is not always appreciative of genius.

Olivier Moréteau, formerly the Director of the *Institut de droit comparé Edouard Lambert* in Lyon, France, since 2005 occupies the Russell Long Chair and is also Director of the Center of Civil Law Studies at LSU. He too is grounded in the Civil and Anglo families of law. He is particularly concerned with the language of the law and its adequacy, now that so many different peoples with different tongues are being brought together under a single law. His store of knowledge is to be envied.

These two colleagues have taught me much and I believe they have learned something from me. They have given me life in my old age.
Punishment, Pardon, Parole

Louisiana is known to be a jurisdiction with little charity toward convicted persons. Instances of parole are few and pardons seldom given. The prevailing attitude is one of vengeance, the avoidance of which is one of the reasons for assigning arrest, trial, sentencing, and correction to public authority. I am not aware that this “letter to the editor” has had any effect on anyone.

In this time of high crime incidence the outcry—popular, political and official—is for long-term imprisonment, execution for serious offenses and victim participation in sentencing, parole and pardon. A spirit of vengeance prevails.

Little thought is given to effective correction and rehabilitation. Still less is given to charity and forgiveness. Almost no recognition is given to the share in the offender’s guilt that we “non-offenders” must bear by reason of our failure to practice the kind of justice and charity toward others, especially in matters of personal dignity, education and economic sufficiency, that is demanded of us as members of a community of mankind under God.

The moral duty of civil society to apprehend the criminal, to take measures reasonably calculated to correct and rehabilitate him, and to restrain him as long as he is a serious danger to others, is not to be doubted. But is civil society warranted in punishing anyone simply as retribution for his offense?

Punishment as retribution is as old as history itself. Its practice is universal even today. The notion usually alleged as its justification is that the injury, loss or damage occasioned by the offender must be balanced by injury, loss or damage to the offender himself. The Old Testament is full of this kind of reasoning, and in the New Testament Jesus, the Christ, assuming to Himself the sins of men of all times, suffers and dies to atone for them. Yet the message of Jesus is that we must not return violence for violence, but forgive “seventy times seven” and never seek vengeance. Even without this revelation, any other thought would be inconsistent with our having been created in the image of an all-loving, all-merciful and all-forgiving God.

Love and forgiveness being the supreme norms for human relations, imprisoning an offender without providing adequately for his correction and rehabilitation, or continuing his confinement after his rehabilitation, or executing him when imprisonment would suffice to protect others—a condition met easily in almost every society, as Pope John Paul II has noted—must be considered morally reprehensible.

In the same spirit of love and forgiveness, victims of crime must be shown compassion by society, helped to bear their material, spiritual and emotional losses and encouraged to become reconciled to those who have hurt them. But they may not be allowed to participate in sentencing, parole and pardon. Their suffering frequently tempts them to seek retributive punishment, even the death sentence, and to object to parole and pardon even though the offender has been rehabilitated.
and reasonably may not be considered a serious threat to the safety of anyone. Vengeance cannot be condoned.
Natural Law and Respect for Law*

The Sixth International Congress of Comparative Law, in 1966 in Uppsala, Sweden, had a section on the effect of Natural Law on modern legal systems. The following was my contribution. Wolfgang Friedman, chairman of the section, and other participants, particularly those from the Soviet dominated countries, thought it well done.

In the era of Christendom, natural law, whatever its variations in the minds of the philosophers, always denoted the law of God addressed to man as a free-willing creature and obligatory for him to the extent he could discover it through use of his intellectual faculties. Man used his intellect and judgment speculatively to ascertain the will or plan of God and practically to discover how he might conform to it by obedience and cooperation. It was an objective law, knowable with certainty in its immutable principles and capable of being specified or

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1 The reference here is primarily to the differences in the thought of Aquinas, Scotus, and Occam. Aquinas regarded the eternal law, of which natural law was a part, as God’s rational plan for the universe; Duns Scotus and William of Occam, on the other hand, stressed God’s will rather than His plan. Bodenheimer, Jurisprudence (2d ed.1962), has a short exposition at 26-29.

completed in time and place by human laws elaborating an order consistent with these principles. Under this thought the functions of legislator and judge were deemed to consist essentially of discovery and specification rather than of creation and prescription. With the advent of Humanism the emphasis began to shift from God the Creator to man the creature, and from the law of God to the rights of man. In the period of Enlightenment, natural law finally gave way to natural right. Human law, then, came to be looked upon as order self-imposed by men for the maximum preservation of their natural God-given rights, now solemnly declared to be inalienable and to consist of life, liberty and property, or the pursuit of happiness. Philosophical skepticism and positivism removed even natural right from the foundation of human law and left it standing on the doubtful bases of subjective and formal norms, history, determinism, and power. Now, finally, with the lesson taught if not learned that mere power cannot be regarded as the basis of law if we are to survive, the search is on again, and perhaps it is

3 This is explicit and implicit in St. Thomas. See id. II.l.Q.91,a.3; Q.94,aa.4,5; Q.95,aa.1,2; Q.57.
4 Locke and Rousseau are the obvious champions of this form of thought. The phrase “pursuit of happiness” is the felicitous substitute for “property” in Locke’s formula used in the American Declaration of Independence.
5 Hume’s insistence that only the empirically observable was reliable or relevant and that morals were emotional rather than rational at once deprived morals and law of objective basis. Kantian morals and law, having their foundation in a subjective norm, the categorical imperative, are in final analysis subjective. Positivism, relativism and pragmatism, all denying the validity or relevance of metaphysics, necessarily reject the notion of objective criteria.
6 Savigny, Burke, Maine, Hegel and Marx, for example, each in his way emphasized historical criteria for law.
7 The behaviorist philosophy, represented especially by Dewey, had profound effect through the Realist movement in the United States, though Realism as such did no more than stress the effect of extralegal factors on the legal process.
8 Besides being formal in its approach to law, positivism is in essence a philosophy of power. See, for example, Friedrich’s appraisal of the positivist position in his The Philosophy of Law in Historical Perspective 176, 177 (1957).
the effort toward consensus⁹ that is being substituted for the hope of the discovery of objective criteria.¹⁰

Thus, from Christendom to the present the broad shift in thought about the foundation of human law has been from natural law to natural right, then to subjective and formal criteria, history, determinism, power and finally, it seems, toward consensus. Each of these positions has contributed much to the determination and redetermination of the substance of legal institutions. This is well known. Less often considered, however, are the effects which these changes in fundamental thought about the bases of law have had on the structural forms of legal institutions and on the recognition of personal obligation to obey the law, effects which in turn have led to a gradually increasing disregard for the law as the plan for order in society and, therefore, to the reduction of the efficacy of the rule of law.

It is simple enough to recognize that during the period of natural law in the scholastic sense positive law was found and declared rather than made. In England, for example, even to the first part of the seventeenth century, Parliament was conceived as a court in which rules found to be declarative of the natural law were enacted into positive law. Interpretation of legislation was always a process of jus dicere rather than of jus dare, but this was also true of judicial activity in the area of unwritten law. The judges found and declared the specific rule, the substantive justification of which was its participation in the natural law. From these premises secondary rules were easily deduced

⁹ The author regards McDougal’s policy science as founded on consensus. See note 33 infra and the text to which it refers.

¹⁰ The effort toward consensus made by those denying objective knowledge must be distinguished from another current effort toward consensus, that of the Christian world to achieve a consensus on the differentiation of a revelation which all Christians accept as objectively known in its compact form. It is only the effort toward consensus for itself without regard to objective truth which is to be criticized.
for organic legal processes. The erroneous judgment could always be repudiated in a later case, the statute that violated the natural law could be declared invalid, and the rule of law that violated the sense of justice could be avoided by the action of the Chancellor as keeper of the king’s conscience.\textsuperscript{11}

At the same time continental legal institutions, though differing from those in England by reason of diverse history and culture, manifested similar understanding of the foundation of positive law. Indeed, it cannot be forgotten that one of the main bases given for accepting and utilizing the \textit{Corpus Juris} was that its principles conformed to or expressed the substance of the natural law even if the particular specifications found in this written record of another people’s legal order were not in form suitable for application to the society of the particular time and place.\textsuperscript{12} Separation of powers, as distinguished from separation of functions, was unknown. Monarchs could apply and interpret the law as well as find and specify it, courts could issue \textit{arrêts de règlement}, and all could admit of dispensations from the accepted rule whenever its application contravened the principle on which the rule itself was founded.\textsuperscript{13} Thus in England and on the Continent natural

\textsuperscript{11} The writer has sketched the English conditions before and after Enlightenment-thought in \textit{Changes in the Roles of Common Law, Equity, and Statute in the Stuart Century}, 46 RICE INSTITUTE PAMPHLET 98 (1960).

\textsuperscript{12} Whereas the work of the Glossators appears to have been primarily to discover the rules and principles of Roman law from the \textit{Corpus Juris}, the Commentators were more concerned with adapting the \textit{ratio scripta} to their time and place. In the overall view, the effort was not so different from Gény’s concern with interpretation of the French \textit{Code Civil} in a manner relevant to French conditions near the turn of the century and yet consistent with “les \textit{données}” implicit in its texts.

\textsuperscript{13} The French Revolution, so far as it concerned the legal system, might be said to have been against \textit{feudalism} and the \textit{abuses} of the ideas and practices described in the text. These abuses, nevertheless, are not to be attributable to the ideas themselves, but to the failure of the institutional forms to provide a framework in which they could be given effect without danger of abuse.
law thought made for a subordination of human law to a standard considered objective and for forms of organic legal institutions that indicated cooperation in the finding, declaration and interpretation of legal order rather than a balancing of powers.

The shift from natural law to natural right produced a profound change in the organic institutional sources of private law, which change in time led to a lessening of respect for the system of the law itself. Natural right, the champion of natural liberty, gave philosophical justification to the supremacy of legislation, a development that changed the interrelationship of the organic sources of law from one of a partnership of equals with different functions in the discovery and specification of law to one of a hierarchy of separated branches of government with limited distinct powers. Thus in England judges, though they continued in fact and in theory to discover and specify the unwritten common law, did so only by sufferance of Parliament. This principle led rapidly to the abandonment of the practice of reversing former errors and to the development of strict *stare decisis*, it being reasoned that those judgments on the content of the common law which Parliament had not overturned by statute had tacitly been approved, or enacted, by Parliament, and thus had become law which only Parliament itself could alter. Equity, formerly the king’s conscience, the agency through which failures in the specification of order could be remedied for the case at hand, ceased to exist as a law-correcting agency.  

14 See note 11 supra.
15 At the turn of the century Maitland was to define Equity in this manner. *Maitland, Equity—A Course of Lectures* 1 (1909).
16 Roberts v. Wynn, 1 Ch. Rep. 236 (1663); Cowper v. Cowper, 2 P. Wms. 685 (1734).
chancery courts, then, ceased to deal as much with the specification of justice as with the application of a law which was, for them, positivistic, or separated from its philosophical base.

The French development, though not identical to the English, proceeded on essentially the same basis and to essentially the same result. With the legislature given supremacy, law was declared to consist of, and solely of, the legislative will. If it was the duty of the legislature to enact laws consistent with natural right, it was not the function or privilege of judges, administrators or professors to enquire into, much less question, the judgment of the legislature in this regard. Judges were not expected to decide cases without citing the texts of the laws on which their decisions were based. Interpretation itself was reserved as a legislative function. The judge was not even to explain the meaning of the legislative text; he was only to cite it and give his conclusion as to its application to the facts at hand. No provision was made for equity; the judge who refused to decide a case on the ground that the law was deficient, that is to say, lacking an applicable declaration of legislative will, was to be prosecuted for denial of justice to the parties. Never was there to be an appeal to extralegal

17 GÉNY, MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF nos. 26 and 27 (2d ed. 1954), contains a short statement with citations of representative literature.

18 Under the Law of April 20, 1810, art. 7, “Judgments . . . which do not contain reasons, are declared null.” Because the only reason a judge could give was the text of a law, he was expected to cite it. Cf. R. DAVID & DEVRIES, THE FRENCH LEGAL SYSTEM 15 (1958).

19 The legislation on this subject enacted from 1790 to 1828 and practically repealed in 1837 is cited in DALLOZ, ENCYCLOPÉDIE, Droit Civil, v. Interprétation, no. 10.

20 CODE CIVIL FRANÇAIS, art. 5.

21 The PROJET DE CODE CIVIL DE L'AN VIII, Liv. Prelim., Titre. V., art. 11, which referred the judge to équité when the texts were silent or insufficient, was not adopted as part of the Code Civil.

22 CODE CIVIL FRANÇAIS, art. 4.
criteria to ameliorate or temper the application of the legislative rule. The judiciary sank into a position of lesser importance, if not of inferiority. Professors of law were enjoined to expound the legislative will and not criticize it. As Buguet said, he knew not a droit français, but only the Code Civil. The French legal literature of the first part of the nineteenth century came to manifest exegetic brilliance and jurisprudential sterility. The new generation of lawyers and judges knew only the scheme of the law as it could be understood deprived of its philosophical reason for being.

Thus, both in England and in France the theory of legislative supremacy produced a spirit of methodological positivism for all except the legislature. Hobbes was vindicated. But the human search for justice and abhorrence of injustice are too strong to allow formal theory to obstruct too long the granting of justice in fact. To this we may attribute in large measure the practice of distinguishing facts to reach other results in later cases, the exaggerated tendency to distinguish ratio decidendi from dictum, and even the construction of facts in such a way as to avoid application of the old rule found in English and American decisions of the era. So, too, came the revolt against the stagnant inadequacy of French law in the middle 1800’s. One device was the misuse of declarative institutions of law, e.g., the use of negotiorum gestio to give a remedy where the gérant had not thought of acting for anyone but himself, for no rule of unjust enrichment had been enacted

\[23\] On instruction in law from the Revolution to 1808, see Bonnecase, La Thémis 33-68 (2d ed. 1914).

\[24\] On the approach of the school of exegesis see, inter alia, Bonnecase, L’École de l’Exégèse en Droit Civil 128-130 (2d ed. 1924).

\[25\] Gény, supra note 17, at no. 28, quotes from Boutmy, Les rapports et les limites des études juridiques et des études politiques, 17 Rev. Int. de l’Enseignement 222-223 (1889), a passage which shows how much this state of affairs was considered correct even at this late date.
by the legislature. Another manifestation was the occasional judicial revolt in the form of openly declaring judgments according to conscience rather than law, or in declaring a rule of law to exist even though there was no legislative text specifying it.

In short, the relative or methodological positivism induced by the shift in thought from natural law to natural right provided the milieu in which disrespect for the forms of law was tolerated for the sake of rendering the law more conscionable. This already amounted to a breakdown in the respect for law as the system by which good order is specified.

Yet it remained for philosophical skepticism and its offspring, relativism and positivism, to bring about general distrust and misuse of legal institutions. Skepticism, by casting doubts on the ability of the human mind to know external reality, drove it to seek sources of order in criteria essentially subjective and formal, such as the adjustment of wills and a reconciliation of interests, or in the essentially deterministic historical dialectics of spirit or matter and behaviorism.

Some of these philosophies of law did have salutary effects not to be ignored. In Germany, for example, the interest in history as the specifier and index of the principles of order both checked an excessive zeal for the reformulation of law along rationalist lines at the expense of culturally developed institutions and stimulated an interest in historical

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26 See, for example, Picard, *La gestion d’affaires dans la jurisprudence contemporaine*, 1921 REVUE TRIMESTRIELLE DE DROIT CIVIL 419, and 1922 REVUE TRIMESTRIELLE DE DROIT CIVIL 5.
27 On the “phénomène Magnaud” see 2 GÉNY, supra note 17, at 286 et seq. On the *libre droit* movement see 2 GÉNY, supra note 17, at 330 et seq.
28 E.g., Cass. Req. 15 juin 1892, S. 93.1.281. Of a similar nature is the principle and rule of *abus de droit*.
29 E.g., Kant and Pound.
30 E.g., Hegel, Marx and Dewey.
studies that facilitated the development of a carefully integrated dogmatic systematization. It is probable, too, that the genius for adaptation of ancient institutions to meet modern conditions, shown in English legislation of the last century, was sharpened by the awareness of English legal development. Moreover, all of the philosophies mentioned introduced pseudo-objective criteria for law which, if honored, would have produced, at least seemingly, satisfactory schemes of order for the general good.

The opportunity for general good through compliance, however, is not the same thing as personal obligation to obey the law, and this is precisely what the subjective and deterministic philosophies of law failed to supply. Thus, law came to be regarded as founded on force or power either threatened or applied. Philosophers of law denied that a rule without sanction could be law\(^{31}\) and in the popular mind, as Holmes was to put it, law came to be no more than that which the bad man was forced to obey.\(^{32}\) Law, then, became essentially a power factor standing at the service of those who could use it to achieve desired ends and in opposition to those who would seek ends not attainable through law.

Stripped of the support of the personal moral obligation of obedience, law ceased to enjoy, and indeed to deserve, the respect required for its effectiveness. Misuse of legislative, judicial and executive authority increased and was increasingly tolerated. Respect for justice through law began to be replaced in fact and theory by the pragmatic use of legal forms for the achievement of desired ends,

\(^{31}\) Hobbes’ position on this point has been adhered to generally by the “analytical” jurists of the last century and this.

\(^{32}\) In *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Holmes, however, did not mean to state that law was without norm, but only that the students of the law, to whom he was addressing his remarks, must know the law in this way in order to advise a client.
separating the law on the books from the law in fact. Law ceased to be the framework of order and truly became the instrument of power. To some extent American legal education reflected this thought, exhibiting for more than a generation more interest in the development of skills for the achievement of desired objectives than in the actual or potential content of the legal order or the formal structure through which such an order might be expressed and maintained. Many a law graduate of the twenties and later understands little or nothing of the plan of the legal order. The law is his weapon or his foil in the effort to satisfy his client’s desires.

It is safe to say that events of recent memory have provided dramatic proof that power cannot be the criterion of law. There is renewed interest in natural law, but skepticism is too widespread to permit of its general acceptance. In the place of sheer power, the more general approaches seem to be through efforts toward consensus. The emphasis on the rule of law is one of these; policy science is another. The interest in the rule of law is, of course, an approach which emphasizes order through adherence to law. Its deficiencies are the existential disagreements on the criteria, role and substance of law, and more seriously, the persisting nonrecognition of a personal moral obligation to obey the law, the very condition that led to the power theory of law. Policy science, it seems, seeks consensus on the objectives of the law rather than on the law itself. Granted that consensus does increase the probability of consistent action, it does not

33 Even today American legal education is characterized by: (1) an insistence that “method” is more important than “substance” or content; (2) a program essentially of optional courses rather than one planned by the faculty for progressive instruction; (3) the common opinion that narrow courses “in depth” are to be preferred to systematic exposition of the structure of the law; and (4) a passion for learning through discovery and dialectic rather than through instruction, which is considered “dogmatic.”

provide an objective basis either for the content of the law or for a personal obligation to obey it as distinguished from an offer of general advantage from conforming action, thus opening the way to nonconformity where personal advantage is envisioned. Moreover, because it transfers from law to policy science the primary role of ordering life in society, it is antithetical to the rule of law and serves to undermine the traditional respect for law as such. In this milieu the exploitation and evasion of law can be expected.

If this thesis is correct, then on reflection it can be said safely that two major contributions of natural law thought to the positive legal order have been, first, the principle of cooperation among the agencies of the law in the finding and specification of law and, secondly, the personal obligation of the subject to obey the law. When these two factors are lacking, the legal order soon suffers loss of respect and efficacy.

35 Friedrich has well described and decried a similar phenomenon in the concept of law in the Basic Law of the Germany Federal Republic and in other systems. In his opinion, “totalitarianism may be considered an exaggerated expression of this general tendency toward the emphasis on policy. For in totalitarianism the leaders claim for themselves the right to decide policy matters without any regard to legal forms.” FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 216-219 (1957). The author does not imply that American policy science has gone this far in practice, but only that its thought is similar to that which Friedrich describes.
PART 2

A MAN OF VISION
A Summary Reflection on Legal Education*

My reflections on legal education began long before my retirement in 1980. A major critique is contained in a memo to the Dean and Faculty of the LSU Law School in 1966, now published as an annex to Alan Watson’s The Shame of American Legal Education, 2nd ed. 2007. The following Summary Reflection began as a simple essay on the deficiencies of American legal education, but it evolved over time to include the observation that whereas knowledge of Anglo-American law is the province of professionals alone, that of modern codified law is available to all who can read, a factor that limits abuse of the law and simplifies its study.

Disrespect for the legal order has become endemic. In general, both its professionals and the public at large manifest it. Lawyers often seek to manipulate the law to serve clients’ purposes, whether or not the result is consistent with the order it projects, regarding their practice more as a power service for those who can pay their exorbitant fees than as a profession at the service of good order. Indeed, for many in the public at large and for many professionals, the very notion of law as a plan of order to be respected, honored, and obeyed is considered

* Originally published, with a Foreword by Olivier Moréteau, in 69 LA. L. REV. 125 (2008). Reprinted with the permission of the Louisiana Law Review.
an infringement on individual freedom (and, recently, privacy). Clients demand lawyer delinquency for selfish reasons and, at the same time, knowing their champions to be willing delinquents, distrust them. Elected judges are suspected of being inclined to favor persons represented by attorneys who have contributed to their campaigns for election. Appointed judges are expected to interpret and apply the law in terms of the political, economic, religious, and philosophical views of those who control their appointments. Legislators are believed to be influenced unduly by the generous offerings of lobbyists and to vote their benefactors’ or constituents’ wishes even if they know them to be contrary to the common good. Practicing lawyers serving as members of law reform groups have been known to sponsor their clients’ selfish interests rather than the general good. For most persons, lawyers, judges, legislators, and the public, law is the instrument of power par excellence. Justice, equality, fairness, and the common good often are ignored, though the rhetoric in use pretends they are of concern. The degree of selfishness dominating the practice of law can be judged by the enormity of the fees charged, the relatively little attention given those unable to pay them, and the manner in which established law firms mistreat their young associates, requiring so many hours of effort from them that often they must leave home before their children awake and return home after they have fallen asleep.

Shamefully, legal education in the United States has contributed, and continues to contribute, to this societal disaster. Law schools have not demanded that the would-be law student have an education in which he has been asked to ponder what it means to be human, or what relation he has to others by reason of his nature, or whether there is anything like a moral obligation. A college degree of any kind suffices for enrollment, though it may evidence no more than intense vocational training in engineering, natural science, mathematics, business, or canoe paddling. Nor do law schools attempt to supply the deficiency during law studies. Once in law school the
student may have the opportunity to elect a course in “legal philosophy,” “legal theory,” or “jurisprudence,” but very often such courses are sketchy surveys without demand for critical appraisal. Most students (and many faculty members) regard them as perhaps interesting, but nevertheless irrelevant to the “practical” world of law.

Indeed, learning what history has taught us about man’s awareness of his nature and his relation to others need not be a prerequisite for legal studies as usually conceived in the United States today. If law itself is regarded as nothing more than the record of previous battles for power in courts and legislatures, a record of humanly created “facts” not qualifiable as good or bad, if the notion of law as an order for men in society projected for their common good is rejected and there is substituted in its place a concept of “problem solving” when the posited aims of individuals clash, then training in rhetoric will suffice. In essence, this thought predominates in legal education in the United States today. Its inadequacy was addressed brilliantly by Robert Maynard Hutchins, once dean of the Yale Law School and the president of the University of Chicago, when, in 1933, he addressed the Annual Meeting of the Association of American Law Schools. His message was very clear. Law schools could remain as they were—and yet are—if every university would establish in its college of liberal arts a “Department of Jurisprudence” so that would-be law students could receive adequate exposure to the liberal arts and to the art, science, purpose, and obligatory moral force of law before entering law school for their professional training. Unfortunately, his plea was not heard.

It is not difficult to trace in bold outline the change in thought leading to the current cultural crisis. Until the 1500’s, in the era of Christendom, the prevailing thought in Western culture was that metaphysics as well as revelation permitted the affirmance of the following propositions: (1) the existence of all persons as an ontological
community under God; (2) the existence, therefore, of the ontological (moral) obligation of each person, as part of the whole, to respect and cooperate with every other for the spiritual and material good of each and all—an obligation in justice at least for the metaphysician, but in charity and mercy as well for the believer in revelation; and (3) the moral certainty of one’s conscious existence after death in a state of beatitude commensurate with one’s degree of holiness in life, that is to say, one’s conscientious endeavor during life to discover one’s relation to God and other persons and, with God’s grace, to live accordingly. Under this understanding of the human condition, just political societies, their just laws, and lawful private agreements, could be recognized as institutions through which the general, unspecified, ontologically founded moral obligation to respect and cooperate with all persons is made specific for persons in particular societies of particular cultures in particular circumstances of time and place, as such morally obligatory, entitled to respect, honor, and obedience, and justly sanctioned by one’s conscience, political force, and fear of social opprobrium.

In the last five hundred years, however, as Eric Voegelin summarized in his *The New Science of Politics* (1951), a gradual change in thought has come to dominate in the public sphere. It discredits and ignores both revelation and metaphysics as valid sources of morally obligatory norms of human action, and does so on the basis of a gratuitous assertion that only the empirically demonstrable may be taken to be true. If this is so, then neither God, nor the ontological community of persons, nor life after death, need to be taken into account in human affairs, for none is subject to empirical verification. Persons, accordingly, are to be considered simply as individual beings, unrelated to each other in the ontological order, without moral obligations to each other, living a life without discoverable meaning and without hope of conscious existence after death. Under this misunderstanding of the ontological condition of man, each person
becomes his own god. Individualism is born. Exercise of power over others to attain one’s posited, criteria-less objectives can become one’s way of life. Concern for others can be subordinated without guilt to the attainment of one’s personal wishes. Conventional morals and laws and associations and contracts of all kinds then may have prudential force, but, being without ontologically based moral force, cannot bind in conscience.

Protestantism, perhaps unwittingly, added to the spread of individualism. The followers of Luther and Calvin, perhaps adhering too literally to St. Paul’s admonition to rely on the word of God rather than human wisdom, limit themselves to revelation, limit that to the Bible, and then interpret the Bible in ways that eliminate personal holiness as a condition for salvation. For Luther, one’s salvation depends entirely on one’s justification through faith (trust) in Christ as savior, itself a free gift of God that can not be earned. For Calvin, God predestines some persons to salvation and others to damnation, without regard to their actions during life.

In each case, individuals are unable to contribute to their own salvation. Ontologically based morality and concern for others logically become irrelevant to salvation. Even the Biblical morality taught so zealously by Protestants logically can have relevance only as a calculus for the individual’s earthly happiness. Then, too, the Protestant tenet of individual interpretation of Scripture renders morality purely subjective, reinforcing the spirit of individualism.

Whatever the explanation, the observable fact is that high individualism, and its logical corollary, selfishness, pervade the American mind and that their source and raison d’être must lie ultimately, at least in large measure, in the secular and religious influences that have no room for the community of man under God and its corollary, the ontological moral obligation to respect and cooperate
with everyone for the spiritual and temporal good of all. It is a spirit that makes competition normal and thus gives pseudo-legitimacy to a life in which taking advantage of another is not regarded as morally wrong.

In this truly anti-intellectual and normless milieu, individualist and self-centered, combative rather than cooperative, it is no wonder that legislation and judicial opinion have come to be regarded as no more than records of previous competitions among men in legislatures and courts, non-normative human acts—mere facts—that might be manipulated for selfish purposes in later “legal” conflicts with others. Europe and the Americas all have suffered from this development, but Anglo-American jurisdictions, particularly those in the United States, have felt it more than the modern Romanist jurisdictions. It is suggested that the difference can be accounted for by the manner in which law is perceived, evidenced, organized, promulgated, studied, and taught in the two legal cultures.

Since the French Revolution most modern Romanist jurisdictions tend to limit law to legislation enacted by the elected representatives of the people in legislative assembly. Nothing else may be considered law. Once enacted it stands as a closed frame of reference. There is no recognition of the relevance of a former historically developed background law, or of philosophical or theological principles against which it may be construed, interpreted, or appraised. The will of the legislature is its only norm. John Henry Merryman once said that modern Romanist law is culturally agnostic. Perhaps it would be more correct to say that in most modern Romanist jurisdictions what constitutes right order (jus in Latin), and therefore justice, is exclusively the province of the legislature, and that both the judiciary and the executive are limited to rectitude in the application and enforcement of the legislation.
This legislative positivism does place enormous moral responsibility on the legislature, but it does offer definite advantages. One is that all judicial decisions must be based on the legislation. Another is that decisions may not be regarded as binding precedents, though everywhere a long line of decisions interpreting or applying the legislation in a certain way can be persuasive. A third is that the legislature must aim at a complete statement of the legal order. Perfection being impossible, almost all Romanist jurisdictions permit the judiciary to decide the case for which there is no legislative rule by specifying a rule based on principles explicit or implicit in the legislation as a whole. In this fashion the legislation remains the ultimate reference. The fourth and greatest advantage of legislative positivism, however, is that the law, being limited to legislation, may be promulgated in its fullness.

The fullness of promulgation in modern Romanist jurisdictions usually is enhanced many times over by the fact that the main legislation on private law, the civil and the commercial, is to be found in civil and commercial codes that tend to be splendidly organized, conceptual and abstract in their provisions, carefully integrated and internally consistent, and written in simple, non-technical vocabulary. Thus organized and written, the codes make possible a reasonable understanding of the basic law by anyone who can read. The same organization and usual clarity of expression have facilitated the development of treatises and manuals of different levels that provide further promulgation for laymen and professionals and facilitate instruction in (and study of) the law with economy of effort. The result is a popular and professional awareness of the law that makes it difficult for both laymen and professionals to avoid its provisions by deliberate falsification or obfuscation. Differences in construction, interpretation, and methods of application can and do exist, but seldom is there a question as to what rule of law applies or what is its basic import.
Those subject to Anglo-American private law have not been so fortunate. The limitation of law to a simply stated, complete, and conceptually consistent plan of order promulgated for all to know is foreign, seemingly repugnant, to English and American legal minds. There are statutes, increasing in number in modern times, but always on particular matters, and usually regarded as modifications of the basic law, the unwritten, un-enacted, and un-promulgated Common Law. Never have statutes achieved the status of legislation detailing the whole of the private law. Efforts to have lawyers and judges construe and apply comprehensive statutes, such as the Uniform Commercial Code, as complete frames of reference, replacing all other law for their subject matters, in the manner of Romanist codes, have failed. So great is the tendency to apply statutes against the background Common Law that one usually cannot say he understands a statute’s effect until the judges have construed it.

