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PAUL M. HEBERT LAW CENTER
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**SCALIA & GARNER’S *READING LAW*:
A CIVIL LAW FOR THE AGE OF STATUTES?**

James R. Maxeiner*

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ABSTRACT

In *Reading Law: The Interpretation of Legal Texts*, U.S. Supreme Court Justice Antonin Scalia and American legal lexicographer Bryan A. Garner challenge Americans to start over in dealing with statutes in the Age of Statutes. They propose

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“textualism,” i.e., “that the words of a governing text are of paramount concern, and what they convey in their context is what the text means.” Textualism is meant to remedy the American lack of “a generally agreed-on approach to the interpretation of legal texts.” That deficiency makes American law unpredictable, unequal, undemocratic and political. In the book’s Foreword, Chief Judge Frank Easterbrook calls the book “a great event in American legal culture.” It is a remarkable book because it challenges common law traditions. This review essay shows how Scalia and Garner challenge common law and summarizes the content of their challenge.

This article contrasts the methods of *Reading Law* with the methods of the Continental civil law. It shows that textualism is consistent with modern civil law methods. It also shows, however, that pure textualism, which largely restricts interpretation to grammatical and historical interpretation and excludes non-textual interpretation such as equitable, pragmatic and purposive approaches, is not consistent with modern civil law methods. In modern civil law, textualism and non-textualism coexist. They must, if law is to honor legal certainty, justice and policy.

I. INTRODUCTION

In *Reading Law: The Interpretation of Legal Texts*,¹ U.S. Supreme Court Justice Antonin Scalia and American legal lexicographer Bryan A. Garner challenge Americans to start over in dealing with statutes in the Age of Statutes.² They propose “textualism,” i.e., “that the words of a governing text are of paramount concern, and what they convey in their context is what

1. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (West 2012). [Hereinafter SCALIA & GARNER, *READING LAW*.]

2. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (Harvard Univ. Press 1982); JAMES WILLARD HURST, *DEALING WITH STATUTES* (Columbia Univ. Press 1982).

the text means.”³ Textualism is meant to remedy America’s lack of “a generally agreed-on approach to the interpretation of legal texts.”⁴ That deficiency makes American law unpredictable, unequal, undemocratic and political.

Reading Law is a how-to handbook for judges who want to apply textualism in their daily work. It is not an academic monograph that argues the merits of textualism and the demerits of non-textualism. Scalia and Garner advise, “Our approach is unapologetically normative, prescribing what, in our view, courts ought to do with operative language.”⁵ *Reading Law* consists of a six-page foreword, a four-page preface, a forty-six page introduction, seventy short chapters of two-to-ten pages each, a four-page afterword, a ten-page appendix on the use of dictionaries, a seventeen-page glossary of legal interpretation and a sixty-four page bibliography of cases, books and articles. The seventy short chapters address fifty-seven “Sound Principles of Interpretation” (broken down into five “fundamental principles” and fifty-two canons classified in various types) and a section of “Thirteen Falsities Exposed.”

In the book’s Foreword, Chief Judge Frank Easterbrook calls the book “a great event in American legal culture. . . . [N]ot since Justice Story has a sitting Justice of the Supreme Court written about interpretation as comprehensively”⁶ In the 1830s Story described an approach to interpretation of legal texts much like that which Scalia and Garner and propose today.⁷ Story went further, however, and addressed codification of law.⁸

3. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 441.

4. *Id.* at xxvii.

5. *Id.* at 9.

6. Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *READING LAW*, *supra* note 1, at xxvi.

7. Where Scalia and Garner provide fifty-seven “Sound Principles of Interpretation,” Story offered his own non-exhaustive list of twenty-one “fundamental maxims” for the interpretation of statutes. *Appendix III (Law, Legislation, Codes)*, in 7 *ENCYCLOPÆDIA AMERICANA. A POPULAR DICTIONARY OF ARTS, SCIENCE, LITERATURE, HISTORY, POLITICS AND BIOGRAPHY, BROUGHT DOWN TO THE PRESENT TIME; INCLUDING A COPIOUS COLLECTION OF ORIGINAL*

The affinity of Scalia and Garner's work to Story's is not coincidental. The problem that Scalia and Garner address today grows out of the failure of American law to adequately resolve the codification controversy of more than a century ago. The controversy arose out of the need of the nation for rational law to support the ever increasing volume of commerce. It pitted proponents of codes, on the one hand, who wanted systematic, rational statements of rules along the lines of the French codes of

ARTICLES IN AMERICAN BIOGRAPHY; ON THE BASIS OF THE SEVENTH EDITION OF THE GERMAN CONVERSATIONS-LEXICON 576, 585 (Francis Lieber ed., Carey and Lea 1831) [hereinafter ENCYCLOPÆDIA AMERICANA]. His work on the principles of constitutional interpretation is better known. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 344-442 (Hilliard, Grey and Co. 1833); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 123-162 (abridged ed., Hilliard, Grey and Co. 1833).

It is remarkable that Scalia and Garner did not note this work in their otherwise exhaustive bibliography and that Easterbrook does not seem to be aware of it. Story's authorship was known in his lifetime, and the article has been reprinted three times in modern works separately from the ENCYCLOPEDIA AMERICANA. *See* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 350-372 (1971; 2d ed. with an Introduction by Stephen Presser, 1990); JOSEPH STORY AND THE ENCYCLOPEDIA AMERICANA. WITH AN ORIGINAL INTRODUCTION BY MORRIS L. COHEN (Valerie L. Horowitz ed., Lawbook Exchange, Ltd. 2006). The later volume reprints the seventeen other articles by Story in the ENCYCLOPEDIA AMERICANA.

8. As Chairman of the Codification Commission in Massachusetts, compiler of federal laws, author of the leading treatise on constitutional law, professor at Harvard Law School, and Supreme Court justice, he was a major participant in the codification controversy that occupied much of American legal discourse in the nineteenth century. *See* JOSEPH STORY ET AL., REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS, OR ANY PART THEREOF (Dutton & Wentworth 1837), available at <http://www.archive.org/details/Reportofcommissi1837mass> (last visited 4/19/13); THE PUBLIC AND GENERAL STATUTES PASSED BY THE CONGRESS OF THE UNITED STATES OF AMERICA FROM 1789 TO 1827 INCLUSIVE. PUBLISHED UNDER THE INSPECTION OF JOSEPH STORY (Wells & Lilly 1827), available at <http://catalog.hathitrust.org/Record/001625604> (last visited 4/19/13); JOSEPH STORY, A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR, AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY (Willard, Gray, Little & Wilkins 1829), available at <http://www.archive.org/details/discoursepronoun08stor> (last visited 4/19/13); CHARLES SUMNER, THE SCHOLAR, THE JURIST, THE ARTIST, THE PHILANTHROPIST (William D. Ticknor & Co. 1846), available at <http://catalog.hathitrust.org/Record/011212036> (last visited 4/19/13).

1804, applied justly and predictably, against proponents of common law rules and common law methods.

The conflict concluded at the end of the 19th century—unresolved—with the deaths of proponents and opponents alike. Inertia, and not conscious decision, determined America's present legal methods. Throughout the century, while proponents and opponents debated the issues, legislatures churned out statutes and judges produced precedents. The bar remained unmoved in opposition to codes and unshaken in devotion to lawyer-controlled common law methods. The newly-established law schools chose to teach precedents and case law methods rather than to develop codes and statutory methods. By century's end, proponents of codes had passed away, but legislative mills ground on and judges kept deciding as they always had. Since 1900, the United States has had uncodified statutory law combined with common law methods: a remarkable and costly mismatch.⁹

Scalia and Garner try to end this mismatch; they try to resurrect interpretive methods last addressed, they say, a century ago.¹⁰ They identify and try to kill the cause of American stagnation: common law methods. Having cleared out the clutter of common law methods, they propose textualism to move the United States forward.

Reading Law presents one possible solution to the proliferation of statutes. What makes it potentially a great event in American legal culture is its attack on common law. Not since David Dudley Field, Jr. has anyone of such stature in the American legal community sought to push aside common law methods to deal with statutes. Part II of this essay shows the attack of Scalia and Garner

9. See James R. Maxeiner, *Costs of No Codes*, 31 MISS. COLLEGE L. REV. 363 (2013).

10. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 9 (“We believe that our effort is the first modern attempt, certainly in a century, [citing to Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* (2d ed. 1911)] to collect and arrange only the valid canons (perhaps a third of the possible candidates) and to show how and why they apply to proper legal interpretation.”).

on common law; Part III summarizes their textualism proposal for those not already familiar with it.

Lawyers in the United States typically identify a world of statutes with the Continental or civil law (e.g., French, German, Japanese). Part IV of this essay asks whether Scalia and Garner have created a civil law for the Age of Statutes. Part V shows how civil law systems combine textual and non-textual methods. Part VI shows how common law procedure is a barrier to such a combination.

II. SCALIA & GARNER: COMMON LAW-TRADITION IS THE PROBLEM

Scalia and Garner rest *Reading Law* on recognition that in today's America the law consists of statutes.¹¹ America of the 21st century is not England of the 19th century, where, in their view, statutes were infrequent, the law was principally judge-made, and judges took liberties with statutes that intruded on the common law in order to put through their personal ideas of public policy. In America of the 21st century we do not welcome such judicial intrusions. "Such distortion of texts adopted by the people's

11. Cf. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 13 (Amy Gutmann ed., Princeton Univ. Press 1997) ("We live in an age of legislation, and most new law is statutory law. . . . The lion's share of the norms and rules that actually govern... the country [come] out of Congress and the legislatures.") [hereinafter Scalia, *Common-Law Courts in a Civil-Law System*]; Antonin Scalia, *Review of Steven D. Smith's Law's Quandary*, 55 CATH. U.L. REV. 687, 689 (2006) [hereinafter Scalia, *Review of Law's Quandary*]:

As interesting as Smith's analysis is, it essentially addresses a legal system that is now barely extant, the system that Holmes wrote about: the common law. That was a system in which there was little legislation, and in which judges *created* the law of crimes, of torts, of agency, of contracts, of property, of family and inheritance. And just as theories such as the Divine Right of Kings were necessary to justify the power of monarchs to make law through edicts, some theory was necessary to justify the power of judges (as agents of the King) to make law through common-law adjudication. That theory was the 'brooding omnipresence' of an unwritten law that the judges merely 'discovered.' . . . [I]t is a rare case [today] that does not involve interpretation of an enacted text.

elected representatives is,” Scalia and Garner say, “undemocratic.”¹²

Yet some American judges refuse to abandon “the ancient judicial prerogative of making the law.” They prefer to “improvis[e] on the text to produce what they deem socially desirable results. . . . [In their lawmaking these] judges are also prodded by interpretative theorists. These are the legal realists, who have “convinced everyone that judges do indeed make law” and do not simply apply it.”¹³

Scalia and Garner reject the claim of these “interpretative theorists” that courts are “better able to discern and articulate basic national ideals than are the people’s politically responsible representatives.”¹⁴ The result, they see, of judges straying from their function of applying law—when judges “overreach” and “fashion law” rather than fairly derive it from governing texts—is that they make law uncertain, create inequality of application, undermine democracy, and politicize themselves and their offices.

Scalia and Garner are bold to take on the common law tradition; they did not have to. They could have attributed the problems they discuss to “the desire for freedom from the text, which enables judges to do what they want.”¹⁵ Instead of timidity, they show courage. They target as principal culprit the common law mindset that the nation’s law professors teach. Perhaps they

12. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 3. *See also* Scalia, *Review of Law’s Quandary*, *supra* note 11, at 687-689 (“[A democracy is] quite incompatible with the making (or the ‘finding’) of law by judges . . .”).

13. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 4-5.

14. *Id.* at 4 (*quoting* THOMAS C. GREY, *DO WE HAVE AN UNWRITTEN CONSTITUTION*, *STANFORD LEGAL ESSAYS* 179, 182 (1975)). The present poor perception of Congress tends to support the conclusions of the theorists, at least in practice, if not in theory. For current criticisms *see, e.g., Symposium: The Most Disparaged Branch: The Role of Congress in the Twenty-First Century*, 89 *BOSTON U.L. REV.* 331-870 (2009); LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (Twelve 2011); THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (Oxford Univ. Press 2006).

15. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 9.

perceive that without disarming the common law tradition, their proposal will suffer the same fate as the few codes that were adopted in the United States in the 19th century: death by judicial interpretation.¹⁶

Scalia and Garner do not nip at the edges of the common law; they attack it head on and try to root out its most important manifestations. So even before they get to the canons of construction, they lob a nuclear artillery shell on the whole idea:

American legal education has long been devoted to the training of common-law lawyers, and hence common-law judges. What aspiring lawyers learn in the first, formative year of law school is how to discern the best (most socially useful) answer to a legal problem, and how to distinguish the prior cases that stand in the way of that solution. Besides giving students the wrong impression about what makes an excellent judge in a modern, democratic, text-based legal system, this training fails to inculcate the skills of textual interpretation.¹⁷

Can this be most conservatives' favorite judge speaking? Is he ready to toss into the dustbin of history common law thinking? Yes, he is. Elsewhere, Scalia affirms that he objects to the common law "mind-set that asks, 'What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?'"¹⁸

In an earlier essay Scalia colorfully explains how the American image of the great judge works against good judging in a modern state. So he writes:

[T]his system of making law by judicial opinion . . . is what every American law student, every newborn American lawyer, first sees when he opens his eyes. And

16. See Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 11, at 11 ("The nineteenth-century codification movement espoused by Rantoul and Field was generally opposed by the bar, and hence did not achieve substantial success, except in one field: civil procedure, the law governing the trial of civil cases.").

17. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 7.

18. Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 11, at 13.

the impression remains for life. His image of the great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law. That image of the great judge remains with the former law student when he himself becomes a judge, and thus the common-law tradition is passed on.¹⁹

This is not the image of a modest judge who applies statutes to facts.²⁰

In a nutshell, Scalia and Garner object to the common law ideal that judges should mold the law to fit the facts, rather than take the law as a legislative given and apply it.²¹ To undercut that ethos, they challenge specific common law traditions in treating statutes.

Canons of strict construction of statutes. Scalia and Garner take on the old common law prejudices against statutes incorporated in the traditional canons that they mostly seek to resuscitate. They expose the false “notion that words should be strictly construed.” Instead, citing Justice Story, they identify that what is needed is “reasonableness, not strictness, of interpretation.”²² They reject, as “a relic of the courts’ historical hostility to the emergence of statutory law,” the old canon that statutes in derogation of the common law are to be strictly construed. Instead, they say, “The better view is that statutes will not be interpreted as changing the common law unless they effect the change with clarity.”²³

19. *Id.* at 9.

20. See James R. Maxeiner, *Imagining Judges that Apply the Law: How They Might Do It*, 114 PENN ST. L. REV. 469 (2009).

21. See generally Richard B. Cappalli, *At the Point of Decision, The Common Law's Advantage over the Civil Law*, 12 TEMP. INT'L & COMP. L. J. 87 (1998).

22. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 355.