To inform oneself of what presently is to be considered the unwritten Common Law is a rather difficult task, even for trained attorneys, judges, and professors. It is an impossible task for the untrained. The best evidence of what had been considered authoritatively to be the Common Law is in the decisions rendered in particular suits, not founded on statutes, between particular persons and under specific fact situations. They are applicable retroactively and theoretically are without prospective operation. In practice, nevertheless, previous decisions are regarded as precedents to be followed as long as differentiating facts do not exist or the judge determines that the precedent no longer satisfies current notions of right order or justice, which notions have always been the actual basic substance of the Common Law in every period of its history. Thus, Common Law jurists often pride themselves on their ability to actualize justice according to current standards in every case and on not being limited by legislated rules; but they suffer from a lack of the predictability available through carefully prepared legislation,
underestimate the flexibility of abstractly worded rules, and ignore the retroactive character of their decisions.

The decisions are published, but their great number, their factual particularity and orientation, and, in our time, the diversity of thought on the notions of good order or justice reflected in them, make it difficult to determine what really had been declared to be the Common Law or what it is likely to be declared to be in the next case. Here the English have had advantage over the Americans. Having one hierarchy of courts, and barristers and judges devoted to consistency in decisions and opposed to attempts to manipulate the law to please clients or particular political parties, professionals can give probably sound predictable opinions in consultations and in rendering judgments. In the United States, however, the judiciaries of fifty states each render decisions that may not be consistent with those in other states, attorneys have no compunction against arguing that out-of-state decisions provide better solutions than those reached in their own states, and the judges themselves may even render new solutions according to their own peculiar notions of good order or justice. Indeed, the attorney in the United States not only must inform himself of multiple versions of the Common Law, but also must inform himself of the notions of good order or justice held by the judge or judges before whom he must plead his case.

How does one teach such a law? Perhaps by stressing its methodology rather than its substance. In 1870, Dean Langdell of the Harvard Law School declared that inasmuch as decisions were the only authoritative evidence of what had been declared to be the Common Law (or the meaning of statutes), law students should learn by studying the decisions. The “case method” became the usual and favored way of training law students. Typically professors select decisions in their fields of assumed competence, order the reading of them in some fashion, quiz the students on their opinions of the premises and reasoning of the
judges, ask them to compare the decision with others, and elicit from
them alternative reasoned solutions. Perhaps no attempt will be made
to give the students an overall account of the law on the subject. The
emphasis is on rhetoric in solving competing contentions on what had
been or might be declared to be the law in a particular case. It is always
hoped that in time the student will learn to “think as a lawyer,” the
ultimate goal of the method. The branches of the law studied are
considered of lesser importance than rhetorical exercises, and so
students are permitted wide discretion in choosing courses.

The case method quickly convinces the future professional that
Justice Cardozo must have been right when he wrote “the law never is;
it always is about to be.” It is always uncertain until the judge declares
what it is in the particular circumstances. This means the non-
professional cannot avoid seeking legal advice in important matters,
even though the legal counselor himself must share much of that
uncertainty. Differences of opinion on the law often must be settled by
suit, or by compromise or negotiation, much of which could be avoided
by clear legislation. The lack of certainty also contributes greatly to the
length of legal documents, for the parties must specify in great detail
provisions that would be totally unnecessary with Romanist type
“suppletive” legislation, legislation that supplies details of law
applicable unless contradicted by express agreement. And the
uncertainty facilitates dishonest claims and dishonest legal arguments.

The tide must be turned. It could be turned if law academics
were to give serious attention to two objectives.

The first must be to bring to Anglo-American private law the
development and style reached by the Roman legal culture with the
confection and promulgation of the French Code Civil in 1804. The
whole of the Anglo-American private law must be stated in legislation
that all can read and understand and that will be used in fact as the
exclusive basis of all professional advice and all judicial pronouncements in the realm of private law. The reasons are clear. Every person is entitled to a succinct statement of the legal order under which he is to live. Lawyers should be able to provide sound advice with minimal doubt. Judges should not have to wonder what is the legal rule they are to construe or apply. Law students should be able to study the substance of the law and not merely legal methodology. The extensive copying or imitation of the French Code Civil style throughout the Roman legal world is proof of the human hunger for its advantages.

Admittedly this cannot be accomplished quickly or easily. It might not have been accomplished at all in France without the persuasion of Napoleon Bonaparte. It could not have been accomplished at all without the works of French jurists of the seventeenth and eighteenth centuries who analyzed, synthesized, and evaluated the diverse laws that prevailed in France at the time. The effort in the United States can succeed only if its law faculties will begin in earnest and complete a similar doctrinal study that can provide a basis for codification. It is a project that should not be delayed. Law faculties in the United States already know that legal education cannot be limited to the Anglo-American law and have begun to foster “polyjural” or “transsystemic” studies. Perhaps students who manage to obtain sufficient knowledge of codified law in action will begin to clamor for codification here. If so, the American project could become a reality. It would be a mistake, however, to ignore that uncertainty and lack of clarity in law are fee-generative. Thus the work of codification must not be allowed to become dominated by the practicing profession.

The second object is even more important than the first. It is to make every effort to make certain that the legal professionals-to-be approach their studies with absolute integrity, recognizing that people are not mere individuals, but members of a community of mankind, morally obliged to respect and cooperate with each other for the
common good, and morally obliged to respect the legal order as the specification of the manner in which these obligations are defined and executed in their society.

To that end, liberal education should be a minimum requirement for all legal professionals, and that liberal education must be better than that of the secularist educators, who have ignored metaphysics and revelation.

What purported revelation is true, if any, is a matter of faith. But legal professionals, being, in the words of Ulpian and Justinian, “priests of right order” in the societal lives of men, must be acquainted with the impact various religions based on alleged revelations, whether true or false, have had on the lives of people. It must be part of their liberal education.

Metaphysical philosophy is another matter. It must not be ignored in any man’s education. It is the exercise of a faculty that all men possess, the only faculty through which they might fulfill their yearning for knowledge of who they are, what relations they have to the rest of being, and what obligations to others result therefrom.

Secularists deny the validity of metaphysical conclusions, and therefore their relevance to men, because they can not be demonstrated. They can not prove this negative to be true, but have succeeded in having their thought prevail simply by ignoring metaphysics in all their endeavors, especially in education, as Cardinal John Henry Newman predicted they would in 1854. There is no justification for this. The speculative thought process is the same for the natural scientist and the metaphysical philosopher. Only the objects of their inquiries are different. The natural scientist will seek the implications of observed phenomena for as yet unobserved, but potentially observable, phenomena. The metaphysical philosopher will seek the implications of observed phenomena for unobservable
phenomena. The natural scientist will want to confirm his conclusions with demonstrations, but often will be certain enough to act upon them before he has demonstrated their truth. The metaphysical philosopher must rely either on logical necessity or on the consistency, coherence, and compatibility of his inferences from observed phenomena.

The metaphysician, for example, logically can be certain a creating and sustaining God exists, for otherwise there is no explanation why anything exists. For his proof of other aspects of the unobservable, however, the metaphysician must rely on the accuracy of his inferences from the observable. Thus the ontological community of mankind can be inferred from their observably unavoidable interdependency, and the ontological moral obligation of each person to respect and cooperate with every other, as occasions arise and permit, logically follows from the fact of the ontological community. Thereafter, the manner in which the unspecified general obligation to respect and cooperate with others in a particular society is a matter of practical reason, of fitting moral means to moral ends. It is the vocation of legal professionals.

To summarize this all too summary reflection, legal education can improve the competence and character of future legal professionals, and indirectly their service to people, by making certain, in pre-legal studies, or at least in preliminary studies in law school, that they understand the nature and purpose of law, its moral foundations, and their own moral obligations in its articulation and application; and, furthermore, legal academicians could improve and simplify the effective promulgation of the law, thereby increasing laymen’s knowledge of it and facilitating law study, law practice, and the judicial process, by moving rapidly toward codification in modern Romanist style.

Probably, Robert Maynard Hutchins would have agreed.
Of the Civil Code and Us *

This 1998 lecture may be my very best work. The Louisiana Civil Code as it was originally is praised for its organization, its simplicity of style and language, its sound principles of good order, and its attunement to the culture of the people. The changes made over the years, however, abandon the notion of good order based on the communitarian nature of man and reflect high emphasis on individualism. The change is radical.

I. PREFATORY REMARKS

It is a joy and satisfaction to me to have been asked, so many years after my retirement, to give one of the annual Tucker Lectures. I hope my faculties have not so deteriorated with age that my effort will be found wanting.

Colonel John H. Tucker, jr., and I had a stormy relationship. For each of us the Louisiana Civil Code proved to be a consuming interest. We, however, had different opinions on the historical origins of the

substance of the law it projects, he thinking wishfully of it as French and I knowing it to be Spanish. We also differed on a number of projects amending the Code or contradicting its principles, he and I having different conceptions of the legal order proper for the common good, conceptions based on different appreciations of the relationship of human beings to each other in the ontological order. I have no doubt that, were he alive today, Colonel Tucker would not like my having been asked to deliver a lecture in a series dedicated to his memory. But if he now enjoys the Beatific Vision—as I hope he does—he will have come to understand that I was right all along and will approve of what I have to say tonight.

My first encounter with the Civil Code came in the spring of 1936, during my last year in bachelor of arts studies at Loyola University in New Orleans. I had just learned that my mother’s ancestors once owned half of Vermillion Parish and all the shell islands in the bay. Wondering if any could be left for the current generation, I thought it well to inform myself of the legislation relating to land transfers, successions, and acquisitive prescription. Shortly thereafter, while walking on the campus, I saw Paul M. Hebert and Joseph Dainow, the one then dean and the other assistant professor at the Loyola Law School. I introduced myself and inquired how I might go about my task. They responded very kindly, even though they must have thought me naive to think I could learn in short order all I needed to know about land titles. Professor Dainow even invited me to his office and showed me a copy of the Louisiana Civil Code, explained its general content and organization, and took particular pains to call my attention to the articles on acquisitive prescription. I went to work reading the Civil Code.

A passion for logic and order and simplicity of statement had been instilled in me at Jesuit High School and at Loyola. It was not long, therefore, before I was able to appreciate the logic, coherence, unity,
simplicity, and clarity of the Civil Code’s statement of the substantive private law under which Louisianians lived. If my intention to study law had not yet become irrevocable, it became so at this point. Appreciation of the quality of the substantive law described in the Civil Code, of course, had to await its systematic study, which I began the following fall. To speak in metaphor, the shape of Miss Louisiana Civil Code was enough to make her my mistress. Once I learned of her ancestry and character, I found her all the more attractive.

Tonight I shall try to describe the shape of Miss Louisiana Civil Code when I first met her and note some of the changes in her appearance wrought by the attentions of men. Then I shall describe the elements of her character in her pristine purity and note how they too were altered in time. Finally, I shall speculate on what we may do to heal and rejuvenate her and to teach ourselves to show her more respect.

II. THE FORM OF THE LOUISIANA CIVIL CODE

No part of a people’s law is more reflective of its culture than what traditionally is known as its civil law, that is to say, its domestic, private, non-commercial, substantive law. A civil code is an attempt to express the general scheme of this civil law in a reasonably brief, would-be complete, orderly, coherent, and integrated fashion. To accomplish this there is of necessity a certain degree of abstraction, even to the point that sometimes a principle will be stated as a rule, permitting its application to a myriad of life situations readily recognizable as occasions in which the principle should prevail. Language becomes extremely important here. Simplicity of sentence structure and use of layman’s non-technical vocabulary, rather than legalese understood by law professionals alone, should characterize it. Indeed, a civil code should be so well written—not drafted—that even the layman reader
should be able to recognize that the legal regime described there conforms to and reinforces an order consistent with a proper understanding of the relation of human beings to each other in the ontological order and consistent with the culture of the people and the physical environment in which they live.

In all these respects, we in Louisiana have been blessed by our Civil Code. That we have had such a good one can be attributed principally to two factors, that the French and Spanish peoples in Louisiana at the time of their coming under United States domination were determined to retain the Spanish civil law under which they had lived,¹ and that by 1806, when it became necessary to prepare a digest of that Spanish law in French and English in order to be able to preserve it, the French *Code Civil* of 1804 and its last preliminary draft, the *Projet* of 1800, were in existence to serve as models of organization and verbiage.

I do believe that it would have been impossible for our local jurists to compose an adequate digest or codification of the Spanish civil law, in the short time available to them, if the French models had not existed. Spain itself had nothing of the kind at that time. Indeed, it is a tribute to Louisiana’s jurists that the first Spanish Civil Code, in 1889, in some respects imitated their work. But using the French *Code Civil* and

¹ Louisiana was under Spanish domination and law from 1769 to 1803, when the Territory was acquired by the United States. Most of what is now the State of Louisiana was carved out of the Louisiana Territory by the United States Congress in 1804 and designated the Territory of Orleans. The determination of the residents of the Territory of Orleans to retain the civil law portion of the Spanish law in force is manifest in the Orleans Legislative Council’s Act of 1806, vetoed by Governor W.C.C. Claiborne, identifying the laws in force in the Territory of Orleans, and the manifesto of the Orleans Legislative Council dated May 28, 1806. See NATIONAL ARCHIVES, ORLEANS TERRITORIAL PAPERS, VOL. VIII, and LE TELEGRAPHE, June 3, 1806 (New Orleans), both reprinted in A.N. YIANNOPOLOUS, *LOUISIANA CIVIL LAW SYSTEM*, Appendix at 8-9 (1971).
its Projet as models of form or organization and taking the very texts of these documents where they expressed Spanish law as well as French or could be altered to do so, our commissioners produced *A Digest of the Civil Laws in force in the Territory of Orleans* in 1808. This “Spanish girl in French dress” was the forerunner of our *Louisiana Civil Code* of 1825 and the *Louisiana Revised Civil Code* of 1870, which retained the French form and essentially Spanish character.

The organization of the Louisiana Civil Code proper, then, is similar to that of the French *Code Civil*. After a Preliminary Title on Law in General, the entire subject matter of the civil law is divided into three main parts, or Books. Book I treats of persons, the subjects of the law; Book II, of permissible interests in things, or patrimonial goods, the objects of the law; and Book III, of the acquisition, transfer, and loss of rights to things. Today, a Book IV, on the Conflict of Laws, has been added, asserting Louisiana’s understanding of its jurisdiction and that of other states and nations to have their laws apply to particular persons, things, and events. I must note the inappropriateness of making this subject a part of the Civil Code, even though its Preliminary Title always contained a few articles on it. That inappropriateness lies in this, that jurisdiction between the States of the Union properly is a matter of United States Constitutional law, though neither the Congress nor the United States Supreme Court is very ready to provide the norms; and jurisdiction between Louisiana and foreign nations is a matter of international law, not of federal law or of Louisiana law. It is

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3 U.S. CONST. art. IV, § 1, the “full faith and credit” clause.
4 The advent of nationalism and positivism in the 19th Century brought with it the tendency to reduce international law to national law applicable to international situations. This is an unacceptable notion. Finding the appropriate norms for legislative and judicial jurisdiction in international matters is no different from finding the legislative or judicial norms for national or state law in the absence of legislation.
well for Louisiana to specify legislatively what it believes those jurisdictional norms to be; but the subject matter does not belong in a code specifying Louisiana’s civil law. Miss Louisiana Civil Code, then, has been fitted with a disfiguring bustle. Here I will ignore the bustle and comment on her shape proper.

To understand the organizational genius of the Civil Code, the content of each book may be examined briefly. Book I, on persons, contains the legislation on the general capacity of persons to act for themselves; their representation if under the age of majority or found by judgment of a court to be incapable of acting for themselves by reason of a disability of mind or body; the laws on marriage and divorce; those on filiation and adoption; and the laws on the personal obligations of those related to each other by marriage, blood, or adoption. All these laws, with few exceptions, are imperative laws, that is to say, laws that may not be waived or modified by unilateral will or by agreement because it is in the interest of good order or good morals that they be observed. Book II describes the interest in things permissible by law: ownership, the personal servitudes like usufruct, use, and habitation, and servitudes over land. These laws, too, are imperative, for it is in the interest of good order that the forms of property be uniform and as simple as possible.

Book III is far more complex than Books I and II, but it has unity in that its many legal institutions have a common denominator: all relate to the acquisition, transfer, and loss of patrimonial things. Purely interpersonal rights and obligations are not within its province. Accordingly, its principal theme is liberty. One may act juridically as he pleases, subject to restrictions by imperative law only in the interest of good morals and the common good. Thus a testator may do as he pleases with his assets as long as he disposes only of lawful kinds of interests in things and realizes, for example, that a disposition violating a descendant’s right of forced heirship will make it possible for that
descendant to claim his legitime. But Book III not only provides rules on
testaments, it also provides *suppletive* laws on intestate succession, that
is to say, laws that relieve a person of the task of making a will if he or
she is satisfied with that distribution of his assets the law considers just
and in keeping with the wishes of most persons in the circumstances of
the deceased. In a similar fashion, one has the maximum liberty to
contract in patrimonial affairs, subject only to restrictions in the interest
of good morals and the common good. Spouses, for example, may enter
into a marriage contract specifying what interests each shall have in
their assets on hand at marriage or acquired thereafter and which of
them can manage or dispose of them; but if they fail to contract, or to
the extent they do not provide differently by marriage contract, the *suppletive* law on the community of gains will apply, specifying rules
presumably just and hopefully in keeping with the culture and probable
wishes of the spouses. And similarly again, there are suppletive laws on
contracts in general and on sale, lease, loan, and all the usual contracts,
which fill in the details of contracts executed in more general terms. The
seller, for example, is presumed to warrant the object’s fitness for the
use intended if he and the buyer do not agree otherwise; and the lender
who does not demand interest when making the loan is, by suppletive
law, deemed to have intended to lend gratuitously, unless there is a
usage to the contrary. These suppletive laws render lengthy instruments
unnecessary, but lawyers and notaries tend to want to create the
illusion their fees are justified.

The remainder of Book III is largely of imperative character. The
obligations arising from lawful voluntary acts in the interest of another,
from unlawful acts causing injury or damage, and from displacements of
patrimonial assets without legal cause, are all subject to imperative
laws. Imperative also are those laws on preferences among creditors,
and those pertaining to the acquisition of un-owned things by
occupation, the acquisition of things owned by others by possession for
a period of time, and the loss of rights to things by the passage of time.
The Civil Code, then, brings order to complexity, and does so very economically, in a short and relatively well written book. The Louisiana Civil Code is not unique in this virtue, but it does possess it. Having the opportunity to consult a relatively short and well written book containing an official authoritative statement of the essential principles and rules of a major segment of the legal order is an advantage that our brethren of the Anglo-American legal world have not experienced with regard to their traditional civil law, evidenced as it is by a multitude of judicial decisions in Common Law and Equity from which one must extract at his peril the law’s principles and rules.

Indeed, whereas the Anglo-American lawyer, when dealing with unenacted Common Law and Equity, seeks always to find in his sources—the previous decisions—a way to contend the “law” is as he would wish it to be, and thus is seeking always to re-invent the law, the lawyer working with codified civil law should inquire how his situation already has been ordered by the enacted law. If he finds the rule applicable to his situation unjust, his remedy is not through the judiciary, but through the legislature. The lawyer and the judge ought not to participate in the making of law, though they of necessity participate directly in its application and incidentally in its interpretation.

This requires that a civil code be written simply, clearly, with internal unity, and as free as humanly possible of all ambiguity. Here, the language clarity, style, and simplicity of our Civil Code must be appreciated. As mentioned before, the French texts of the articles of the Digest of 1808 often were copied or adapted from the French Code Civil or its Projet, whenever they expressed, or could be altered to express, the Spanish law; and the elegance and directness of the French Code Civil is acknowledged universally. The articles added to the Civil Code in 1825 often were taken from other French sources and usually of good style. The articles written in French by our codifiers often were less well
done, but graceful enough, and the English translations of the French texts generally have been quite clear if less worthy in style.

The Civil Code, indeed, was written to be a book for the people, not simply for lawyers and judges. This was true for the French Civil Code, where a major purpose of codification was the proclamation of a new uniform legal order to replace the vast multiplicity of local customs. It was hoped every poilu would carry a copy in his pocket, to read it during wine-breaks, and thereby learn and appreciate the new civil law. Here in Louisiana our original objective was to state the Spanish civil law in force clearly and simply, in French and English, the languages in predominant use, so that all the population might know what it was. Published as they were originally, without titles to articles, without cross-references, case references, comments, and notes of various kinds, our Digest and Codes were eminently readable documents.

The official edition of the Revised Civil Code of 1870 was a relatively small hard bound volume of 514 pages in all, of which 438 were devoted to the Code’s Table of Contents and the text of the Code itself, and 73 to an index. The volume contained nothing else. Not only could it be carried and held in hand easily, but its articles in any Title or Chapter could be read continuously, as a whole, as they should be, so that the relationship of each article to the others as parts of the whole could be understood.

Since 1980, however, the bulk, the format, and the extraneous material content of the only available one-volume edition of the Louisiana Civil Code have increased steadily. It is terribly bulky. There are 1424 pages in the 1998 edition. The pages are large, measuring 9 13/16 inches by 7 5/16 inches. The texts of the Civil Code proper, with extraneous material between those articles recently revised by the Louisiana State Law Institute, occupy 742 double-columned pages. They

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5 Louisiana Civil Code 1998, one of "West’s Louisiana Deskbooks."
will occupy more pages as the Louisiana State Law Institute continues its work of revision. In addition to a Table of Contents for the entire volume, which includes a complete Table of Contents for the Civil Code, there is a so-called *Numerical Analysis of the Civil Code*, really nothing more than the Civil Code’s table of contents expanded by listing each article by number and its unofficial, editorially added title. This uselessly takes up *fifty pages*. Then there are other features too numerous to detail completely: a table of changes made by the last legislative session; a preface; two guides on the use of the publisher’s research tools; a foreword; a discourse on the Civil Codes of Louisiana; a reprint of Title 9 of the Revised Statutes, the so-called Civil Code Ancillaries; and various tables *ad infinitum*.

The various features mentioned above can have some utility, and thus the volume is a useful single-volume research tool. But they complicate the effort to read the Civil Code as the simple, direct, comprehensive, and readily understandable work it is intended to be. No doubt having a big book, updated and republished every year, coupled with a failure to publish a supplement with recent changes that would make older editions usable, is to the financial advantage of the publisher and to that of the editor, for then the number of volumes sold, the price, and the royalties all increase.

The most objectionable features of this book from a theoretical point of view, however, are two, and blame for them can be placed at the feet of the Louisiana State Law Institute for recommending them and at those of the Louisiana state legislature for adopting them. As the Institute proposes revisions of portions of the Civil Code, it provides an unofficial title for each article and an extensive commentary on such things as the history of the text, the reason for the changes in wording, judicial decisions applying or interpreting the previous text, and so forth. The legislature enacts revisions of the Civil Code in bills that contain not only the articles’ texts as revised, but also those distracting
and sometimes inaccurate article titles and revisors’ comments. These titles and comments are declared not to constitute part of the law, but are published with them, and often their language would limit or expand the meaning that the text of an article seems to have. Thus in fact the articles themselves often no longer convey exactly the intended meaning of the legislated law.6 I know from my own experience, in the seventies, as a member of the Council of the Louisiana State Law Institute, that often the objection that a proposed article did not convey its full intended meaning was countered with the decision to “take care of that in the comment.” This is a sloppy way to write a civil code. Indeed, when the Louisiana State Law Institute completes its revision of the Civil Code it will be necessary to rewrite it so that its full meaning can be derived from its texts, at least if we wish to have that great benefit of codification, the restriction of positive law to the legislated texts (except for the rarity of custom).

III. THE CHARACTER OF THE LOUISIANA CIVIL CODE

My inquiry into the character of the Louisiana Civil Code will seek answers to three questions: First, what institutions of our civil government may specify the rules of the legal order we know as the civil law? Second, what norms should inspire this specification of the civil law? Third, what norms or principles of order do we find explicitly or implicitly in the law specified in the Civil Code? Answers to the first two of these questions can be discovered from an examination of the articles in the Preliminary Title of the Civil Code on Law in General. The answer to the third question must be extracted from the articles in Books I, II, and III.

6 See, for example, Article 1575 as amended by 1997 La. Acts 1421 and Comment (c).
A. What Governmental Institutions May Specify the Law?

Under the Civil Code only legislation and custom may be considered (positive) law.\(^7\) Neither the Digest of 1808 nor the Civil Codes of 1825 and 1870 permit the decisions of judges to be considered declarative of authoritative rules of law. True, a judicial decision must operate as a definitive interpretation and application of the law for the particular parties in the particular controversy. That is its function. It also may serve as a guide to what should or should not be considered a proper interpretation or application of the law in future similar cases; but it may not be considered to project an authoritative rule for the future.

Very clearly then, according to the Civil Code, authoritative positive law is always either legislation, a product of the judgment and will of the people’s elected representatives in legislative assembly, or custom, a product of the judgment and will of the people themselves expressed implicitly and informally by their general acquiescence in actions and solutions practiced uniformly over a period of time.

Of course legislation cannot be expected to be infallibly complete. It is a human product. Custom sometimes arises to fill a gap, but often neither legislation nor custom will supply the rule of order. In that event the Civil Code directs a resort to equity.\(^8\)

B. The General Norms for Legislation and Custom

Are there any particular norms that legislators are to follow when specifying the law? The Civil Code does not answer the question explicitly, but I suggest it does implicitly. If judges are expected to appeal to equity when the positive law is silent, then it must be because that is the proper source of norms for the legal order. It would be

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\(^7\) Articles 1-3 as amended by 1987 La. Acts 124.
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inconsistent to require judges to appeal to equity in deciding an unprovided for case and to free the legislature of the same norms. Custom, too, being a form of law, must be subject to the same norms.

What, then, is the content of “equity”? The Digest of 1808, the Civil Code of 1825, and the Revised Civil Code of 1870 as enacted all defined “equity” as an appeal to “natural law,” “reason,” or “received usages.”9 The text came into existence for us with the Digest of 1808, which, it is to be remembered, was a digest of the Spanish law in force. It should be correct, therefore, to assume that “natural law” was intended to have the meaning attributed to it in Spain, judgments about proper human order both consistent with Spanish culture and based on the understanding that all men ontologically—by creation—form a community of mankind under God and, being a community, are obliged morally to respect each other and to live and act cooperatively with each other for the common good. It is to be distinguished from the “natural law” of Enlightenment thought, which had not reached Catholic Spain in 1803. This Enlightenment “natural law” did not acknowledge the ontological community of mankind.10 On the contrary, it regarded each person as an individual unrelated to others in the order of being, capable of association, but not members of an ontological community. Thus respect for others and cooperation for the common good were not morally obligatory, but only dictated for individual selfish concerns. Positive law and other conventions thus were deprived of morally obligatory force. Certainly it was the Spanish conception of natural law and not that of the Enlightenment that the Civil Code recognized.

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9 The Article was numbered 21 in the Digest and in the Civil Codes of 1825 and 1870 as enacted.
10 The classic formulations are those of Hobbes and Locke. Modern versions are those of Rawls and Dworkin. For an excellent appreciation of the latter two philosophers, see Bobby Jindal, Relativism, Neutrality, and Transcendentalism: Beyond Autonomy, 57 LA. L. REV. 1253 (1997).
In 1986, however, in revising the *Preliminary Title* of the Civil Code, the Louisiana State Law Institute substituted the term “justice” for “natural law” in the definition of “equity.”\(^{11}\) The revisors’ comments state the change in wording does not change the law and that it was made because “natural law . . . has no defined meaning in Louisiana jurisprudence.” This should not have been surprising, for “natural law” is a philosophical concept, not one of positive law. Yet neither does “justice” have a “defined meaning” in Louisiana jurisprudence. But these comments do not themselves constitute law, and hence the change in wording may be regarded as a change in the law. Indeed, I am compelled to suspect that a change in the law was intended because the revisors wished to render Louisiana law more secular. With “justice” not having a definition in Louisiana law, it may be inferred that the revisors wished to limit the content of “justice” to notions to be found explicitly or implicitly in the positive law. The entire legal order, therefore, would have to be considered the creation of legislators not bound by any norms exterior to their collective will and “justice” equated with the positive law and its implications. This positivistic notion is very prevalent in other legislations. It is, however, an insult to human dignity and to the Creator who gave men their dignity by giving them free will and the intellectual capacity to discover norms for its exercise.

The same attitude is reflected by other changes in articles already revised by the Louisiana State Law Institute. Thus “natural justice” has been eliminated; the concept of “duty” has been suppressed because of its strong philosophical overtones; and “moral obligation” has been reduced to a second class legal obligation implied

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* Note of the Editor: what has been suppressed is: “binding in conscience and according to natural justice.”
by law.\textsuperscript{12} I may note too that “public order and good morals” and “public good” have become “public interest”\textsuperscript{13} or “public policy.”\textsuperscript{14} Both terms are in the positivistic tradition, that is to say, that in which the denial of the possibility of knowing anything to be true if it is not demonstrable empirically leads to the necessity of inventing, or positing, norms of action. “Interest” is used in the positivistic vocabulary to designate a subjective advantage or preference, without concern for its justification in terms of the ontologically indicated good. Indeed, “policy” is positivism’s substitute for “principle” and “value” its substitute for “good.” “Policy” is one’s norm or suedo principle because he likes it and wills it. “Value” is what one chooses as a good for whatever reason he may have. It need not have philosophical or theological justification. The positivist posits his own criteria. He is his own god.

The implications of this substitution of this so-called “modern usage” for words having traditional meaning consistent with an understanding that morals are discoverable through philosophy and revelation, has serious consequences. If nothing is ontologically either good or bad, right of wrong, then the meaning of discussion and dialogue have changed radically. No longer are they efforts to discover what is true or good. They have become power struggles in which assumed positions are paraded about in the hope they will be accepted. And because nothing is either right or wrong, there is absolutely no criterion for anything other than selfish gratification or advantage; and then law cannot bind in conscience. Marriage, partnerships, indeed conventions of all kinds, including political societies and their laws, logically can be regarded only as arrangements for selfish concerns, to be flaunted and ignored when selfish advantage is not achieved through

\textsuperscript{12} Article 1760 as enacted by 1984 La. Acts 331, replacing former Article 1757, and Comments (d) and (e).
\textsuperscript{13} Article 7 as enacted by 1987 La. Acts 124, replacing in part original Article 11.
\textsuperscript{14} Article 1968 as enacted by 1984 La. Acts 331, replacing original Article 1985.
them. A society cannot continue long in this way without being regarded as an arena for competition and conflict resolution rather than for the specification of a cooperative just order.

Possibly we in Louisiana had been saved from this positivistic development until now because the Civil Code itself acknowledged “natural law” and “natural justice” as sources of ordering principles for the legal order. With the elimination of “natural law,” “natural justice,” “public good,” and “good morals” from our legislation’s vocabulary, however, there is danger that we too will join the ranks of the positivists.

C. Principles Explicit or Implicit in Books I, II, and III

Before attempting to elaborate on some of the main principles of order we find in Books I, II, and III of our Civil Code, it will be well to state as succinctly as possible the general criteria by which I judge they should be appraised.

In order for positive law to be morally good it must be founded on the truth that ontologically persons exist, not as autonomous individuals, but as members of a community of all mankind. The source of this community is a sharing in transcendence that all can experience and that unites all in a whole of which each is a part. Accordingly each person, as a part of the whole, is obliged morally to respect all others and to live in a manner consistent with the good of all others, the common good. In short, mutual respect and the common good morally require the cooperation of all. All selfishness and exploitation of others must be avoided. The function of law is to provide an order for living that specifies how best this respect and cooperation may be realized, taking into consideration the culture of the people, the environment in which they live, and the fact that, as persons with God-given capacities for observation, reflection, and free will, they must not be denied self-determination except to the extent required by the common good.
1. Mutual Respect and Cooperation in Life the Fundamental Principles

In my judgment, the principles of mutual respect and cooperation for the common good underlie the entire Civil Code. I think of them as being the essence of what Justinian meant by his first precept of the law, *honeste vivere*, or live honorably. Indeed, I believe they should be seen as including the remaining two of Justinian’s precepts, *alterum non laedere* and *suum cuique tribuere*, or harm no one and give everyone his own (or his share?). But here I shall restrict my remarks to institutions of the Civil Code falling more directly under the precept *honeste vivere*, or live honorably, or show all men respect and cooperate with all for the common good.

a. The Basic Institution Eliciting Cooperation

Nowhere is the principle of cooperation more clearly manifested than in the institution known to the Romans, and to the legally trained at least, as *negotiorum gestio*, the undertaking and management of an affair for another without obligation or authorization. I consider it the basic institution of the civil law. Under the Civil Code of 1870, the person who undertook such a performance in the interest of another was entitled to his expenses and costs, even if his endeavor was not successful, as long as his intervention and performance might be judged objectively as “useful” to the other, to use the Roman law word, or as “good management” for the other, to use the phrase of the Civil Code itself. There was no requirement that the other (“the principal”) be aware of the voluntary undertaking, or that it be in conformity with his actual wishes, unless the gestor knew them. The important criterion was the “utility” or “good management,” or, in my words, the quality of cooperation judged objectively. Thus the

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15 *Institutes of Justinian (A.D. 533) 1.1.3.*
16 Articles 2295-2300.
law recognized that even though the mode or instance of cooperation had not been specified by legislation, custom, contract, or authorization, and perhaps actually was not desired by the principal, one was always to be encouraged to act for the benefit of another if his action could be recognized objectively as an act of cooperation.

The French Code Civil extended the same range of application to *negotiorum gestio*, but the advent of individualistic thought brought with it the restriction of the institution in other legislations. Thus the Austrian Civil Code of 1811 required a necessity for acting to prevent imminent damage to the principal’s interest, or an instance of evident, paramount advantage to him, and the German Civil Code of 1900 required that the intervention be conformable to the actual or presumable wishes of the principal. Recently the Louisiana State Law Institute, its reporters and council apparently being largely of an individualistic mind, have restricted the gestor to instances of “necessity” of action to protect the principal unless the gestor first obtains the principal’s consent. In the latter case, of course, there really is no case of *negotiorum gestio*, but actually a contract between principal and gestor. Thus our Civil Code has been rendered less tolerant of voluntary cooperation. Perhaps we should be thankful that the lawfulness of voluntary cooperation is yet to be found at all in our new *negotiorum gestio* rules, even if it is limited to instances of necessary action to protect interests of the principal. The modern Anglo-American private law, being highly individualistic, though Anglo-American public law is not, does not even recognize the institution.

17 CODE CIVIL DES FRANÇAIS (1804), Articles 1372-1375.
18 ALLGEMEINES BÜRGERLICHES GESETZBUCH (1811), Articles 1035-1040.
19 BÜRGERLICHES GESETZBUCH (1896), Articles 677-687.
b. Cooperation by Agreement—Contract

Only in negotiorum gestio does one find the generation of a legal obligation otherwise than by provision of law or custom, on the one hand, or by private juridical act on the other. The objectively well-conceived intervention by the gestor, coupled with its appropriate execution, operate to convert the general moral obligation of cooperation into a specific mode of cooperation that can be given legal recognition. The Civil Code used to have an Article 1757 that testified generally to the process. It in effect declared that unspecified moral obligations were given no effect in law, but that once the moral obligation was specified in some way it could have force as a natural obligation or as a civil or legal obligation, depending on whether the requirements of the law for civil obligations had been met. Today the idea of a general moral obligation on ontological grounds has been abolished and “moral obligation” exists only where the law posits it.21

The matter is of considerable importance. Contract, for example, derives its legal force from the consent of the parties, but it derives its moral force from the fact it specifies how the general obligation of cooperation shall be particularized in the particular instance. Unless the contract results in the specification of a previously existing moral obligation the parties are morally free to ignore it. Of course the positive law may say there is a legal obligation, but all this means is that the defaulting party may suffer consequences, usually being compelled to pay damages or to suffer a damaged credit rating. As a result, if we look to the positive law alone, a party is free to calculate what course of action is more in his selfish interest and act accordingly. Thus the certainty of transaction is lost, with attendant damage to faith and trust in people in the daily affairs of life. We all have perceived this in our time.

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21 Articles 1756 and 1760, as enacted by 1984 La. Acts 331, and Comments thereto.
Recent developments in contract law here and internationally reflect a consciousness of the essential necessity of making contracts fairer and of demanding more good faith in agreement and performance. Recent changes in the Civil Code’s articles on obligations reflect that. But in my mind, this is not enough. Persons will be well advised to abide by the new norms for selfish reasons, but, unless the law emphasizes that the law binds morally as well as legally, we can expect to continue to encounter avoidance of the law or its breach whenever selfish interests are strong enough, and the chance of being made to suffer consequences remote. This is why I believe that the Civil Code should state clearly the moral bases of negotiorum gestio, contract, and all other institutions of which it treats. The law should teach, as the Spanish law formerly in force emphasized.

**c. Required Cooperation—Intra-Family Obligations**

The instances of negotiorum gestio and contract are instances of voluntary cooperation among men. There are areas of life, however, in which cooperation is required. Rarely is this true among strangers. But among family members it is the general rule.

Thus the law imposes imperatively the general personal obligations of husbands and wives to each other, and, in earlier days, did not recognize divorce. Marriage, after all, is the foundation of family life, and family is the foundation for civilization; but now divorce is easy. Similarly, because children must be reared properly in terms of support, discipline, and education in matters divine and secular, and their assets administered, not only must parents do their part, but, in their absence, blood relatives, even collaterals, are obliged to accept the tutorship of children if the parent dying last has not appointed one. Originally the

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22 See for example, Articles 1759 and 2003 as enacted by 1984 La. Acts 331.
23 LAS SIETE PARTIDAS DE LA LEY (1348) 1.1.1, 4, 10.
appointment of a tutor and his administration in principle required the assent of a family meeting, that is to say, a meeting of members of the minor’s extended family,25 and thus emphasized the cooperation expected of family members. Beginning in 192626 the family meeting could be dispensed with, and in 1950 it was abolished, only a judge’s approval being required.27 Thus the extended family’s role in the rearing of children has been reduced. Until 1972 ascendants and descendants were obliged to render to each other all services (even personal ones) required in the event of insanity,28 but now under the civil law insanity calls for support only, not personal care, and then only if funds are not obtainable from other sources, another sign of the relaxation of required family cooperation.

The principle of cooperation among family members was evident also in the way in which the Civil Code provided for a sharing of wealth among them. Although under Spanish law, evidenced by the Digest of 1808, the matrimonial regime between husband and wife was primarily a matter of contract, as it remains today, the community of gains—a sharing of their earnings, fruits, and revenues, and things acquired therewith—was a “necessary part” of every such marriage contract.29 This remained in effect in Louisiana only until 1825, however, when for the first time the community of gains could be avoided.30 This was the first blow against family sharing of wealth.

Among blood relatives—and one must remember that in Louisiana the notion of family was limited originally to legitimate relatives by blood and only later expanded to include relatives by

26 1926 La. Acts 319 was the first of several.
28 Article 229, par. 2, now repealed.
29 DIGEST (1808) 3. 5. 10.
30 Article 2305 of the CIVIL CODE OF 1825; present Article 2328 as enacted by 1979 La. Acts 709.
adoption—wealth was indeed familial. Thus fathers and mothers by the
general rule even today enjoy inalienably the fruits and revenues of the
unearned capital of their minor unemancipated children,31 which
revenue thus becomes available to the parents for their and their other
children’s needs. Parents have always owed support and education to
their children, of course, out of any means they have;32 but over and
above this, by the general rule until 1979, as I interpret the Civil Code,
ascendants and descendants of every age owed each other alimony
when one was relatively in need and the other enjoyed more income
from property than he needed for himself.33

Both need and ability to pay were relative to the circumstances
of the parties,34 and the legitimate person seeking alimony did not have
to show inability to provide for himself.35 No legitimate person was to
be expected to earn his living if his or her ascendants or descendants
enjoyed income from capital assets in excess of what they required for
their own living. Thus a young man or woman might very properly
choose to forsake money-making and devote his or her time and talents
to other purposes, perhaps to charitable service, to free legal advice to
the poor, to theological, philosophical, literary, or scientific studies, or
simply to observing the beauties of nature along the beaches. Wealth

31 Article 223.
32 Article 227.
33 Article 229 must be interpreted against Article 227 and others. If the two are
interpreted alike, then there was no need for Article 227, for fathers and
mothers, as parents, are also ancestors. On the other hand, the Civil Code does
not seem to have favored giving one person rights to the earnings of another.
Thus the parental right of enjoyment in Article 223 never has extended to the
minor’s earnings. Similarly, Article 160, providing alimony for the divorced wife,
originally limited her claim to amounts “out of the property of her husband.”
Here certainly “property” was understood to mean income from property, and
not to include earnings, as is evident from the article’s amendment by 1916 La.
Acts 247 to read “property and earnings.”
34 Article 231.
35 No article so required.
indeed was familial. Illegitimate children also could demand alimony from their fathers and mothers and, after the death of either, from the heirs of the deceased parent, out of the revenue of property inherited by them, though only to the extent necessary to supply basic necessities of life and only if they could not earn their own living and had not been provided with capital sufficient for the purpose.36 But today much has changed, even legitimates are restricted in alimony claims to what is not otherwise obtainable for minimal needs.37 This, however, is only part of the shift of Louisiana civil law from a very Catholic position on family wealth to a more secular, individualistic one.

Perhaps we see the same thing in changes that have come about over the years in our laws on successions and donations. There can be no doubt that the succession laws in force in Louisiana during our Spanish days and until 1825 were designed to keep wealth in the legitimate blood family. If a deceased died with even only one descendant, that descendant—or descendants—could claim four fifths of all the deceased had acquired during life and not alienated for value. If he left no descendants, but only ascendants, they were entitled to one third of all the deceased had acquired during life.38 In the latter case, the inheriting ancestors eventually passed most of the property on to their descendants, collaterals to the original deceased and members of his extended family. Beginning in 1825, in spite of an impassioned plea by Governor Roman to retain the old law, our legislators reduced the forced portion.39

Over the years it was reduced more and more and ancestors were deleted from the ranks of forced heirs. Then in 1996 forced

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36 Articles 240-243.
38 DIGEST (1808) 3.2.19 and 20.
39 CIVIL CODE OF 1825, Articles 1480, 1481.
heirship was abolished except for children under twenty-four years of age or incapacitated and certain grandchildren.\textsuperscript{40} Otherwise there is complete liberty of testation. Family property has given way to individual property.

The attacks on forced heirship began in 1920, when the first trust legislation provided that the forced heirship laws would not apply to assets placed in trust.\textsuperscript{41} The Constitution of 1921 forbade the “abolition of forced heirship,” but not its modification.\textsuperscript{42} Thereafter gradual modification was the rule. Opposition to forced heirship increased after 1981, when illegitimates were given the same inheritance rights as legitimates.\textsuperscript{43} The final blow, however, came after a determined and well-financed campaign on the part of three groups in the population. Persons of highly individualistic thought insisted on freedom to do what they wished with “their” property, on freedom of testation in order to control their heirs through threats of disinheritance, and on the possibility of using the trust device to avoid taxes. Then second spouses often wished to make certain their partners in marriage could leave all their property to them and not have to leave any to their children by prior marriages. Finally, there were those less concerned with family property than with the profits they could gain from the new law: the banks, institutions seeking large donations, the attorneys for all involved, legislators seeking re-election, and paid lobbyists. The good of the family, the primary institution of society, was given second place to high individualism and greed. Power over people

\textsuperscript{40} The current legislation is in Articles 1493 and 1495 as enacted by 1996 La. Acts 77, 1st Ex. Sess.
\textsuperscript{41} 1920 La. Acts 107, § 8.
\textsuperscript{42} LA. CONST. art. IV, § 16 (1921).
\textsuperscript{43} The rules on intestate succession contained in Articles 880-901 as enacted by 1981 La. Acts 919 for the first time made no distinction between legitimates and illegitimates.
replaced cooperation in life. The common good lost ground, for it was not being recognized as the end of the law.

Forced heirship, it should be pointed out, when available to descending heirs regardless of age, and especially when it covered most of the deceased’s patrimony, gave offspring a certain immunity from parental and ancestral tyranny. Societies in which forced heirship does not exist are notorious as places in which children are threatened with disinheritance if they fail to comply with the wishes of their elders in such matters as marriage, education, and vocation in life. By being assured of a goodly portion of the parent’s or ancestor’s wealth on his or her death, offspring can feel more free to act and live in accordance with their own aptitudes and judgments. This enforces human dignity as well as the family character of wealth.

In spite of the Spanish civil law’s emphasis on wealth being familial, however, children were not permitted to sue for a dowry, marriage settlement, or other advancement on eventual inheritance. The provision to that effect, yet in our Civil Code,\(^{44}\) is testimony to the cultural recognition of a moral obligation to make such advancements to children during the life of the parent. This attitude, however, even before the increasing reduction and final elimination of most instances of forced heirship, had lost ground to a tendency to deny children the enjoyment of what they had inherited even as legitime or forced portion. Thus as early as 1844, by intestate succession law, the surviving spouse was given a usufruct, until remarriage, over community assets inherited by children of the marriage, no matter what their ages.\(^{45}\) In our own time, the spouse dying first was given the right to award the surviving spouse a usufruct for life over community and separate property inherited by any child of the deceased, whether or not a child

\(^{44}\) Article 228.

of the survivor.\textsuperscript{46} Similarly, under the law on private trusts, the heir’s inheritance might be placed under the control of a trustee and the revenues from the legitime only paid to the forced heir.\textsuperscript{47} Of course, the current abolition of forced heirship for most instances goes far beyond that.

I may mention briefly some of the other ways in which the familial character of property once was evident in the law of succession on death and donations. First of all, ancestors on death were presumed to have intended to distribute their assets among their legitimate descending heirs equally by roots, so that, unless the ancestor had expressed a contrary intention, all property given during life to such heirs had to be added to that remaining to the ancestor at death in order to determine the mass to be divided among all the heirs. Those who received more during the ancestor’s life would receive proportionately less at his death.\textsuperscript{48} Secondly, until 1844 spouses were not ordinarily heirs of each other, the succession of a deceased intestate going always to legitimate blood relatives if any existed.\textsuperscript{49} Thus, family property did not cross over to the surviving spouse’s family by intestate succession, whether land, businesses, or heirlooms.

Recalling that the community of gains was a necessary part of every marriage contract until 1825 will help one understand this, together with the fact that, inasmuch as in those days wealth usually meant land or family enterprises, neither the family wealth nor the family's peace could be protected if part of it were to be inherited by another family. For the same reason illegitimate children were not allowed to inherit with legitimate children, but, if in need, they were

\textsuperscript{46} Article 890 as amended by 1990 La. Acts 1075.
\textsuperscript{47} Louisiana Trust Code, LA. REV. STAT. §§ 9:1841 and 1963.
\textsuperscript{48} Articles 1227-1241 as enacted originally.
\textsuperscript{49} See DIGEST (1808) 3.2.1. 43-57; CIVIL CODE (1825) Articles 911-927. The change was made of 1844 La. Acts 152, § 2, cited in footnote 45.
always entitled to claim alimony from the heirs of the parent out of the revenue produced by the inheritance. Over the years all these notions have changed, but I think to the detriment of families. Illegitimate children now share intestate succession with legitimate children, even if this results in a partition destroying a family’s home or economy. Surviving spouses inherit deceased spouses’ shares of community property if there are no descendants. Thus parents and other ancestors and collaterals never succeeded to a deceased intestate’s share of community property. As to separate property, the intestate inheritance of parents when brothers and sisters exist has been reduced to a mere usufruct. The presumption that an ancestor wished to treat his descendants equally has all but vanished.

One result of all this, to the benefit of attorneys and notaries, is that almost everyone now must think seriously of writing a will. Formerly our suppletive laws on matrimonial regimes, successions, and donations were such that most people did not have to think of express marriage contracts and wills. The suppletive laws provided for results that were fair and in keeping with family responsibilities, sensibilities, and expectations. Now there is much uncertainty and much tension, and certainly an opening to injustice to heirs by reason of rash action by people in old age or under the influence of second spouses, unmarried partners, or donation-seeking institutions.

50 Articles 917-924 and 241-245.
54 Article 1235 as enacted by 1981 La. Acts 77 restricts the demand for collation to descendants of the first degree who are forced heirs (thus excluding grandchildren when forced heirs) and to donations made within three years of the death of the ancestor.
**d. Respect for the Person**

The Civil Codes originally showed tremendous respect for the individual person as a creature with God-given capacities of intellect, judgment, and will. Indeed, these capacities of intellect, judgment, and will, themselves a consequence of the human being’s consciousness of his own consciousness, define personhood. And whereas the membership of each person in an ontological community of mankind obligates each to seek the common good, it is the fact of individual personhood that requires the community of mankind to respect each individual’s capacities for self-determination to the extent the common good does not dictate otherwise. Thus it is that, under the Civil Code, a person of the age of majority, and not declared incapable of acting for himself by a judgment based on criteria declared in the legislation, may not be denied the management and disposition of his assets by other persons of their own volition. There simply is no provision in the Civil Code allowing this. Minors’ and interdicted persons’ affairs are controlled by parents, tutors, and curators whose representations and administrations must follow general laws on the subject.55 Under the laws on trusts, however, anyone transferring property (the settlor) to another (the beneficiary) may place a third person (the trustee) in charge of the administration of that property and the disbursement of its revenues in accordance with the express wishes of the settlor with few restrictions in law.56 In this way, the judgment and will of the beneficiary or his legal representative are superceded by those of the settlor. A person of age, therefore, might be hampered in the integration of the management of his affairs, and so might the tutor or curator of an incapable person be unable to integrate the incapable’s assets to best advantage. Moreover, property given a minor in trust does not become subject to the enjoyment of his parents for the good

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55 Articles 216, 221, 246, 354, and 389.
56 Louisiana Trust Code, LA. REV. STAT. §§ 9:1731, 1761, 1781, 1801, and 2061.
of the family as a whole. The private will of the settlor is permitted to supercede laws established to strengthen the family for the common good.

I would like to note that my most fundamental objection to the trust as introduced into Louisiana law is that the beneficiary or his legal representatives may not modify or terminate it. Had modification or termination of the trust by the beneficiary been accepted by the Louisiana State Law Institute and our Legislature, that objection would have been removed. The trust, in that case, would have amounted to no more than a plan for investment and management that, in most cases, probably, the beneficiary or his legal representative would have been well advised to honor. This is, and always has been, the general rule in England, the origin of the trust. It does more honor to the dignity of the human being by allowing him to make patrimonial decisions for himself. It is true that some income tax advantages would have been lost by giving the beneficiary or his legal representative such control, but I for one see no reason to allow a tax advantage to those who are given assets in trusts. The tax burden should fall equally on all with equal revenue, whether realizable immediately or not.

My second objection to the trust as enacted in Louisiana is that the trust was defined in Anglo-American law terms—placing “legal title” in the “trustee” and “beneficial interest” in the transferee or “beneficiary”—whereas the same result could have been accomplished by acknowledging that property given to one person could be subjected

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57 No provision of legislation so provides expressly, but it follows from Sec. 1724 of the Trust Code (LA. REV. STAT. § 9:1724) under which neither the Civil Code nor other legislation may be invoked “to defeat a disposition sanctioned . . . by this Code.”

58 All this was discussed at length in the lecturer’s article, Of Trusts, Human Dignity, Legal Science, and Taxes, 23 LA. L. REV. 639 (1963).
to management and control by another.\footnote{Id.} Indeed the trust was so defined in Louisiana’s first trust legislation\footnote{1920 La. Acts 107.} and in effect was so defined in the Uniform Gift to Minor’s Act.\footnote{LA. REV. STAT. § 9:735 et seq. Replaced by the Uniform Transfers to Minors Act, LA. REV. STAT. § 9: 751 et seq., which, however, uses the Anglo-American trust formula.} The argument for the Anglo-American definition was one toward uniformity with the trust definition in other States, and generally I favor uniformity in laws from State to State. But as long as we retain our traditional concepts of ownership and its modifications we should use a definition of trusts compatible with them. Probably the motivation of those who prevailed was not simply uniformity of law, but the prospect of rendering easier the introduction of other concepts of Anglo-American property law that, indeed, have been introduced gradually over the last thirty-four years. I shall speak of them later in this lecture.

\textit{e. Wealth is for the Living}

The Civil Code contains or contained a number of rules that may be classified under a general principle that “wealth is for the living.” On reflection, you will agree with me that this principle is in reality one demanding respect for the living person and thus cooperation with him.

The first rule that I should like to mention is that even now under the Civil Code no one is permitted to make a donation of all his property that will be effective before he dies.\footnote{Article 1498.} He must reserve to himself an amount sufficient to provide sustinence for himself.

\footnotesize
\begin{itemize}
\item \textit{Id.}
\item 1920 La. Acts 107.
\item LA. REV. STAT. § 9:735 et seq. Replaced by the Uniform Transfers to Minors Act, LA. REV. STAT. § 9: 751 et seq., which, however, uses the Anglo-American trust formula.
\item Article 1498.
\end{itemize}
The second rule, related to the first, is that one may not dispose of future assets, except by marriage contract.63 One might indeed regret such a disposition.

The third rule, theoretically yet in effect, is that all testamentary dispositions remain revocable.64 No one during life is to bind himself irrevocably as to the manner in which his patrimonial assets will be disposed of at his death.

Similarly inspired was the fourth rule, that one might not dispose of the naked ownership of any asset while retaining its usufruct, that is to say, its use and its revenues.65 Such a disposition, after all, would be the equivalent of an irrevocable legacy. But this rule no longer is in effect. Its first diminution came through the Trust Code of 1964, under which one establishing a trust might give another the naked ownership or principal interest and reserve to himself the usufruct or the income interest.66 Finally in 1974 the Civil Code itself was amended to permit one to donate the naked ownership of particular things to another and reserve the usufruct to himself without employing the trust.67 Thus, one is now permitted to make the equivalent of irrevocable legacies. Having been given this power, one might, by making a number of donations of the naked ownership of particular things, effectively achieve the equivalent of an irrevocable will. Is this for the common good? Or will it give power to second and third spouses, to avaricious children, to the detriment of the donor?

Next, under this rubric of “wealth is for the living,” I should like to mention that our Civil Code yet provides a fifth and most important rule, that only persons already in being, that is to say, born or at least

63 Articles 1528, 1532.
64 Article 1469.
conceived, may receive things by donation.68 Perhaps this is the strongest rule evidencing the principle “wealth is for the living.” But here again the Trust Code has come to the rescue of those who believe they should be able to do with “their property” what they wish and thereby impose their own schemes of order on their transferees in perpetuity. Thus the Trust Code of 1964 provided that a “class” of persons, consisting of one’s children or grandchildren, or both, born and unborn, might be designated beneficiaries of the income or principal, or both, of assets in trust.69 This was bad enough. Such a trust might last for many years, for it could continue until the last member of the class, whether child or grandchild, died. Thus if one of my good friends, who already has eleven children and thirty-three living grandchildren, and undoubtedly will have more by birth or adoption, established a trust for them as a class, the trust would last until all his children and grandchildren, born or yet to be born or adopted, had died. But our gifted legislators now have managed to give settlors of trusts yet more power to dominate the future. Under legislation of 1997—not sponsored by the Louisiana State Law Institute in this instance—a settlor may establish a trust for a class of persons consisting of all his “descendants in the direct line,” whenever born to the end of time, or all his “descendants in any collateral line” (yes, that is the language) whenever born to the end of time, or any combination of these persons, as long as at least one member of the class is in existence on the creation of the trust.70 How many centuries or millennia will trusts of this kind continue? What computer will be able to determine the interests of the perhaps thousands or millions who eventually will be beneficiaries of the settlor? Will banks, who usually become substitute

68 Articles 1472-1474.
69 Louisiana Trust Code, LA. REV. STAT. § 1891 as enacted in 1964.
trustees if not named original trustees, be happy with this legislation? Of course they will, as long as the trusts can pay their fees.

Finally, under this same rubric, I should like to mention a sixth rule of the Civil Code, that one transferring ownership of a thing to one person may not provide that, at some time in the future, ownership should shift to a third person. This in our law has been called a prohibited substitution. 71 In the Equity side of the Anglo-American law such shifting interests have been recognized provided that, as of the time of the act of disposition, it can be known certainly that the shift will occur, if at all, within the life of a person in being and identifiable through the instrument of disposition plus twenty-one years. There are various modifications of this “Rule Against Perpetuities” in various Anglo-American jurisdictions, but this is the classic rule, settled by judges “as a matter of convenience.” Wags rationalize this rule by asserting every Englishman believes his children unfit to manage and preserve property, but has great faith that his grandchildren will be fully capable, rational, and prudent on reaching twenty-one years of age. We do not have such a rule in the Civil Code because the Code does not allow shifting interests.

From the very beginning, however, the Trust Code allowed the settlor to provide for some substitutions. Thus it allowed the settlor to direct that in the event a beneficiary died intestate and without descendants, his or her interest would belong to the other members of the class. 72 Today, however, the settlor may provide for substitute beneficiaries in certain cases, and sometimes the substitute beneficiary

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71 Article 1520 as enacted originally. As amended by 1962 La. Acts 45, the article now asserts substitutions in trusts are allowed to the extent provided in the Trust Code.
need not be identifiable until the death of the principal beneficiary.\textsuperscript{73} We have gone beyond the limits of the Anglo-American Rule against Perpetuities.

Is it not correct to say, now, that the notion “Wealth is for the living” has been transformed into “Wealth is for the dead to control to the end of time”? Have our legislators thought of human dignity? Have they thought of the common good?

\section*{IV. CONTRITION AND REDEMPTION}

The picture I have painted of the changes wrought in the form and substance of our Revised Civil Code of 1870 is not a pretty one. But the disorder introduced into our civil law, and therefore into our lives, is real, and I have wanted to note it particularly so that some might realize we must redeem ourselves.

Some of the changes I referred to as matters of form could be remedied easily by legislative action. Certainly it would be easy to remove from the Civil Code the new Book IV, on the Conflict of laws, and give it separate existence as the Louisiana Conflict of Laws Code. It would be easy to publish revisors’ comments separately from the Civil Code, if they are to be preserved at all, and to delete all titles to articles, in order to emphasize that only the texts are law. Of course I realize we might not be able to prevail upon publishers and editors to do this, for they see financial profit in the present practice. We must do what we can, too, to reduce the detail often found in some recent amendments to the Civil Code. A well written Civil Code should concentrate, as nearly as possible, on reducing all statements of rule to fairly simple specifications of principle so as to permit intelligent application

according to circumstances and not bind judges to detail that can hinder the accomplishment of justice. In short, we should seek to do what we can to make the Civil Code the people’s law book and give laymen, students, lawyers, and judges a better opportunity to appreciate our basic plan of civil order and have it realized in action.