23. *Id.* at 318. Story, too, felt the need to moderate rather than terminate the canon. See ENCYCLOPEDIA AMERICANA, *supra* note 7, at 584 (“In all cases of a

Statutory stare decisis. Scalia and Garner boldly challenge, as inconsistent with textualism, the essential doctrine of the common law, *stare decisis*, i.e., that common law courts follow their past decisions and that inferior courts are bound to follow decisions of superior courts. In the course of the 19th century, American courts began to apply *stare decisis*, not only to decisions based on the common law, but to decisions construing statutes (“statutory *stare decisis*” or “statutory precedent”). Some appellate courts take that principle further in order to use interpretation of statutes as opportunity to make law; they create legal uncertainty that Scalia and Garner decry. Lower courts, in following statutory precedents, turn their attention away from the text that they are to apply, to the appellate court’s interpretation of the text; they devalue the statute itself.²⁴

Scalia and Garner reject statutory *stare decisis*. The text controls. Thus, they say, “good judges dealing with statutes do *not* make law. Judges deciding cases do not ‘give new content’ to the statute, but merely apply the content that has been there all along, awaiting application to myriad factual scenarios.”²⁵ What they do is considerably more modest than making law: “a court’s application of a statute to a ‘new situation’ can be said to establish *the law applicable to that situation*—that is, to pronounce definitely whether and how the statute applies to that situation. But establishing this retail application is [not] ‘creating law,’ ‘adapt[ing] legal doctrines,’ and ‘giv[ing] them new content.’”²⁶

doubtful nature, the common law will prevail, and the statute not be construed to repeal it.”).

24. On statutory *stare decisis*, see Peter L. Strauss, *The Common Law and Statutes*, 70 COLO. L. REV. 225, 231, 244-245 (1999); James R. Maxeiner, *Thinking Like a Lawyer Abroad: Putting Justice into Legal Reasoning*, 11 WASH. U. GLOBAL STUD. L. REV. 55, 82-83 (2012) [hereinafter Maxeiner, *Thinking Like a Lawyer Abroad*].

25. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 5. [Emphasis in original, quotation and citations omitted].

26. *Id.*

As much as Scalia and Garner would like to throw out statutory *stare decisis* altogether, they cannot quite bring themselves to do so. They end their book condemning it, yet acknowledging dependence on it:

Stare decisis . . . is not a part of textualism. It is an exception to textualism (as it is to any theory of interpretation) born not of logic but of necessity. Courts cannot consider anew every previously decided question that comes before them. *Stare decisis* has been a part of our law from time immemorial,²⁷ and we must bow to it. All we categorically propose here is that, when a governing precedent deserving of *stare decisis* effect does not dictate a contrary disposition, judges ought to use proper methods of textual interpretation. If they will do that, then over time the law will be more certain, and the rule of law will be more secure.²⁸

If truth be told, here Scalia and Garner are bowing to a different necessity than convenience.²⁹ It is a necessity of political acceptance: their originalism-based proposals will be dead on arrival if they are seen “to turn the clock back” to produce a “‘radical purge’ of society’s settled practices and beliefs.”³⁰

27. The Supreme Court itself sometimes puts aside Holmes’ aphorism and decides, because, that’s the way we always have done it. *See, e.g.*, *Flood v. Kuhn*, 407 U.S. 258 (1972) (baseball exemption from antitrust law); *Burnham v. Superior Court*, 495 U.S. 604 (1990) (tag rule of civil procedure); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (civil forfeiture of innocent owner’s yacht).

28. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 413-414.

29. Civil law systems get along fine interpreting statutes without binding precedents.

30. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 411. *Accord, id.* at 87:

A frequent line of attack against originalism consists in appeal to popular Supreme Court decisions that are asserted based on a rejection of original meaning. We do not propose overruling all those decisions. Our prescriptions are for the future. For the past, we believe in the doctrine of *stare decisis*, which will preserve most of the nonoriginalist holdings on the books. Which ones will fall depends on several factors. [FN 38. *See infra* at 411-14] *Stare decisis* is beyond the scope of our discussion here, but it is germane to the present point that the relevant factors include the degree of public acceptance.

III. SCALIA & GARNER: [PURE] TEXTUALISM IS THE SOLUTION

Scalia and Garner propose textualism as the solution to the problem of controlling judges who take liberties with texts. It is to be the generally agreed on approach to the interpretation of legal texts. Textualism will save Americans from politicized judges who impair the predictability of judicial decisions, give unequal treatment to similarly situated litigants, weaken our democratic process and distort our governmental system of checks and balances. It is not too late to restore a strong sense of judicial fidelity to texts.³¹

Textualism, Scalia and Garner say, is not a novel approach, but “the oldest and most commonsensical interpretative principle.”³² They define textualism to be “the doctrine that the words of a governing text are of paramount concern, and what they convey in their context is what the text means.”³³

Scalia and Garner assert that if one is not a textualist, one must be a “non-textualist.” Non-textualists come in a variety of species, the two most common of which are purposivists and pragmatists (also called “consequentialists” by Scalia and Garner). Both purposivism and pragmatism “liberate” judges from the constraints of rules. Purposivism gives interpreters the opportunity to change texts according to what they perceive to be the purposes of statutes. Scalia and Garner pigeon-hole purposivism as a license to manipulate. It produces uncertainty. Pragmatism allows interpreters to give texts “sensible, desirable results.” The problem: “people differ over what is sensible and what is desirable.” According to Scalia and Garner, the people have given those decisions to elected representatives.³⁴

Scalia and Garner are concerned with controlling judges; they do not dwell on obvious benefits that textualism has for guiding

31. SCALIA & GARNER, *READING LAW*, *supra* note 1, at xxvii.

32. *Id.* at 15.

33. *Id.* at 441.

34. *Id.* at 22.

society generally. Most applications of law are self-applications. Subjects consider what they know of the law and fit themselves within it. If law is easily manipulated, or simply uncertain, those who skirt the law have an invitation to do so: So sue me! Those who scrupulously follow the law are dissuaded from taking action they might otherwise take: It's too risky!³⁵

The principal elements of textualism in its basic form are:

The words of the statute are paramount. A textualist extracts the meaning of the text from the words of the text itself and nothing more.³⁶

The statute is to be given a fair reading, neither strict, nor liberal. A fair reading is: "The interpretation that would be given to a text by a reasonable reader, fully competent in the language, who seeks to understand what the text meant at its adoption, and who considers the purpose of the text but derives purpose from the words actually used."³⁷

The statute is to be understood objectively. The interpreter is to look to the words expressed in the text and not to the unexpressed thoughts of legislators. Collective bodies have no intent.³⁸

If the plain meaning of a statute is clear, it should be followed, unless absurd. An unambiguous text is to be applied by its terms without recourse to policy, historical arguments or other matter extraneous to the text. The legislature has stated what the law is; it is not for law-appliers to overrule those decisions.

Where more than one interpretation is possible, only permissible meanings are to be considered. Words and sentences are not to be given meanings that they will not bear.³⁹

35. See generally James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VALPARAISO L. REV. 517 (2006).

36. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 441.

37. *Id.* at 428. Basic textualism does not seem to require, however, as pure textualism does, that the meaning be fixed as that at the time of adoption.

38. *Id.* at 391.

39. *Id.* at 31.

Where more than one interpretation is permissible, principles of interpretation, many called “canons of construction”, guide decision-makers.⁴⁰ These principles are not absolute; instead, they interrelate.⁴¹

It is at this point, when the meaning of the text is ambiguous,⁴² that pure textualism diverges from basic textualism. In basic textualism, the interpreter might resort to any number of interpretative tools. In pure textualism, according to Scalia and Garner, interpretation “begins and ends with what the text says and fairly implies.”⁴³ It limits interpretation to principles based on language and historical meaning (but not legislative history). Scalia and Garner allow some systemic arguments. But they exclude other interpretive arguments, including purposive, pragmatic, and most equitable arguments.

Principal additional characteristics of pure textualism are:

*Words must be given the meaning they had when the text was adopted.*⁴⁴ This is Scalia and Garner’s preferred meaning of originalism.⁴⁵

40. *Id.* at 32.

41. *Id.* at 59. This rejects the approach many common lawyers would like to see, i.e., that canons of construction are like rules that are binding. Presumably there would be a mandatory and therefore predictable construction, which would facilitate presenting cases in court. *See generally*, Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation, Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010); Abbe R. Gluck, *Statutory Interpretation Methodology as “Law”: Oregon’s Path-Breaking Interpretive Framework and Its Lessons for the Nation*, 47 WILLAMETTE L. REV. 539 (2011); Gary O’Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 333 (2003); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). It is, however, consistent with Supreme Court precedent. *See* *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (“no more than rules of thumb that help courts determine the meaning of legislation”); *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (canons of construction are not “mandatory rules” but rather are “guides that need not be conclusive”).

42. Note that here Scalia and Garner are dealing with ambiguity in the language of the text, and not ambiguity in how the text applies to a particular case.

43. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 16.

44. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 78.

Legislative history is not an acceptable argument in statutory interpretation. Legislative bodies are collectives. Who is to say that all of the legislators had the same understanding?

Doing justice is not an acceptable basis for statutory interpretation. Judges must be faithful to the law.⁴⁶ Scalia and Garner follow Blackstone: “law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law.”⁴⁷

*The meaning of a statute is not to be found in the social, political or economic objectives of the law.*⁴⁸

Judges are not to supply law for omitted cases. Legislation is for the legislature. For judges to correct the statute violates principles of separation of powers.⁴⁹

This is the prescription of Scalia and Garner of a modern law for the Age of Statutes.

45. *Id.* at 435.

46. *Id.* at 347. *Id.* at 348:

The problem is that although properly informed human minds may agree on what a text means, human hearts often disagree on what is right. That is why we vote (directly or through our representatives) on what the law ought to be, but leave it to experts of interpretation called judges to decide what an enacted law means. It is doubtless true, as a descriptive matter, that judges will often strain to avoid what they consider an unjust result. But we decline to elevate that human tendency to an approved principle of interpretation.

The soundest, most defensible position is one that requires discipline and self-abnegation. If judges think no further ahead than achieving justice in the dispute now at hand, the law becomes subject to personal preferences and hence shrouded in doubt. It is age-old wisdom among mature, experienced legal thinkers that procedure matters most: how things should be done, as opposed to what should be done. And for judges the ‘how’ is fidelity to law. But it is a hard lesson to learn, and harder to follow.

47. SCALIA & GARNER, READING LAW, *supra* note 1, at v (unnumbered in book).

48. *Id.* at 438.

49. *Id.* at 349-350.

IV. IS TEXTUALISM A CIVIL LAW FOR THE AGE OF STATUTES?

Is textualism a civil law for the Age of Statues? Scalia and Garner invite us to ask that question when they claim the mantle of consistency with “the best legal thinkers” and when they invoke Bentham and Continentals such as Gadamer, Kelsen, Locke, Montesquieu and Thibaut. The title of an earlier essay by Scalia practically begs us to ask it: *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*.⁵⁰ Is Scalia, who is better known for opposing references to foreign law than promoting them, creating his own civil law? In *Reading Law*, he and Garner peripherally pay tribute to civil law methods when they quote Karl Llewellyn (albeit in a footnote): “It is indeed both sobering and saddening to match our boisterous ways with a statutory text against the watchmaker’s delicacy and care of a . . . Continental legal craftsman.”⁵¹

Textualism shares much with civil law approaches. Its basic model is mainstream the world over. It has been used, as Scalia and Garner say, for centuries. In textualism, the written law governs. *Pure* textualism, however, has more in common with past manifestations of civil law methods than with modern ones. In Germany, for example, its closest cousin is the Prussian Code of 1794, and not any later code.

This observation is not condemnation, but constructive criticism. Scalia and Garner are making up for a deficit of two centuries in dealing with statutes. While Americans have made little progress with written law since the path-breaking Constitution,⁵² civil law countries have made much.⁵³ Scalia and

50. In SCALIA, A MATTER OF INTERPRETATION, *supra* note 11, at 3-47.

51. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 8, n.16 *citing to* KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 380 (1960).

52. Cf. Charles Abernathy, *The Lost European Aspirations of US Constitutional Law*, in 24. FEBRUAR 1803, DIE ERFINDUNG DER VERFASSUNGSGERICHTSBARKEIT UND IHRE FOLGEN 37 (Werner Kremp, ed. 2003):

Garner have released, what we might call, U.S. Textualism Version 1.0.

Here in Part IV we consider what basic textualism shares with civil law methods, and second, what sets pure textualism apart from contemporary civil law methods. For practical reasons, we limit our consideration to one of the world's two leading civil law jurisdictions, that of Germany, and mention only incidentally that of the other, France.⁵⁴

A. Textualism is Civil

Basic textualism as stated by Scalia and Garner is consistent with German approaches to statutes. In Germany, statutes are the

Despite its European origins, [the U.S.] legal constitutional tree has grown into a very strange hybrid, a tree with continental European roots but an increasingly common-law superstructure of branches, trunks, and leaves. Despite repeated attempts by some Supreme Court justices, the continental code-law tradition has been unable to win a majority at the Supreme Court for many decades.

53. See, e.g., Reinhard Zimmermann, *Statute Sunt Stricte Interpretanda? Statutes and the Common Law: A Continental Perspective*, 56 CAMBRIDGE L.J. 315, 315-316 (1997) [hereinafter Zimmermann, *Statutes*] ("An English colleague has suggested that 'civilian lawyers regard our case law with admiration and our statute book with despair.' It may therefore be appropriate to remind ourselves that civilian lawyers once struggled with the same kind of problem that is being addressed today."); *id.* at 321 (in Germany, following adoption of the 1949 constitution, in statutory interpretation there has been "a considerable advance in legal culture.").

54. For the convenience of readers who may not read German and yet wish to follow the argument further, I largely cite English-language works by leading German scholars. In particular, I cite the one standard work on German legal methods which has been translated into English: REINHOLD ZIPPELIUS, AN INTRODUCTION TO GERMAN LEGAL METHODS (Kirk W. Junker & P. Matthew Roy trans., 10th ed., Carolina Acad. Press 2008) [hereinafter ZIPPELIUS]. The first edition appeared under the title EINFÜHRUNG IN DIE JURISTISCHE METHODENLEHRE (1st ed. 1971); the most recent is under the title JURISTISCHE METHODENLEHRE: EINE EINFÜHRUNG (10th ed. 2006). The other classic students' text is KARL ENGISCH, EINFÜHRUNG IN DAS JURISTISCHE DENKEN (1st ed. 1956; 10th ed., Thomas Würtenberger & Dirk Otto eds., 2005). The classic academic text is KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT (1st ed. 1960; 6th ed. 1991; 4th condensed study ed. with Claus-Wilhelm Canaris, 2009). The global comparative work is WOLFGANG FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG (5 vols., Mohr 1975-1977).

principal form of law. If their application is clear, they must be followed, unless they are invalid (e.g., unconstitutional). Democracy and the rule of law demand no less.⁵⁵

The words of the text are paramount. In Germany, the words of the text are of paramount concern; they convey what the text means. The statute—*das Gesetz*—is the fundamental concept of all law. When an American says, “we have a rule of law, not of men,” a German says, “statutes, not men, govern.”⁵⁶

*Statutes must be followed unless the result is irrational or unjust.*⁵⁷ No one—other than the Constitutional Court—is permitted to put a valid law out-of-force. To allow a judge, a government official or a subject of the law not to apply the law is to deny that Germany is a democratic, rule-of-law state.

Statutes are interpreted objectively. Statutes should be understood *objectively*, that is, according to “the intention of the statute itself.”⁵⁸ An *objective interpretation* seeks an understanding “familiar to the mindset of a wide number of people.”⁵⁹ There is no attempt to recreate a subjective intent of those who took part in the legislative process.⁶⁰ Their individual wills are difficult to determine and are unlikely to be in harmony with one another.⁶¹

Words have a range of meanings. Statutes and other legal rules put ideas into words. Words are, however, ambiguous; they may refer to more than one concept. Words that describe facts seldom

55. Winfried Brugger, *Concretization of Law and Statutory Interpretation*, 11 TUL. EUR. & CIV. L.F. 207, 208 (1996) [hereinafter Brugger, *Concretization of Law*].

56. WALTER LEISNER, *KRISE DES GESETZES: DIE AUFLÖSUNG DES NORMENSTAATES 5* (Duncker und Humblot 2001) (“*Nicht Menschen herrschen—Gesetze gelten.*”). See also James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TULANE J. INT’L & COMP. L. 541, 558 (2007) [hereinafter Maxeiner, *Legal Certainty*].

57. Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View*, 42 AM. J. COMP. L. 395, 401 (1994) [hereinafter Brugger, *Legal Interpretation*]. See also Brugger, *Concretization of Law*, *supra* note 55.

58. ZIPPELIUS, *supra* note 54, at 30.

59. *Id.* at 32.

60. *Id.* at 32.

61. *Id.* at 33.

carry the same meaning for everyone. A given word has a “range of meanings.”⁶² To go outside the range of possible meanings creates a legitimacy problem;⁶³ it is to take over the function reserved to the legislature.⁶⁴

Where there is more than one meaning within a range, principles of interpretation guide interpretation. Where the principles of the common law, the canons, are numerous and particular, the principles of German law are few and general. Four approaches are dominant:⁶⁵ (1) grammatical, (2) historical, (3) systemic, and (4) purposive (teleological).⁶⁶ The classical criteria of interpretation, while they facilitate finding the correct interpretation, do not give license to go outside the range of possible meanings of a statute's words. “All further efforts at interpretation proceed on the basis of a word's possible meaning. These efforts are carried out within a range of meaning that is permissible according to linguistic usage (possibly circumscribed by legal definitions).”⁶⁷ Every approach must, however, “respect the outer bounds of grammatical analysis.”⁶⁸

62. *Id.* at 62-66.

63. *Id.* at 96.

64. *Id.* at 72.

65. Zimmermann, *Statutes*, *supra* note 53, at 320.

66. *Id.* at 60. *See also id.* at 320 (“(1) the literal meaning of the words or the grammatical structure of a sentence, (2) the legislative history, (3) the systematic context and (4) the design, or purpose, of a legal rule.” [citing 1 FRIEDRICH CARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 206 (1840) (translated as *SYSTEM OF THE ROMAN LAW* (William Holloway trans., 1979) (1867))]; Brugger, *Concretization of Law*, *supra* note 55, at 234 (listing in table form what four methods more fully described in the article, i.e., “I. textual interpretation ‘what is specifically said’; II. Contextual interpretation ‘what is said in context’; III. Historical interpretation ‘what was willed’; IV. Teleological interpretation ‘what is the purpose’”); Robert Alexy & Ralf Dreier, *Statutory Interpretation in Germany*, in *INTERPRETING STATUTES: A COMPARATIVE STUDY* 73, 82-89 (D. Neil MacCormick & Robert S. Summers eds., Ashgate 1991) (giving a somewhat different breakdown of approaches).

67. ZIPPELIUS, *supra* note 54, at 60; (“feasible meanings” at 67).

68. Brugger, *Legal Interpretation*, *supra* note 57, at 400; *See also* Brugger, *Concretization of Law*, *supra* note 55.

Of these four approaches, the most common is the purposive, which includes an equitable approach.⁶⁹

Variations and additions are sometimes suggested, particularly since the adoption of the Basic Law in 1949 (with respect to fundamental rights and the structure of the state), and the accession in 1958 to what is now the European Union (particularly with respect to harmonization of law). Whether constitutional texts should receive different treatment is debated, with no clear resolution.

Which interpretation prevails is argumentative. There is no hierarchy in applying the approaches. An interpreter may make use of all approaches and choose the approach or approaches that seem most convincing in a particular case.⁷⁰ It is said that “the decisive point of reference is the interpreter’s notion of a result that, according to the ‘independent function’ or value of the pertinent legal provision, must be the correct one.”⁷¹

B. Pure Textualism is Uncivil

Pure textualism was the approach of the Prussian Civil Code of 1794. Its section 46 of the Introductory Part prohibited judges from going beyond the text. If the judge could not get the meaning from the text, he was to refer the legal question to a special code commission.⁷² The approach was regarded as monstrous.

Pure textualism in Germany today would be anathema. Zimmermann writes that “[o]n the Continent we have managed to

69. Zimmermann, *Statutes*, *supra* note 53, at 320; Reinhard Zimmermann, *Characteristic Aspects of German Legal Culture*, in INTRODUCTION OF GERMAN LAW 1, 24-25 (J. Zekoll & M. Reimann eds., 2d ed., Wolters Kluwer 2005).

70. Brugger, *Legal Interpretation*, *supra* note 57, at 402.

71. *Id.* at 397.

72. “*Bey Entscheidungen streitiger Rechtsfälle darf der Richter den Gesetzen keinen andern Sinn beylegen, als welcher aus den Worten, und den Zusammenhänge derselben, in Beziehung auf den streitigen Gegenstand, oder aus den nächsten unzweifelhaften Gründe des Gesetzes, deutlich erhellt.*” ALLGEMEINES LANDRECHT FÜR DIE PREUBISCHEN STAATEN VON 1794, TEXTAUSGABE MIT EINER EINFÜHRUNG VON HANS HATTEHAUER 58 (2d ed., Luchterhand 1994).

shake off the self-imposed fetters of a literalist approach to statutory interpretation.”⁷³ In Germany, the most practiced method is said to be purposivism:⁷⁴ i.e., poison to Scalia and Garner. Their panacea, the historical, it is said in Germany, “generally serves only as a secondary, supplementary way of clarifying a rule’s meaning.”⁷⁵

Some basic principles of modern German interpretation are opposed to Scalia and Garner’s pure textualism. For example:

Statutes should be interpreted according to ideas of the present (“living interpretation”). They are not to be limited ideas controlling at the time they were adopted.⁷⁶ “The basis of legitimacy of law to be applied today does not lie in the past; it lies in the present. . . . For the present it does not matter under whose authority the statute was enacted, but rather under whose authority it lives on today.”⁷⁷

Certain legislative history is an acceptable argument in statutory interpretation. German legislative procedures differ from American. Most statutes are presented to the legislature in draft form for debate. The debates themselves are not tools of interpretation, but one may rely on the formal justifications provided with the draft statutes to understanding the meaning of the words used in the drafts.

73. Zimmermann, *Statutes*, *supra* note 53, at 320.

74. *Id.* at 320.

75. Brugger, *Legal Interpretation*, *supra* note 57, at 401.

76. ZIPPELIUS, *supra* note 54, at 34.

77. *Id.* at 34-35. While considerations of legitimacy and of justice demand a living interpretation, Zippelius teaches that considerations of separation of powers (and we might add, of legal certainty), require that “a change in meaning must not only keep itself within the possible meanings of the text of a legal norm, but also, where possible, within that very range of meaning that the purpose of the legislation leaves open for honing in on.” *Id.* at 36. German ministries of justice are responsible for removing from the statute books obsolete laws. Some newer German laws as adopted automatically expire. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BETTER REGULATION IN EUROPE: GERMANY, 114-15 (2010), available at http://www.oecd.org/document/63/0,3746,en_2649_34141_45048895_1_1_1_1_00.html (last visited 04/23/13).

Doing justice is an acceptable basis for statutory interpretation. The judge asks: “Which of the possible ‘justifiable’ interpretations, according to the rules of the art, lead to the most just solution?”⁷⁸

The meaning of a statute may be found in the social, political or economic objectives of the law.

*Judges may—exceptionally—supply law for omitted cases.*⁷⁹ In filling in gaps, it is appropriate to consider societal goals, system consistency and justice.⁸⁰ Gap-filling to achieve material justice raises the question as to whether supplementation should be done politically, for the future by the legislature, or according to existing law, by judges.⁸¹

The German system poses a challenge to Scalia and Garner: it practices textualism, but rejects its pure form and takes the poison of purposivism. It seeks to do justice in individual cases or to provide pragmatic solutions. One would expect that Germany would be a cesspool of renegade judges imposing their individual ideas of justice; yet the German system is not. To the contrary, it is known for separating policy and law, and stressing legal certainty. How are we to explain this enigma? That is the topic of Part V.

78. ZIPPELIUS, *supra* note 54 at 86.

79. *Id.* at 17.

80. *Id.* at 97.

81. *Id.* at 91:

By supplementing the law, the judge is functioning in a manner reserved for the legislature under a system of separation of powers. The legislature is in a better position than a court to tackle questions of legal supplementation—considerations that are often highly political in nature—and it does so with more democratic legitimacy, particularly with respect to the necessary debate and conversation with the public.

V. IN MODERN CIVIL LAW TEXTUALISM AND NON-TEXTUALISM
COEXIST

Textualism and non-textualism coexist in modern civil law systems. They must, if law is to do its job and balance justice, policy and legal certainty.⁸²

A. Law in Time Requires that Textualism and Non-Textualism Must Coexist

Legislatures enact rules that apply generally today and into the future. The limits of our ability to know the present, and to foresee the future, limit the ability of legislatures to prescribe legal answers to future questions.⁸³ Often rules set outer limits of their application without prescribing exact decisions. They leave precise decisions to those who apply the law. They may provide criteria or procedures for decisions.

Textualism defines the outer limits of decisions. Non-textualism determines how those rules are applied within the limits set. The outer limits provide one level of legal certainty to those subject to the law;⁸⁴ confidence in how those applying the law will do so within those outer limits can add a second level of legal certainty. The laws, written by the legislature, provide general rules intended to achieve justice and policy goals. Those charged with applying the law, within its limits, are responsible for reaching decisions that not only comply with the letter of the law, but that also fulfill the goal of law to achieve justice and good policy.

82. Cf. JAMES R. MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY 12 (Praeger 1986) [hereinafter MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW]; Brugger, *Concretization of Law*, supra note 55, at 209-217.

83. See James R. Maxeiner, *Legal Certainty*, supra note 56, at 554-55; Brugger, *Concretization of Law*, supra note 55, at 224-30.

84. One might say that the law binds negatively. See MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW, supra note 82.

As we have seen, the drafters of the Prussian Code of 1794 sought to tie judges strictly to texts. If the text did not deliver the answer, then judges were to refer questions to a legislative commission. The drafters of the French Codes of 1804 charted a better and more modern course. They sought to limit judges with textualism, but to guide them with what Scalia and Garner call non-textualism. So Portalis, the drafter of the Code Civil, wrote in an essay introductory to his code: “When the law is clear, it must be heeded; when it is unclear, the provisions must be further elaborated. If there is no law, then custom or equity must be consulted. Equity is the return to natural law when positive laws are silent, contradictory or vague.”⁸⁵ In the modern civil law world, textualism and non-textualism can and must coexist.

Portalis eloquently stated how the phenomenon of law in time requires that texts cannot be unchanging:

Whatever one might do, positive laws could never entirely replace the use of natural reason in life’s affairs. The needs of society are so varied, the communication of men so active, their interests so numerous, and their relationships so far reaching, that the lawmaker cannot possibly foresee all.

The very matters on which he fixes his attention involve a host of particulars that escape him or are too contentious and too volatile to be the subject of a statutory enactment.

Moreover, how does one bind the action of time? How to go against the course of events, or the imperceptible inclination of morals? How to know and calculate in advance what experience alone can reveal? Can foresight ever extend to things beyond the reach of thought?

A code, however complete it may seem, is no sooner

85. PRELIMINARY ADDRESS ON THE FIRST DRAFT OF THE CIVIL CODE PRESENTED IN THE YEAR IX BY MESSRS. PORTALIS, TRONCHET, BIGOT-PRÉAMENEU AND MALEVILLE, MEMBERS OF THE GOVERNMENT-APPOINTED COMMISSION (1801), translated and available at <http://www.justice.gc.ca/eng/pi/icg-gci/code/index.html> (last visited 4/26/13); see the original French Portalis, Tronchet, Bigot-Préameneu & Maleville, *Discourse préliminaire*, in 1 J. LOCRÉ, LA LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE 251, 255-72 (1827); see also ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM 54-55 (2d ed., Little, Brown & Co. 1977) (translation of an extract).

finished than thousands of unexpected questions present themselves to the magistrate. For these laws, once drafted, remain as written. Men, on the other hand, never rest. They are always moving; and this movement, which never ceases and whose effects are variously modified by circumstances, continually produces some new fact, some new outcome.⁸⁶

How are Scalia and Garner and other proponents of pure textualism and originalism to answer this wisdom? It is simplistic for them to say that the legislature should amend the laws. It is wishful thinking and reminiscent of the failed Prussian legislative commission to think that we might, as some scholars have recently suggested, add procedures to refer disputed questions back to legislatures.⁸⁷

Civil law systems can read law combining textualism and non-textualism because civil law methods of writing and applying law facilitate doing so. Statutes and procedures anticipate that appliers will be making equity and policy decisions.

B. Reading Law is Doctrinal Rather than Authoritative

In civil law systems, most instances of statutory interpretation are, in the words of Portalis which we adopt here, *doctrinal* and not *authoritative*.⁸⁸ Doctrinal interpretation helps judges determine whether the facts of a particular case fall within the bounds of a statute. It consists of understanding the true meaning of statutes. The interpretation binds no future courts. Authoritative interpretation, on the other hand, settles issues and creates rules. It does bind future decisions. Authoritative interpretation ideally

86. PORTALIS, *supra* note 85 [unpaginated].

87. See, e.g., Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007).

88. So Portalis wrote:

Doctrinal interpretation consists in grasping the true meaning of laws, in applying them judiciously and in supplementing them in cases where they do not apply. Can one conceive of fulfilling the office of judge without this type of interpretation?

Authoritative interpretation consists in settling issues and doubts by means of rules or general provisions. This mode of interpretation is the only one denied the judge.

would be the exclusive prerogative of the legislature. But practical realities preclude that. Today, courts of last resort in Germany and other civil law countries issue authoritative interpretations. When interpretation is doctrinal, the integrity of the text is maintained no matter how a particular court decides in an individual case; when it is authoritative, courts, by becoming interpreters, become lawgivers.⁸⁹

Scalia and Garner, in seeking to curtail *stare decisis*, would make statutory interpretation largely doctrinal. They too see authoritative interpretation as lawmaking. They would limit authoritative interpretations. They say that applying law in a particular case is—at most—a “retail” making of law: “a court’s application of a statute to a ‘new situation’ can be said to establish *the law applicable to that situation*—that is, to pronounce definitively whether and how the statute applies to that situation. But establishing this retail application is [not] ‘creating law’ . . .”⁹⁰

C. Writing Law in the Age of Statutes

Modern codes in civil law countries do not regulate comprehensively. Portalis again well-captures their methods:

The function of the statute is to set down, in broad terms, the general maxims of the law, to establish principles rich in consequences, and not to deal with the particulars of the questions that may arise on every subject.

89. John Chipman Grey in one of his books famously quoted Bishop Hoadly, not one time, but three times: “Whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law-Giver to all intents and purposes, and not the person who first wrote or spoke them.” JOHN CHIPMAN GREY, *THE NATURE AND SOURCES OF LAW* 229, 276, 369 (Columbia Univ. Press 1909).

90. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 5. In Germany, where interpretations of statutes are not given binding effect, Professor Fikentscher has proposed a limited binding effect in such applications, which he calls a “case norm”. See Wolfgang Fikentscher, *Eine Theorie der Fallnorm als Grundlage von Kodex- und Fallrecht (code law and case law)*, 21 *ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG (ZfRV)* 161 (1980).