Of great concern to all of us, however, should be the fact that so many of the amendments to the Revised Civil Code of 1870 have demonstrated a triumph of individualism and its corollaries, selfishness, greed, and power over the lives of others. The spirit of cooperation in living, proper to a legal system meant to order the lives of men to their common good, has been all but eliminated, as has been all reference to moral norms for the law. Our Civil Code has been rendered profoundly secular, positivistic, and individualistic.

A. Whose Fault Is It?

The fault is ours, collectively to be sure, and individually in particular degrees. Often the Louisiana State Law Institute, created to provide guidance to the Legislature, has proposed this legislation, and on occasion it has done the Legislature’s bidding even after it had judged what the Legislature demanded to be inconsistent with the common good. Some law professors collaborated in these bad reforms and attorney members of the Louisiana State Law Institute Council often have acted as lobbyists for their clients in spite of knowing the common good to lie elsewhere. I have had personal experience of what I say here.

None of this should surprise us. Generally speaking, in all aspects of society individualism has replaced the community of mankind in the thinking of most persons, and thus selfishness has come to replace the sense of moral obligation to cooperate with others for the common good.
B. What Can We Do?

This virus of individualism and selfishness will not be overcome except to the degree we can bring people at large to recognize that we are ontologically a community of mankind under God and for that reason have the moral obligation to seek the common good. This is a formidable task in an age in which each person, regardless of intelligence and education, has a voice—or vote—in the direction of formulating the plan of order we call law. In retrospect, the Irish monks who brought civilization back to continental Europe after the destruction of the Christianized Roman Empire had an easier time, for by convincing the elite in power they could bring proper order to the lives of their subjects. Now we must convince the people at large so that they will demand good order from their law-making representatives.

We must start somewhere, however, and I suggest that law faculties could do much. Our graduates, after all, dominate the law-teaching process, the law-making process, the judicial process, and the executive offices as well. We may not be able to control effectively the pre-law-school preparation of those who would wish to study law, though I suggest we could go so far as to make certain all who enroll have had something approaching a liberal education, that is to say, one in which they have been required to become familiar with what people have learned over the ages of the nature of man and the relation between God and men and among men in the ontological order. Studies in business, economics, engineering, the natural sciences, agriculture, and music are all very well and good, but I wonder how much such studies help one to understand humanity, the basis of morals, and the nature, function, and purpose of law.

I do not believe we could attain such an objective in the foreseeable future, but we could insist on a program of study in law school that would help students, the future lawyers, legislators, judges,
and executives, understand the necessity of working with law as an instrument for ordering the form of cooperation for the common good and resisting every effort to regard law as an arena for competition for selfish interests. Today too little attention is given to that. The concentration of academic effort often seems to be mainly on the manipulation of legal materials to reach objectives of the client or those of the judge. It is legal rhetoric neutral as to truth and purpose. The emphasis is not on the structure of the legal order, its underlying principles, its fitness for its proper purpose, and the roles of the legislator, lawyer, and judge as priests of good order.

Finally, I would like to suggest that the law faculties should demand a reform of the Louisiana State Law Institute. Probably no other group in our society is in a better position to do so. And the Institute must be reformed in several ways. First, it must not be allowed to remain a self-perpetuating entity. Second, the governing council should be re-composed to include educated non-lawyers: philosophers, theologians, social workers, economists, educators and ordinary people. By all means lawyers on the Council must not be allowed to vote when their clients’ affairs would be affected by the legislation proposed. Third, the Institute must be required to publish its proposals a reasonable time before it gives them its final approval so that the public will be able to voice its approval or disapproval and make recommendations. Fourth, the Institute must be forbidden by law to alter its recommendations once they have been made to the Legislature. Once its recommendations have been made, its work on the project should be considered at an end. Colonel Tucker helped create the Institute to help the Legislature enact better laws. It must not permit itself to become the servant of the Legislature for the enactment of laws less good than those it has proposed.
Of Trusts, Human Dignity, Legal Science, and Taxes* 

In 1959 the Louisiana State Law Institute appointed me advisor to the Institute’s Reporter and his committee charged with writing a new private trust estates law. I decided to concentrate my efforts on two essential points, to define the private trust in terms compatible with our own civil law, and to give the beneficiary or his representative the right to modify or terminate the trust. Neither proposal was accepted by the Reporter and his committee or by the Council of the Institute. At that point I resigned my position, wrote the article below, and gave a copy to each member of the Louisiana legislature. My campaign was not successful.

The legislature of the State of Louisiana has directed that a revision of the Trust Estates Law be prepared for its consideration.1 In this article the writer shall express his recommendations and the reasons which underlie them. The observations to be made fall into three categories: the substance of the trust and the uses to which it


1 The Louisiana State Law Institute received an initial appropriation for this work in 1958. See ELEVENTH BIENNIAL REPORT OF THE LOUISIANA STATE LAW INSTITUTE (May 8, 1960).
should—and should not—be put; its form or technical structure; and its tax consequences.

I. THE SUBSTANCE OF THE TRUST

What Is an Express Private Trust?

The present Trust Estates Law\(^2\) declares an express private trust is created when one person (the settlor) transfers legal title to property to another (the trustee) for his own benefit or that of a third person (the beneficiary).\(^3\) This statement conforms to both the historical origin and the present technical formulation of the express private trust in Anglo-American law. Functionally, however, as the writer has elsewhere explained,\(^4\) the express private trust is a property regime, a dismemberment of ownership, in which control and management are separated from beneficial right.\(^5\) Only the person who is at the time owner of the property or patrimonial right may create the trust. He may do so for his own benefit, transferring only the power of control and management to the trustee and retaining the beneficial rights in the property; or he may create the trust for the benefit of others, transferring to them the beneficial rights in the property subject to its control and management by the trustee.\(^6\) It is a fiduciary institution pure and simple. The trustee in principle never has a beneficial interest in the property interest over which he has management and control.

\(^3\) Id. at § 9:1811, as amended, 1952 La. Acts 209, § 2.
\(^5\) See LAWSON, INTRODUCTION TO THE LAW OF PROPERTY 9, 10, 77 (1958).
\(^6\) Anglo-American law, but not Louisiana law, recognizes a third manner in which a trust may be created: the settlor may declare himself trustee of his property for another, thus transferring beneficial interests and retaining control as a fiduciary for the beneficiary.
is not a mandatory, nevertheless, for his authority and duties are dictated by the settlor within broad limits imposed by law, and not by the person who is to have the beneficial interest in the property subject to the trust.

Is the Express Private Trust Consistent With the Rest of Louisiana Property Law?

To this question the answer must be that it is not. Understood and defined functionally rather than in technical Anglo-American terms, the express private trust can be fitted into Louisiana law without formal difficulty; but the separation of control and interest, which is of the essence of the private trust, is very little favored; and when it is permitted it is always by the body social acting through general laws prescribing both the occasion and the form; never otherwise than in express private trusts is one individual allowed to deprive another individual of control of his property and dictate the rules of its administration.

Basic Louisiana property law seeks to give to the owner maximum control over his patrimony. This is the spirit and principle

7 See especially Pascal, supra note 4, in which this is demonstrated in connection with the supposed, but in fact unjustified, antagonism between trusts and the prohibition against substitutions.

8 Paternal authority, tutorship, curatorship of interdicts, administration of successions by administrators and executors are the most common examples. The phenomenon of separation of control from interest is also present in the business corporation, but here the question is avoided legally by treating the stock share, rather than what it represents, as the object of ownership.

9 An apparent, but unreal, exception is the custodianship of money or securities donated to minors under the Gifts to Minors Law, LA. REV. STAT. § 9:735-742 (Supp. 1962), added by 1958 La. Acts 195, §1. This institution, however, is really a trust defined in modern terms, the minor being the beneficiary owner and the custodian the administrator of the property. Again, see Pascal, supra note 4, at 274-75.
implicit in our law which provides for management or control of one’s property by another only through law or through his consent and makes mandate essentially revocable. This is the basis of the general rule that an owner in indivision may always demand a partition. This is the spirit and principle of the prohibition against substitutions, for he who must preserve property for another is denied the powers of disposition and free use which belong to an owner. Nevertheless it is true that this principle is not applied as an absolute. It is made to give way to more important considerations under certain circumstances.

Obviously the property of minors and mental deficients must be placed under the authority of others. Control over an insolvent’s assets may be denied him and given to syndics or trustees to insure the orderly discharge of his obligations to his creditors. Through the fiction of the corporate personality, or perhaps more accurately, by recognizing a stock share as a thing rather than a right to things, a group of non-owners may be given very substantial control and management of the stockholders’ property and the individual stockholder denied the usual right to partition. Partition may be denied to heirs for a limited time, and it is always denied to usufructuaries as against the naked owners and vice versa. A mandate may be regarded as irrevocable if used as a security device. Indeed, even a substitution will be permitted for not longer than a lifetime, though it will then be regarded not as a substitution but as a dismemberment of ownership into naked ownership and either usufruct, use, or habitation.\(^\text{10}\) The question whether the trust is to be tolerated, then, is not to be answered simply by observing that the trust \textit{qua trust} seems contrary to the basic principle that the owner should have control over his property. Rather is the question to be answered in terms of the advantages and

\(^{10}\) \textit{La. Civil Code} art. 1522 (1870). It is interesting to note that Bracton regarded the life estate—remainder disposition, which corresponds roughly to our usufruct-naked ownership arrangement, as a substitution. \textit{See Plucknett, A Concise History of the Common Law} 560-61 (5th ed. 1956).
disadvantages incident to permitting this departure from the accepted basic principle and the manner in which it may be created. And this question, in turn, must be answered in the light of the legitimacy of the uses to which the device will be put.

**Are There Advantages To Permitting Private Express Trusts?**

Again an unequivocal answer can be given. Yes, there are reasons for which a trust might be used very legitimately, and therefore there is good reason to have a trust law in Louisiana. Some good uses of the trust may be mentioned. First of all the trust often may be a better solution than the ordinary usufruct-naked ownership arrangement where the purpose to be achieved is a present utilization of property by one person and its subsequent full enjoyment by another. Without the trust the naked owner often finds himself prejudiced by the usufructuary’s inadequate management or upkeep of the tangible property or his inability to return the money which he enjoyed in imperfect usufruct. The naked owner’s lot is especially difficult if the usufructuary has not been required to give security, or if the usufructuary or his representatives be persons against whom he would be reluctant to enforce his right for family or other considerations. If the property were in trust, and the beneficiaries entitled either to the usufruct and naked ownership or to the income and principal thereof subject to the trust, the naked owner or principal beneficiary might be better protected by the trustee’s lack of personal interest and his obligation to preserve and to augment the value of the property for the eventual beneficiary as well as to make it productive for the income or usufruct beneficiary.

What is said here concerning the advantage of trusts in instances of usufruct-naked ownership dispositions applies with equal, if not more, force to dispositions on suspensive or resolutory conditions or on terms. Such dispositions are relatively rare in Louisiana, but
perhaps they are rare precisely because they are inconvenient to the owner pending their eventual outcome, and the trust would minimize this inconvenience.

Again, ordinarily property owned in terms of usufruct and naked ownership cannot be converted to other forms of assets or investments without the cooperation of both parties. Neither the usufructuary nor the naked owner may compel the other to consent to a conversion of assets. When property is in trust, on the other hand, the trustee can be given the power and ordinarily has the duty to convert the trust assets into property of a kind which will best protect the interests of the several beneficiaries. In the same connection it may be observed that the trust also makes practicable the avoidance of one of the consequences of imperfect usufruct, namely, the realization of all capital gains by the party presently entitled rather than by the party eventually entitled. To say the same thing in other words, whereas the imperfect usufructuary benefits from capital gains, and not the naked owner, in a trust with income and principal beneficiaries, the capital gains belong to the principal beneficiary and not to the income beneficiary. To change the rules of imperfect usufruct to give the naked owner the same advantage would be possible in theory, but impossible in practice. In order to avoid otherwise insurmountable tracing problems it would be necessary to make the imperfect usufructuary a fiduciary of the naked owner; and this would render his position almost indistinguishable from that of a fideicommissarius. The trust device simplifies the whole matter by putting the fiduciary onus on a third disinterested party, the trustee. Of course, it is not suggested that usufruct-naked ownership interests should not be given subject to trusts; indeed trusts with usufruct-naked ownership beneficiaries have been and are yet being written in Louisiana. Much less so is it suggested that usufruct-naked ownership arrangements outside of trust, including imperfect usufruct, should be forbidden. There are times and
circumstances in which only one of several possible arrangements may be satisfactory, not any one of them, and all should be permitted.

Another important use of the trust would be to facilitate a simpler and more unified management of property to be transferred to minors or interdicts and persons of full capacity as owners in indivision. Without the trust the only solution, and often a less satisfactory one, would be through incorporation.

The trust can also be used wisely to provide a management of property for minors and interdicts where it appears likely either that the prospective tutors or curators would be insufficiently capable, or that the rules on administration of property by tutors and curators would be too restrictive, to assure the best employment of the property. In this connection, however, the trust is no longer so much in need. Recent changes in the law of tutorship and curatorship, especially on investments by the tutor or curator, do much to make the use of trusts for the benefit of incapables unnecessary. Each situation must receive separate appraisal.

Not to be ignored is the possibility of providing a regime of property management for persons who may not in fact have the aptitude for such. Widows and children are the age-old examples. Yet, as shall be developed below, it would be a crime against the dignity of man to permit such a trust to be interminable by the beneficiary or, in any event, to remain indestructible too long. A trust for this purpose should be regarded as a suggested plan of investment and management, to be rejected by the beneficiary, the actual party at interest, if he or she prefers.

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11 LA. CODE OF CIVIL PROCEDURE arts. 4269, 4554 (1960) require the tutor and curator to adhere to the “prudent investor rule.”
Most significantly, the trust could be, and should be, used to make possible dispositions in favor of unborn persons, at least in instances in which there is a social and familial need for them. Present law, for example, makes it impossible for a person to make a legacy to grandchildren born and to be born. Anglo-American experience testifies to the troublesomeness of such donations unless made in trust. In trust, however, they cause no difficulty, for the income from the property can be paid to the grandchildren existing at any time and the final determination of the shares in the principal can be made to await the day on which the total number of grandchildren is ascertainable.

Similarly, but for somewhat different reasons, an inter vivos disposition to one's children born and to be born could and should be permitted if in trust. Gift and estate tax laws encourage a person to dispose of his property gradually during life rather than on death. The reason is a social one, the encouragement of the distribution of wealth. Yet outright donations to living children, for example, often would work to the prejudice of those later born or, in Louisiana, give rise to incidents for collation to satisfy the legitime of the later born children. By placing the donations inter vivos in trust for the children born and to be born the donor can satisfy his legitimate desire to treat all children equally, and incidentally avoid collation problems. Possibly it would be unwise, at least at this moment, considering Louisiana law's long prohibition against dispositions to the unborn, to permit more than these two particular kinds of class gifts; but at least these two should be permitted now.

What Abuses Ought To Be Avoided?

Primary Abuses: Indestructibility and Indivisibility.—From the preceding section it is evident that the separation of control and interest which the trust device affords can at times be of great utility and practical advantage. Yet this separation of control and interest can
be abusive. In the opinion of the writer it is abusive in principle whenever the beneficiary may not terminate the trust and take personal charge of the property of which he has the beneficial interest. In short, the trust established for the benefit of another than the settlor should be regarded as the establishment of an investment and management program for the property transferred to the beneficiary, which program the beneficiary may reject or modify as he chooses; and the trust established by the settlor for his own benefit should always be subject to modification or termination by him.

The general American law on trust is to the contrary, and so is the present Louisiana Trust Estates Law. Under the generally accepted American rule and under the Louisiana Trust Estates Law a trust is indestructible by the beneficiary unless the settlor has given him the power to terminate it; and under the Louisiana Trust Estates Law, though not under the rule generally prevailing in America, unless the trust instrument so provides, the trust cannot be terminated “even though the settlor, trustee, and beneficiary”—the only parties possibly at interest—“so desire and consent thereto.” Such rules, the writer submits, are abusive because they violate the dignity of the human person. Men have reason and free will. It is proper to the nature of the human person, therefore, that he should be allowed to decide for himself how he should live, and this living includes the use of wealth properly appropriated by or transferred to him for his use and benefit.

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12 SCOTT, TRUSTS §337 (1939); LA. REV. STAT. § 9:2176 (1950).
13 In American law the trust can be terminated if the settlor and all beneficiaries consent. SCOTT, supra note 12, at §338. Contra in Louisiana unless the trust instrument so provides. LA. REV. STAT. § 9:2176 (1950).
14 See, for example, JOHN XXIII, Encyclical PACEM IN TERRIS (PEACE ON EARTH) issued April 11, 1963. The following excerpts are taken from Part I, Order between Men:

First of all, it is necessary to speak of the order which should exist between men. Any human society, if it is to be well-ordered and
It is true, nevertheless, that application of any principle of action should be restricted to the sphere indicated by its basis and further limited so that due respect can be given other principles of action. The principle of self-determination being based on man’s reason and free will, it is not applicable to persons in the degree in which they lack freedom of will or the full maturity of judgment. This consideration justifies denying minors and other incompetents authority to deal with their property and placing it under the control of parents, tutors, and productive, must lay down as a foundation this principle, namely, that every human being is a person, that is, his nature is endowed with intelligence and free will. By virtue of this, he has rights and duties of his own, flowing directly and simultaneously from his very nature, which are therefore universal, inviolable and inalienable.

... Human beings have the natural right to free initiative in the economic field, and the right to work.

... The right to private property, even of productive goods, also derives from the nature of man. This right, as we have elsewhere declared, is a suitable means for safeguarding the dignity of the human person and for the exercise of responsibility in all fields; it strengthens and gives serenity to family life, thereby increasing the peace and prosperity of the state.

... The dignity of the human person also requires that every man enjoy the right to act freely and responsibly. For this reason, therefore, in social relations man should exercise his rights, fulfill his obligations; and, in the countless forms of collaboration with others, act chiefly on his own responsibility and initiative. This is to be done in such a way that each one acts on his own decision, of set purpose and from a consciousness of his obligation, without being moved by force or pressure brought to bear on him externally. For any human society that is established on relations of force must be regarded as inhuman, inasmuch as the personality of its members is repressed or restricted, when in fact they should be provided with appropriate incentives and means for developing and perfecting themselves. Those who prefer a more secularly oriented source may be referred to JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT (1689).
curators; so too can it be justification for denying the minor or person of unsound mind the right to terminate a trust in his favor.

Yet this is not the end of the affair for the trust in favor of incapables. Though incapables may be denied some or all the control over property ordinarily given individuals possessing mature judgment and will, it is one thing to deny them that control according to a plan applicable to all in like situations according to general laws and another thing to permit the administration of their affairs to be dictated, as it may be through trusts, by other individuals. This gives too much authority to individuals over other individuals. Reason and free will give rise to a right to self-determination,\textsuperscript{15} not to a right to determine the affairs of others. The denial to men of their fundamental rights, even for their own good, as in the case of incapables, should be possible normally only through action according to law, for it is the responsibility of government, not of individual men, to provide for the common good and the regulation of the affairs of those incapable of caring for themselves. Applied to trusts in favor of incapables, the indication is that a trust scheme of management must not be allowed to interfere with the proper management of the incapable’s affairs by his legal representative. Therefore the legal representative should have authority to demand that a trust be modified or terminated for the good of the incapable. Of course, the incapable’s representative might be made to prove that the interests of the incapable require modification or termination of the trust before he be permitted to take such action, just as he must make such proof before selling or mortgaging an immovable of the incapable or compromising his claims.

What has been said above concerning termination of trusts by beneficiaries applies with equal force to partial termination and even to partition of the trust where the property in trust is partitionable. Thus,

\textsuperscript{15} Id.
to give a simple example, if there are two beneficiaries, each of whom has a fractional interest as beneficiary of income as well as of principal, and the trust property is partitionable, either should be allowed to demand the partition of the trust into two trusts, or to terminate the trust as to his fractional interest. If, for any reason, however, partition or partial termination would prejudice the other seriously, as might be the case, for example, if one is income beneficiary and the other principal beneficiary, then the partition or partial termination should not be allowed except by mutual consent, for this in itself would be forcing one beneficiary to abide by the will of another. This will be discussed further below.

The settlor who creates a trust for his own benefit cannot be said to suffer the indignity of having to accept a property management scheme imposed on him by another. Nevertheless the trust which he establishes in his favor must be subject to his modification or termination at all times, for the right to use one’s mind and will to work out one’s life must itself be regarded as inalienable. One may, and often must, limit his freedom to the extent necessary to achieve the kind of cooperation which life in society demands; but he may not ethically limit his own freedom without social need. A law which permits him to do so is as morally wrong as that which permits another to impose his will on him.

There are, nevertheless, instances in which the principle of self-determination, though applicable, must be applied in such a manner as to give a due respect for the application of other principles as well. Thus it is that there are instances in which the sphere of application of the principle should be reduced. By way of example, an income or usufruct beneficiary in trust should not be allowed to demand a termination of the trust against the opposition of the principal or naked ownership

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16 *Id.*
beneficiary, or vice versa. If the income and naked ownership beneficiaries could demand the trust’s termination by unilateral act, the principal and usufruct beneficiaries would be compelled to assume fiduciary responsibilities toward the others. Similarly, if the usufruct and principal beneficiaries could demand termination of the trust, the naked ownership and income beneficiaries would be obliged to accept an administration of the property by the former. In any of these four situations the principle of self-determination would be violated by permitting termination of the trust.

Similarly, if class dispositions are to be permitted, it may be better normally—though not necessarily always—to forbid termination even with the consent of all living beneficiaries until all beneficiaries are ascertained. The living always being the greatest concern of the law, should the good of all or any of the living beneficiaries stand to suffer more from the continuance of the trust than the others would from its termination, then termination should be permitted. Of course, where termination is to be allowed, partition should be allowed where practicable, as mentioned before.

If a trust is destructible, it matters not how long it lasts; the beneficiaries can always put an end to it. But the moral wrong inherent in the indestructibility of trusts is increased in direct proportion to the term for which the trust is to last. Under the Louisiana Trust Estates Law a trust may endure for as long as any income beneficiary alive at the creation of the trust continues to live. Thus the trust may continue indestructible for a very long lifetime if one of the beneficiaries is an infant at the time of its creation. To add insult to injury, the Louisiana Trust Estates Law also provides that the trust shall last for the longest period of time allowed by law unless an earlier termination date is

17 See the reference to the English Variations of Trusts Act, 1958, at page 184 infra.
provided in the trust instrument. Nonetheless, there is some merit to permitting a settlor to specify indestructibility for a very short time, probably not more than five years. Often a trust will provide a program of investment and management the value of which the beneficiary may not appreciate immediately, and a few years of indestructibility may afford him time to gain the proper perspective. The opportunity to weigh the advantages of the trust as created may justify the short period of indestructibility.

Related But Aggravated Abuses: Trusts Over the Legitime; Accumulations; Spendthrift Trusts; Duration Beyond Death of Beneficiaries

If an indestructible trust is morally wrong because it denies the beneficiary whomsoever he be his natural right as a person to administer his own affairs, then it is even more wrong morally to permit an indestructible trust over the legitime, or forced share of an inheritance, to be indestructible. The legitime has its origin in the recognition of every man’s right to a share in the world’s goods which he can use as he judges best. It is especially reprehensible to permit this share to be unalterably under the control of another. Yet the present Trust Estates Law—and the Louisiana Constitution—permit this. The new Trust Estates Law need not forbid the placing of the legitime in trust; but under no circumstances should it permit the trust over the legitime to be indestructible or unmodifiable by the forced heir.

Similarly, if it is morally wrong to permit indestructible trusts, then it is even more wrong to permit directions for the accumulation of income contrary to the wishes of the beneficiary. Indeed, whereas the

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19 Id.
indestructibility of trusts denies to the beneficiary the possibility of gaining control and management of his capital, the accumulation of income denies to him even its revenues. Under the present Trust Estates Law the settlor may direct the accumulation of income—except that derived from the legitime in trust—for as long as the trust will last.\textsuperscript{22} Thus it is that a beneficiary might be denied the use of all or a substantial portion of the income from the trust during his entire life. But the law is not heartless: if the trust is not of the spendthrift variety he will be able to assign his interest in the income, and always he will have the right to let it pass to his heirs by inheritance or to dispose of it by will. Actually in either case the beneficiary’s interest is reduced to a power or capacity to dispose of it at death, for eventual interests in trusts usually are not readily assignable. This is hardly great satisfaction. Through the device of accumulating the income, therefore, the first generation can be substantially prejudiced to the advantage of the second. It is no defense to argue that inasmuch as the income to be accumulated is that on property outside the legitime, that is to say, property which could have been given to another, the beneficiary cannot be heard to complain. The root of the objection is that one is given property but permitted neither control nor enjoyment of it. In effect, the beneficiary of income accumulated for life is not a beneficiary at all; he is a human conduit of an asset, a person in a much worse position than the \textit{fideicommissarius} of former times. The latter at least had substantial control and enjoyment during his lifetime even though he was obliged to transfer the property to a second donee at a later date.\textsuperscript{23} Again, however, the writer wishes to emphasize that even

\textsuperscript{22} \textit{La. Rev. Stat.} § 9:2092(c) (1950) permits accumulations. The only limitations are from the provision as to income derived from the legitime in trust, \textit{id.} § 9:1793, and from that on the duration of the trust itself, \textit{id.} § 9:1794, as amended, 1962 \textit{La. Acts} 74, § 1.

\textsuperscript{23} Indeed, he had a right to retain for himself a portion of the property of which he was \textit{fideicommissarius}. This was the trebellianic portion mentioned in Article
a direction for accumulation is not objectionable if the beneficiary is entitled to terminate it or modify it. The direction to accumulate is then part of the plan for investment and employment of the trust funds suggested to the beneficiary but not forced upon him.

Again, if a trust is objectionable if indestructible by the beneficiary, it is even more objectionable if the beneficiary cannot assign or transfer his interest subject to the trust. Yet the Louisiana Trust Estates Law provides that a settlor may specify that the beneficiary's interest shall be inalienable by him. In addition, the settlor may even provide that creditors may not reach any of the principal of the trust or any more than a certain portion of the income not to exceed the limits established by law. This last provision, therefore, not only interferes with the beneficiary's obligation to discharge his debts, but violates the principle that the property of a debtor is the common pledge of his creditors.

Every indestructible express private trust is to some extent an interdiction by private act as to the property in trust; but the spendthrift trust is the extreme form. The argument for spendthrift trusts is usually that some persons must be saved from their own folly. The answer to that is that men cannot be saved from their own folly without being subject to the indignity of a kind of paternalistic solicitation that finds a fair parallel in so-called beneficial colonialism among nations. The price, a failure to recognize the right of another to self-determination, is too high. Yet it is not to be denied that sometimes there are persons who should be interdicted and are not, and therefore it would be understandable to allow the settlor to impose a spendthrift trust if the

25 Id.
26 LA. CIVIL CODE art. 3183 (1870).
beneficiary would then be given the opportunity to modify the trust on showing he is capable of managing the property in trust. If the representative of society, and not the settlor, can make the final decision, then a spendthrift trust will be tolerable. Thus the spendthrift clause—or clause against voluntary or involuntary alienation—can be permitted if a reasonable procedure is established through which the beneficiary—or even his creditors—can demonstrate his capacity and be allowed to alienate his interest in the trust or to terminate the trust itself. Certainly standards for determining whether the non-interdicted person should be allowed to sell his interest in a trust or terminate it can be worked out, and if there is fear of mistake here great latitude of discretion can be left to the judge until our experience grows.

Last in the list of abuses which might be mentioned here is the provision in the Louisiana Trust Estates Law as a result of which, unless the settlor stipulates the contrary, a trust may endure beyond the lives of all beneficiaries until ten years after the testator’s death.27 The writer fails to see the reason for such a provision, unless it be to flatter a settlor’s vanity by assuring him this projection of will shall not be totally defeated even if the beneficiaries are not there to enjoy it, or unless it be to assure a professional trustee a minimum number of years of fees from every trusteeship accepted. Certainly amicable trustees would not want such a provision. If professional trustees need such economic protection, then the writer suggests that some measure be taken to insure it, but otherwise than through the device of continuing the trust without other purpose.

Further Remarks on the Uses and Abuses of Express Private Trusts

In summary, most of the abuses tolerated under the present Trust Estates Law stem from the fact that the beneficiary may be—and in practice usually is—denied authority to modify, partition, or

terminate the trust. Were the beneficiary given, in principle at least, the right to modify, partition, or terminate the trust he would be master of his property, and there could be no objection of a moral nature.

The indestructibility of express private trusts is an American invention.\(^{28}\) The English have never tolerated it, and have always permitted the termination or modification of the trust by agreement of all beneficiaries \textit{sui juris}, provided their interests were absolute. Thus according to Underhill’s \textit{Law of Trusts and Trustees}, a trust may be terminated
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\text{(\ldots even where the settlor has contemplated and intended that the trustee shall have the control of the property, if the sole party beneficially interested, or the parties collectively if there are several of them, are unanimously in favour of ‘breaking the trust,’ and all are \textit{sui juris}. For a trust is the equitable equivalent of a common law gift, and, when once declared, the settlor, like the donor of a gift, has no further rights over the property.\ldots)}^{29}
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This rule is applied to successive as well as to simultaneous beneficiaries.\(^{30}\) Just as they may terminate the trust they may modify it, though they may not compel a trustee to accept new duties involving an exercise of discretion.\(^{31}\) Even a mortgagee of the beneficiary’s interest may demand a termination if the mortgage absorbs all equity in the property, for then the beneficiary has no interest to be protected.\(^{32}\)

\(^{28}\) \textit{Scott, supra} note 12, at §337.


\(^{30}\) \textit{Id.} at 448.