It is left to the magistrate and the jurisconsult, fully alive to the overall spirit of laws, to guide their application.⁹¹

In how closely they deal with particulars, codes vary from country to country, within each country, and even within themselves. Nevertheless, they have in common that they do not regulate every particular and that they do leave it to judges and lawyers to guide their application.

Modern statutes serve two purposes: to the extent they can, they prescribe rights and obligations. When they cannot do that, they prescribe who can create or determine rights and obligations and how they may do so. In other words, statutes structure authority.

In Germany, it is said that organization of authority is the “backbone” of a legal system’s rational structure.⁹² “The law [not only] . . . consists of obligations to do something or refrain from doing something, [it consists] as well as rules regulating the creation, modification and termination of behavioral norms or individual rights.”⁹³ When we think of law, we think first of obligations, such as stopping at a red light. But its authorizations are no less important: e.g., a traffic officer may stop a motorist who the officer observes is not complying with traffic rules.

Authorizations take over when rules cannot direct solutions. Legislatures cannot anticipate all eventualities; they cannot rationally pre-determine what all outcomes will be. What they can do is to structure authority and its exercise. Then they do not try to calibrate all choices in advance. They let government officials or individuals subject to law make essential choices. Usually, when legislatures give others leeway in deciding, they do not leave decision-makers free to decide without limitation. Usually they require specific criteria or specific procedures for those choices.

91. *Supra* note 85 [unpaginated].

92. ZIPPELIUS, *supra* note 54, at 6.

93. *Id.* at 11.

They authorize law-appliers to make value decisions of justice or policy.⁹⁴ Yet in all these instances, law structures decisions without claiming to command particular decisions. Although law cannot answer definitively *what* should be decided, it can answer *who* should decide using *which criteria*, subject to *which process*.⁹⁵ Among the techniques modern statutes use are indefinite legal terms, general clauses and grants of discretion.

Indefinite legal concepts. Indefinite legal concepts allow for a range of meanings; they deliberately give law flexibility. “This range of meaning allows these general legal words to adapt to the wide and diverse range of legal problems and circumstances of life that the law seeks to regulate, as well as to the changing prevalent social-ethical views.”⁹⁶ They permit a range of judgment to the law appliers.⁹⁷ When indefinite concepts are used, there may be no “one meaning to be made from general persuasive reasons.” There thus becomes a range of “justifiable decisions,” although “some interpretations are more justifiable than others.”⁹⁸

General clauses. A general clause is a provision that depends on an indefinite legal concept as the operative provision. German statutes use general clauses to take into account the many sides of life that do not lend themselves to definition in clearly defined

94. See MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW, *supra* note 82.

95. ZIPPELIUS, *supra* note 54, at xii. “The interpretation and development of the law are indeed capable of being rationally structured; however, they are not completely capable of being rationally determined.”

96. *Id.* at 66.

97. Zippelius gives as an example of room for judgment the term “forest.” Is a “small, free-standing, natural pine woods with approximately 50 half-grown trees” a forest? Suppose the requisite element for a crime of arson is setting fire to a forest. Classifying this stand of trees as a forest is for Zippelius preeminently a question of interpreting the statute and not one of subsuming the facts under the statute. In so doing, that interpretation then gives “meaning for future cases.” In other words, the specific case “gives the impetus to weigh and to make precise the range of the meaning of the norm—with regard to the submitted facts of behavior.” (emphasis in the original) *Id.* at 132.

98. ZIPPELIUS, *supra* note 54, at 135.

concepts. By using general clauses, legislation need not be fragmentary, but can be gap free.⁹⁹

General clauses do not permit judges to decide what they think is “fair” or in the “general welfare.”¹⁰⁰ Instead, case groups develop in an almost common-law manner.¹⁰¹ Only where there are no prior decisions do judges have some freedom in reaching new solutions.¹⁰² Sometimes the legislature notes the development of these case groups and enacts them into law or introduces its own groups of cases.

Discretion. Sometimes statutes deliberately do not bind decision-makers to one correct decision, but grant them discretion to reach their own decisions based on their own responsibility and independent choice. It is used to permit a purposeful or just decision in individual cases.¹⁰³ Administrative authorities are allowed to make policy-oriented decisions upon their own responsibility; they may choose on the basis of current and local interests among several possibilities. This freedom is acceptable

99. KARL ENGISCH, EINFÜHRUNG IN DAS JURISTISCHE DENKEN 124 (7th ed., Kohlhammer 1977). German indefinite legal concepts are best known in the United States through two general clauses of the German Civil Code, sections 138 and 242, which have become parts of American law through adoption in the Uniform Commercial Code (U.C.C.). BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] Aug. 18, 1896, RGBL 195, as amended, §§ 138, 242. Section 138's U.C.C. counterpart is § 2-302, which permits nonenforcement of “unconscionable” contracts or terms. U.C.C. § 2-302 (2004). Section 242 requires performance of contracts in “good faith,” BGB § 242; its U.C.C. counterpart is § 1-304 (formerly § 1-203). U.C.C. § 1-304. For the origin of § 2-302, see James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age*, 28 YALE J. INT'L L. 109, 116-117 (2003) [hereinafter Maxeiner, *Standard-Terms Contracting*].

100. See Franz Wieacker, *Zur rechtstheoretischen Präzisierung des § 242 BGB*, in 2 AUSGEWÄHLTE SCHRIFTEN 195, 203 (Dieter Simon ed., Metzner 1983).

101. See Maxeiner, *Standard-Terms Contracting*, *supra* note 99.

102. Wieacker, *supra* note 100, at 203. Wieacker also notes that § 242 looks to issues of individual justice and not to general welfare (policy). *Id.* at 196.

103. A common view in Germany holds that discretion in choice of legal consequences (e.g., five or ten years' imprisonment) is appropriate, but not in determination of the prerequisites for action (e.g., whether defendant committed the crime of arson). This distinction marks a difference between indefinite legal concepts and discretion: the former leaves room for judgment in the prerequisites of action, while the latter provides for freedom of action.

because administrative authorities are politically accountable. Administrative authorities are nonetheless obligated to exercise their freedom of choice in the public interest. Relaxation of binding to statute for judicial decisions, on the other hand, is preferably limited to situations, where necessary, that permit judges to do justice in individual cases. Judges are not politically accountable; they are guaranteed independence to permit them to do justice.

D. Applying Law in the Age of Statutes

German procedure supports the coexistence of textualism and non-textualism. Among the ways it does this are: (i) judges and government officials know the law (*iura novit curia*) and are responsible for applying it to facts provided by parties (*da mihi factum, dabo tibi ius*); (ii) judges and government officials must give reasoned explanations for their decisions; and (iii) judges of the intermediate level of appeal are responsible for reviewing all aspects of the decisions of courts of first instance, including the application of law to facts.

i. *Judges know the law and are responsible for applying it.* In the first and second instance, the focus of German judges is on whether the facts in the case fulfill the requisite elements of any legal rule. They need to know which statutes might apply and to understand those statutes well enough to know what they require. The judge is constitutionally bound to decide according to both statute and justice. Procedurally the judge is bound to clarify cases. A judge, troubled that a case may lead to a decision contrary to justice or good policy, need not twist the law to reach a good decision; he or she may better understand the facts. Intermediate appellate courts have similar obligations.¹⁰⁴

104. See JAMES R. MAXEINER WITH ARMIN WEBER AND GYOOHO LEE, FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE (Cambridge Univ. Press 2011) [hereinafter MAXEINER, FAILURES OF AMERICAN CIVIL JUSTICE].

ii. Reasoned explanations. Judges and government officials are required to give reasoned explanations for their findings of fact, conclusions of law and application of law to facts. They must deal in a prescribed form with all possible relevant laws and party assertions. Reasoned opinions are said to help make up for shortcomings of statutes. They enhance the quality of legal decisions. They provide foundations for review of decisions made. Just the knowledge that such a review is possible impels decision-makers to self-control. It requires them to base their decisions, or at least the justifications for their decisions, on approved reasons (e.g., the statutory requirements) and not on unapproved ones (e.g., bias and prejudice).¹⁰⁵

VI. COMMON LAW PROCEDURE IS A PROBLEM

Scalia and Garner courageously confront common law tradition. There is to be no more judicial law making; only legislatures are to make law. Yet Scalia and Garner are haunted by common law procedure and a heritage of neglect of legislation. Their textualism is for litigation and not for life. It speaks to judges and to litigating parties and not to people. Its idea of a statute has more in common with the old writs of common law special pleading than it does with modern codes. Its idea of the role of the judge is that of an oracle who speaks law, not that of a workman who applies law. They fear a text that might give way to considerations of justice or policy, for then it would endanger the rule of law and separation of powers.

Scalia and Garner are clear that their book is a how-to book for judges,¹⁰⁶ especially appellate judges, who want to interpret law.

105. *Id.* at 202-03, 228-29.

106. If this were not clear enough from the book itself, Scalia says exactly this in talking about the book. Interview with PBS NewsHour, broadcast August 9, 2012.

They write “our basic presumption: legislators enact; judges interpret.”¹⁰⁷

They do not address how legislators should enact laws. They almost overlook that courts of first instance apply law.¹⁰⁸ They begin their book: “You be the judge—the appellate judge—for a moment.”¹⁰⁹ Yet both writing and applying law are integral to a well-functioning reading of the law.

The poor quality of American legislation is well known.¹¹⁰ Although Scalia and Garner do not directly address it in *Reading Law*, Scalia has stressed the importance of good laws: garbage in, garbage out.¹¹¹ He has berated Congress for “Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation.”¹¹² The United States has laws that we call codes, but they do not integrate laws the way true codes do.¹¹³ We use indefinite concepts and general clauses, and some are designed that way and do work, but many do

107. SCALIA & GARNER, *READING LAW*, *supra* note 1, at xxx (citations omitted).

108. James Wilson wrote “every prudent and cautious judge . . . will remember, that his duty and his business is not to make the law, but to interpret and *apply it*.” [Emphasis added.] *Part 2, Chapter V, Of the Constituent Parts of Courts—Of the Judges*, in *LECTURES ON LAW DELIVERED IN THE COLLEGE OF PHILADELPHIA, IN THE YEARS ONE THOUSAND SEVEN HUNDRED AND NINETY, AND ONE THOUSAND SEVEN HUNDRED AND NINETY ONE, posthumously published in 2 THE WORKS OF THE HONOURABLE JAMES WILSON, 299, 303* (Bird Wilson, 1804); *2 THE WORKS OF JAMES WILSON 500, 502* (Robert Green McCloskey ed., 1967); *2 COLLECTED WORKS OF JAMES WILSON, 950, 953* (Kermit L. Hall & Mark David Hall eds., 2007).

109. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 1.

110. *See, e.g.*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *REGULATORY REFORM IN THE UNITED STATES 48* (OECD, 1999) (“At the heart of the most severe regulatory problems in the United States is the [poor] quality of primary legislation.”); Mary Ann Glendon, Comment, in SCALIA, *A MATTER OF INTERPRETATION*, *supra* note 11, at 95 (our skills with legislation are “primitive.”).

111. In a television interview he said: “But in this job, it’s garbage in, garbage out. If it’s a foolish law, you are bound by oath to produce a foolish result, because it’s not your job to decide what is foolish and what isn’t. It’s the job of the people across the street.” C-Span Interview at 1:49:34 (Oct. 8, 2009), <http://www.c-spanvideo.org/program/7716-1> (last visited 04/26/13).

112. *Sykes v. United States*, 131 US 2267, 2288 (2011) (Scalia, J., dissenting).

113. Maxeiner, *Costs of No Codes*, *supra* note 9, at 364-65.

not.¹¹⁴ We have discretion, but our granting and controlling of discretion is flawed at best.¹¹⁵

If our skills with statutes are poor, our common law procedures may be worse in how they try to apply statutes.

No one knows the law and no one has responsibility for applying it. We share the task of applying law among parties, judges and jurors. In the old common law system of special pleading, the plaintiff chose the form of action, and the parties together, through pleading, identified the point in issue. If an issue of law, the judge interpreted the writ, the statute, or the precedent. No trial was necessary; the legal point decided the case. If an issue of fact, jurors determined the decisive fact that fell under the point of issue. Of course, the law was too complicated for special pleading to work and the United States abandoned it—over Supreme Court objection—in the 19th century. The outward division of responsibilities, however, remains the same: the selection of law is for the parties, the interpretation of law is for the judges, and the findings of fact are for jurors. But the rational application of law is more myth than reality. Either judges take facts as given and decide motions for summary judgment, or they hand the case over to jurors, give them quick, unfathomable instructions on applying law, and pray that jurors do a good job. Of course, this procedure—besides expense—is so unpredictable that it is the rare case that ever ends up being decided by a jury.¹¹⁶

Only exceptionally do courts give reasoned explanations for decisions. Jurors are not jurists and they are not thought capable of explaining their decisions. At best—and rarely—they may provide special verdicts or answer special interrogatories. More commonly,

114. See, e.g., James R. Maxeiner, *Standard Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109 (2003).

115. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (LSU Press 1969); MORTIMER K. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* (Stanford Univ. Press 1973).

116. See MAXEINER, *FAILURES OF AMERICAN CIVIL JUSTICE*, *supra* note 104; James R. Maxeiner, *Thinking Like a Lawyer Abroad*, *supra* note 24.

they provide unreasoned general verdicts. Americans know that there is better way. When judges decide alone without jurors they are required to explain their decisions. But bench trials and a judge's reasoning are even rarer in many jurisdictions than are jury trials and verdicts.¹¹⁷

How is an appellate court supposed to review such decisions? By American appellate procedure, judges must accept the (unstated) findings of fact of jurors. So if they find the outcome deficient, i.e., unjust or contrary to good public policy, they cannot go back—as their civil law counterparts—and reexamine how law and facts fit together. They are stuck with jiggering, with “interpreting”, the law. No wonder they produce decisions that Scalia and Garner find awful.¹¹⁸

VII. CONCLUSION

It is a remarkable event that a sitting justice has called the common law out in no uncertain terms. With textualism, Justice Scalia and Mr. Garner have restored the playing field to its 1830 condition. But pure textualism will not bring us into the present.

Pure textualism takes us back, not to the America of 1789, but to Blackstone of 1770 and a “law without equity.”¹¹⁹ Has America's number one originalist forgotten the preamble of the Constitution? “We the people of the United States, in order to form a more perfect union, *establish justice*, insure domestic tranquility, provide for the common defense, *promote the general welfare*, and secure the blessings of liberty to ourselves and our posterity, to ordain and establish this Constitution for the United States of America.”¹²⁰

117. *Id.*

118. *Id.*

119. SCALIA & GARNER, *READING LAW*, *supra* note 1, at v [unnumbered introductory page].

120. U.S. Const. pmbl.; Scalia and Garner are not alone. According to America's number one proponent of rules, “rule-based and precedent based decision making often require legal decision-makers to do something other than

We deserve law that honors justice and policy as well as order.

We deserve modern legal methods, not 18th century methods of England or Prussia, but those of the modern civil law. The United States desperately needs modern legal methods for the Age of Statues. Those methods will encompass not only reading law, but writing law, applying law and teaching law. Justice Story was a master of all four. It will be a great event when the American legal system—perhaps led by Justice Scalia—can do all four well.

the right thing” FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 212 (Harvard Univ. Press 2009); *see also* Maxeiner, *Thinking Like a Lawyer Abroad*, *supra* note 24.