\(^{31}\) \textit{Id.} at 450.

\(^{32}\) \textit{Id.} at 449.
Ordinarily in English law a trust may not be terminated where there are future interests yet unvested, but even here there are exceptions. Thus a class entitled in the discretion of a trustee may act together, though not individually, to terminate the trust; and one of several beneficiaries may terminate the trust as to him if no one is injured by his action. Thus a trust to apply income for a beneficiary’s maintenance entitles the beneficiary to the income absolutely, though, not having an interest in the remainder, he would not be entitled to modify the trust in other respects. More significantly, under the recent Variation of Trusts Act, 1958, the English have moved substantially in the direction of permitting a judicial modification or variation of trusts in the interests of beneficiaries not *sui juris*, and this whether their interests be direct or indirect, vested or contingent. The act allows the court to approve of any plan “varying or revoking all or any of the trusts or enlarging the powers of the trustee of managing or administering any of the property subject to the trusts,” submitted by co-beneficiaries or any other persons, if it be to the incapable’s advantage. Today, therefore, even a trust in which an incapable is a beneficiary may be modified or varied if it is to the benefit of such a beneficiary to do so.

Thus it is that in the native home of the trust the beneficiaries may in principle always terminate or modify it. Nevertheless the English permit of some devices in trusts which have some of the obnoxious features of indestructible trusts and most of those of spendthrift trusts.

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33 *Id.* at 445.
34 *Id.* at 452.
35 Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, c. 53. This legislation, the general American law, and the very strict Louisiana law are compared in Camp, *The Variation of Trusts Act, 1958: A Departure from Traditional Principles of Trust Law*, 34 Tul. L. Rev. 87 (1950).
36 Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, c. 53, § 1(1).
37 Camp, *supra* note 35.
Thus the English, while insisting that every absolutely vested interest be subject to the control of its owner, have nevertheless tolerated gifts over in the event of bankruptcy or the attempt to alienate and dispositions in which the interests of a beneficiary are determined by the trustee in his discretion.\textsuperscript{38} It seems to the writer that it is little consolation to the beneficiary that he may not control his interest because it is not vested absolutely, when the purpose for not giving it to him absolutely is to deprive him of control. The one is as obnoxious as the other.

Why has American law generally, and Louisiana law in particular, permitted indestructible trusts and its dependent devices, indestructible directions to accumulate income and spendthrift trusts? And why has English law permitted some of the same effects through other devices? The only persons pleased by such devices are settlors and trustees. And yet, what is their claim of right? Certainly the trustee should have none. And should settlors have a claim of right? It is no argument that the property placed in trust is that which at the time of the creation of the trust belongs to them. Property ceases to be that of a transferor—or should—immediately upon his transfer of it to another, whether absolutely or subject to a trust. Indeed, the most vocal proponents of trusts insist that the trust property should not be subject to the settlors’ control after the creation of the trust, so that the trust capital will not continue to be considered theirs under the gift and estate tax laws.\textsuperscript{39} But does it not really remain theirs in part if their schemes for its administration, investment, and employment—products of their wills—remain fixed for long periods after they have divested themselves of any personal benefit, even for long periods after their deaths? Very obviously through such trusts the law has permitted

\textsuperscript{38} See generally UNDERHILL, supra note 29, at 85-90.
\textsuperscript{39} The tax implications of the proposals made in this article are considered briefly at page 195 infra.
individual persons to be placed in partial and private economic dictatorships by other individual persons.

We in Louisiana, so long free of this insult through law to human dignity, finally succumbed to it in increasing doses. The very general trust legislation of 1920 was severely but insufficiently restricted by Article IV, Section 16, of the Constitution of 1921. Under that section the trust could not last longer, as to a natural person beneficiary, than ten years after the death of the settlor unless that beneficiary were a minor at the time of the creation of the trust; in that event the trust could last, as to that person, until ten years after his majority. The maximum duration period specified in the 1938 Trust Estates Act as originally enacted adhered to this limitation. In 1952 the permissible duration of the trust as to any natural person beneficiary was increased to his death or ten years after that of the settlor, whichever was the longer period. And in 1962 the law was changed to the effect that the trust could last as to all beneficiaries until the death of the last surviving income beneficiary, or if the settlor specifically so provided, for ten years after the settlor’s death, whichever was the longer period. Similarly, spendthrift trusts, or prohibitions against voluntary or involuntary alienations by the beneficiary, originally were allowable only as to the income, and not as to the principal, of a trust. In 1944, however, the permissibility of such prohibitions was extended to cover the principal as well as the income interest of a beneficiary. There was

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no specific amendatory legislation on accumulations, but with each extension of the duration of the trust the evil of accumulations was extended.

Strangely, few voices have been raised against all this, either in America generally or in Louisiana in particular. Perhaps it is because beneficiaries do not have a lobby, but settlors and professional trustees in effect do. Those who wish to project their wills over their property—and over their transferees—after they have given up beneficial interests in it of course want “liberal” trust legislation. Attorneys’ naturally want to satisfy the desires of their clients, and in practice this means the desires of would-be settlors and professional trustees, not of those who become beneficiaries. Settlors tend to like, and professional trustees stand to gain, from “liberal” trust legislation, legislation which will give the settlor the opportunity to do what he wishes. Professional trustees, too, over the nation, have long had well-organized advertising or “public relations” programs. And there is no doubt most of these persons and entities are of the utmost good faith, seeing only the good they do and failing to notice the harm. The harm is, after all, mostly of a kind which is not readily apparent: injury to personal dignity; lost opportunities for self expression and development of the individual beneficiary; and, as will be mentioned below, unwholesome economic effects.

There are murmurs against all this and, though they be few, they shall probably increase. Thus in the February 1963 issue of Trusts and Estates, one trust officer complained that beneficiaries often suffered from unalterable schemes of settlors, well intentioned though they might have been. And in December 1962, at the annual meeting of American law professors, the subject of a round table on property law was the adverse economic effect of the control of property by persons without beneficial interest, and much of the discussion was

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related to or applied to express private trusts as well as to other forms of trusts. It does not take a trained economist to understand that an extensive use of trusts will shift much capital to investments in Grade A common stocks and away from investments in smaller enterprises and consumer spending. One possible effect which Louisiana should consider is that much capital will be placed in investments which will produce most of their economic good outside this state. Unfortunately, the writer knows of no studies which might supply accurate data on such economic conditions and effects attributable to private trusts.

It would be well, therefore, for those revising our trust legislation to solicit not only the aid of lawyers, but also that of moralists (philosophers and theologians), economists, and sociologists, before deciding on the proper content of a Trust Estates Law for Louisiana. Legal experts must be relied upon to supply advice regarding the form of the trust legislation once a decision is made as to its proper content or substance; and whereas legal experts no doubt will be able to offer much even as to the substance of the law, they are not, by reason of legal training at least, equipped to do the whole job.

II. THE TECHNICAL FORMULATION OF THE TRUST

In the terms of its historical derivation, the Anglo-American private trust is an institution in which the owner at law of property is obliged in equity to deal with it for the benefit of another. The almost

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complete disappearance of separate courts of law and equity leads to the rephrasing of that definition to read that the trust is an institution in which one with legal title to property is obliged equitably (or in accordance with the principles developed in equity) to deal with it for the benefit of another. There is no reason to quarrel with this historically oriented definition, even though the trustee’s “legal title” in Anglo-American law now means nothing more than that he is a person endowed with well-defined duties and powers to deal with the trust property for the benefit of another. The trustee has no rights, only duties toward others. Over the centuries the trustee’s “legal title” has been transformed from an ownership at law (which itself gave him the powers which equity required him to use for another rather than for himself) to a fiduciary capacity with obligations and responsibilities. The Anglo-American lawyer now reads “fiduciary” where his forebears read “legal owner” or “owner at law,” and he is not confused:

The English comparatist Lawson, for example, in his Introduction to the [English] Law of Property, recognizes all this in very clear language:

Fragmentation [of ownership] takes place in several different ways . . . through the operation of tenure between landlord and tenant, by co-ownership, by a peculiar way of looking at rights to successive enjoyment, by the creation of rent charges, by the detachment of powers of alienation or appointment from enjoyment, and by the use of trusts as a means of divorcing the management from the enjoyment of property. 48 [Emphasis added.]

. . . If property is given to trustees to hold in trust for beneficiaries the trustees are said, now mainly for

48 LAWSON, supra note 5, at 9.
historical reasons, to have the legal estate, and the beneficiaries the equitable interest. The former is merely a way of explaining that the trustees are the managers of the property and can act commercially as owners of it, enjoying wide powers of alienating it in the market; while the latter means that the beneficiaries have the beneficial ownership, which implies that they can enjoy the use and possession of it and draw an income from it.\textsuperscript{49} [Emphasis added.]

Again,

[T]here must be some personal relation between the manager and the beneficiary, under which, the former may be made liable to the latter if he wrongfully mismanages the property. That relation is in English law called a trust. The manager is \textit{trustee} for the beneficiary. But the question still remains, what are the relations of trustee and beneficiary to the thing held in trust? \textit{It would have been possible to say} either that the trustee owns the property but is under a duty to manage it for the benefit of the beneficiary, who has nothing more than a correlative personal right against the trustee, or on the contrary \textit{that the beneficiary owns the property but gives full powers of management to the trustee, who stands in no direct relation to the property but acts merely by delegation of property rights vested in the beneficiary.} English law has taken neither course, but has in effect said that both trustee and beneficiary own the property in different ways, or, more accurately, that neither owns the property in the strict Roman sense of the term ownership, but each

\textsuperscript{49} Id. at 10.
owns a different interest in it, called respectively the legal estate and the equitable interest. It says that to ask in such a situation who owns the physical object is an improper question, just as it would be improper to ask whether a tenant for life or a person entitled to the land after his death owned the land itself.\footnote{Id. at 77.} [Emphasis added.]

Thus English legal science recognizes the difference between the substantive nature of the trust and its historical and technical formulation or definition. At the same time it recognizes that there is no need to depart from that formula in English law, and what is said of English law may equally well be said of American law. But justification and excuse for the retention of that formula for the trust in Anglo-American jurisdictions is not of itself justification for its use in Louisiana law. Thus the question is whether the new trust legislation should retain that formula. Admittedly several arguments for its retention might be made. It is already in our law, and it has been in our law at least since 1938. The Anglo-American literature which Louisiana lawyers no doubt will use reflects this concept of the trust. Anglo-American lawyers would be able to understand our trust law more easily if it were written in terms already familiar to them. Conflict-of-laws trust problems might be minimized. Each of these arguments has some merit in fact, but the writer submits that it would be both possible and wiser to avoid the Anglo-American trust formula.

It is not difficult to define the trust in functional rather than traditional Anglo-American terms.\footnote{Ample support of this is to be found in the writer’s previous articles: \textit{Some ABC’s About Trusts and Us}, 13 LA. L. REV. 555 (1953), and \textit{The Trust Concept and Substitution}, 19 LA. L. REV. 273 (1959).} If the trustee is only a fiduciary, why not simply say so? In the private trust it is the beneficiaries who
have the real present and future interests in the property in trust. Why not recognize them as owners of the present and future interests in the property subject to the trustee’s administration, management, and control under the terms of the trust?

The absence in our law of separate divisions known as law and equity is sufficient reason to avoid the Anglo-American trust formula. Louisiana legal science should be knowledgeable enough, and brave enough, to do it. Our “laboratory of comparative law” can continue to be an object of pride only if it is productive. It is not a work of legal science to import an institution into our law in such a form that its components cannot be absorbed into the existing legal structure. But admittedly this is a plea largely for the sake of our as yet justifiable pride as bi-cultural jurists. Probably we could get along with the Anglo-American definition of trusts, but we would sacrifice our right to consider ourselves astute in legal technology. We would, too, miss an opportunity to offer an example to other civil law jurisdictions who as yet have difficulties introducing the trust in such a form as to avail themselves of its beneficial uses without sacrificing the coherence of their legal systems.

Beyond the interest of legal science, or legal technology, there is also the practical interest in facilitating the understanding of the trust by our own practitioners and judges. Admittedly we will be able to get along with the Anglo-American definition, but getting along is not the same as living well. Admittedly, too, the greatest difficulty which Louisiana lawyers have had with the Anglo-American trust definition has been in connection with our former constitutional prohibitions against fidei commissa and substitutions. Some members of the bench and bar were inclined to think of any trust as a fideicommissary substitution because the trustee was given “title” (which they mistakenly equated with “ownership”) subject to the obligation to transfer the property to

52 La. Const, art. IV, § 16.
another at the end of the trust.\textsuperscript{53} Since 1962 substitutions may be contained in trusts to the extent authorized by the legislature,\textsuperscript{54} and hence no longer can a trust permissible under the legislation be objectionable because it is thought, rightly or wrongly, to contain a fideicommissary substitution.

But rendering a situation lawful does not in itself insure understanding of the nature of that situation, and in the future there may arise further instances of confusion not connected with fideicommissary substitutions. Some Louisiana lawyers, too, find it preferable to avoid the Anglo-American formula in creating trusts and transfer property to one person \textit{subject to} a trust of which a certain person is named trustee. This practice, after all, not only is more realistic, but makes the trust more understandable to both the civilian-oriented lawyers and their laymen clients. And this in itself is a factor not to be ignored, for many Louisiana lawyers admit to being baffled by the Anglo-American concept. Perhaps this in itself is a reason why the trust has not been used more widely in Louisiana.

\textbf{III. A WORD ABOUT TAXATION}

What would be the tax consequences of a trust estates law based on the principles espoused in this article? First, neither defining the trust in functional rather than traditional Anglo-American terms, nor giving the beneficiaries the power to terminate it, would deprive the settlor of estate tax savings presently achievable through trusts. Those savings would be lost, then as now, only when the settlor retained

\textsuperscript{53} See Succession of Guillory, 232 La. 213, 94 So. 2d 38 (1957) and Succession of Meadors, 135 So. 2d 679 (La. App. 2d Cir. 1962), both of which are sufficiently discussed in the Note, 22 \textit{LA. L. REV.} 889 (1962).

\textsuperscript{54} \textit{LA. CONST}, art. IV, § 16, as amended, 1962 La. Acts 521.
control of the trust or of the property placed in trust.\footnote{INT. REV. CODE of 1954, § 2038(a) (1).} Secondly, defining the trust in functional terms compatible with our property law would not of itself result in the income from the trust being taxed to the beneficiaries. Not “legal title,” but economic power, or substantial control, is the principle according to which the tax laws and regulations are written, interpreted, and applied.\footnote{See, for example, Rev. Rul. 154, 1959-1 CUM. BULL. 160, which emphasizes that no legal title under local law, but control, determines the taxable entity. The Internal Revenue Code of 1954 itself clearly implies this principle in § 678, discussed hereafter in the text, when it taxes the beneficiaries of an Anglo-American trust if they in fact have control over the property, or its income, and also in §§ 671-677, in which the settlor is taxed if he retains control over the trust or the property subject to it.} A trust indestructible by the beneficiaries, therefore, though defined in functional terms, would produce the same tax consequences as one defined in Anglo-American terms.

But what of the trust, whether defined in functional or Anglo-American terms, which might be terminated, or the income therefrom demanded, by the beneficiaries? Here, apparently, it is necessary to take Section 678 of the Internal Revenue Code into account. That section reads in part:

(a) \textit{General rule.} A person other than the grantor shall be treated as the owner of any portions of a trust with respect to which:

\begin{enumerate}
\item such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself \ldots \footnote{INT. REV. CODE of 1954, § 678. Under another provision of the Internal Revenue Code, § 622, trust income is not taxable to the beneficiary unless “paid, credited, or required to be distributed” and “whether distributed or not.” In the light of § 678, however, this provision must not be available to the beneficiary who can terminate the trust or demand the accumulated income.}
\end{enumerate}
Inasmuch as the principles espoused in this article would lead to a rule permitting each ascertained income or usufruct beneficiary to demand his share of the trust income even if the settlor has stipulated it should be accumulated, the income from all trusts would, in the writer’s opinion, be taxed to the beneficiaries. Thus the income tax savings presently available to *beneficiaries*\(^58\) of indestructible trusts would disappear. But this, after all, is exactly as it should be. No one with the same income in fact as another should be permitted to enjoy preferential tax treatment.\(^59\)

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\(^{58}\) One income tax advantage, nevertheless, would result from the creation of a trust even though the beneficiaries could terminate it or demand the income. By shifting revenue-producing property from the settlor’s patrimony to that of another, the combined income taxes of the settlor on his remaining income and of the beneficiary on his income might be less than that which would otherwise be payable by the settlor. This facet of the income tax laws, like the estate tax laws, encourages the distribution of wealth.

\(^{59}\) Indeed, present tax laws permit the separate taxation of the income from a trust not distributed, credited, or required to be distributed to a beneficiary precisely because such a beneficiary does not in fact enjoy the benefits of his alleged right to it. But this well-intentioned rule encourages those who would effect tax savings to create indestructible trusts with directions to accumulate income, and thus to deprive their beneficiaries of fundamental human rights.
PART 3

A MAN OF DIVERSE SCHOLARSHIP
Updating Louisiana’s Community of Gains*

The nineteen seventies were a decade of militant action on the part of women’s organizations to remove all differences between the legal rights and obligations of men and women. I was a member of the committee of advisors to the Louisiana State Law Institute’s Reporter on the revision of matrimonial regimes law until 1976, when the Louisiana legislature refused to consider the Law Institute’s proposal, ordered the Institute to prepare an “equal management” law, and the Institute, contrary to its then purpose to propose improvements in legislation to the Louisiana legislature, not to do its bidding, proceeded to conform to this demand. I continue to have the views on matrimonial regimes law expressed in the article below.

The updating of the community of gains and other Louisiana matrimonial regimes is imminent. The Louisiana State Law Institute,¹ invited by the Louisiana legislature to prepare a revision of the Civil

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Code, has named a Reporter\(^2\) to prepare observations and drafts for its consideration and has appointed a Committee of Advisors\(^3\) to assist her in her deliberations. Even if this process had not begun, the re-evaluation of Louisiana matrimonial regimes laws would be timely. There are some inequities under the legislation itself, other inequities have resulted from judicial misconstructions and misapplications, and both professional and lay misunderstandings abound. In addition, the women’s rights movement has questioned the fairness and even the constitutionality of some aspects of Louisiana matrimonial regimes. The writer, as a professor of law seeking to contribute what he can to clarity of thought in this area of his presumed competence, will attempt to state the essentials of the law of matrimonial regimes in general and of the community of gains in particular, identify the major roots of dissatisfaction, and suggest the principles on which reforms should be based.\(^4\)

**GENERALITIES OF MATRIMONIAL REGIMES LAW**

Matrimonial regimes\(^5\) are those plans of order between husband and wife particularizing the manner in which they shall share

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\(^2\) Professor Janet Mary Riley, Loyola University, New Orleans.

\(^3\) The advisors are all Louisiana professors of law, members of the bar, or judges.

\(^4\) The author is a member of the Louisiana State Law Institute’s Committee of Advisors to the Reporter on matrimonial regimes law revision, but his opinions are not to be attributed to the Reporter or to other members of the committee. Often their views are opposed radically to the ideas expressed here.

\(^5\) The term “matrimonial regime” is not to be found in Louisiana legislation. The Civil Code uses “conjugal association.” LA. CIVIL CODE art. 2325 (1870). “Matrimonial regime,” nevertheless, is in common doctrinal use in Louisiana and other Romanist jurisdictions and will be used in this article. The two terms refer to the same institution; but, whereas “matrimonial regime” emphasizes the plan of order (regime) itself, “conjugal association” connotes also the agreement between the spouses which is the regime’s legal cause.
(if at all) and control their assets and liabilities. Since 1825, all Louisiana matrimonial regimes that might arise upon marriage have been contractual. Under the Digest of 1808, every marriage subject to Louisiana law entailed “of necessity,” or as a matter of public order, the community of gains as specified in the legislation. Neither a complete separation of property (assets and liabilities) nor a modification of the community of gains could be stipulated by marriage contract; but the spouses could thereby make provisions for donations to each other, donations from other persons to either or both of them and the children to be born of the marriage, a dowry, or any other patrimonial arrangement which did not contradict the community of gains, other imperative laws, or principles of public order or good morals. The Civil Code of 1825, however, permitted the spouses to modify the community of gains in any way and even to exclude it entirely, leaving them free to enter into a marriage contract specifying any patrimonial arrangement they might confect so long as it did not offend minimal provisions for good public order and morals. The law remains the same today. The community of gains is “superinduced” by every marriage subject to Louisiana law only if the spouses either have not entered into a marriage contract, or have entered into one which does not modify or reject that community regime. This freedom to modify and reject the community of gains changed the character of that regime from one imposed by law into one essentially conventional. Thus, spouses must be deemed to have contracted tacitly the community of gains to the extent they have not contracted expressly against it.

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6 A Digest of the Civil Laws Now in Force in the Territory of Orleans (1808) [hereinafter cited as Digest of 1808].
7 Digest of 1808, 3.5.10, 63.
8 Digest of 1808, 3.5.1, .3, .4, .15, .16 et seq.; 3.2.219 et seq.
9 LA. Civil Code arts. 2305-07, 2393, 2394 (1825).
10 LA. Civil Code arts. 2325-27, 2392, 2424 (1870).
11 Id. arts. 2325, 2332, 2399.
From the essentially conventional character of Louisiana matrimonial regimes follows a consequence of supreme importance: a matrimonial regime can have *direct* effects only between the spouses themselves; third persons cannot know a community of gains or any other matrimonial regime either as a subject of rights or as a patrimonial mass against which they can allege rights of their own. The matrimonial regime, on the other hand, can affect third persons *indirectly* through its consequences for the patrimonies of the spouses. Creditors of either spouse may look to that spouse’s total patrimony for satisfaction of that spouse’s obligations to them. Third persons, in other words, may have legal relations with the spouses as individuals and avail themselves of each spouse’s patrimony as affected and constituted by the matrimonial regime; but third persons do not have legal relations in their favor by the direct effect of a matrimonial regime established by marriage contract. This is why, for example, the Civil Code does not contain a single provision for the ranking of privileges between “community” and “separate” creditors of a spouse. They are all creditors of the spouse, on an equal footing before the law on privileges. An appreciation of this aspect of matrimonial regimes law is essential, particularly in understanding the laws on the community of gains.

A second consequence of importance stemming from the conventional character of Louisiana matrimonial regimes is that no matrimonial regime already in existence between particular spouses may be changed by the effect of law without violating the traditional constitutional prohibitions against the impairment of obligations of contract. This does not mean that legislation might not be enacted authorizing married persons to agree to a change in their matrimonial regimes, whether contracted tacitly or expressly, but here the efficient legal cause of the alteration would be the contract of the parties and not the law itself. None of the amendments to Louisiana matrimonial regimes laws, however, has provided for such acceptance by spouses.
already married. The matrimonial regimes of parties now subject to Louisiana matrimonial regimes laws, therefore, are governed by the laws as they were at the times those regimes were contracted.

An express marriage contract, by general rule, may be entered into only before marriage. Since 1910, however, spouses moving to Louisiana after having been domiciled elsewhere as married persons may enter into an express marriage contract within one year of their arrival. Partially because of the merits of the community of gains itself and partially because of general ignorance of the rules just mentioned, marriage contracts are extremely infrequent in Louisiana. Most couples subject to Louisiana law, therefore, live under the “legal” community of gains, that is to say, the community of gains as specified in the suppletive (presumed-intent-supplying) legislation of the Civil Code and the Revised Statutes and tacitly accepted by the spouses on their failure to contract against it.

Besides regulating the “legal” community of gains, the Civil Code details the rules of three matrimonial regime “clauses” which might be the subject of express marriage contracts: dowry, paraphernalia—the nondotal separate property of the wife under matrimonial regimes which include either a dowry or a community of some kind—and the separation of property by marriage contract. The Civil Code also specifies the rules of the marriage regime which results, as a matter of law, when the spouses are separated from bed and board or when the wife has obtained a judgment terminating the

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12 Id. art. 2329. The constitutionality of this article under the full faith and credit clause of the federal Constitution is questioned by the author, but not argued here.  
14 Id. arts. 2334, 2386, 2402-23.  
15 Id. arts. 2337-81.  
16 Id. arts. 2383-91.  
17 Id. arts. 2392-96.
conventional regime for causes predetermined by law. This article, however, will concentrate on the community of gains and refer only incidentally to other regimes.

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**THE ESSENTIAL CHARACTER OF THE COMMUNITY OF GAINS AS DESCRIBED IN THE LEGISLATION**

At the very outset it should be noted that the community of gains is only a part of a matrimonial regime. Only certain gains of the spouses during marriage, principally revenues of their capital and products of their labor and industry, ever enter into it; and only certain “debts contracted during the marriage” are, as between the spouses, dischargeable from those gains. The capital of each spouse at the time of marriage and that acquired by either spouse after marriage by inheritance or by donation do not form a part of the community assets; and debts owing at the time of marriage or incurred during marriage by or in the interest of one spouse alone are, as between the spouses, payable from the separate assets of the debtor spouse. The regime known as the community of gains, therefore, could be described more accurately as a regime of separation of property modified by a “clause” for a community of gains. A name is not important, perhaps,

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18 Id. arts. 155, 2425-36.
19 Id. arts. 2334, 2386, 2402-23.
20 Id. arts. 2334, 2386, 2402.
21 Id. art. 2403. This article, however, demands construction in the context of other articles on the subject. See text at notes 25-30 infra.
22 LA. CIVIL CODE art. 2334 (1870).
23 Id. art. 2403. See supra note 21.
24 The Civil Code refers to the articles on donations by marriage contract, dowry, and separation of property as provisions on “conventions” or “clauses” in marriage contracts. See LA. CIVIL CODE arts. 2331, 2333 (1870), and the title to Book III, Title VI, Chapter 2, Section 4. Had the community of gains been conventional in 1808, the Digest of that year, and the Civil Codes of 1825 and
but a concept can have consequences of importance for the construction of the total law on the subject.

The Civil Code’s provisions, moreover, do not convey clearly the nature of the community of gains. The articles must be construed against one another in a careful exegesis carried on in the light of the Spanish law from which it was mainly derived. Thus, from an initial reading of articles 2402-09 it would appear that the contract of the spouses is for a regime under which there will be, during marriage: (1) a pooling of certain revenues of their capital, the products of their labor and industry, and certain acquisitions, into a common fund; (2) the management of this fund and its revenues by the husband; (3) the payment from the common fund of “debts contracted [but by whom?] during the marriage;” and, on dissolution of the regime, (4) a partition of the common assets and (5) a sharing equally of the “debts contracted during the marriage” and yet unpaid. Aside from the question of which “debts contracted during the marriage” are to be discharged from the common fund, the articles could be accepted as accurately descriptive of the Spanish law they were to digest. That in any event they failed to describe accurately the Spanish community of gains then in force, however, is a fact.

1870 as well, probably would have referred to the community as a “convention” or “clause” in a marriage contract.

25 An explanation, and to some extent an excuse, for the inadequacy of the articles on the subject may be as follows. The Spanish community of gains was so different from the French community of movables that, for the most part, the drafters of the Digest of 1808 could not use French legal works, as they did for many subjects in the Digest, as sources of ready-drawn provisions accurately descriptive of the Spanish law they were to digest. The drafters of the Digest, therefore, were required to derive their inspirations from various documents on the uncodified Spanish law and draft such provisions as they might without delaying unreasonably the completion of the Digest as a whole. That in any event they failed to describe accurately the Spanish community of gains then in force, however, is a fact.

26 LA. CIVIL CODE art. 2402 (1870).

27 Id. art. 2404.

28 Id. art. 2403.

29 Id. arts. 2406-08.

30 Id. art. 2409.
clear. The exegesis cannot stop here, however, for subsequent articles introduce ideas incompatible with the apparent meaning of articles 2402-09.

Articles 2410, 2411, and 2423 allow the wife or her heirs or other successors in interest “to exonerate themselves from the debts contracted during the marriage” by renouncing her right to the community of gains, that is to say, her right to one half of the assets in the common fund. Now, under general rules of Louisiana law, one may renounce his rights but not his obligations.31 Hence there is reason to suspect that the obligations spoken of as “debts contracted during the marriage” in articles 2403 and 2409 must be limited to the debts of the husband. Were the wife the principal obligor of half these debts, she could not renounce them.32 The creditors of those obligations would have the right to enforce their credits even against her separate assets.33

The conclusion is made more certain by subsequent articles of the Civil Code and by provisions of the Revised Statutes under which the wife or her heirs or her successors in interest are given rights very similar to those of succession heirs and their heirs or successors in interest. Articles 2412, 2417, and 2418 evidence that the wife who has acted as if she had a right to a portion of the community assets, or who has allowed a judgment for debts originally payable from community assets to be rendered against her, may not renounce the share of the community assets and liabilities which she was entitled to accept. Under article 2415, her renunciation must be made before a notary public and two witnesses. And under La. R.S. 9:2821, she is extended the right,  

31 Id. arts. 3182, 3183.  
32 At first reading, article 131 may appear to contradict the conclusion reached here. On the contrary, however, the article lends support to the conclusion. See discussion of article 131 at pages 228-229 infra.  
33 LA. CIVIL CODE arts. 3182, 3183 (1870).
similar to that of one of several heirs, to accept her share of the community assets and liabilities under benefit of inventory. These provisions lead to the conclusion that not only must the “debts contracted during the marriage” be limited to debts incurred by the husband, but also that the assets in the community or common fund are really a part of the patrimony of the husband as long as the regime continues. Whereas the wife has an absolute right under the marriage contract to take half those assets if she will accept personal liability for the debts which, as between her and her husband under the marriage contract, are dischargeable from the common fund, before dissolution of the regime those assets and liabilities are not to be considered part of her patrimony. Accordingly, during the existence of the community of gains, the wife’s patrimony can consist only of her separate assets and of liabilities incurred by her personally. On the other hand, during the marriage the husband’s patrimony includes his separate assets and liabilities, the community assets, and “debts contracted [by the husband] during the marriage.”