CYPRUS AS A MIXED LEGAL SYSTEM

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This article is dedicated, in loving tribute and respectful admiration, to the memory of Andreas M. Karaolis.

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ABSTRACT

Cyprus presents us with its own kind of a mixed legal system: its private law is mostly common law, long codified in statutes. Its public law derives from the continental tradition. Procedural law is purely common law—a major factor in the mutation of the “continental” elements of the legal system. The state of play is affected by the split in the legal profession between continental- and English-educated lawyers (a split acquiring generational and subject-matter dimensions). The bulk of legislation and legal institutions have a distinctively colonial and/or post-colonial flavor. However, the country and the legal elites identify with, and are active participants in, European law and institutions. Last, but not least, Cyprus law combines a traditionalist mentality with the sense of perpetual temporariness (interimness) due to the decades-long state of political emergency and the Turkish occupation of a substantial part of the territory. All these factors, and more, contribute to an amazingly complex picture of a unique legal system, which has seldom been studied properly, either from the inside or the outside. My paper attempts to use modern theories of comparative law, especially with regard to mixed jurisdictions,

legal influences and hybridity, to account for the complexities of Cyprus law.

I. INTRODUCTION

Mixed jurisdictions theory has come of age: it could even assert today the status of a sub-genre of comparative law itself, mixing traditional thinking about legal families with modern ideas on the uniqueness of, and communication between, individual legal systems.¹ Having begun as an exercise in understanding—and drawing connections between—legal systems that combine strong civilian and common-law elements, mixed jurisdictions theory is moving forward. In the past few years, the focus appears to be on bringing more legal systems into the mix; on drawing on “our” line of work to challenge the traditional ways of thinking about both the classification of legal systems and legal systems themselves.² There have also been repeated pleas to examine—and possibly use

1. See MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (Vernon Palmer ed., Cambridge Univ. Press 2001)[hereinafter MIXED JURISDICTIONS WORLDWIDE]; Kenneth Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5 (2003); MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA (Reinhard Zimmerman et al. eds., Clarendon Press 2004); MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND (Vernon Palmer ed., Edinburgh Univ. Press 2009); for studies of individual mixed legal systems, see notably SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA (Reinhard Zimmerman & Daniel Visser eds., Oxford Univ. Press 1996); A HISTORY OF PRIVATE LAW IN SCOTLAND I – II (Kenneth Reid & Reinhard Zimmerman eds., Oxford Univ. Press 2000); LOUISIANA: A MICROCOSM OF A MIXED JURISDICTION (Vernon Palmer ed., Carolina Academic Press 1999). For a shorter introduction to the idea of mixed legal systems, see Vernon Palmer, *Mixed Jurisdictions* in EDGAR ENCYCLOPEDIA OF COMPARATIVE LAW (Jan Smits ed., Edward Elgar 2006); Jacques Du Plessis, *Comparative Law and the Study of Mixed Legal Systems* in OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmerman eds., Oxford Univ. Press 2008).

2. See, e.g., most of the essays included in MIXED LEGAL SYSTEMS AT NEW FRONTIERS (Esin Öricü ed., Wildy Simmons & Hill 2010) (originally presented in the Second Congress of Mixed Jurisdiction Jurists); COMPARATIVE LAW AND HYBRID LEGAL TRADITIONS (Eleanor Cashin Ritain et al. eds., Schulthess 2010); STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING (Esin Öricü, Elspeth Attwool & Sean Coyle eds., Kluwer 1996).

as models—mixed legal systems in the discussion about the harmonization and future directions of European private law.³

The present article is somewhat more modest in its ambition, which is to present a comprehensive overview, in comparative-law terms, of a mixed legal system in the traditional sense. Today, Cyprus tends to be considered a mixed legal system. However, with the exception of Dean Symeonides's paper presented at the First Worldwide Congress of Mixed Jurisdiction Jurists in 2003,⁴ it has been neglected in most comparative law narratives, whether because it was forgotten or because it was classified as yet another member of the common law family. In fact, by the end of British colonial rule in the early postwar years, Cyprus was exactly that—a common law jurisdiction. Moreover, part of its legal establishment has traditionally defined Cypriot legal identity in common law terms. Today, Cyprus still more closely resembles a common law jurisdiction than do legal systems habitually classified as mixed. The civilian or continental tradition has nonetheless considerably expanded its sphere of influence within the legal system. The common law tradition has probably retained its primacy and even managed to mutate some of the civilian elements; but common law institutions have also mutated.

The legal system of Cyprus, in fact, both confirms and challenges the basic premises of mixed jurisdiction theory. Like the better known members of Vernon Palmer's "third legal family," the law of Cyprus is built on the twin foundations of common law and continental law, each in control of different legal subjects.⁵ It is also rather unique, in the sense that it is private law

3. See, e.g., THE CONTRIBUTION OF MIXED LEGAL SYSTEMS TO EUROPEAN PRIVATE LAW (Jan Smits ed., Intersentia 2001); JAN SMITS, THE MAKING OF EUROPEAN PRIVATE LAW: TOWARD A *IUS COMMUNE EUROPAEUM* AS A MIXED LEGAL SYSTEM (Intersentia 2002).

4. See Symeon S. Symeonides, *The Mixed Legal System of the Republic of Cyprus*, 78 TUL. L. REV. 441 (2003).

5. See Vernon Palmer, *Introduction* in MIXED JURISDICTIONS WORLDWIDE, *supra* note 1, at 7-9. In a legal system classified as "mixed" under Palmer's definition, "[T]he presence of these dual elements will be obvious to

(in most subjects) and criminal law that follow the English common law, whereas public law has a continental orientation. Procedural law is purely common law—a major factor in the mutation of the “continental” elements of the legal system. Like all major mixed legal systems, the *bijurality* of Cyprus law has been founded upon a transfer of sovereignty: from British colonial rule (1878-1960) to independence.⁶ It has also been strengthened, and challenged, by the bilingualism of the system and the power politics of the legal elites.⁷

Mixed jurisdictions theory can help both comparative law scholars and the lawyers of Cyprus to better understand a legal system that has been aptly characterized as “a colorful plurilegal mosaic.”⁸ In its turn, the in-depth study of Cyprus law will provide material for the ongoing theoretical discussions about mixed jurisdictions and the legal process in general.

This article is but a first installment in such a long-term project.⁹ Its principal aim is to provide an international—and, to some extent, a Cypriot—audience with a comparative lawyer’s introduction to Cyprus law.¹⁰ It consists of three parts: Part II

an ordinary observer,” a condition which probably requires “a quantitative threshold” (a condition met, *e.g.*, by Louisiana, but not Texas and California, despite their own civilian roots); *id.* at 8. Palmer also emphasizes the “structural allocation of content”; *id.* at 8-9. Of course, in Palmer’s ideal type of a mixed jurisdiction civil law is dominant but “cordoned off within the field of private law.”

6. On the importance of such “defining moments” in the “foundation” of a mixed jurisdiction see Vernon Palmer, *A Descriptive and Comparative Overview* in *MIXED JURISDICTIONS WORLDWIDE*, *supra* note 1, at 17-31.

7. See *id.*, at 31-40 and 41-44 on the importance of the linguistic factor and the roles of the local jurists in the maintenance of mixity.

8. Symeonides, *The Mixed Legal System of the Republic of Cyprus*, *supra* note 4, at 442.

9. This project has involved, on the one hand, detailed studies of each of the systemic aspects—legal profession, judiciary, sources of law, legal discourse—and, on the other hand, case studies on individual legal fields which showcase a different level of hybridity: contracts, family law and private international law.

10. Apart from Symeonides’s article, the main English-language reference, with chapters in all areas is ANDREAS NEOCLEOUS, *INTRODUCTION TO CYPRUS LAW* (Andreas Neocleous & Co LLC 2000). Symeon Symeonides & Erik

presents a short historical overview; Part III addresses the administration of the justice system (legal profession and court structure); and Part IV examines the sources of Cyprus law.

II. A HISTORICAL OVERVIEW

The Republic of Cyprus is a former British colony. It is a member of the Commonwealth and, since 2004, a member of the European Union. It was under British colonial rule between 1878 and 1960; that is for considerably less time than Malta, and much longer than Israel. Land- and population-wise, Cyprus is much bigger than Malta, and considerably smaller than Israel.¹¹ In 1960, the year of independence but also of the last island-wide official census, the island's native population was estimated at 550,000 people, composed of 81.14% Greek and 18.86% Turkish Cypriots.¹² The ethnic proportion of roughly 4:1 is a sensitive point and still adhered to, but the latest census, taking into account the significant number of EU and third-country immigrants, results

Jayme, *Zypern* in INTERNATIONALES EHE- UND KINDESRRECHT (Bergman & Murad Ferid eds., Gmb H & Co. 1979) also provides useful material. Most of the literature on Cyprus law is in Greek; the principal general reference remains Symeon Symeonides, *Introduction to Cyprus Law* in COMPARATIVE LAW (Dimitrios Evrigenis, Phocion Franceskakis & Symeon Symeonides eds., Sakkoulas Pubs. 1978), supplemented by EVANGELOS VASILAKAKIS & SAVVAS PAPASAVVAS, ELEMENTS OF CYPRUS LAW (Sakkoulas Pubs. 2002). The Republic's legislation and appellate case law is published in official collections and reports – the Official Journal (O.J.) and the Cyprus Law Reports (C.L.R.—this reference is used here for both the volumes published in English as C.L.R. and the subsequent volumes entitled Apofaseis Anotatou Dikasteriou (“Judgments of the Supreme Court”). Current legislation and appellate cases are also available online at the open-access legal database <http://www.cylaw.org/cpr.html>. An annotated collection of basic legislation was recently published: EGKOLPIO KYPRIAKON NOMON (Neocleous LLP & Nikitas Hatzimihail eds., Nomiki Bibliothiki 2013). Doctrinal works on individual subjects are cited below where appropriate.

11. Cyprus is the third-largest island in the Mediterranean, after Sicily and Sardinia, with an area of 9251 km²; http://www.mfa.gov.cy/mfa/mfa2006.nsf/glance_en/glance_en?OpenDocument (last visited Jul. 2, 2013).

12. CYPRUS: A COUNTRY STUDY (Eric Solsten ed., GPO for the Library of Congress, 1991), <http://countrystudies.us/cyprus/21.htm> (last visited Jul. 26, 2013).

in a population of close to one million, where Greek and Turkish Cypriots stand respectively at 71.5% and 9.5% of the total population.¹³ Despite the longstanding demographic predominance of ethnic Greeks, who self-identify as deriving from Mycenaean settlers who came from the Greek mainland over three thousand years ago, geographically, the island is much closer to Turkey (to its north) and the Middle East (to its east) than it is to the Greek mainland (to its west). Its location has been a principal cause of both its strategic importance and its misfortunes.

A. Early History

Cyprus law has been the tributary of several legal cultures across time. Prior to 1164, ancient Greek and then Roman-Byzantine law was the law of the land.¹⁴ Between 1164 and 1571, the island formed part of the Western European world: the Lusignan Kingdom of Jerusalem moved there following Saladin's reconquest of the Holy Land, with the Republic of Venice taking over in 1489. Venice has left us *Othello* and impressive fortifications; the Lusignans left the *Assizes of Cyprus and Jerusalem*.¹⁵

The Ottoman conquest of the island in 1571 led to the effective termination of the Catholic presence, the immigration of Muslim (and Christian) populations from Anatolia, and the emergence of the autocephalous Greek Orthodox Church of Cyprus as the political leader of the Greek population under the *millet* system.

13. As of December 2011, the population comprised 681,000 Greek Cypriots (including the 8,400 members of the three non-Greek Orthodox, acknowledged Christian religious groups that opted to be regarded as part of the Greek community under the 1960 Constitution: Maronite, Armenian, and Latin), 90,100 Turkish Cypriots and 181,000 foreign residents. This count does not include the so-called "settlers" from mainland Turkey (estimated by some at 160,000), *supra* note 11.

14. See Symeonides, *The Mixed Legal System of the Republic of Cyprus*, *supra* note 4, at 443-445.

15. See Vol.1-2 of ASSISES DE JÉRUSALEM, OU RECUEIL DES OUVRAGES DE JURISPRUDENCE COMPOSÉS PENDANT LE XIII^E SIÈCLE DANS LES ROYAUMES DE JÉRUSALEM ET DE CHYPRE (Arthur Beugnot ed., Imprimerie Royale 1841-1843).

According to this system, non-Muslim confessional communities were treated as a “nation” (*millet*) and allowed to govern their own affairs according to their own laws and customs; the religious head was responsible for his *millet*’s administration and its good behavior towards the “paramount power.”¹⁶ The Church of Cyprus has continued to claim this role of national leadership (*Ethnarchy*) up to the present day.

The Greek Revolution of 1821, and the creation of an independent Greek state, which quickly began orienting itself to French-style codification and German *Pandektenrecht* and abolishing ecclesiastical jurisdiction over civil and family matters, marked a split between the Greeks in the new Kingdom, and those remaining under Ottoman (and Church) control. In 1839, the *Tanzimat* (“reorganization”) movement of Ottoman institutional reform saw the introduction of large-scale legislative projects, which basically introduced Western-style private and criminal law legislation, such as the Commercial Code. Some of these laws remained in force until the very end of the British colonial era.¹⁷

B. British Colonial Rule (1878-1960)

In 1878, the British took possession of the island, with a view to reinforcing the maritime route to India and denying the Russians access to the Eastern Mediterranean.¹⁸ With the Treaty of Berlin, the Ottoman Empire leased the island to the British Empire, but few, if any, thought this lease would expire. At first, the island’s

16. See, e.g., STEVEN RUNCIMAN, *THE GREAT CHURCH IN CAPTIVITY* 167 (Cambridge Univ. Press 1968).

17. The legal history of Ottoman Cyprus certainly merits a separate study. Ironically, the first stage of the British colonial era (in which “Continental” statutes of Ottoman provenance, regulating the basic legal subjects of private and criminal law, remained in force in a legal system that had adopted a common law system of administration of justice and an English language) comes closer to the classic definition of a mixed jurisdiction. For a short discussion, see *infra* Part IV. B(1). Again, this is the subject for a separate study that I hope to present in the near future.