Now it becomes evident also that “debts contracted [by the husband] during the marriage” can be a reference only to those debts “contracted” by him in a matter of common concern to the spouses under the community of gains. It may be regarded as certain that the Civil Code does not consider debts incurred for the separate concerns of the spouses properly payable, as between them, from the common fund. The principle underlying article 2408 would be contradicted in that case, for that article requires each spouse, on dissolution of the regime, to reimburse the other spouse half the value added to his separate assets through the utilization of common funds or energies.

From the exegesis thus far the community of gains emerges as a marriage contract under which the spouses agree that certain of the revenues of each spouse, the products of their labor and industry, and certain of their acquisitions shall form a special mass within the
patrimony of the husband and subject to his control. From this mass the
debts that he contracts during the marriage in relation to their common
concerns are, as between them, to be discharged. Finally, on dissolution
of the regime the wife or her heirs or successors in interest shall have
the right to take half the assets in the special mass, if either she or they
will accept personal liability in full for half the debts dischargeable
therefrom according to their marriage contract or if she will accept
liability for those debts under benefit of inventory.34

One note of clarification remains. Because the community of
gains has the effect, as long as it lasts, of making all common assets part
of the husband’s patrimony, before dissolution of the community the
husband’s creditors of every kind may enforce their rights against the
community assets or the husband’s separate assets; on the other hand,
because the wife’s patrimony consists only of her separate assets and
her separate liabilities, her creditors, who are all her separate creditors
as long as the regime lasts, may enforce their rights only against her
separate assets. This conclusion is in conformity with the Spanish
community of gains in force in Louisiana in 1803.35

If the community of gains, as described in this exegesis, is
examined in the light of traditional notions of the roles of husbands and
wives, it stands out as a splendid institution. Even the wife who

34 Thus, the community of gains, as article 2807 states clearly, is not a
partnership. Unfortunately, the translators of the Digest of 1808 and of the
Civil Code of 1825 used that term to translate the French text’s société, the
connotation of which in the articles on the community of gains was
“association” and not “partnership.” The one place in which the translators
correctly used “association” rather than “partnership” is the translation of
société appearing in article 2325, where the phrase “conjugal association” is
found.
35 Pugh, The Spanish Community of Gains in 1808, 80 La. L. Rev. 1, 21-22 (1969),
emphasizes the lack of sources directly on the point, but notes that the wife’s
separate creditors could not have reached community assets because of the
contributes no patrimonial assets to the community of gains receives
recognition for her cooperative efforts as wife, mother, and principal
attendant to the family’s cultural needs, its social life, and its obligations
in kind for works of mercy and societal concern. In return for her efforts
she is given the opportunity to share in her husband’s gains during
marriage without running the risk of losing, through her husband’s
misfortune or inadequacy, the capital which she had at marriage or
acquired thereafter by succession or donation to her particularly. On
the other hand, should she decide for any reason to engage in activities
for gain, it is only right that she should contribute those gains, as the
husband must, to the general family fund. The system has the wisdom
of centuries to recommend it. The question is whether modern women
remain sufficiently attuned to the ancient wisdom to permit the
community of gains to remain the “legal” matrimonial regime without
alteration of its basic structure.

THE ROOTS OF DISSATISFACTION AND POSSIBLE REMEDIES

The roots of dissatisfaction and possible remedies may be
divided for discussion into four topics: the historic, basic concept that
the community of gains, during its existence, is part of the husband’s
patrimony alone; the immutability of the regime; other roots of
dissatisfaction stemming from the legislation proper; and difficulties
resulting from misunderstandings of the laws on the subject.

The Community as Part of the Husband’s Patrimony and its Alternatives

Women of late have objected strenuously to several aspects of
the community of gains which have their common basis in the idea that
the community is part of the husband’s patrimony. They have objected
that no disbursement of community funds can be made by the wife except as the husband’s mandatory;\textsuperscript{36} that separate creditors of the wife may not enforce their rights against community assets; that nevertheless the husband may employ community funds and other assets as he pleases, even for his separate interests, subject to the necessity of the wife’s consent in only a few instances;\textsuperscript{37} and that even the husband’s separate creditors may enforce their rights against the community assets as long as the regime lasts.\textsuperscript{38} Many women take the position that these aspects of the community of gains violate the fourteenth amendment and the Louisiana Constitution’s Bill of Rights, and would violate the Equal Rights Amendment to the United States Constitution were it to be adopted. The author disagrees. The proposed Equal Rights Amendment does not forbid contracts between husband

\textsuperscript{36} \textit{La. Civil Code} art. 2404 designates the husband as “head and master” of the community of gains, “administrator” of its effects, and “disposer” of its revenues. Although sometimes the wife’s consent is required, no provision is made whereby the community of gains may be affected by the wife acting without consent of the husband. See also \textit{La. Civil Code} arts. 131, 1786, 2334 (1870).

\textsuperscript{37} \textit{La. Civil Code} arts. 2334 and 2404 list most of the instances in which the wife’s consent must be obtained: donation of immovables or of the whole or “quotas” of the movables except to establish children of the marriage; sale or mortgage of immovables or movables standing in the wife’s name only—apparently to prevent disposition of the wife’s separate assets by the husband; sale, mortgage, or lease of immovables standing in names of both spouses if the wife has recorded a declaration that her consent will be required; and, by construction, lease of a community immovable standing in name of the wife alone if the wife has recorded the above declaration. \textit{La. Rev. Stat.} § 9:2801-04 (1950) also forbids the alienation or encumbrance without the wife’s consent of a community immovable which has been registered as the family home.

\textsuperscript{38} This was always true in the Spanish tradition and in Louisiana until United States Fidelity & Guar. Co. v. Green, 252 La. 227, 210 So. 2d 328 (1968), muddied the waters. Green, however, was overruled in Creech v. Capitol Mack, Inc., 287 So. 2d 497 (La. 1973), restoring consistency between the decisions of the Louisiana Supreme Court and tradition.
and wife, and the community of gains is contractual. Even if the regime were not conventional, it would not violate either the fourteenth amendment as construed or the Louisiana Constitution’s Bill of Rights. These forbid differences in the law’s treatments of men and women which are “unreasonable,” “arbitrary,” or “capricious.” An institution which is of such tradition cannot be termed arbitrary or capricious. Nor can it be considered unreasonable for the law to have provided for a regime which so much honors the traditional roles of husband and wife. Yet, given the present highly individualistic state of women’s attitudes—one which places the woman in competition with her husband, or at least in a dollars-and-cents bargaining position with him as if theirs were a commercial partnership rather than a union in

39 The proposed Equal Rights Amendment is directed at laws imposing differences in treatment on men and women: “Equality of right under the law shall not be denied or abridged by the United States or by any State on account of sex.”

40 See text at notes 9-11 supra.

41 Professor George L. Bilbe contends that previous constructions of the fourteenth amendment indicate that a presumption of tacit marriage contract accepting the community of gains would be unconstitutional because couples in fact usually are ignorant of the features of the community of gains and of the availability of express marriage contracts to modify or reject the community. Bilbe, Constitutionality of Sex-Based Differentiations in the Louisiana Community Property Regime, 19 Loy. L. Rev. 373 (1973). The argument has weight, but the writer does not consider it conclusive. Nor does the author consider convincing the arguments based on Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), in which husband-wife relationships were not involved. It may be unreasonable to give preference to a male when it comes to administering a third person’s succession (Reed) or not to presume the husband is dependent on the wife, when the wife is presumed dependent on the husband, for military allowance eligibility purposes (Frontiero), but in any event neither case involved a division of authority between husband and wife for good order.

42 La. Const. art. I, § 3 (1974): “No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of . . . sex . . . ”

43 Id.
which each seeks the maximum fulfillment of both through a division of interests and efforts compatible with the traditional roles of husband and wife—the legislator must take these objections into account and modify the structure of the community of gains. The question, then, becomes one of determining how the basic structure of the community of gains shall be modified to meet these demands in fact.

Rejecting the community of gains entirely and accepting an absolute separation of assets and liabilities as the legal regime would have the very salutary general effects of increasing to the highest degree possible the security of transaction third persons might have in dealing with either spouse, of giving husband and wife each undisputed separate control of his or her assets and revenues, and of insulating each from loss resulting from the other’s mismanagement. The very great disadvantage of this regime as a legal regime, however, would be that it would require revision of the laws on succession between husband and wife if Louisianians were to continue to enjoy on intestacy anything resembling the effects of the combination of the present laws on the community of gains and successions. This would be difficult to do without destroying in large measure the great solicitude the law has had for providing for the surviving spouse out of community assets and thereby eliminating, in the usual case, the surviving spouse’s inheritance of a share in effects in which the blood relatives of the deceased may have an interest. The author, at least, considers this effect of prime importance for preserving peace among in-laws. No doubt, too, if separation of property were accepted as the legal regime, some provision would have to be made for the spouse of insufficient capital in instances of separation from bed and board and divorce. A legislated scheme would present the same, if not aggravated, problems of intestate succession provisions, and the author, at least, does not believe that discretion should be placed in the judiciary in a matter of this kind. No one, however, seems to be urging an abandonment of a regime based on the idea of a community of gains, not even women’s
rights advocates, who realize full well that ordinarily it is the man who accumulates most in patrimonial matters. Thus, they wish to preserve the idea of a sharing of gains. The writer agrees, even if perhaps for different motives.

The alternatives presently being urged for changing the structure of the community of gains appear reducible to four distinct kinds.

The first, very simply, would give to each spouse severally full power to administer and control the community assets. This change would place the whole of the community assets in the patrimony of each spouse, thus affording the creditors of each spouse, whether antenuptial or postnuptial, separate or community creditors, the right to obtain satisfaction out of any and all community assets as well as out of the separate assets of the debtor spouse. Under this plan, neither spouse could be allowed to renounce the community of gains.

The second alternative is to require the joint action of the spouses (or at least the consent of the spouse not the mover in the act) for any matter affecting the community of gains, both as between the spouses and as between the spouses and third persons. In the event of joint action, both spouses would be obligated personally toward the creditors, and the creditors could enforce their rights out of the community assets or the separate assets of either spouse. In the event one spouse acts with merely the consent of the other, the creditors of the acting spouse could reach the community assets and that spouse’s separate assets, but not the separate assets of the merely consenting spouse. Whether joint action or action with consent of the other spouse were involved, however, neither spouse could be allowed to renounce the community of gains. Whether the separate creditors of one spouse whose credits originated without the consent of the other spouse (for example, an antenuptial creditor, or the creditor of a debt inherited or
contracted during marriage without the consent of the other spouse) should be allowed to enforce his right against the community assets could be settled either way.

The third alternative is to leave the community of gains essentially as it is except (1) to require the spouses to designate before marriage who shall control it or (2) to permit the spouses to redetermine after marriage which spouse shall have control. The possibility of a renunciation of the community by the noncontrolling spouse could be retained in the first instance, but probably not in the second.

The fourth alternative, which the author recommends, would give each spouse, during marriage, full control over those community assets acquired by him, and sole liability for those community debts incurred by him, so long as the regime lasted; but would give each spouse, on dissolution of the regime, the right to accept or renounce half the community assets and liabilities acquired or incurred by the other spouse. The author believes this regime would have all the advantages of a separation of property during marriage and yet preserve the possibility of each spouse’s sharing in the other’s gains during marriage without either depriving him of maximum freedom to act during marriage or subjecting him to personal loss from the other’s economic misfortune.

Evaluation of the Alternatives for Reform

The first proposal, that to give each spouse separate and identical powers to deal with community assets and incur obligations which his or her creditors could enforce out of all community assets, is the ideal regime for the ideal couples who will be realized en masse by society, if at all, only in millennia to come. How noble and charitable it is to attribute to each spouse common goals in life, unison of mind on the details of their execution and realization, and complete acceptance by
each of whatever may be done by the other! Spouses who have the spiritual assets to cope with the demands of this regime should be urged to contract it specially—indeed, they should be urged to enlarge it to include all assets and liabilities of the spouses whenever and however acquired, before as well as during marriage. But to make this the legal regime in the absence of sufficiently widespread utopian virtue would require couples who wish to look forward to marriages with some degree of permanency to enter into marriage contracts denouncing it. The legal regime should be that which fits best the vast majority of the people, whatever their virtue or lack of it.

There is danger, nevertheless, that a legislature might be moved to adopt such a regime as the legal regime. Some militant women’s rights advocates wish to give the wife the same credit husbands have enjoyed up to now to buy luxuries beyond the family’s means, and legislators fear their political power. Another reason is that the suggested regime would coincide, at least temporarily, with the economic advantage of merchants and other professional extenders of small credit. They would be able to extend credit to a wife and collect from her husband, not simply for ordinary family requirements, but for anything at all. Extenders of major credit might be expected to become more anxious to have themselves provided with real or at least

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44 Arizona, California, Idaho, and Washington have now amended their community regimes in directions which approach this plan. See ARIZ. REV. STAT. ANN. § 25-214 (Supp. 1973); CAL. CIV. CODE § 5125 (Deering Supp. 1975); IDAHO CODE § 32-912 (Supp. 1974); WASH. REV. CODE § 26.16.030 (Supp. 1973). The various laws have different formulae and variations in substantive detail, but in general all give each spouse the power to incur obligations enforceable out of all community assets and the power to alienate community movables for value. In general, the acquisition, disposition, or encumbrance of an immovable requires the action of both spouses. All these provisions are very new, Washington’s having been enacted in 1972, Arizona’s in 1973, Idaho’s in 1974, and California’s in 1973 to take effect in 1975. Experience with them, therefore, has been limited.
nonspousal personal security. Unsecured loans to husbands in business would be far fewer, for the wife’s capacity to deprive her husband’s creditor of the security afforded by the community assets would be all too great. No doubt credit generally would become more difficult and more expensive.

Advocates of this deceptively simple, but at the same time the most radical, departure from the community of gains’ traditional structure, have urged that it is the only way to recognize fully woman’s contribution in marriage and to keep her out of the employment market in the interest of the family. The observation implies a recognition of different roles for men and women during marriage, but it also implies that married women in general may be more concerned today with financial partnership than with giving the family that kind of cooperation in life only the woman can give so well. Such an attitude, it seems to the author, is precisely what causes the present community of gains to be distasteful to some women and what necessitates its change. But one can suspect that men will not accept gladly a regime which gives the wife control of all their gains, and one can suspect, too, that in those rarer instances in which the woman provides the greater portion of the gains, the wife will not be so anxious to give her husband the same authority she has to control them. Human nature must be taken into account by the law.

The second alternative for reform, providing for joint control of the community of gains, is ruled out by its cumbersomeness and its fundamental premise of mutual distrust. A marriage cannot survive if action on the part of each spouse is dependent totally on the other’s concurrence. Each spouse remains a separate person in fact in spite of marriage; differences of opinion between them are bound to arise, and these differences will encumber free action. Couples may be able to tolerate joint control in rare, important transactions, such as the sale of a family home, but not for everyday events of the market place, or in
ordinary business transactions. It is to be suspected that differences of opinion on such occasions might easily lead to quicker dissolutions of the marriages than otherwise would have occurred. Probably only those marriages in which the spouses provided each other or at least one of them with a mandate to act for both could survive. If that is so, the first alternative plan would seem better than this one as the legal regime. Third persons wishing to deal with either spouse would have to obtain the cooperation of the other or at least a copy of the mandate to the acting spouse in order to protect themselves, increasing the red tape of commerce. Being married must not be made an occasion for inconveniencing third persons in their normal dealings with husbands and wives in daily life.

The third plan leaves the community of gains essentially as it is, except that it requires or permits the spouses, either before marriage only or at any time during marriage, to decide which of them shall control it. To a greater degree than the second plan it would place third persons in the position of having to ascertain which of the spouses has the authority to act. In the author’s opinion, the spouses should present as simple a legal posture as possible in the presence of third persons in order to provide for the greatest security of transaction. In addition, if change of control by mutual consent were permitted during marriage, serious disputes leading to family disintegration could be anticipated. The author considers this proposal to be the worst of all possible plans, both from the point of view of third persons dealing with the spouses and from that of the spouses in relation to each other.

The fourth alternative is that recommended by the author. During marriage, control over community assets and liability for community debts would be divided between the spouses as follows: Each spouse would have, as part of his patrimony, those community assets and those community liabilities acquired and incurred by him. His act alone would suffice for acquisition of an asset. A community liability
incurred by him alone would be enforceable only out of the community assets under his control and out of his separate assets. One spouse’s creditors could not enforce their rights out of the community assets under the control of the other spouse or against the other spouse’s separate assets. As against all third persons, each spouse would be as independent of the other in assets and liabilities as are spouses separate in property. Each could contract community obligations toward third persons or toward the other spouse as if he were a stranger. Together they could incur obligations toward others jointly or solidarily as if strangers. They could acquire community assets as co-owners in indivision and demand partition thereof against each other, and the creditor of each could demand satisfaction out of his debtor spouse’s undivided interest, all as if the spouses were unmarried co-owners. Never would a single thing acquired by the act of both, even as a community asset, be other than one acquired in indivision, so far as third persons are concerned. Never would any asset acquired by both fall under the control of one only, or be placed beyond the reach of his creditors. In all things, so far as the public is concerned, the spouses would appear as if single persons, each having his own patrimony. Yet, as between the spouses, there would be a community of gains. Each spouse’s patrimony would include his separate assets and liabilities and the community assets and liabilities acquired or incurred by him. On dissolution of the regime, each spouse would have the right to renounce his right to share the community assets and liabilities acquired or incurred by the other spouse, thus both preserving the fundamental notion of a sharing of gains at the termination of the regime and also extending to the husband a right which the wife alone has under the present law, that of renouncing a community mass which one has no power to control and whose liabilities exceed its assets. Another way of looking at the plan is that each spouse’s patrimony would function, both as to third persons and as between the spouses themselves, like the
The author has not been able to discover a defect in this plan. It preserves a community of gains. It affords each spouse sole control of what comes to the community through his hands—fruits and revenues of his separate assets, fruits and revenues of community assets already acquired by him, products of his labor and industry, donations to him made as community assets, and all things acquired by him with these things. It would enable the unmarried but marriageable woman to obtain more credit, for her antenuptial creditors could rely on her future gains even though they were to become community assets. It insulates each spouse against personal liability for debts originating with the other. It affords third persons the same security of transaction in dealings with either spouse that could be achieved with a separation of property. Third persons would never have to inquire whether an asset was a separate asset or a community asset, as long as it was found in the acting spouse’s patrimony. No inquiry would have to be made in extending credit except as to that spouse’s actual or potential patrimony. Neither before third persons nor between the spouses would there be a “head and master” of the community. Each spouse would be equal before the other under the marriage contract. Yet, regardless of who acquired the most or who spent the most, there would be a sharing of gains as they existed at the end of the regime, reflecting the understanding that each should share the other’s good or poor fortune.

The suggestion, to be certain, would not meet the demands of those who insist that the “houseperson,” male or female, should have as much control over the “earningperson’s” earnings as the “earningperson” himself. Nor would it satisfy completely the extenders of small credit, for they would like to have their business opportunities expanded even more by being given the right to extend credit to the
wife against the husband’s present and future acquisitions. But it will satisfy the reasonable demands of women to control those community assets acquired by them without depriving their husbands of the credit usually extended them on the basis of their present assets and prospects for future gains. Few extenders of credit to husbands have relied in fact on the wife’s earning potential simply because those earnings fell into the community of gains.

Advocates of the first proposal, which the author rejects, point out that only that concept of the community of gains would assure the revenueless wife of a source of finances that she deserves as a matter of human dignity. That she should have some income to use as she sees fit is agreed, and most emphatically so. The woman who must or chooses to leave finances entirely to her husband and who has no other source of revenue must be assured of a portion of his income which she might spend or obligate as she herself decides. The same is true of a man who depends on his wife’s income. This objective, however, should be met not by matrimonial regimes law, which is the subject of contract, but by the law of marriage, which is not. Provision for an allowance for the spouse without revenue—or whatever one may call it—should be by a law applicable between the spouses as a matter of public order, whatever the spouses might agree in their marriage contract.

The author is not certain of the precise form a rule to that end should take. Possibly the only method is to require that the spouse having less than a certain percentage, perhaps 20 per cent, of the combined incomes of both be entitled to demand enough from the other to raise his total income to that percentage. The funds transferred would remain community assets if taken from community assets, but would be subject to the complete control of the payee spouse. That the rule would be an empty gesture in some instances if it were not enforceable by suit, is clear. That even the availability of suit would not
suffice in some instances, also is clear. But the law can do very little to enforce rights between spouses at odds with each other.

It may be noted, finally, that nothing has been said in any of the discussion above about the right of either spouse to pledge the credit of the other in making purchases for the normal, ordinary demands of family life. The reason is that this, too, should not be satisfied through matrimonial regimes law, which is contractual and may be varied by the parties in entering into their marriage contract, but by the conventionally unalterable public order law of marriage. Up to now, Louisiana has lived with what the author would like to consider a true custom, given popular approbation, that the husband is presumed to have authorized his wife tacitly to incur in his name obligations for such requirements of the family’s usual life as husbands in Louisiana ordinarily expect their wives to procure in their husband’s names. 45 In the opinion of the author, the law of marriage could be amended to obligate husband and wife solidarily, so far as their creditors are concerned, for all such obligations. Extenders of credit for such things should not have to inquire into the authority of the husband or wife with whom they deal. As between the spouses themselves, however, liability for such obligations should be left to the spouses’ marriage contract or, failing a stipulation on the point, be divided between them in proportion to their respective incomes.

Conventional Immutability

Never in Louisiana have the spouses been able to modify their matrimonial regime once the marriage has taken place. A separation of goods and effects might occur on separation from bed and board46 or on a judgment of separation of property obtained by the wife for

45 See ROBERT A. PASCAL, LOUISIANA FAMILY LAW COURSE § 6.8 (1973).
46 LA. CIVIL CODE art. 155 (1870).
cause,\textsuperscript{47} placing the spouses under a legally imposed regime of separation of property;\textsuperscript{48} but never could spouses use the contract form to vary the regime which they had contracted expressly or tacitly at marriage.\textsuperscript{49} Today there is some clamor for an abandonment of this rule, not simply by women’s rights advocates who see the rule as a male chauvinist trick, but also by others who do not believe that any contractual arrangement between persons should be beyond review and revision by mutual consent. There can be no doubt that one or both spouses to a marriage may come to regret their marriage regime. Louisiana attorneys will testify that occasionally spouses are so dissatisfied with their regime that they obtain separations from bed and board only to put an end to the existing regime and then become reconciled and continue to live under the then legally imposed regime of separation of property. It is also true that even the French, long enforcers of the immutability rule, have made possible the conventional amendment of matrimonial regimes under judicial supervision in instances of family advantage.\textsuperscript{50}

The author indicated once before in this article that the possibility of allowing the spouses to designate one or the other of themselves as administrator of the community of gains by conventional act during marriage probably would lead to incessant discussions on the point and eventually to the disintegration of marriages that otherwise would have succeeded. The same might be said of the possibility of making other changes in a matrimonial regime by convention. No doubt a husband who had accepted a community of gains sometimes might come to wish he had insisted on a separation of property, or a wife who had consented to a separation of property might come to desire a

\textsuperscript{47} Id. art. 2425.
\textsuperscript{48} Id. arts. 2430, 2435.
\textsuperscript{49} Id. art. 2329.
community of gains. The spouse who conceived of a selfish advantage would be tempted to demand a change and the other would tend to resist. Business partners can afford to risk dissolution of the partnership when one partner decides to strike for himself alone, but married persons and their children cannot. Anything which can be the cause of friction—an envisioned gain realizable only with the other spouse’s consent—must be eliminated. Each spouse must understand that talk of change of regime is useless. If change of regime is possible, interspousal discord will occur and all too often end either in family disintegration or in one spouse’s acceptance of unjustifiable personal loss in order to hold the family together. The proper remedy is to make certain each spouse understands before marriage what the legal regime is and how it may be modified or rejected in favor of another, and to make the legal regime one that will minimize interspousal dissatisfactions.

Other Dissatisfactions and Difficulties Caused by the Legislation

If Louisiana men always have been “male chauvinists,” they also have been most chivalrous. Thus, Civil Code article 2386 and its counterparts in the Digest of 1808 and Civil Code of 1825 have allowed the wife who administered her paraphernal assets to keep their fruits—even those produced by her labor, for example, crops—as part of her separate property. Fruits of the husband’s separate assets, however, invariably form part of the community of gains. Articles 2334 and 2402 provide that actions for damages for personal injuries to the wife are her separate assets, but that those for personal injuries to the husband are community assets except when he is injured while living separate from her by reason of fault on her part sufficient for separation or divorce. And article 2334 allows the wife living separate and apart from

51 S. 314, introduced in the 1974 Louisiana legislative session by Senator Fontenot, would have amended LA. CIVIL CODE art. 2325 to this effect, but was not enacted into law.
her husband, whomsoever’s may have been the fault, to keep her earnings as separate assets, although the husband’s earnings always constitute gains.52

These inequalities should and can be eliminated easily. All or none of the fruits of separate assets should be community assets. If they are to constitute community assets, then it should be legislated that only the net fruits enter the community. The latter rule would simplify accounting and minimize commingling problems by focusing the community rights on identifiable values or credits rather than on gross fruits against which the costs of production would have to be considered community obligations. All damages for personal injuries, and even for loss of earning capacity, should be considered separate assets. It is true that the products of “the industry and labor” of the spouses belong to the community of gains, but it is also true that in this day marriages often are shortlived, especially when the badly injured husband recovers a sizeable amount for personal injuries and the wife realizes that, through separation or divorce, she can both free herself of him and obtain, as her own, one-half his recovery.53 It would be better

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52 LA. CIVIL CODE art. 2334, as amended in 1912 and thereafter, also treats the earnings of the wife in a trade, occupation, or profession “separate” (i.e., different) from her husband’s as her separate assets. The Louisiana Supreme Court, however, construed the provision as repetitious of that making the earnings of the wife while living separate from her husband her separate assets. Houghton v. Hall, 177 La. 237, 148 So. 37 (1933). Popular acceptance and reliance on the decision gave rise to a custom contra legem which was confirmed by implication by an amendment to the Code of Civil Procedure. LA. CODE CIV. PROC. art. 686 (1960), as amended, 1970 La. Acts 344. The article, designating the proper party plaintiff to enforce rights forming part of the community of gains, was amended to name the wife proper party plaintiff to recover her earnings.

53 See Chambers v. Chambers, 259 La. 246, 249 So. 2d 896 (1971), and cases cited therein for examples of instances in which the uninjured spouse might come to share unjustly in the injured spouse’s award for personal injuries and future earnings.
to allow the injured spouse to retain the damages as his. Any community, of any marriage, could expect to be enriched by the fruits produced by the recovered damages, and, in any event, each spouse must be required to contribute to the expenses of the existing marriage out of all his income, community or separate. Earnings while spouses are living separate and apart should be classed as community assets; but, whatever the community regime, during a period of separation in fact the earning spouse should be allowed to retain control of his earnings and of the fruits of his separate assets. If the author’s recommendation for the structure of a community of gains were adopted, of course, that result would not have to be provided specifically for that particular regime.

It would also be well to reconsider two general provisions: the “omnibus clause” of article 2334 and the presumption under article 2405. Under the “omnibus clause,” all things acquired during marriage by either spouse are community assets unless legislation has declared them to be separate assets. This rule is much too sweeping. Its literal application requires a thing not labelled a separate asset by the legislation to be treated as a community asset even if to do so would violate the principle of the community of gains evident from article 2402 and the major portion of 2334, that gains include only fruits of assets, products of labor and industry, donations received as community assets, and things acquired in exchange for community assets. It was the “omnibus clause,” for example, that brought about the first decisions holding that recoveries for personal injuries entered the community.54 A more reasonable conclusion would have been that such damages replaced a personal and therefore separate value, one’s bodily integrity. The community scheme may give the other spouse a right to the products of one’s body, but not to one’s body as such. Life insurance

proceeds were left out of community assets because the judiciary was able to take the view that they were donated funds, though the donations had to be declared to be of a special kind, free of the rules on ordinary donations.55 Today the "omnibus clause" seems to be one of the motives for classifying most rights to retirement benefits as community assets, and yet there are good reasons to suggest that many of these rights (as distinguished from their proceeds when paid) should be considered intensely personal and therefore as separate assets, in spite of their being to some extent the products of labor and industry. If the clause were eliminated, doctrine and judicial opinion could guide the proper characterization of new rights as community or separate in accordance with the basic principles of the regime.

Article 2405 declares that upon dissolution of the regime all things possessed by either spouse are presumed community assets until the contrary is proved. Although such a presumption might be fair in those instances in which the spouses have been married many years or in those in which it can be shown generally that the spouses’ acquisitions were largely through gains after marriage, it is often a vicious rule when applied to marriages recently contracted, or when the general situations of the spouses at marriage or at death would seem to render the contrary presumption a more reliable indication of the true facts. Although the present rule facilitates the quick disposition of successions and even of partitions after separation and divorce, it probably does so at the expense of justice in many instances. The author would abolish the presumption and in its place substitute the general provision that if the spouses or their successors in interest

cannot agree on the characterization of a thing, its characterization should depend on a preponderance of evidence, giving due regard to the nature of the thing, the time of its acquisition, the general configuration of the patrimonies of the spouses, and all other factors which may be shown to be relevant and probative.

Two definite defects in the law of marriage relevant to matrimonial regimes are, first, the absence of a requirement that the spouses disclose fully to each other, at all times, the states of their patrimonies, and second, the prohibition of suit between spouses. Full disclosure of the spouses’ patrimonies is essential not only under the community of gains, but also under any other regime, for, whatever the regime, the spouses should be required to contribute to the expenses of the marriage in the manner specified in the marriage contract or, failing such specification, in proportion to their respective incomes. The requirement of disclosure would become especially important if the author’s suggestion that a revenueless spouse should be able to claim a minimum allowance from the other were adopted.

Presently, Louisiana legislation forbids wives to sue husbands except for separation from bed and board, divorce, (nullity of marriage), separation of property, and return of paraphernalia. No legislation forbids husband to sue wife, but the jurisprudence seems to suggest that such a suit will not be allowed the husband except in instances similar to those in which the wife might sue him. These prohibitions, legal and factual, seem inconsistent with present modes of thought and certainly have caused inconveniences. The wife needing alimony during marriage, for example, has been forced either to file suit for separation

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56 See text at pages 239-240 infra.
57 LA. REV. STAT. § 9:291 (1950). Nullity of marriage, although not expressly one of the statutory exceptions, obviously is another permissible interspousal suit.
58 See Seeling v. Seeling, 133 So. 2d 168 (La. App. 4th Cir. 1961), and cases cited therein.
from bed and board or to charge her husband with criminal neglect of family, even though she has not been left in “destitute or necessitous” circumstances. Neither spouse has been able to prove his right to recover from the other for delict while the evidence was available unless he first obtained a separation from bed and board. In addition, if the author’s plan for a community of gains were accepted, with its treatment of the spouses as if they were strangers to each other’s patrimonies even during marriage, it would be well to allow suit between them generally for any cause of action.

Another problem needing attention arises from article 131 of the Civil Code. That article declares that the wife who is a public merchant obligates herself and, if there is a community between them, her husband personally as well. The article never was intended to mean that the wife might obligate the husband personally without his consent to her acting as a public merchant. This is made abundantly clear by article 1786, which restricts the husband’s liability for the wife’s acts in trade to instances in which he has permitted her to act as a public merchant. His consent, in other words, renders her act his if there is a community between them, for her activity is a type which produces revenues which should fall into the community of gains.

There is, nevertheless, dictum in two cases\(^5\) and some popular opinion that, as a result of the married women’s emancipation legislation,\(^6\) the married woman may be a public merchant without the permission of her husband and that in so acting she obligates not only herself, but her husband personally as well. If so, the married woman has, in her activity as a public merchant, the same capacity as the husband to incur debts which enter the community of gains and, in addition, may do something which the husband as manager of the

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community of gains may not do, obligate her spouse personally to her creditors without his consent. The result could not have been intended, certainly, and was not. If the married women’s emancipation legislation has this effect, it has modified the laws on the community of gains, and La. R.S. 9:105 states explicitly that nothing in that legislation is intended to modify the community of gains. Under the present law, therefore, it may very well be concluded that the married woman, though relieved of the “incapacities” and “disabilities” of a married woman “as such” by that legislation, either (1) may not be a public merchant if forbidden by her husband, or (2) may be a public merchant against his prohibition, but in that case without affecting either the community of gains or her husband personally.

The niceties of the present effect of article 131, however, need not be dwelt upon unless the management provisions of the community of gains are retained substantially as they are today. Of the four general types of suggested reforms mentioned in this article, only that in which the community would remain as it is, subject to the right of the spouses to decide who shall manage it, would not necessarily repeal article 131 by implication. If that were the regime adopted as the “legal” regime, then the author would recommend, at a minimum, that article 131 be amended to eliminate the personal liability of the managing spouse for the acts of the nonmanaging spouse who is a public merchant. It would be preferable, however, that the activity of the nonmanaging spouse who is a public merchant affect his separate patrimony only.

The final source of dissatisfaction is the manner in which the wife is protected against inter vivos acts of the husband to the prejudice of her interest in the community of gains. Donations of immovables or of the whole or a quota of the movables, except those to establish
children of the marriage, appear to be declared null. Suits to have such donations declared null before dissolution of the regime, however, are not known. The husband is permitted to make donations of particular movables unless he can be said to have acted with the intention to defraud his wife. Even then the act is not null, the wife having only an action in damages against the husband or his heirs at the dissolution of the regime. Other alienations made to defraud the wife give rise to the same remedy only. Proof of intent to defraud the wife is difficult in any case, and years after the event it may be impossible or useless. No matter what plan for revising the community of gains is accepted, it would seem desirable that the nonmanaging spouse be given more protection of his eventual right to share the community assets. An adequate remedy or preventative, however, is difficult to devise except in the instances of immovables or registered movables. There, a requirement of concurrence or written consent might be enforced easily. But it is questionable that written consent of the nonmanaging spouse should be required for other than gratuitous acts, except possibly the alienation or encumbrance of the family home. Any other rule increases the difficulty of dealing with third persons and makes transacting business too inconvenient. The author, therefore, would prefer to adhere to the present rule, even if it cannot always provide an adequate remedy, but would extend it by giving the aggrieved spouse the right to sue immediately either the acting spouse or any third party who has received the asset with knowledge of the intent to defraud the aggrieved spouse.

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61 LA. CIVIL CODE art. 2404 (1870). See also Bister v. Menge, 21 La. Ann. 216 (1869).
62 LA. CIVIL CODE art. 2404 (1870). The judiciary has shown impatience with the rule and, in at least one case, has forced the donee to surrender the movables (stock shares) donated with intent to defraud the wife. See Succession of Geagan, 212 La. 574, 33 So. 2d 118 (1947).
Purchases with Separate Funds

The jurisprudence has treated acquisitions by the husband with separate funds differently from similar acquisitions by the wife. The husband’s acquisitions have been designated community assets if the husband failed to state in the act of acquisition both that he was making the purchase with separate funds and that he intended the thing purchased to be his separate asset.\(^6\) The wife, on the other hand, has been allowed to show at any time that a purchase was made with separate funds and the proper intent.\(^6\) It will be noted that the jurisprudential rules imply that a purchase with separate funds can be a community asset, and that whether it is or not depends on the intent of the purchaser. Yet article 2334, as amended in 1912, declares that a thing purchased with separate assets is itself a separate thing, and article 2334 does not require any particular mode of proof to establish the separate character of the purchase money. Nor does any article of the Civil Code suggest that during marriage, or otherwise than at dissolution,\(^6\) a thing is to be presumed a community asset until the

\(^6\) The principal case is Sharp v. Zeller, 110 La. 61, 34 So. 129 (1902).
\(^6\) See Fortier v. Barry, 111 La. 776, 35 So. 900 (1904), for the classic statement.
\(^6\) The jurisprudential requirements have a peculiar history. Originally, purchases even with separate funds were community assets. See La. Civil Code art. 2402 (1870). The judiciary first admitted that a thing exchanged for a separate thing could itself be a separate thing in Savenat v. LeBreton, 1 La. 520 (1830); then, that a purchase with separate funds could be a separate thing if the purchaser so intended. In Sharp v. Zeller, 110 La. 61, 34 So. 129 (1903), however, the supreme court imitated a rule of the French Code civil, obtaining inspiration from a French author, even though the French community of movables justification for the French rule could not be said to be consistent with a regime of separation of property with a community of gains. The jurisprudential rule, therefore, was doubly in violation of article 2402. Then, strangely, the judiciary continued to apply the idea of Sharp v. Zeller even
contrary is proved. Whatever the new community regime, care must be taken to negate and avoid such unauthorized and unwarranted judicial legislation. The community of gains is, as mentioned earlier in this article, not a complete matrimonial regime. The spouses are separate in property as to part of their patrimonies and in community as to part. There is no reason to establish strong presumptions in favor of community characterization. The spouses have as much right to be protected in their separate assets as they have in their community assets.

The “Ownership” of the Community Assets

Much concern was caused by the United States Supreme Court decision in *United States v. Mitchell*,66 which held that a wife was obliged to file an income tax return and pay income tax on one-half the income of the community of gains although she had had no control over the income and had no way to compel her husband to furnish her with information sufficient to make the return or with the money with which to pay the tax. Certainly the decision was in error, for the general principle of income tax liability is economic power, whatever the phraseology of the statute. The Supreme Court, however, used the false concept of the wife’s *ownership* of one-half the community of gains, made prominent by *Phillips v. Phillips*67 in 1926, in reasoning that the tax statutes imposed liability on the owner of the income and that under Louisiana decisions the wife was owner of half the community income even if she could not control it. The *Phillips* decision has been overruled on this point by *Creech v. Capitol Mack, Inc.*,68 and hence

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66 403 U.S. 190 (1971).
67 160 La. 813, 107 So. 584 (1926).
68 287 So. 2d 497 (La. 1973).
there should be no difficulty in arguing the incorrectness of *Mitchell* and avoiding its pronouncement in the future.

In any event, a change in the structure of the control over the community of gains may alter the income tax liability of the spouses. The first alternative plan discussed previously might very well be construed to render each spouse liable for the whole tax due on all community income, for each spouse severally would have the right to control the whole community income. Under the second plan, that of joint control, it would seem that each spouse should be liable for only half the tax, for neither might act alone to control the community assets. Under the third plan, that of a single community administered by the spouse chosen by the mutual consent of both, any attempt to assign a half interest to the non-managing spouse might result in a legal situation similar to that described in *Mitchell*. Under the plan advocated by the author, however, it would seem reasonable to conclude that each spouse could be held liable for only that tax due on the community income coming into his hands, unless the revised laws on the community unwisely attempt to declare each spouse “owner” of one-half the community of gains during its existence. The author, therefore, recommends that any such definition of the interests of the spouses in the community of gains be avoided. The term, after all, is merely one of art. The actual rights and powers of the spouses with regard to community assets and liabilities are the more important considerations.

*The “Entity” Notion and its Ramifications*

The Civil Code does not treat the community of gains as a separate “entity” or fund with elements of legal personality, but the bench and bar have thought about it in this fashion since the first part
of the 19th century.\textsuperscript{69} This kind of thinking led to many false conclusions. Sometimes on the death of the wife the husband or his heirs were deemed to have the right to “administer” the community of gains for its “liquidation,” thus reducing the right of the wife or her heirs to a surplus in value. Yet under the Civil Code, each spouse or his heirs is entitled to a partition immediately on dissolution of the regime in order to realize his interest in terms of \textit{half the assets} rather than \textit{a half interest in all of them}.\textsuperscript{70} This is true even if there is acceptance of the community with benefit of inventory, for the benefit of inventory properly understood operates only on the share of the spouse so accepting.\textsuperscript{71} Yet in instances of acceptance with benefit of inventory the tendency was to place the entire community in administration, perhaps much to the prejudice of the desire of the other spouse or his heirs to realize the ownership of particular items through partition. There are decisions with better foundations and better results, to be sure, but the popular misconception persists among members of the legal profession.\textsuperscript{72}

The same tendency to regard the community as an entity to be administered and liquidated by the husband on dissolution led to the practice of including that administration as a part of the deceased husband’s succession, quite contrary to the Civil Code’s requirement that the community be partitioned so that the assets in the succession of the deceased might be ascertained.\textsuperscript{73} The 1960 Code of Civil

\textsuperscript{69} For a fall review of the subject see especially Comment, \textit{The Fictitious Community and the Right to Partition}, 30 LA. L. REV. 603 (1970) [hereinafter cited as \textit{Fictitious Community}].

\textsuperscript{70} LA. CIVIL CODE art. 2406 (1870).

\textsuperscript{71} Id. art. 1047, rendered applicable to the wife’s acceptance under benefit of inventory by LA. REV. STAT. § 9:2821 (1950), is abundantly clear on the point.

\textsuperscript{72} See, e.g., Edwards v. Edwards, 268 So. 2d 686 (La. App. 1st Cir. 1972); Lester v. Lester, 245 So. 2d 478 (La. App. 3d Cir. 1971).

\textsuperscript{73} LA. CIVIL CODE art. 1135 (1870), unfortunately repealed by 1960 La. Acts 30, on adoption of the 1960 Code of Civil Procedure.
Procedure compounded difficulties by *seeming to say*, at least, that the surviving spouse was to be placed in possession of that half of the community of gains which is his right under matrimonial regimes law in the succession proceedings and after any administration therein. Similarly, the tendency to personify the community of gains led the judiciary to speak of the community creditors’ preference over a spouse’s separate creditors to reach community assets for satisfaction of their rights. There is, however, no justification for this preference in our legislation, for preferences exist only by legislation, and there is no legislation creating any such preference. All creditors of a spouse have rights against all assets of the spouse on the same basis, whether those assets are or were community assets or separate assets.

The author suggests that any legislation revising the community of gains should specify clearly the purely conventional character of the community of gains, the nonexistence of a community entity, and the absolute right of either spouse to demand a partition upon dissolution as long as he or she accepts the community simply or with benefit of inventory. The right of each spouse or his heirs to half the specific things in the community, as opposed to a half interest in surplus assets after an administration to pay debts, should be preserved. A surviving spouse or the heir of a deceased spouse may well prefer to preserve his right to a particular asset even if he has to use separate funds to discharge community debts. This refinement of the traditional law should not be abandoned for a concept that both reduces all goods

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75 Thompson v. Vance, 110 La. 26, 34 So. 112 (1903).
to simple money values and demonstrates a creditor orientation that ignores personal sensibilities concerning the assets which have formed a part of one’s life or that of one’s spouse, parent, or other relative. At the same time, the apparently inconsistent articles of the 1960 Code of Civil Procedure should be corrected by amendment.

Legacies of Community Assets

The failure to understand that the community is not an entity to be liquidated and, further, that the spouses each have upon its dissolution an absolute right to one-half the particular assets in the community of gains as distinguished from a mere half interest in each asset as owners in indivision, has given rise to the common assumption that the spouse dying first cannot make a legacy of a community asset, but only a legacy of his half interest in any or all of the community assets. There is no reason, however, why a spouse’s legacy of a specific community thing should not be upheld as valid subject to either of two conditions: (1) that the thing falls to the deceased’s lot in the partition in kind, that being possible, or (2) that the survivor consents to the legacy in return for the right to take full ownership of other community assets of equal value for himself. If a unitary community mass is continued under such revision of the laws as may come, then the rule suggested above should apply to all community assets. Should the author’s suggestion for a community regime be accepted, however, then each spouse’s right to make legacies of particular community assets should be limited to those community assets which have been in his patrimony and subject to his control.

Commingling of Assets

Commingling is the community’s bane of existence, but legislation can do nothing to eliminate it. Spouses who have both separate assets and community assets in their possession and control will commingle them. The only way to avoid commingling is to have an
absolutely universal community of all things which the spouses have and may acquire, or, in other words, commingle all as a matter of law.

It is unnecessary and unfair, however, to label as a community asset everything or every mass of things which results from commingling. Not even the presumption under article 2405, that on dissolution all things possessed by the spouses are deemed community assets until the contrary is proved, requires this conclusion. The ordinary principles of accession should come into play once it can be ascertained that the commingled mass has been constituted of separate and community things. If the value of the separate element exceeds the value of the community element, it would seem more reasonable to consider the whole a separate asset subject to accounting under the rule of article 2408. Under that article, the spouse whose separate asset has been augmented by community assets or energies owes the other spouse half the value which was added to the separate asset. If the community element exceeded the value of the separate element, then the commingled mass should be regarded as a community asset and the rule of article 2408 should be applied by analogy. But a commingled mass should not be labelled a community thing just because some community assets were involved.

There is a problem, of course, when community and separate fungibles or funds have been placed in a single pool or account from which withdrawals have been made without records over so long a period as to make a tracing of values impossible. In that case it may be legitimate to have a presumption in favor of the community character of the thing, for in this way the most any spouse could lose under the formula is half of that to which he would have been entitled.
THE OBLIGATIONS OF SPOUSES TO CONTRIBUTE TO THE EXPENSES OF THE MARRIAGE

The probability of significant changes in matrimonial regimes law suggests that the obligations of spouses for the support of the expenses of the marriage, as between themselves and third-party creditors, should be re-examined.

The Civil Code has considered the question from two different points of view, one of public order, under the laws of marriage and those on father and child, and one of private order, under the law of matrimonial regimes. Under the law of marriage, not subject to the convention of the spouses, each has been obliged to furnish the other with basic support and assistance, but the husband has been placed under the greater obligation of supplying his wife with all the conveniences of life in accordance with his means and condition. Under the law of father and child, parents are obliged to contribute in proportion to their means to the basic support and education of their children, whatever their ages; but as a corollary of their right to enjoy (use and take the revenues of) the patrimonies of their minor unemancipated children, they are obliged to support and educate them “according to their station in life.” These obligations are of public order. Nothing anyone could provide by marriage contract could derogate from them. They must be understood, however, to have application only when the person claiming support does not have

76 La. Civil Code art. 119 (1870).
77 Id. art. 120.
78 Id. art. 227. This article obliges fathers and mothers to educate their children and does not limit their obligation to the children’s minority. Article 230, on the other hand, reads that alimony for a minor includes what is necessary for his education. In the author’s opinion, article 230 limits the alimentary obligation of nonparent obligors toward major children, but not the general obligation of parents specified by article 227.
79 Id. arts. 223, 224.
sufficient means to provide for himself; for all these obligations are
enforced, when enforced at all, by alimony, and alimony is due only to
the extent the obligee has need and the obligor has the ability to pay.\textsuperscript{80}

The spouses, nevertheless, may provide by marriage contract
how they are to support the expenses of the marriage, including the
education of the children. Their stipulations, as agreements, control
between them unless the standards set by the imperative laws of public
order would not be met. In that event, the imperative laws always may
be enforced. But subject to that limitation, the spouses may agree that
only one of them shall bear all the expenses of the marriage, or that
they shall share those expenses according to a specified formula.\textsuperscript{81} In
the absence of the stipulation of a formula in the marriage contract, the
suppletive matrimonial regimes laws provide one.

As the Civil Code now reads, if the wife has brought a dowry,
then the revenues from the dowry constitute her contribution to the
marriage expenses.\textsuperscript{82} She need contribute no more under matrimonial
regimes law. The husband then must bear all expenses beyond the
revenues of the dowry. If the wife has not brought a dowry, then she
must share the marriage expenses with her husband in proportion to
their incomes, with the limitation that she need not contribute more
than half her income even if it exceeds his.\textsuperscript{83} If there is a community of
gains, the income therefrom is to be considered the husband’s for this

\textsuperscript{80} Id. arts. 231, 232.
\textsuperscript{81} See, e.g., id. art. 2395.
\textsuperscript{82} Id. art. 2389.
\textsuperscript{83} Id. arts. 2389, 2395. Article 2389 mentions only income from the wife’s
paraphernalia, but the article was written when the community of gains was a
necessary part of every Louisiana matrimonial regime. Were the wife to be
allowed earnings as separate property, article 2389 would have to be
construed broadly to include those earnings as income out of which she would
be expected to contribute to the marriage expenses.
purpose. Only after a separation of property does the law expect the wife to bear all expenses of the marriage if need be.\(^{84}\)

It may be asked whether the suppletive laws on conventional matrimonial regimes should presume the spouses intend to limit the wife’s contribution to the expenses of the marriage to one-half of her income. The author would be in favor of deleting the limitation so that, in the absence of stipulation in the marriage contract, the wife and husband always would be expected to contribute to the expenses of the marriage in proportion to their respective total incomes from both separate and community sources. Similarly, the author sees nothing to warrant the retention of the rule of article 120, which imposes a greater burden of support on the husband than on the wife. The rights and obligations of each spouse with regard to support to or from the other should be equalized at the greater obligation. The wife should be obliged as much as the husband to contribute to the furnishing of the conveniences of life in accordance with their condition in society and in proportion to their respective incomes.

All the rules discussed above are rules between husband and wife. Should third persons be allowed to hold one spouse liable personally for obligations incurred by the other spouse for “expenses of the marriage”? Certainly no creditor of one spouse should be recognized as having a right against the other spouse by reason of a provision in a marriage contract. For the sake of an orderly legal science, the effects of contracts must be kept between the parties. Besides, “expenses of the marriage” as that term is used in matrimonial regimes law covers many more than the ordinary family expenses. Included is the total outlay for the life of the spouses and the rearing of the family as opposed to outlays for investments and speculations—house, automobiles, travel, seasonal donations, and entertainment of friends,

\(^{84}\) *Id.* art. 2435.
as well as food, clothing, and educational needs. Each spouse should be considered to obligate both solidarily, as stated before, for the expenses of the ordinary life of the family; but obligations for other marriage expenses should be, so far as third persons are concerned, those of the contracting spouse alone. Only in this way may one spouse be assured adequate freedom from the other in managing his own patrimony. Neither spouse should be given cause to feel that the other can obligate his total income for marriage expenses beyond ordinary family expenses.

**Bringing as Many Persons as Possible Under a New Legal Regime**

It is to the general public’s advantage to have most persons under a single matrimonial regime. In this way the greatest security of transaction and the greatest ease in commerce can be realized. All matrimonial regimes are contractual in Louisiana, however, and the attempt to legislate a change in any matrimonial regime already in force would result in a violation of the constitutional prohibition against the impairment of the obligations of contract. How, then, to bring most Louisiana couples under a new legal regime without risking unconstitutioanl action? The author suggests the following measures:

1. The effective date of the new legal regime should be not less than six months after the promulgation of the legislation prescribing it.

2. Couples marrying on or after the effective date of the new legal regime should be deemed to have contracted it tacitly unless they modify or reject it by express marriage contract.

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85 See text at notes 5-18 supra.
(3) Couples already married on the effective date of the new legal regime, and who had not entered into an express marriage contract, should be deemed to have accepted the new legal regime tacitly as of that day unless one of them executes and records, before that time, an authentic act negating his willingness to accept it.

(4) Couples already married on the effective date of the new legal regime and who had entered into an express marriage contract might accept the new legal regime by executing a marriage contract to that effect before that day.

The first, second, and fourth provisions certainly pose no constitutional issues. It does not seem reasonable to believe that the third might do so, for usually six months is sufficient time to permit a person to protect his acquired right against change by reform legislation. Both the third and fourth represent deviations from the principle that matrimonial regimes should be unalterable by convention. It is submitted, however, that the extension of the right to make a change on the enactment of a new legal regime may be warranted if the period for deliberation and final action is not extended too long.

**Ultima Verba**

Throughout this article the author has tried to make evaluations and judgments on the basis of the following considerations, which he believes accord with general human experience with law:

(1) A matrimonial regime, like any other plan of order among men, must be one which does not strain their virtue too far. The human
condition, the culture of the time, and even the ignorance and ill will of men must be given recognition. The world is a real world of people as we find them.

(2) The legal matrimonial regime, that which the law will presume, spouses intended to contract if they fail to provide for another, must be that which will be acceptable to most spouses in the various stages of married life.

(3) Whatever the regime, the natural desire of men and women to control what they acquire through their efforts or by inheritance or donation should not be defeated. Though sharing in control decisions is to be considered an ideal to be fostered, it is not one which can be forced on married persons without endangering the marriage fabric itself. And in a society of two there cannot be the palliative of majority rule. The alternatives are giving authority legally to one spouse alone, to each severally over the whole, to both jointly, or giving each spouse authority over certain aspects only of their common concerns; but authority to one or each over the whole may cause a spouse to feel his patrimony is at the mercy of the other, and authority to both jointly will cause each to consider his actions hampered by the other.

(4) The sharing of gains by married persons is most appropriate, for willy-nilly their lives are as one. But it is better to postpone their sharing in each other’s gains until dissolution of their life as married persons. The regular division of gains during the common life may well come to annoy the acquiring spouse and prove a serious detriment to family peace. Out of respect for human dignity, nevertheless, the spouse without revenue must be provided with a minimum, to be under his sole control, from the income of the other.

(5) Marriage and the marriage regime of the spouses should have the very least possible effect on the actual and potential patrimonial relations between the spouses as individual persons and the
general public. As much as possible, a matrimonial regime should not change the mode in which the spouses and third persons deal with each other. The regime, as much as possible, should have its effects only between the spouses themselves. As to the world, the spouses should be as if unmarried. Although the author has not departed so far from tradition in his recommendations, it might be well to consider whether third persons should ever have to stop to consider the married or single state of the persons with whom they are dealing, much less their matrimonial regimes. The matrimonial regime should be a matter of private order in the strictest sense.

(6) Finally, the laws on the subject should reduce to a minimum the need for evidence of authority to act, thus providing for speed and economy in everyday affairs without risking security of transaction.

The author suggests that the proposals he has advanced in this article incorporate these considerations.
Characterization as an Approach
to the Conflict of Laws*

The conflict of laws, or private international law, has always been of considerable interest to me. This comment below, written in 1940 while a graduate student at LSU, later became the basis of my contacts with several European-trained scholars, notably Ernst Rabel and Rodolfo DeNova, the latter of whom invited me to give lectures at the University of Pavia in 1952 and 1964. The subject was and is one of particular concern to jurisdictions limiting law to their own legislation. Jurisdictions open to equity when the positive law is silent (e.g. Louisiana, Anglo-American states) can do “justice” when there is no applicable legislation.

Litigation may in a sense be divided into two categories. The ordinary case involves operative facts and issues which are connected with only that legislative jurisdiction in which the court sits and the court simply applies the law of the forum. The second category—the conflict of laws case—involves operative facts and issues some of which are connected with legislative jurisdictions other than that of the forum.

In this type of case no one system of positive law regulates the entire situation. The court might either decide arbitrarily without reference to any system of law, or apply its own law exclusively, or refer the matter to the system of law with which the case seems to have the closest association. This last course is the one followed.

It is usual to think of this reference as being accomplished through the application of a conflicts rule, a rule of the forum by which the issue as defined is referred to a certain law by means of a connecting factor or place element. This connecting factor may be a juridical concept or an extra-legal fact. Thus, capacity to marry may be referred to the law of the domicile; succession to an immovable may be referred to the law of its *situs*.

In 1891 Kahn\(^1\) in Germany pointed out that the same case might be decided differently in different states because of the conflicts which might exist in the conflicts rules of the states concerned. (1) The conflicts rules themselves might be patently different, as where capacity to marry is referred by one state to the party’s domiciliary law and by another state to his national law. (2) The conflicts rules may be apparently the same, but actually different because different meanings may be given to the connecting factor in each state, as where domicile is the connecting factor in each state, but one method of determining domicile does not correspond to the other. (3) The conflicts rules may be apparently the same in each state, with the connecting factors the same in content, but the issue not defined in the same manner in each

\(^1\) Kahn, *Gesetzeskollisionen: ein Beitrag zur Lehre des internationalen Privatrechts*, 30 JHERING JAHNBUCHER FÜR DE DOGMATISCHES HEUTIGEN ROMISCHEN UND DEUTSCHEN PRIVATRECHTS 1-143 (1801), and republished in 1 ABHANDLUNGEN ZUM INTERNATIONALEN PRIVATRECHT VON FRANZ KAHN 1-123 (Otto Lenel and Hans Lewald eds. 1928), as summarized by Falconbridge, *Characterization in the Conflict of Laws*, 53 L. Q. REV. 235, 238 (1937).
state, as where the necessity of parental consent is legally defined as a question of capacity in one state and as a question of form in another.

The often cited case of *Ogden v. Ogden*\(^2\) may be given as an illustration of the last type of conflict mentioned, namely the difference in the definition of the issue. A minor Frenchman had married an Englishwoman in England without previously obtaining the consent of his parents as required by French law. An English court considered the French requirement a matter of form and applied the English conflicts rule that form is governed by the law of the place of celebration (England). The court found the French law inapplicable and upheld the validity of the marriage. Shortly before, a French court had to decide on the validity of the same marriage. Defining the necessity of parental consent as a question of capacity to marry, the French court applied the French conflicts rule that such capacity is governed by the party’s national (French) law, and declared the marriage null. Both England and France had the same conflicts rules that form is determined by the law of the place of celebration and capacity by the law of the party’s domicile (or nationality—here the same),\(^3\) but a difference in the definition of the issue led to a difference in result. The problem of defining the issue and the connecting factor is called the problem of characterization; this has also been called “qualification,” or “classification.”\(^4\)

\(^2\) *Ogden v. Ogden*, 1908 P. 46 (Eng. C.A.).

\(^3\) Actually, there are two conflicting rules of reference on the question of capacity, but as the Frenchman was domiciled in France by English law, there would have been no difference in result in this case.

\(^4\) “Qualifications” is used almost exclusively on the Continent. For use of the terms and a survey of the statements of the problem in English see Robertson, *A Survey of the Characterization Problem in the Conflict of Laws*, 52 HARV. L. REV. 747 (1939). The only other writers in the United States who have given the problem any serious consideration are: Lorenzen, *The Theory of Qualifications in the Conflict of Laws*, 20 COL. L. REV. 247 (1920); and Rheinstein, *Comparative...
Six years after Kahn’s statement, Bardin\(^5\) concluded that the problem could not be solved. To Bardin, conflicts rules were as much a part of the law of the forum as the rules of internal law. As such they were phrased in terms of the internal law. To give them other characterizations, such as those of a foreign law, would be to give them a meaning not intended by the sovereign. Hence all characterizations must be by the law of the forum.\(^6\) Bardin admitted that the sovereign may deliberately use a characterization which would fit similar concepts or institutions in other systems of law, but such a characterization could not be used outside of its own jurisdiction. In considering this law the foreign court would have to characterize its terms according to its own local concepts.\(^7\)

It is important to note that the conflicts rule has, according to Bardin, the same binding force as a rule of internal law and must be applied in the manner in which the sovereign understands it. It is not such a law as will dispose of the issue, but a rule of reference, one which

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Law and the Conflict of Laws in Germany, 2 U. OF CHI. L. REV. 232, 257 et seq (1935). 1 BEALE, A TREATISE OF THE CONFLICT OF LAWS 55, § 7.2 (2d ed. 1938), dismisses the problem with the statement that in America “all qualifications are determined by the law of the forum.” STUMBERG, CONFLICT OF LAWS (1937) and GOODRICH, CONFLICT OF LAWS (2d ed. 1938) seem to ignore the problem entirely. There will be occasion later herein to explain the lack of material on this subject in the United States.