18. WILLIAM MALLINSON, *CYPRUS: A MODERN HISTORY* 10 (IB Tauris 2009).

ethnic Greek majority rejoiced at the prospect of rule by their fellow Christians and eventual union (*Enosis*) with the Greek “motherland”; it was only in 1864, after all, that the British had ceded their Ionian protectorate as a gift to the new King of Greece. British policy remained ambivalent in that regard, but the outbreak of World War I, which brought the British and Ottomans at war with each other, led to the annexation of Cyprus and fired up hopes of *Enosis*. A few overtures were indeed made, in the early stages of the war, by London to Athens, with a view to luring Greece to the side of the Entente, but the two years it took for the anglophile faction to prevail in Greece and for the latter to join the war effort allowed the British to shelve their offer, in the postwar negotiating table. The end of World War I renewed Greek hopes of the eventual fulfillment of the so-called “Grand Idea” of uniting all territories primarily inhabited by ethnic Greeks into the Kingdom, but the Greek military expedition into Anatolia ended in disaster and death, or uprooting of the ethnic Greek populations there.¹⁹ The 1923 Lausanne Treaty, which entombed the Greek “Grand Idea”, was also the international instrument with which Turkey officially acknowledged British sovereignty over Cyprus.²⁰ In 1925, Cyprus officially became a British Colony.²¹ It maintained that status until Independence in 1960.²²

The institutions of British colonial rule included a small but effective colonial bureaucracy, led by the Governor; a partially elected Legislative Council; a King’s Advocate (the future Attorney-General) who controlled all aspects of colonial governance, originally including the courts; and a two-tier judicial system of District Courts and a Supreme Court, with appeal to the

19. MICHAEL LLEWYELLYN SMITH, *IONIAN VISION: GREECE IN ASIA MINOR, 1919-1922* (C. Hurst 1998)

20. Treaty of Peace with Turkey, July 24, 1923, Article 16. Available at www.lib.byu.edu/index.php/Treaty_of_Lausanne.

21. See THE CYPRUS GAZETTE (EXTRAORDINARY NO. 1) No. 1691, May 1, 1925.

22. Independence was implemented by the Cyprus Act 1960, 8 & 9 Eliz. 2, c. 52, § 1 (1960) (U.K.).

Judicial Committee of the Privy Council and no lay participation.²³ British colonial officials dominated the judiciary throughout the colonial period, especially in the upper echelons.²⁴ Only in 1927 were the first Cypriots, one Greek and one Muslim, appointed as *puisne* judges to the Supreme Court, whereas the first Cypriot President of a District Court was appointed in 1942.²⁵ Seats in the Legislative Council were calibrated so as to deny the Greeks of the island a deciding majority: the six (and, after 1925, nine) colonial administrators could normally rely on the three Ottoman notables who represented the Muslim community to balance off the nine (after 1925, twelve) Greek delegates, letting the Governor cast a deciding vote.²⁶ Even in cases where the delegates of the two communities would side together,²⁷ the Governor could circumvent the Council and promulgate his proposed legislation by an Order-in-Council.

In October 1931, such government-by-decree ignited a major uprising of Greek Cypriots demanding the Union (*Enosis*) of Cyprus with Greece.²⁸ The ensuing crackdown on Greek nationalism and the expressed desire for the “substitution of a

23. See the *Cyprus Courts of Justice Order-in-Council*, November 30, 1882 in THE IMPERIAL ORDERS IN CYPRUS APPLICABLE TO CYPRUS (1923).

24. See D.H. HADJIHAMBIS, THE SUPREME COURT OF CYPRUS AND ITS JUDGES SINCE ITS ESTABLISHMENT IN 1883 at 39-101 (2010), which profiles all judges who served on the Supreme Court between its establishment in 1883 and independence in 1960.

25. The first two *puisne* (or junior) Judges were Vasilios Sertsios and Mustafa Bey Fuad. Both had previously served as District Judges. See HADJIHAMBIS, *supra* note 24, at 72-75. Criton Tornaritis (1902-1997), originally named as District Judge to the Nicosia District Court in 1940, served as President of the Famagusta District Court from 1942 until he was appointed to the position of Solicitor-General of the Colony in 1944. In 1952, he became the Attorney-General of the Colony, a position he maintained until 1984.

26. See *supra* note 23.

27. It is ironic that the first Turkish nationalist elected to the Council sided with the Greeks, leading to the Governor's overruling the Council majority, which incited the 1931 Unionist insurrection.

28. See G. S. GEORGHALLIDES, CYPRUS AND THE GOVERNORSHIP OF SIR RONALD STORRS: THE CAUSES OF THE 1931 CRISIS (Cyprus Research Centre 1985).

British for a Greek atmosphere in the colony”²⁹ led to the suspension of the Legislative Council, along with the elected municipal councils and a number of political and cultural associations. British authoritarian policies, and especially the effective abolition of elected offices, may have had effects to this day: a vibrant culture of associations and political representation was interrupted, allowing, on the one hand, for the emergence of a strong labor movement with Communist affiliation, and forcing, on the other hand, the organization of the political mainstream (including much of the labor movement) under the ideological banner of Greek nationalism and the political leadership of the Church.³⁰

A major consequence of the 1931 events for the development of the Cyprus legal system, with repercussions to this day, was making professional training in London and admission there as a barrister or solicitor an absolute prerequisite for admission to the Cyprus Bar. This effectively prohibited Cypriot graduates of the two Greek law schools from entering legal practice in their homeland (by 1931, Athens law graduates were constituting the majority of the relatively small number of Cyprus lawyers); as a result, United Kingdom-trained lawyers monopolized the legal profession and especially the judiciary during the last decades of colonial rule and continued to dominate both for decades after independence. Another side effect, which affected the administration of justice system but also had broader repercussions for Cypriot society, was an intensified British effort to stir up ethnic rivalries: Turkish Cypriots, who had been traditionally

29. Governor Sir Richmond Palmer, as quoted by JAMES MCHENRY, *THE UNEASY PARTNERSHIP ON CYPRUS, 1919-1939: THE POLITICAL AND DIPLOMATIC INTERACTION BETWEEN GREAT BRITAIN, TURKEY AND THE TURKISH-CYPRIOT COMMUNITY* 85 (Taylor & Francis 1987).

30. On how this complex polarization affected colonial governance and the nationalist struggle, see ROBERT HOLLAND, *BRITAIN AND THE REVOLT IN CYPRUS 1954-1959* 10-12, 15-19 (Clarendon Press 1998); and MARIA TSAMPIKA LAMPITSI, *COMMUNISM, NATIONALISM AND LABOR IN COLONIAL CYPRUS 1945-1960* (2010; on file with author).

underrepresented in the liberal professions, including law, were promoted beyond demographic proportion to the Bar, the courts and colonial administration, including the police. This eventually helped undermine the good relations between the two communities, especially as the repressive task entrusted to the colonial police were expanding.

The struggle for *Enosis* intensified in the 1950s, culminating in the EOKA (National Organization of Cypriot Fighters) armed rebellion (1955-1959).³¹ In seeking to counter Greek nationalism, the British colonial administration, both prior to and during the rebellion, combined harsh reprisals and suppression of civil liberties, with offering incentives for self-rule. They also encouraged, notably in the 1950s, Turkish nationalist claims to partition of the island, as a counterweight to the Greek Cypriot demands for union with Greece, and despite the renunciation by Turkey under the Lausanne Treaty of all claims to the former Ottoman territories.

C. Independence

Independence of the Republic of Cyprus was imposed on a reluctant people in 1960 with the Zurich-London Agreements,³² to which the Constitution of the Republic was attached. A joint committee of Greek and Turkish Cypriot jurists supposedly drafted the Constitution, with outside help, but its *travaux pratiques* remain unpublished to this day.

In constitutional law terms, the Constitution of Cyprus is an extremely rigid instrument: many provisions have been characterized as “fundamental” and may never be amended

31. HOLLAND, *supra* note 30, provides the most complete, and generally objective, treatment of the EOKA struggle and what led us to it.

32. The conferences which resulted in the Zurich-London Agreements took place in February 1959, with the participation of Greece, Turkey, Great Britain, and representatives of the Greek and Turkish Cypriot communities; http://www.kypros.org/Cyprus_Problem/p_zurich.html (last visited Jul. 2, 2013).

(putting in doubt, according to some, the very existence of the principle of popular sovereignty).³³ For other provisions, a two-thirds vote by the representatives of each community was required for any amendment.³⁴ The Constitution divided all citizens of the Republic into a Greek and a Turkish Community³⁵ and provided for a binary or *bi-communal* government with presidential characteristics. For the highest offices, a “Turkish” second-in-command to the “Greek” office holder was explicitly provided for: President and Vice President of the Republic,³⁶ Speaker and Deputy Speaker of the House of Representatives.³⁷ The *independent officers* of the Republic established in the Constitution were also to be paired with a deputy who ought to belong to the other Community: Attorney General and Assistant Attorney General,³⁸ Auditor General and Assistant Auditor General,³⁹ Governor and Deputy Governor of the Central Bank,⁴⁰ Accountant General and Deputy Accountant General.⁴¹ The Constitution also provided for relative parity in the two supreme courts of the land, both of which were to be presided over by third-country nationals: the Supreme Constitutional Court was to comprise one Greek and one Turkish Cypriot as members,⁴² and the High Court, two Greek and one Turkish Cypriot.⁴³ Under the Constitution, Greek and Turkish replaced English as the official languages of the Republic, even though the presence of foreign presiding judges meant that

33. See CYPRUS CONST. art. 182(1), referring to Annex III. Of the Constitution’s articles, fifteen have been declared as “fundamental” in their entirety, along with provisions from thirty-three more.

34. *Id.* at art. 182(3).

35. *Id.* at art. 2. The three acknowledged religious groups (Armenian, Maronite Catholic and Latin Catholic) have elected to join the Greek Community pursuant to Art. 2(3).

36. *Id.* at art. 1.

37. *Id.* at art. 72(1).

38. *Id.* at art. 112(1).

39. *Id.* at art. 115(1).

40. *Id.* at art. 118(1).

41. *Id.* at art. 126(1).

42. *Id.* at art. 133(1).

43. *Id.* at art. 153(1).

English was to remain, at the very least, the language of appellate adjudication into the distant future.

Bi-communal governance was, unfortunately, short-lived. Following the collapse of intercommunal talks on the governance of municipalities, the President of the Republic, in consultation with the British High Commissioner, submitted to the Turkish Cypriot leadership a proposal to reform certain constitutional arrangements in November 1963.⁴⁴ The proposals were rejected by Turkey before the Turkish Cypriot Vice-President had the chance to respond. A Turkish threat to invade and divide the island, followed up by bombing raids by the Turkish Air Force and paramilitary action on both sides, led to deployment of a United Nations peace-keeping force and gave the impetus for the departure of Turkish Cypriot officials from government and, most pointedly, the segregation of the Turkish Cypriot community, with the creation of enclaves policed by Turkish military and Turkish Cypriot paramilitary forces. Under what came to be known as the “law of necessity”, measures were introduced to allow the Republic’s institutions to keep functioning in spite of Turkish Cypriot non-participation.⁴⁵ At the same time, the separate institutions of the Greek Community were absorbed into the institutions of the Republic; Greek became the sole language of new legislation and eventually displaced English completely as the working language of civil service. The next decade saw small-scale conflict between the communities, but the Turkish Cypriot stance encouraged nationalist tendencies among the Greek Cypriots, leading eventually to violence between their own political factions. On July 15, 1974, a coup by army elements controlled by the Athens dictatorship against the President of the Republic provided the excuse for the Turkish threat of invasion from ten years earlier

44. See DIANA WESTON MARKIDES, *CYPRUS 1957-1963: FROM COLONIAL CONFLICT TO CONSTITUTIONAL CRISIS* 129 (Univ. of Minnesota 2001).

45. See SAVVAS S. PAPASAVVAS, *LA JUSTICE CONSTITUTIONNELLE À CHYPRE* 127-44 (Economica 1998).

to finally materialize: the amphibious invasion in July 20, 1974, established a beachhead at the north of the island; it was followed by a massive land grab, in a combined armored and airborne assault on August 15, 1974, in violation of the ceasefire and despite ongoing negotiations with the restored democratic government.⁴⁶ To this day, Turkey continues to hold 36% of the island, with another 3% constituting a buffer zone under the control of U.N. peacekeepers. The United Kingdom claims sovereign status for its two military bases, Akrotiri and Dhekelia, which cover another 2.74% of the island.

Today, the Republic of Cyprus lives on as a bi-communal polity, in which the Turkish Cypriot community is expected to return, once set free from Turkey, and reclaim the seats allocated to the Turkish Cypriots in government, parliament and the judiciary. Turkish Cypriot property in the area controlled by the Republic is held for them in trust by the government, pending resolution of the Cyprus problem.⁴⁷

The two communities have long been engaged in negotiations for a political settlement of the Cyprus problem.⁴⁸ In 1983, a “Turkish Republic of Northern Cyprus” was proclaimed in the occupied lands and recognized only by Turkey.⁴⁹ On the contrary, the international community has insisted that the Republic of Cyprus remains the sole legitimate government on the island,⁵⁰ with sovereignty over the entire territory. The Turkish Cypriot administration in the occupied north has been referred to instead,

46. See PAULOS TZERMIAS, 2 GESCHICHTE DES REPUBLIKS ZYPERN 747-48 (3d ed., Franke 1998)

47. See the Turkish Cypriot Properties (Management and Other Topics) Law, L. 139/91, as amended. The Minister of the Interior acts as Guardian of Turkish Cypriot properties.

48. See CLAIRE PALLEY, AN INTERNATIONAL RELATIONS DEBACLE: THE UN SECRETARY GENERAL’S GOOD OFFICES IN CYPRUS 1999-2004 (Hart 2005).

49. See U.N. Security Council, Resolution 541 (1983), http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/541%281983%29; and Resolution 550 (1984), http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/550%281984%29 (both last visited Jul. 2, 2013).

50. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 146 (2d ed., Oxford Univ. Press 2007).

by the European Court of Human Rights, as a “subordinate local administration”,⁵¹ which “survives by virtue of Turkish military and other support.”⁵²

Cyprus’ accession into the EU has posed its own problems: Turkish Cypriot citizens of the Republic possess the privileges of EU citizenship, but the Community *acquis* has been suspended in the occupied North.⁵³ However, the European Court of Justice has held that the courts and institutions of the Republic may validly pass judgment over land situated in the areas not under its effective control.⁵⁴

D. The Post-Colonial Legal Mind

The constitutional crisis of 1963-64, and the invasion of 1974, created what has been considered the major contribution of Cyprus to comparative constitutional law, i.e., the doctrine of necessity (*δίκαιο της ανάγκης*). Moreover, the persistence of the so-called “Cyprus problem” (*Kypriakó*) has, since the very beginning of the new country, laid the foundations for what I would describe as the two principal characteristics of Cypriot legal consciousness—and public life.

On the one hand, the prevailing sense in Cyprus has long been one of being in an interim stage, pending resolution of the communal dispute—one could speak of “perpetual interimness”. The general tendency has, therefore, been to postpone legal,

51. *Loizidou v. Turkey*, Preliminary Objections, 23 March 1995 (GC), 310 Eur. Ct. H.R. (ser. A) (Appl. no. 15318/89).

52. *Cyprus v. Turkey*, Decision of 10 May 2001, 2001-IV Eur. Ct. H.R. 1 at par. 77 (Appl. no. 25781/94).

53. See Protocol No 10 on Cyprus in the *Act concerning the conditions of accession [to the European Union] of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded*, 2003 O.J. (L236), at 955. For a detailed discussion, see NIKOS SKOUTARIS, *THE CYPRUS ISSUE: THE FOUR FREEDOMS IN A MEMBER STATE UNDER SIEGE* (Hart 2011).

54. *Apostolides v. Orams*, Case C-420/07, 2009 ECR I-3571.

institutional and political reform indefinitely. Thus, it took thirty years after independence for Greek to fully replace English as the language of court proceedings and appellate judgments. The translation, from English to Greek, of colonial laws still in force took even more time. In fact, the main body of the Rules of Civil Procedure has to this day not been officially translated.⁵⁵ Accession to the European Union—initially as a prospect and subsequently as a fact—has changed this attitude only in part.

On the other hand, *the Constitution has become the totem of the Republic*, the defining symbol of statehood and Cypriot identity. Ironic as this might appear for a document that was originally much derided as a “legal monstrosity,” or as “the outcome of a dreadful dialogue between a mathematician and a lawyer,”⁵⁶ it is also a political necessity. The Supreme Court was initially very reluctant to allow the House of Representatives to amend non-fundamental provisions of the Constitution.⁵⁷ The first successful amendment, which concerned the allocation of jurisdiction over family law matters for members of the Greek Orthodox Church (remarkably, a matter left to the institutions of the Greek Community under the Constitution), was simply tolerated by an evenly split Court.⁵⁸ A strong majority of the Supreme Court would only expressly endorse the right of two-thirds of Greek Cypriot Representatives to amend non-fundamental provisions of the Constitution several years later.⁵⁹

It goes without saying that such delicate insistence on the status quo has led to noticeable legal formalism. To use a recent example near home, given that the Constitution holds “the office of a

55. For a discussion of the translation process (and the methodological problems it incurred) see Nikitas Hatzimihail, *Sources of Law and Plurilingualism* in FESTSCHRIFT IOANNIS SPYRIDAKIS (in Greek, forthcoming, Ant.Sakkoulas Eds., 2013; English text on file with editors).

56. See S.A. DESMITH, *THE NEW COMMONWEALTH AND ITS CONSTITUTIONS* 282-96 (Stephens 1964).

57. See *President of Republic v. House of Representatives*, (1986) 3 C.L.R. 1439.

58. *Nicolaou v. Nicolaou*, (1992) 1 C.L.R. 1338.

59. *Kouloundis v. House of Representatives*, (1997) 1 C.L.R. 1026.

Minister . . . incompatible . . . with a public or municipal office,”⁶⁰ it was widely claimed (and would probably be thus held by the Supreme Court) that a professor at the state-funded University of Cyprus could not become a cabinet minister even if he suspended his university affiliation. More often than not, constitutional defense of the status quo has been used to protect the vested interests of social and professional groups, especially among the legal elite and most notably the judiciary.⁶¹ A unanimous full bench of the Supreme Court recently held unconstitutional the legislative amendment of the statutory provision on *locus standi* requirements for administrative litigation.⁶² Calls to create an intermediate appellate jurisdiction or a separate administrative court, or even to return to the original constitutional arrangement and separate High and Constitutional Court were until recently commonly rejected by the judiciary as contrary to the Constitution.

III. THE ADMINISTRATION OF JUSTICE SYSTEM

Administration of justice in Cyprus would at first glance seem to conform entirely to common law stereotypes. The present judicial structure of Cyprus is principally a legacy of the late colonial period, especially after the merger of the two supreme courts provided for in the Constitution. The Cyprus judiciary strongly identifies with the common law tradition—an attitude shared by much, though by no means all, of the legal profession at large—and uses common law tools in judicial reasoning. Moreover, procedural law is probably the field of Cyprus law that most fully adheres to the English common law. This holds true even in areas where substantive law is modeled after, or even transplanted from, continental law.

60. CYPRUS CONST. art. 59(2) (with reference to the expansive definition in Article 41(1)).

61. See the criticism by Papasavvas, *supra* note 45, esp. at 219-20.

62. See *President of Republic v. House of Representatives*, (2009) 3 C.L.R. 23, 3 LYSIAS 44 (2010).

A closer look, however, at the operation of Cyprus courts, as well as the structure of the bar and especially of the judiciary, will demonstrate considerable elements of hybridity and mutation.

A. *The Legal Profession*

In continental legal systems, reference is made to the legal professions in the plural.⁶³ For example, in Greece, even though Bar membership for a number of years is a prerequisite for a career either as a notary or in the judicial branch, both are considered to be distinct legal professions (*νομικά επαγγέλματα*).⁶⁴ On the contrary, Cyprus follows the unitary conception of the legal profession (*νομικό επάγγελμα*) prevailing in the common law.

1. *A Unitary Bar*

The Law regulating *advocates* is the second chapter in the colonial collection of the *Laws of Cyprus*.⁶⁵ The Law's description of what constitutes "practicing as an advocate" includes both litigation-related tasks and the basic forms of consultative lawyering.⁶⁶ The traditional English split between barristers and solicitors appears, therefore, alien to Cyprus.⁶⁷ In practice, however, a Cypriot advocate will often present herself as a "lawyer

63. See, e.g., the presentation of legal professions across EU member states at the European Judicial Network, available at http://ec.europa.eu/civiljustice/legal_prof/legal_prof_gen_en.htm.

64. See, e.g., IOANNA LAMPIRI-DIMAKI, LEGAL STUDIES AND LEGAL PROFESSIONS IN GREECE 1960-2003 (3d ed., Sakkoulas Pubs. 2004, in Greek).

65. See the Advocates Law Cap. 2 (L. 58/55; "A Law to consolidate and amend the law relating to advocates and to make provision for the establishment of an Advocates' Pension Fund," as amended by L. 24/56). The Law has been amended over thirty times in the fifty years since independence; [hereinafter Advocates Law].

66. Advocates Law Cap. 2, art. 2(1), as amended gradually post-independence. Most consulting services enumerated were added in the early 1980s.

67. The original art. 2 provision of L. 58/55, *supra* note 6565, made reference only to court-related tasks. See 1 STATUTE LAWS OF CYPRUS: IN FORCE ON THE 1ST DAY OF APRIL, 1959 (rev. ed., C.F. Roworth 1959).

and legal consultant” in her business cards and storefront displays of law firms.

Cypriot advocates are organized into the Cyprus Bar Association, which constitutes the countrywide licensing body,⁶⁸ and a local Bar Association (one for each of the original District Courts), which takes charge of day-to-day affairs.⁶⁹ Requirements for admission include a law degree, pupillage for at least a year with an advocate, and success in exams organized by the Law Council—which consists of the leadership of the Cyprus Bar Association, the Attorney General, and advocates selected by them.⁷⁰ Once admitted to the Bar, Cypriot advocates are allowed to present themselves before any court throughout the Republic.⁷¹

The composition of the Cyprus Bar is representative of the legal system’s evolution. Prior to independence, especially after the 1931 revolt, members of the Bar—including government lawyers and the judiciary—were trained in England and Wales (often without university education in law).⁷² After independence in 1960, the majority of those entering the profession had obtained university degrees from Greek law schools; the United Kingdom remained the destination of choice for a minority, which included, however, most of the sons (and, gradually, the daughters) of the colonial-era Greek Cypriot barristers. Continental concepts and terms were introduced into Cyprus law, but less than might be expected in terms of the Bar’s demographics. Moreover, it took more than three decades for English to be replaced by the Republic’s official languages in courts (and colonial statutes to be translated). Both these phenomena could be explained in terms of a

68. Advocates Law Cap. 2, arts. 21-25, *supra* note 6565.

69. *Id.* at arts. 19-20.

70. *Id.* at art. 3.

71. *Id.*

72. In fact, according to biographical data, the majority of native lawyers admitted to the profession prior to 1931 held degrees from the University of Athens Law School. Following the revolt, successful training in the United Kingdom as a barrister (or a Scottish advocate) became the sole prerequisite.

contest between the various generations and social groups constituting the (Greek) Cypriot Bar.

The post-colonial character of the legal system as well as the lack, until very recently, of a legal academia (its impact has yet to be felt in practice) have also meant that the Bar has remained deferential to the judiciary much more than might be the case in other European countries. There exist relatively few publications on Cypriot law, and most are limited to the uncritical presentation of basic local case law.

The British colonial origins of the modern legal system are best illustrated by the omnipresent office of the Attorney General of the Republic (*Γενικός Εισαγγελέας*). During colonial rule, the Attorney General acted as both the colonial government's legal counsel and the head of colonial lawyers (and, for a certain period, judges). Upon independence, the Constitution established the Attorney General as the first among the "independent officers" of the Republic. The Constitution consecrated the Attorney General's role as both "the legal adviser of the Republic and of the President and of the Vice President of the Republic and of the Council of Ministers and of the Ministers"⁷³ and the officer vested with full prosecutorial powers.⁷⁴ The Attorney-General is also legally regarded as the first lawyer (advocate) of Cyprus: apart from being the Honorary President of the Cyprus Bar Association,⁷⁵ he also presides over the Disciplinary Council for advocates,⁷⁶ the Advocates Pension Fund⁷⁷ and the Law Council.⁷⁸ The office of

73. CYPRUS CONST. art. 113(1).

74. CYPRUS CONST. art. 113(2). *See also* DESPINA KYPRIANOU, *THE ROLE OF THE CYPRUS ATTORNEY GENERAL'S OFFICE IN PROSECUTIONS: RHETORIC, IDEOLOGY AND PRACTICE* (Springer 2009).

75. Advocates Law Cap. 2, arts. 23(1) and (4), *supra* note 65.

76. *Id.* at art. 16(2).

77. *Id.* at art. 26, which authorizes the Council of the Cyprus Bar Association to issue Regulations, approved by the Council of Ministers, on the creation and operation of the Advocates' Pension Fund. Issued in 1966, the Regulations name the Attorney-General as president of the Fund's Board of Directors.

78. Advocates Law Cap. 2, art. 3(1), *supra* note 65.

the Attorney General also acts as legal counsel to the House of Representatives, advises the Foreign Ministry, organizes the participation of Cyprus in EU law-making and the implementation of EU law in Cyprus, and represents Cyprus before European and international courts.

2. *A Judicial Career*

To be a judge in Cyprus means embarking upon a judicial career. According to the statute books of Cyprus, not unlike common-law jurisdictions, judicial appointments come on the basis of a successful career in the legal profession, with direct appointment to the higher ranks of first-instance judges, or even the Supreme Court, being possible. But the practice of judicial appointments has placed strong emphasis on seniority. It moreover comes close to continental models of a hierarchical, career-based judiciary. Trial judges are dependent for their promotions and transfers between districts on the thirteen Justices of the Supreme Court, who act as the Supreme Judicial Council.

“High moral standards” and a minimum of six years in legal practice are required for an entry-level appointment to the District Court, with ten years required for appointment to the middle and senior ranks of first instance.⁷⁹ The legal practice requirement can be fulfilled by “service in any judicial position.”⁸⁰ It can also be reduced to five years for appointees at the entry-level, on the advice of two thirds of the Supreme Court Justices.⁸¹ In fact, one only needs to have been a registered member of the Bar for the appropriate amount of time, without necessarily having distinguished oneself at the Bar. The selection process—operated by the Supreme Court Justices, in their capacity as the Supreme Judicial Council—principally involves an interview. One might say that neither the safety valves of continental systems (exams,

79. The Courts of Justice Law 1960, Art. 6(1) (L. 14/60).

80. *Id.*

81. Art. 6(2), *supra* note 79.

judicial training), nor those of common law systems (reputation among the Bar and the legal profession) are in place. On the other hand, the Cypriot legal profession is a small world and reputations are easily confirmable. Getting qualified candidates to apply might be a bigger problem than selecting the best suited among those who do apply.

District Judges, once appointed, are scrutinized from the higher judicial echelon, not unlike in continental systems. There are three ranks of District Judges: District Judge, Senior District Judge, and President of the District Court.⁸² “Sorting out” takes place in the first two ranks, and disciplinary proceedings are not unknown. Each District Court is presided over by the senior President (known in the colloquial legal language as the “administrative President”).

Appointment to the Supreme Court—and even the selection of the Supreme Court’s President—tends to be strictly a matter of seniority between the Judge-Presidents of the District Court. The Constitution, in fact, provides that appointment to the appellate bench is made by the President “from amongst lawyers of high professional and moral standard.”⁸³ However, only once was there an appointment made from outside the ranks of senior judges. In 1997, heeding calls from the Bar for an advocate to sit on the appellate bench, the President named a senior prosecutor to the Court in one of the two openings. This prompted an especially strong reaction by the judiciary.⁸⁴ Since 1991, Judges are also

82. Art. 4 of the Courts of Justice Law 1960, *supra* note 79. At present, the maximum numbers of active District Court judges are set at thirty-nine, sixteen and thirteen respectively for each rank, according to art. 6(3) of the Law.

83. CYPRUS CONST. art. 153(5).

84. The appointment was condemned by the Union of Judges in their general meeting, with thirty-four (out of forty-four) Judges present tending their resignation. *See, e.g., Logos News from Cyprus*, September 29, 1997 (in Greek), available at <http://www.hri.org/news/cyprus/logosg/1997/97-09-29.logosg.html> (last visited Jul. 3, 2013).

organized into a Union, whose President is usually a senior President of the District Court.⁸⁵

The judiciary is supported by an administrative mechanism of registrars and law clerks. The Court administrative personnel are considered part of the civil service of Cyprus: appointments and promotions are thus controlled by the Civil Service Commission. At the head of court administration sits the Chief Registrar of the Supreme Court. The Supreme Court employs permanent law clerks (“Legal Officers”), who assist the Justices with research and in drafting their opinions, especially with regard to administrative law cases. Originally modeled after the law clerks of common-law appellate courts, these legal officers increasingly play a role similar to—and certainly identify themselves with—the Assistant Judges (*εισηγητές*; *Auditeurs* in French) of the Greek Council of State (who constitute, however, junior members of the judiciary, and tend to rise through the Court’s ranks).⁸⁶ At present—and somewhat controversially—these, too, are considered as civil servants, rather than judicial officers.

In his study of Louisiana judges, Symeon Symeonides, himself a Cypriot, associates the characteristics of the judge being or acting like “a law-maker, a policy-maker, a statesman, a politician” with common law judges, as contrasted to their brethren in civil-law jurisdictions.⁸⁷ In the case of Cyprus, partly by the power of law and partly by the force of necessity, the judiciary has been endowed with powers not unlike those of judges and justices in a common law jurisdiction. Cyprus judges enjoy the respect of Cyprus society; however they are often defensive of their status

85. Creation of the Union was enabled by art. 4 of L. 136/91, which also added art. 10A to the Courts of Justice Law, *supra* note 79.

86. The *Référéndaires* of the European Court of Justice are another model alluded to; however, the legal officers of the Supreme Court have a very high rate of permanent service. Very few have moved. A few have been subsequently appointed as Family Judges.

87. Symeon C. Symeonides, *The Louisiana Judge: Judge, Statesman, Politician*, in LOUISIANA: MICROCOSM OF A MIXED JURISDICTION, *supra* note 1, at 89.

and do not tolerate challenges from either advocates or the public. The notion of contempt of court was used expansively,⁸⁸ until the European Court of Human Rights called Cyprus to task.⁸⁹ However, the judiciary has exercised notable self-restraint in matters of political sensitivity.⁹⁰ Even in less political subjects, we will search in vain for systematic efforts by the appellate bench to reshape the law. In fact, the recent tendency in many landmark cases appears to be to avoid expansive reasoning.

B. The Judicial System of Cyprus

Cyprus presently maintains a two-tier judicial system, one level each of trial and appellate jurisdiction.⁹¹ The appellate jurisdiction of the Judicial Committee of the Privy Council was abolished upon independence.⁹²

1. The Trial Courts of Cyprus: General Jurisdiction and Tribunals

The primary trial court, i.e. the court of general jurisdiction, is the District Court (*Επαρχιακό Δικαστήριο*).⁹³ Its jurisdiction extends over most civil and criminal matters.⁹⁴ All cases are

88. Contempt is regulated in art. 44 of the Courts of Justice Law 1960, *supra* note 79, which effectively reprinted art. 49 of the Colonial Courts of Justice statute 1953 (L. 40/53, Cap. 8).

89. *See* Kyprianou v. Cyprus (G.C.), 2005-XIII Eur. Ct. H.R. (Appl. no. 73797/01). The Supreme Court of Cyprus, (2001) 2 C.L.R. 236, had upheld the conviction of an advocate by the Assizes Court of Limassol for complaining that the judges on the bench were exchanging “billets doux” during his speech.