The question of determining the meaning of concepts in the foreign law to which reference is made by the conflicts rule is now generally resolved in favor of definition by the foreign law itself (see infra note 38). It will not be treated in this paper. The only problem here is that a judge must be careful when using concepts of a system of law with which he may not be familiar.

\(^5\) Bardin, De l’Impossibilité d’Arriver a la Suppression Définitive des Conflits des Lois, 24 JOURNAL DU DROIT INTERNATIONAL PRIVE 225-255, 466-495, 720-728 (Clunet, 1897).

\(^6\) Id. at 235-240.

\(^7\) Id. at 241 et seq.
will refer the issue to a certain law, local or foreign, for determination; an “indicative” rather than a “dispositive” rule. Therefore, the juridical definition or characterization of the issue must be known before the conflicts rule can be selected and the law referred to applied. In the words of Falconbridge, the solution of a conflicts case requires the characterization of the issue, selection of the law to be applied by means of the conflicts rule, and application of the law selected. Each state having its own concepts and institutions which cannot be expected to be the same in other states, the characterizations of one state will not necessarily conform to those of another, and therefore it is vain to expect uniformity of result for similar conflict cases in different courts. Bartin concluded that there can be no solution to such conflict of decisions in similar cases; this could be eliminated only by having the same laws with similar characterizations in every state; such uniformity cannot be expected.

Bartin admitted two exceptions to his rule that characterization must be made in accordance with the law of the forum. The first was in determining (preliminary to characterization of the issue) the movable or immovable nature of a thing, which he considered must always be by the law of the situs. Bartin reasoned to this exception on the basis of the security which would be afforded to transactions. There could be no dispute as to the location of a thing. All courts could seize upon this material fact and characterize by the law of the place where the thing is found. The second exception was that the determination of the applicable law should be left to the will or intention of the parties.

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8 Id. at 236, 239-240, 480, 732.
10 Falconbridge, *supra* note 1, at 235 *et seq.*
11 Bartin, *supra* note 5, at 734.
12 Id. at 246 *et seq.*
13 Id. at 251-255.
wherever possible.\(^{14}\) Bartin, we are told,\(^ {15}\) has come to realize that this latter point is no exception at all because the forum must first characterize the issue as one of “contract” before the will or intention of the parties to act under one of the possibly applicable laws may be considered. This analysis does not affect the point which we wish to make here, namely, that sovereignty does not always require that concepts of the local law be used in the conflicts rule.\(^ {16}\)

It must be remembered that Bartin reasoned to the necessity of characterization by the law of the forum on the ground that to use foreign concepts in the local rule would deny the intended application of the local conflicts rule. But if the use of foreign concepts in a local conflicts rule might result in the misapplication of that rule, the use of the foreign law in connection with the local characterizations might result in a misapplication of the foreign law.\(^ {17}\) Therefore, argued Despagnet,\(^ {18}\) characterization of the issue must be made in terms of the law to be applied. H. Donnedieu de Vabres\(^ {19}\) admitted that the foreign law could not be given its intended application with local

\(^{14}\) Id. at 472 et seq.

\(^{15}\) Rabel, Le Problème de la Qualification, 28 Revue de Droit International Privé 1, 14, n. 3 (Darras, 1933); and Robertson, supra note 4, at 761, citing 1 Recueil des Cours 608 (1930).

\(^{16}\) Cf. Robertson, supra note 4, at 759-760.

\(^{17}\) By extending Bartin’s reasoning we could say that the sovereign creating the conflicts rule has no intention to apply the foreign law, but only a law of its own, the content of which is to be found by interpreting the foreign law in terms of local concepts. That such is not actually the case hardly needs refutation. The sovereign might as well direct that its internal law be applied to conflicts cases. The fact that a use of the foreign law is directed would seem to indicate an intention that it be interpreted and applied as in that foreign state.


\(^{19}\) H. Donnedieu de Vabres, De l’Impossibilité d’une Solution Rationelle et Définitive des Conflits des Lois, 32 Journal du Droit International Privé 1231, 1236-1238 (Clunet, 1905).
characterizations, but concluded that this result could not be avoided: how would it be possible to determine what law is applicable before characterizing the issue? Thus, in his opinion, Despagnet’s views involved a vicious circle.

Bartin’s view of the approach to the conflict of laws has been adopted by Arminjon\textsuperscript{20} and Niboyet\textsuperscript{21} in France, by Cheshire\textsuperscript{22} in England, and by Falconbridge\textsuperscript{23} in Canada. In the United States, Lorenzen takes the same view,\textsuperscript{24} and Beale seems to be in accord for he dismisses the problem with the statement that in America “all qualifications are determined by the law of the forum.”\textsuperscript{25} This is not as astonishing as it may seem at first, for the process of characterization, selection, and application gives rise to difficulty only if the concepts and institutions of the states involved cannot be characterized in the same manner. Since the laws of most of the states of the Union are based upon a common tradition of law, the concepts, institutions, and classification of the internal laws are likely to be the same or so similar that conflicts will arise but infrequently. Rheinstein has noted that the use of concepts as a basis of approach to the conflict of laws “is unobjectionable as long as we have to deal exclusively with conflicts between various bodies of law inside of one single legal system, e.g.,

\textsuperscript{20} 1 \textsc{Arminjon, \textit{Précis de Droit International Privé} 133-136 (2d ed. 1927). For translated selections, see \textsc{Harper and Taintor, \textit{Cases and Other Materials on Judicial Technique in Conflict of Laws} 258 (1937).}

\textsuperscript{21} \textsc{Niboyet, \textit{Notions Sommaires de Droit International Privé} 121-125, n. 197-202 (3d ed. 1937).}

\textsuperscript{22} \textsc{Cheshire, \textit{Private International Law} 24-45 (2d ed. 1938).}

\textsuperscript{23} Falconbridge, \textit{supra} note 1. Compare the summary of Falconbridge’s views by Robertson, \textit{supra} note 4, at 766-767. For further discussion of Falconbridge’s views see infra, page 220 et seq.

\textsuperscript{24} Lorenzen, \textit{supra} note 4, at 268. For a summary of Lorenzen’s views see Robertson, \textit{supra} note 4, at 747-751, 758-762. According to Robertson (at 747, n. 1), Lorenzen has since considerably modified his views.

\textsuperscript{25} 1 \textsc{Beale, \textit{supra} note 4, at 55, § 7.2. See also \textsc{Restatement of the Conflict of Laws, § 7(a)}; Lorenzen, \textit{supra} note 4, at 268.
between various *statua* of the medieval Italian cities, between various French *coutumes*, between various laws of the ancient Dutch provinces, between various jurisdictions inside the Common Law."\(^{26}\) It would seem that the approach by means of characterization, selection, and application may be used within certain limits in the conflict of laws.

On the continent of Europe, where there are different traditions of law, the process of characterizing by the law of the forum would not lead to satisfactory results. Certain writers, unlike Bartin, Niboyet and Arminjon, could not reconcile themselves to these results and sought other methods. These methods may be roughly divided into two groups: one which sought to characterize on the basis of comparative law, and another which sought to refer all matters to the law of a place which could be readily located by a material fact or by a universally accepted legal concept.

One way of avoiding Bartin’s logic was to deny that the conflicts rule of the forum was drafted in terms of local concepts and institutions. The terms used therein were to be understood as terms of international significance, terms which were intended to include and to refer to similar concepts and institutions in all systems of law; that is, concepts and institutions which, though perhaps not similar, were used for the same function, to protect or to secure similar interests. Thus “tutorship” in a conflicts rule would include in its meaning not only tutorship as understood in the forum’s internal law, but guardianship or any other institution with the same function in other systems of law. Similarly, “usufruct” in connection with the property rights of the surviving spouse could include “dower.”

Comparative law could be used to discover the corresponding concepts and institutions in all systems of law and, with the gradually extending adoption of the same conflicts rule, uniformity of results

\(^{26}\) Rheinstein, *supra* note 4, at 263.
could be obtained. This was the theory announced by Rabel\textsuperscript{27} in Germany and which seems to have been followed by Wigny\textsuperscript{28} in France and Rheinstein\textsuperscript{29} in the United States. Meriggi,\textsuperscript{30} following a similar doctrine, declared that the number of conflicts in institutions and concepts were very few indeed, and that real conflicts would be found only in what he termed the \textit{substrata} of various systems of law. As long as the \textit{substrata} are the same, that is, as long as the aims of the law are the same, conflicts would not appear. The institutions and concepts of the internal law might differ in detail, but as long as they perform the same function there would be no conflicts for they could be used interchangeably.\textsuperscript{31}

From these observations and from observations previously made regarding the possibility of using characterizations of the \textit{lex fori} where different bodies of law in the same system or tradition are involved, we are led to this conclusion: that the process of characterization, selection, and application may be used as long as the issue is characterized in terms of some concept or institution common to all systems of law involved. If the different bodies of law belong to the same system or tradition, the common elements may be found in the institutions and concepts themselves. If the bodies of law are more

\textsuperscript{27} Rabel, \textit{supra} note 15, at 17.
\textsuperscript{28} Wigny, \textit{Remarques sur le Problème des Qualifications}, 31 \textit{REVUE CRITIQUE DE DROIT INTERNATIONAL} 392, 418 (Darras, 1936).
\textsuperscript{29} Rheinstein, \textit{supra} note 4, at 264-268.
\textsuperscript{30} Meriggi, \textit{Les Qualifications en Droit International Privé}, 28 \textit{REVUE DE DROIT INTERNATIONAL PRIVE} 201, 205 et seq (Darras, 1933).
\textsuperscript{31} Beckett, \textit{The Question of Classification (“Qualification”) in Private International Law} 15 B.Y.I.L. 46 (1934), as reported by Robertson, \textit{supra} note 4, at 754, 762-766, would seem to advocate characterization of the issue on the basis of conceptions of analytical jurisprudence as found by a study of comparative law, but at the same time he practically denies this principle by the broad exceptions for the characterization of which he would look to the law of the forum. If Robertson’s report on Beckett is correct, we cannot class him as an advocate of characterization on the basis of comparative law.
widely separated in tradition, but agree in seeking to perform the same functions and to protect the same interests, the common elements will manifest themselves in the function and purposes of the institutions. If the different bodies of law do not seek to protect the same interests, in short, if they are not based on the same philosophy of law, conflicts will appear and they cannot be avoided. Thus the possibility of using the system of characterization, selection, and application is directly proportional to the points of similarity in the systems of law involved. It must be noted that this method presupposes an examination of the various laws which may be applicable in order to discover the characterization which will fit them all. This is contrary to Bartin’s reasoning that the foreign law cannot be reached without the reference of the conflicts rule. Although the approach through the conflicts rule is practical, it is artificial, as will be shown below.

Falconbridge\textsuperscript{32} maintains that characterization of the issue should precede selection of the applicable law but is unable to accept characterization by the law of the forum because of the obviously unfair results to which it often leads. Likewise, characterization on a strict comparative law basis is not acceptable to Falconbridge because it would demand of the judge a vast and complete knowledge of all systems of law.\textsuperscript{33} He therefore sought to provide a \textit{via media}.

Just what Falconbridge means by this \textit{via media} is not clear from his explanation, for he states that characterization of the issue must precede selection of the connecting factor and then proceeds:

This characterization of the question—which may be provisional and subject to revision—lays the foundation for the Court’s consideration of the concrete provisions of the laws of various countries which are or may be

\textsuperscript{32} Falconbridge, \textit{supra} note 1, at 241, 245-246.
\textsuperscript{33} \textit{Id.} at 246.
applicable in the light of the characterization of the main question or different aspects of that question.\textsuperscript{34}

To say that characterization of the issue may be provisional and subject to revision is inconsistent with the statement that characterization must precede selection of the connecting factor. Thus it would seem that Falconbridge contradicts himself.

However, a consideration of what Falconbridge includes in “characterization of the issue,” and an analysis of his advocated approach to the problem in the \textit{Ogden} case seems to indicate that he has confused—in the application of his principles—characterization of the issue and application of the law once selected—the first and third steps to his process.\textsuperscript{35} Thus, in discussing the problem of the \textit{Ogden} case,\textsuperscript{36} Falconbridge remarks that the English court should examine the laws of England and the laws of France, construing the latter in its context—that is, according to French characterizations—just as a French court would do, in order to determine whether all provisions of English law essential to the formal validity, and all provisions of French law essential to the \textit{substantive} validity of the marriage have been complied with. Finding that the English law does not require parental consent as essential to the formal validity of a marriage in England, it should declare the English law inapplicable; but finding that the French law does require parental consent as essential to the substantive validity of the marriage in that it considers it essential to the party’s capacity to

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Cf.} Robertson, \textit{supra} note 4, at 767. Falconbridge seems to have done this same thing in most of his examples of characterization of the issue. It should be noted that what Robertson refers to as “primary” and “secondary” classification corresponds to Falconbridge’s “characterization of the issue” and “application of the law selected.” The latter does not present any particular problem. \textit{See supra} note 4.

\textsuperscript{36} \textit{See} note 2 and text thereto.
marry, it should declare the marriage null. 37 Apparently, “form” and “capacity” are here his “provisional characterizations.”

What Falconbridge appears to have done is to characterize the issue as “validity of the marriage” and to apply the conflicts rules that formal validity of a marriage is determined according to the law of the place of the celebration, and substantive validity by the law of the domicile of the parties. Thus, in looking to the English law to determine what related to form, and to the French law to determine what related to capacity, Falconbridge was only applying the law selected by the conflicts rule.

This seems to be the only way to interpret Falconbridge and as thus interpreted his writings do not show a via media. They do show the necessity of starting with the issue characterized in terms of a concept which is understood in the same way by all the systems of law possibly involved and the necessity of applying the foreign law as it is applied in the foreign state. The first point is particularly the subject of this paper; the second is now generally admitted 38 and need not be considered herein. Since Falconbridge has not given us a via media on the question of characterizing the issue 39 and since he at least impliedly recognizes the need for universality on this point, we are forced to return to our finding that characterization of the issue must be in terms of function, characterizations to be discovered through the study of comparative law.

37 Falconbridge, supra note 1, at 254.
38 Even by Bartin. Robertson, supra note 4, at 761, citing I RECUEIL DES COURS 608. See also CHESIRE, supra note 22, at 38.
39 Falconbridge’s lack of a via media seems to be confirmed by his later statement that, as a general rule, characterization of the issue must be by the lex fori. Falconbridge, supra note 1, at 542, 643. Cf. Robertson, supra note 4, at 766, 767.
Now whereas the comparative law method would seem to be satisfactory for the purpose of characterizing the issue in the case, it could not be used for the purpose of characterizing the connecting factor. The connecting factor is a place element. Even if the issue is given a universal characterization, the outcome of the case will depend upon the system of law to which it is referred. Thus it is imperative that the system of law referred to be the same regardless of the court in which the issue arises. Similarity of function in the connecting factor would not suffice to accomplish this because similarity of function does not necessarily (and often does not) mean identity of place reference. For example, “domicile” and “nationality” are place elements used by different courts for the same issue, but a party’s domicile and nationality may or may not coincide and so the result of the case may depend upon the choice of forum. Even the concepts “domicile” and “nationality” may be determined differently in different states. It would seem, therefore, that connecting factors must be universally accepted for the same issues. This universality would probably be best accomplished through international treaties adopting and defining the connecting factor.40

The realization of the importance of universality in the connecting factor has been, we believe, the reason which prompted Frankenstein41 to devise his approach. This noted German international law lawyer would reduce the characterization of all issues to the concepts “personal” and “real.” He applies to the first a universally accepted notion of nationality for a connecting factor, and to the second the unmistakable law of the situs of the thing. The manner in which he arrives at his conclusions is ingenious. All laws relate to persons or to things; the solution of problems of conflict of laws lies,

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40 This does not mean, however, that comparative law could not be used to determine the best place element to be selected.
41 Frankenstein, Une Doctrine Moderne du Droit International Privé, 27 REVUE DE DROIT INTERNATIONAL PRIVE 47 (Darras, 1932).
therefore, in discovering the closest points of contact between persons and things and the juridical order. Persons are more closely connected with their nations than with any other idea and hence the national law should be used in all cases of purely personal relations. Besides, the idea of nationality recommends itself because of its stability. But where the relation is between persons with regard to things, Frankenstein reasoned that a person is related not only to one other person, but to all persons in the world. As it is impossible to apply all systems of law, the only thing to do is to choose one upon which all persons can agree and which can be easily determined; hence no better solution can be found than to apply the law of the situs of the thing.42

Frankenstein’s system would be difficult to put into execution. To say the least, it is doubtful whether the national law of the parties is always the law most closely connected with an issue, and it would be difficult at times to determine whether the issue is “real” or “personal.” But the fact that such a system has been advocated does show the importance of having connecting factors universally accepted.

We are now in a position to announce what we believe is the best method to follow in approaching the conflict of laws. The issue must be characterized on the basis of corresponding concepts and institutions in all the systems of law which may be involved. For this purpose comparative law must be the guide. If there is nothing corresponding in the systems and if they are fundamentally opposed to each other, it is useless to attempt to reconcile them and the court should dispose of the case in whatever manner it deems best for the interest of all concerned. If some corresponding concept can be found, however, it will be necessary to have all systems of law refer this concept or institution to the law of the same state. For this purpose the

42 Id. at 50 et seq. Compare the system of Cock, discussed by Delage, Une Nouvelle Théorie pour Résoudre le Conflit des Lois, 63 JOURNAL DU DROIT INTERNATIONAL PRIVE 1038,1042 et seq (Clunet, 1936).
aim of the conflict of laws should be to have all states agree on connecting factors or place elements. This should be possible to a great extent if not in all cases, for the place element has little to do with the method by which interests are secured in the internal law, and international agreements would possibly be the best means. Therefore, the science of conflict of laws should seek to discover by a study of comparative law the corresponding concepts and institutions in all systems of law and seek to have the same connecting factors universally adopted.\textsuperscript{43} Only in this manner will any degree of uniformity be obtained in the method of solving conflicts cases.\textsuperscript{44}

This goal may not be susceptible of immediate or even ultimate complete achievement. But it does seem that once the similarity of institutions and concepts can be shown by comparative law it should not be too difficult to reach an agreement on the rules of reference. Already in the more widely accepted institutions we see near universality in results because of similarity in effect, though not always in form, of the conflicts rules used. Barbey\textsuperscript{45} has shown that a great deal of universality of result exists in the conflict of laws in contract matters in English, French and American law. Taintor has shown that there is even greater universality in this matter than Barbey found,\textsuperscript{46} and has discovered a similar tendency in marriage cases in the United States.\textsuperscript{47} Cock, we are told, has erected his system of approach to the conflict of laws on the universality of results in conflict cases.\textsuperscript{48} And Robertson,

\begin{itemize}
\item[43] It must be noted that universality in conflicts rules would necessarily dispense with the notion of \textit{renvoi}.
\item[45] Barbey, \textit{Le Conflit des Lois en Matière de Contrats dans le Droit des États-Unis d’Amérique et le Droit Anglais Comparé au Droit Français} (1938).
\item[46] Taintor, \textit{supra} note 9, at 712, 734-736.
\item[48] Cock, as reported by Delage, \textit{supra} note 42, at 1038.
\end{itemize}
while discussing the characterization of property, has shown that considerable uniformity exists regarding the laws to which such matters are referred.\textsuperscript{49}

Something must be said of the method of approach through a conflicts rule or, what is the same thing, through characterization, selection and application. Bartin concluded that characterization could be made by the law of the forum alone because he conceived of the conflicts rules as rules of reference created by the sovereign in the same manner as an internal rule of law. To say the least, it would be difficult to imagine a state arbitrarily referring a matter to a foreign law if it did not consider that the foreign law had more connection with the facts than its own law. Instead, it appears that the conflicts rule must be a generalization of what a court has been doing in certain factual situations. It is true that conflicts rules have been codified and enacted just as rules of internal law, but this in itself would not deprive the rule of its character or purpose.

That a conflicts rule is really not a rule of reference is demonstrated by the fact that it is abandoned in individual cases when it does not lead to satisfactory results; courts use one connecting factor or another in order to reach results which they deem desirable.\textsuperscript{50} Again, we find well settled conflicts rules denied application by reason of the doctrine of public policy, the policy against circumvention of the law, the doctrine of acquired rights, and the practice of varying the characterization of the issue itself.\textsuperscript{51} Besides, in cases where all the facts have taken place in one state and there does not appear to be any

\textsuperscript{49}Robertson, The Characterization of Property in the Conflict of Laws, 28 GEO. L.J. 739 (1940).
\textsuperscript{51}DONNEDIEU DE VABRES, supra note 44, at 764. NIBOYET, supra note 21, at 120, 134, 141, n. 196, 216, 226.
connection with another, even a foreign court does not hesitate to apply the substantive law of that state in its entirety.\textsuperscript{52} Rheinstein\textsuperscript{53} has suggested that the approach to the conflicts case is no different from that used in an ordinary case in which internal law will be applied. In the latter instance, all the facts are connected with one state alone and so the court never thinks of applying any other law. In a conflicts case, the facts seem to have some connection with other states and thus the problem arises as to which law should be applied. It would seem that a conflicts case is decided by selecting the law to be applied on the basis of the greatest connection between the facts and a system of law, in short, on the basis of what law would seem to have the most valid claim to be applied.\textsuperscript{54}

The method of working with conflicts rules is not to be condemned because of its artificiality. The economy of effort and the wisdom of following past solutions which have proved satisfactory would sanction the use of the conflicts rule as a rule of reference, as a guide. But the nature of the conflicts rule must be kept in mind and its application should not be allowed to defeat the purposes of the law. The doctrines of public policy and the policy against circumvention of the law will preclude undesirable results. By keeping in mind that the conflicts rule is merely a guide based on past experience we can understand how the court can examine all the laws which may be applicable before characterizing the issue. The conflicts rule will also provide a means of working towards universality of results in cases where similar interests are involved. Once the similarity of institutions and concepts is realized through a study of comparative law, the way is

\textsuperscript{52} Robertson, \textit{supra} note 4, at 760, n. 20.

\textsuperscript{53} Rheinstein, \textit{supra} note 4, at 261-262.

\textsuperscript{54} DONNEDIEU DE VABRES, \textit{supra} note 44, at 740 \textit{et seq.}, has shown that this is the conclusion to be drawn from French jurisprudence.
open to the universal adoption of connecting factors. In this method lies the future of the conflict of laws.55

55 As to the necessity of universality in conflicts rules, see Levy-Ullmann, *La Doctrine Universaliste en Matière de Conflit des Lois*, in BARBEY, supra note 45, at vii-xix.
The Italian Legal System:
A Book Review*

My review of The Italian Legal System, below, pleased authors Mario Cappelletti and Joseph M. Perillo. I heard nothing from John Henry Merryman, whom I knew quite well, he and I having participated in seminars at the University of Rome’s Institute of Comparative Law in 1963-64.

This sophisticated work is the best I know of any introductory book in English on a foreign legal system. Professors Cappelletti and Perillo, the Italian and American proceduralists and comparativists who in 1965 gave us Civil Procedure in Italy, combined their efforts with Professor Merryman, who only in recent years has turned his concentrated attention to civil law in general, and to the Italian legal system in particular, to produce a most readable, lucid and highly instructive whole. It is a book written for English language readers, not a translation of a work written for Italians, and its co-authors have

overcome remarkably well the difficulty of describing one legal system to persons of another.

Each chapter has its special merit. The first, attributed to Professor Cappelletti with acknowledgments of assistance from Dr. Lamberto Pansolli, is an extremely rich and sensitive account of the history of continental law in general and of the Italian law in particular, one which is filled with evidence of just pride in the role which Italian jurists have had in both. Of all the chapters it is the most literary in style, and perhaps it reflects more than any other the traditional erudition and perspective of the Italian legal scholar. Deserving of special note are the chapter’s expositions of the nature and position of the *jus commune*, the distinction between the *mos italicus* and the *mos gallicus*, the development of canon law and its influence on the civil law, and the reception of the civil law in Spain. I do not know of any short treatment of the general subject which expounds these aspects of it with as much depth of understanding. Equally good are the chapter’s sections on the multiple influences on the development of Italian law since the Napoleonic era.

Professor Periilo’s contribution consists of the second and third chapters, on the structure of the Italian state and on the Italian law professionals. These are written very clearly and, it appears to me, with a definite understanding of the problems the average Anglo-American would have in coming to know Italian institutions and methods. These chapters are distinguished by their efforts to communicate both official structures and actualities in government, legal education and practice. Supplementing them is an appendix containing an English translation of the Italian constitution.

The fourth chapter on civil procedure and evidence is Professor Cappelletti’s. Again great pains have been taken to make the subject comprehensible to Anglo-American oriented readers and to describe
the law in practice as well as in the books. The author is very critical of Italian procedure in both theory and practice, particularly its rules of evidence, its toleration of excessive delays, and its failure in fact to require truth of the parties in the conduct of trials. Professor Cappelletti shows himself somewhat impatient with Italian procedural doctrine because of its “excessive emphasis on systematic construction and dogmatics” and because often “it is divorced from the social, economic, and ideological bases of the law” and points hopefully to signs and forces of reform. Supplementing this chapter is an appendix containing in translation significant portions of the record of a simple civil suit to recover indemnification for bodily injury and property damage. Its one hundred and twenty-four pages give convincing testimony to why it is many Italian suits are compromised, but one is compelled to wonder whether the particular suit was typical or especially indicative of the kinds of abuses which may be found in the trial of civil suits in Italy.

The fifth, sixth and seventh chapters on Italian doctrine, law and interpretation are in my mind the most important of the book. Professor Merryman, who authored all three, has shown remarkable insight and within each he has been meticulous in the attempt to describe each institution and practice in its Italian context and to avoid characterizing or appraising it in American legal terms. His exposition is careful without being pedantic and includes Italian appraisals of their own legal system as well as his own observations. The documentation is ample, but selective rather than cumulative. Reading these chapters is a pleasant experience as well as an informative one. On the whole I do not hesitate to characterize Professor Merryman’s success as brilliant.

There are, nevertheless, some critical observations which I believe fair to make. First, the organization of the book as a whole would have reflected better the dominant and official Italian legal theory if the chapter on procedure and evidence had been placed last, after those on doctrine, law and interpretation. The theoretical basis of
Italian law being legislative positivism, procedure may not be considered more than the means of maintaining and enforcing the substantive law presumably completely defined by legislation. Thus to treat the subject matters in logical sequence, procedure should have been considered last.

Secondly, and for the same reason for which the chapter on procedure should have followed those on the substantive law, the chapter on law (that is, legislation) should have preceded that on doctrine. In a system founded on legislative positivism, doctrine (literally, the teaching) performs a number of functions, but none of them is to provide evidence of a background of unlegislated law against which the legislation is to be envisaged, and this no matter how much the practice may seem to be to the contrary. Before the nineteenth century, when the *jus commune* formed the basis of Italian law, doctrine was indeed its best evidence, the container of its pervading notions. One writing on the Italian system of that time would have been correct in considering doctrine first. Once legislative positivism became the official basis of the Italian legal system, however, doctrine of logical necessity became the servant of the legislation rather than the institution through which the law was to receive primary formulation. Doctrine from that time forward could expound the law, point the way to its extension, criticize it and suggest the mode of its reform, but it could not legitimately provide a teaching on the existing legal order which did not have its foundation in the expression of legislative will. Thus, in my opinion, to give the reader the correct impression of the structure of the Italian legal system through the book’s organization as well as through the contents of its chapters, the chapter on law should have preceded that on doctrine. There is another reason, too, why this arrangement would have been better. Under the chapter on interpretation, which then would have followed that on doctrine, Professor Merryman quite correctly discusses both interpretation by doctrine and interpretation by the judiciary. The chapter on
interpretation, therefore, would have been a logical sequel to that on doctrine. As the book stands, the chapter on law breaks the continuity of thought which otherwise would have existed.

Professor Merryman’s arrangement of the chapters in question, and to some extent their contents, suggest to me that in spite of his most diligent efforts to be absolutely objective in presenting the subject, his predilection for American realism has manifested itself and indirectly colored his exposition. On first reading the chapters on doctrine, law and interpretation it occurred to me that Professor Merryman might have been delighted to find it possible to label them “policy science,” “the materials of the law” and “the judicial process.” He writes approvingly of an emerging doctrine in opposition to the traditional theory of legislative positivism (which he characterizes, I think inaccurately, as “folklore” and “cultural agnosticism”) and criticizes the judiciary for not exercising a primary role in interpretation. In a sense I share his observations on and his concern for the present state of Italian interpretation. The enactment of a new Civil Code in 1942 and of a new Code of Civil Procedure in 1940 understandably resulted in doctrine being directed principally to the work of expounding the content of the new statements of the law and neglecting for the time being that of interpretation in the sense of the adjustment and application of the rules and principles of the legislation to evolving postwar conditions. Probably it is true also that legal education on the whole has not paid sufficient attention to the attunement of law students to the art of interpretation. I agree, too, that Italian judges should participate more in interpretation than Professor Merryman says they do, though I would insist they draw their inspiration from good doctrine if it exists. In my opinion, however, Italians would lose more than they could gain if they failed to adhere to the traditional approach and veered toward a “policy science.” Italian thought today is acutely pluralistic and most often skeptic. In this environment legislative positivism provides an authoritative
pseudoconsensus, if not a real one, through which interpretation must be given and by means of which its limits will be somewhat confined. Unless this interpretation remains primarily in the hands of the legal scientists rather than the judges, Italian law will soon become as varied and uncertain as opinion on American common law. Judicial interpretation eventually would result in a judicial gloss, much like that in Louisiana, which probably would be devoid of the expertise, the consistency and the order which reasonably might be found in doctrinal writings. By the very nature of their work judges cannot be expected to see the law as a whole in dealing with particular situations in trial environment. The doctrinaires at least have more opportunity to do so.

In spite of these defects, however, the book may become recognized as a classic, and justly so.
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