90. *See, e.g.,* Kettiros v. Koutsou, (2007) 1 C.L.R. 828, LYSIAS 71 (2008) with editors’ note: even though the law on parliamentary elections effectively penalizes coalitions of parties as opposed to single party lists, the Court unanimously held that it is a matter for the electoral list itself to define its status.

91. The Constitution provides explicitly for the High Court (subsequently renamed the Supreme Court of Cyprus) as the highest court of last resort (“supreme second-instance court”) and allows lower courts to be established by statute. *See* CYPRUS CONST. art. 152(1) explicitly provides art. 155(1).

92. Cyprus Act 1960, *supra* note 22, c. 52, §5.

93. Courts of Justice Law 1960, art. 22(1), *supra* note 79.

94. *Id.* at art. 22(1). The Supreme Court retained trial jurisdiction over admiralty cases; *see id.* at art. 19. In 1986, an art. 22B was added by L. 96/1986, which enables the District Court to hear certain kinds of admiralty cases referred

judged by a single judge—with the exception of serious crimes judged by the Assizes Court (*Κακούργοδικείο*), which sits in panels of three rotating senior District Judges.⁹⁵ Specialized tribunals, consisting of one professional and two lay judges (one representative for each of the respective social groups), adjudicate rent-control cases and employment disputes.⁹⁶ There are also the Family Courts, which are discussed below.

The trial courts of Cyprus are staffed by professional judges with tenure. With the exception of the representatives of the social groups participating in the Employment and Rent Control Tribunals, no lay participation is provided for anywhere in the administration of the justice system. Also, no magistrates' courts exist, or other small-claims jurisdictions.

2. Family Courts

Family Courts were established in 1990,⁹⁷ when the Republic began reforming its family law in a unified, secular direction.⁹⁸ Until then, family law had been a matter of personal law, administered by community tribunals.⁹⁹ The British had removed community jurisdiction over a range of matters, including childcare and marital property, leaving ecclesiastical courts with

to it by the Supreme Court (whether on its own initiative or by application of a litigant). These cases are listed in an Annex to the Law.

95. *See id.* at art. 5. The Assizes Court is presided over by a Judge-President of the District Court, with two Senior District Judges (or District Judges) as members. The Law does not dictate the duration of the term. Members of the Assizes Court may also sit in regular District Court cases.

96. On the Employment Tribunal, *see* the Remunerated Annual Leave Law 1967 (L. 8/67, as amended by L. 5/1973, art. 3), arts. 12 and 12A; Termination of Employment Law 1967 (L. 577/67), arts. 30-31. On the Rent Control Tribunal, *see* the Rent Control Law 1983 (L. 23/83), art. 4. The Court-Martial is usually regarded as a tribunal.

97. Family Courts Law 1990 (L. 23/90), as amended.

98. *See* Eliana Nicolaou, *Recent Developments in Family Law in Cyprus*, in INTERNATIONAL SURVEY OF FAMILY LAW 1996 at 121-34 (A. Bainham ed., Martinus Nijhoff Pubs. 1998).

99. *See* GEORGE SERGHIDES, INTERNAL AND EXTERNAL CONFLICT OF LAWS IN REGARD TO FAMILY RELATIONS IN CYPRUS (G.A.S. 1988).

jurisdiction over the validity and dissolution of Greek Orthodox marriages.¹⁰⁰ The Constitution maintained the application of jurisdiction of Greek Orthodox ecclesiastical Courts.¹⁰¹ The Family Courts were originally intended to replace community tribunals, especially with regard to Greek Orthodox Cypriots. Separate Family Tribunals of Religious Groups were also set up to deal with the divorces of members of the three religious groups (Armenian, Maronite, Latin) recognized by the Constitution: these tribunals are composed of one “President” judge, appointed by the Supreme Court “from among members of the judicial service,” one District Judge, and one representative of the respective group.¹⁰² Over the past two decades, the jurisdiction of the Family Courts has been expanded, by statute and via the case law of the Supreme Court, both *ratione materiae* on every aspect of family law, and *ratione personae*.¹⁰³ At the moment, the main exceptions concern the validity and dissolution of marriage under the rules of the three religious groups (which fall under the jurisdiction of the respective Family Tribunal), and some cases involving Turkish Cypriots.¹⁰⁴ A three-member panel of Supreme Court justices, rotating in two-year terms, judge appeals.¹⁰⁵

The Family Courts are one of the most interesting examples of Cyprus’ legal hybridity. In fact, the ongoing conflicts about the status of Family Court judges and the delimitation of the Family Courts’ jurisdiction vis-à-vis District Courts can tell a lot about the legal profession in Cyprus—just as the insistence, until very

100. See art. 34 of the Courts of Justice Law 1953 (L. 40/53, Cap. 8). For English-era family legislation see Caps. 274-280 in the 5 Statute Laws of Cyprus, *supra* note 65.

101. See the original Art. 111 of the Constitution.

102. See the Family Courts (Religious Groups) Law 1994 (L. 87(I)/94), especially art. 3.

103. See a full account of the evolution in MODERN ASPECTS OF GREEK AND CYPRIOT CIVIL LAW (Nikitas Hatzimihail ed., 2013, in Greek).

104. See George A. Serghides, *Reflections on Some Aspects of the Family Law of the Turkish Community in Cyprus*, in PECUNIARY RELATIONS OF SPOUSES AND COHABITANTS 24-29 (G. A. Serghides ed., G.A.S. 2010)

105. Family Courts Law 1990, Art. 21(1), *supra* note 97.

recently, of the Church of Cyprus, alone among Greek Orthodox Churches in Europe, in maintaining some sort of divorce proceedings before its own bodies in addition to the court-granted divorce, might reveal something about the triggers of local particularities. But it is the development of Cyprus family law which makes it a fascinating case study.

What we have here is a legal field in which substantive law is, on the face of it, purely continental—a case of the effective transplantation of modern Greek family law. All but one of the ten family court judges were educated in continental law schools (more specifically, in Greece). This also holds true of most attorneys appearing regularly before the Family Courts. Family Court judges have been more prolific than their District Court brethren in legal publishing—whether this could be attributed to individual personalities, the limited subject matter they cover, the continental nature of their field, or to the availability of original material in Greek. But Cyprus family law is a true hybrid. Part of its hybridity is a matter of procedure: procedural law is common law and Family Judges use common law institutions, such as cross-examination of witnesses, alongside inquisitorial techniques. Unlike Greece, there is no consensual divorce and a marital dispute may involve four separate court cases—one each for divorce, marital property, child support and family home. As far as judicial reasoning is concerned, leading cases will cite Greek textbooks, but references to Greek family case law are less common.

Today, the Family Courts of Cyprus appear not unlike the Australian Family Court, or the Family Division of the High Court in London. They are viewed as courts of specialized jurisdiction, not as tribunals.¹⁰⁶ Family Court judges however tend to complain that even though they hold the same qualifications as their brethren at District Court, they are regarded as inferior. Their pay grade is

106. *Sioukrou v. Ulrich*, Judgment of March 10, 2011 (Kramvis, J. apparently endorsing a statement to that effect by Nikitas Hatzimihail in 1 LYSIAS 47 (2008)).

inferior: a President of the Family Court is equated to a Senior District Judge and not entitled to certain financial benefits enjoyed by their general-jurisdiction brethren. There can only be one President in each Family Court and senior justices appear firmly opposed to the idea of a President of a Family Court being eligible for appointment to the Supreme Court.

3. *The Supreme Court of Cyprus*

At the apex of the administration of justice system sits a single appellate court: the Supreme Court of Cyprus. The thirteen-strong Supreme Court has the attitude, and powers, of a common-law court of last resort. Its status and powers are determined in detail by the Constitution.¹⁰⁷ The Supreme Court sits on appeals and supervises trial courts and tribunals.¹⁰⁸ The Justices of the Supreme Court¹⁰⁹ act as the Supreme Judicial Council, which selects, appoints, promotes, and moves trial judges around.¹¹⁰ The Supreme Court also writes the Rules of Procedure, which govern most procedural matters.¹¹¹ It issues prerogative writs.¹¹² It is also

107. See CYPRUS CONST. arts. 152-163.

108. *Id.* at art. 155(1); Courts of Justice Act 1960, art. 25, *supra* note 79.

109. The same word (*Δικαστής*) exists in Greek for “Judge” and “Justice” (as a person’s title). Given that the Constitution referred to the members of the High Court as Judges, reference to them in English as Justices has been a very recent phenomenon.

110. Administration of Justice (Miscellaneous Provisions) Act 1964 (L. 33/64), art. 10, as amended by L. 3/87, art. 2). Between 1964 and 1987, Supreme Court justices constituted only the plurality of the Council (which was composed by the Attorney General, the President and two justices of the Supreme Court, one President of a District Court, one District Judge, and one experienced advocate). The Constitution provided that the High Court Judges act as the Supreme Judicial Council; see CYPRUS CONST. art. 157. Supreme Constitutional Court judges were to act as judicial council for matters pertaining to the High Court Judges, and vice versa; *id.* at arts. 153(8) and 133(8).

111. CYPRUS CONST. art. 163.

112. *Id.* at art. 155.4. The writs include *habeas corpus*, *certiorari*, *prohibition*, *mandamus*, and *quo warranto*. See the overview of case law in PETROS ARTEMIS, PREROGATIVE WRITS: PRINCIPLES AND CASES (2004, in Greek).

the country's constitutional court, with full power of judicial review in full bench,¹¹³ as well as the sole administrative court.

The Constitution had provided, in fact, for two supreme courts: the *Supreme Constitutional Court*¹¹⁴ and the *High Court of Justice*,¹¹⁵ the former with one Greek and one Turkish Cypriot member, the latter with two Greek and one Turkish Cypriot members.¹¹⁶ In both, a “neutral judge” (i.e. not a national of Cyprus, Greece or Turkey) was to preside—casting the deciding vote in cases of disagreement.¹¹⁷ Constitutional Court members were supposed to act as a supreme judicial council overseeing the High Court judges, and vice versa.¹¹⁸ The High Court reprised the first- and second-instance jurisdiction of the colonial Supreme Court over civil and criminal cases.¹¹⁹ The Constitutional Court was, in addition to what is implied in its name, endowed with trial-instance jurisdiction over administrative-law cases.¹²⁰ Unlike his High Court counterpart, the President of the Supreme Constitutional Court could not be a “subject or citizen” of the United Kingdom or one of its present-day or former colonies.¹²¹ The German law professor Ernst Horsthoff was accordingly appointed to that position, whereas the first High Court President (1960-1961) was the Irish Barra O’Briain, and his successor the

113. Board for Registration of Architects v. Kyriakides, (1966) 3 C.L.R. 640.

114. See CYPRUS CONST. arts. 113-151.

115. See CYPRUS CONST. arts. 152-164.

116. See *id.* at arts. 133(1) and 153(1), respectively.

117. See *id.* at art. 133(1)(1) for the Supreme Constitutional Court; art. 153 for the High Court (whose President was to have “two votes,” in order to balance off a two-judge plurality).

118. See *id.* at art. 153(8) and 133(8), respectively.

119. See CYPRUS CONST. arts. 155-156.

120. Article 146 of the Constitution establishes a general ground of jurisdiction over petitions (the term “recourses” is being used, in the spirit of the French *recours en annulation*) to annul or confirm administrative acts. The provision has acquired great importance in actual practice. The Constitution also empowered the Supreme Constitutional Court to make a final determination of cases where the Public Service Commission is unable to muster the necessary majorities for an appointments or promotion decision. See art. 125(3), in conjunction with 151(1).

121. *Id.* at art. 133(2)(3).

Canadian John Leonard Wilson (1962-1964)¹²². In 1964, as the constitutional crisis escalated and the threat of full-scale war loomed over Cyprus, both foreign Presidents left the island and the House of Representatives decided to merge the two high courts into a single *Supreme Court of Cyprus*.¹²³ It must be noted that the term in Greek (*Ανώτατο Δικαστήριο*), is the same for both High Court of Justice and Supreme Court. The two Turkish Cypriot incumbents continued to participate for a few more years, and indeed the Turkish Cypriot High Court Judge Mehmet Zekia (1903-1984) became the united Supreme Court's first President, on the basis of his seniority to the bench.¹²⁴ A side effect of the merger was that the High Court, which represented the continuation of the British colonial tradition and the English common law, effectively absorbed the Constitutional Court, which had embarked upon a process of transplantation and development of Continental public-law doctrine. Even though the Continental doctrinal influence over Cyprus administrative litigation persisted (in fact, it was significantly expanded) since 1964, it is likely that it would have had a more systematic, less haphazard character were it emanating from a specialized appellate bench with a Continental orientation, as opposed to a court with a strong, almost exclusively common law identity.¹²⁵

Today, the Supreme Court constitutes a real super-court, which has absorbed the powers of both Courts—and has more recently extended its jurisdiction over family law matters, previously left to

122. See HADJIHAMBIS, *supra* note 24, at 112-13 (on Forsthoff), 114-15 (on O'Briain), 120-21 (on Wilson).

123. See the Administration of Justice (Miscellaneous provisions) Law 1964 (L.33/64), especially art. 3.

124. Administration of Justice Law 1964, art. 3(4). On President Zekia see HADJIHAMBIS, *supra* note 24, at 94-97. Zekia became also the first Cypriot judge at the European Court of Human Rights, from 1961 until his death.

125. A corollary speculation concerns the possible orientation of Cyprus public law within the Continental legal tradition: the departure of Forsthoff led to the monopolization of Continental public-law influences by the Greek administrative law tradition, which at the time was strongly oriented towards the French.

confessional courts. The Supreme Court constitutes the veritable final arbiter of constitutional questions, given that the Constitution may only be modified with a procedure based on the doctrine of necessity, in cases it is absolutely necessary to do so.¹²⁶

It is therefore evident that the Supreme Court of Cyprus is not just your typical “patriarchal” common law highest appellate court.¹²⁷ A noticeable difference with common law courts of last resort is that the Supreme Court has no discretionary power to select its own caseload: all civil—and criminal—judgments of trial courts are subject to appeal.¹²⁸ It thus performs the function of a common law intermediate appellate court. Moreover, the Supreme Court may review facts and even rehear evidence.¹²⁹ This new rule was introduced immediately upon Independence.¹³⁰ It could thus be argued that the Court’s role is sometimes not unlike that of a continental court of appeals, *i.e.* of a second-level “trial” court (*jurisdiction du fond*).

What all this means, however, is that only a fraction of the appeals pose real legal questions. The Justices are thus left with little time on their hands for serious research. Some Justices, in some cases, effectively tend to simply choose between arguments presented by counsel.

126. See Papasavvas, *supra* note 45.

127. Cf. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (Harvard Univ. Press 1997).

128. The Courts of Justice Law, art. 25(1) and (2), *supra* note 79.

129. *Id.* at art. 25(1)(3): “Notwithstanding anything contained in the Criminal Procedure Law or in any other Law or in any Rules of Court and in addition to any powers conferred thereby, the Supreme Court, on hearing and determining any appeal either in a civil or a criminal case, shall not be bound by any determinations on questions of fact made by the trial court and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence and, where the circumstances of the case so require, re-hear any witnesses already heard by the trial court, and may give any judgment or make any order which the circumstances of the case may justify. . .”

130. See Charalambous v. Demetriou, (1961) C.L.R. 14 (the last case decided under the Courts of Justice Law Cap. 8). In the words of the Court’s reporter, the opinions (“judgments”) of the three Cypriot High Court Judges contain “a restatement of the powers of Appellate Courts in Cyprus under the old law in disturbing findings of fact of trial courts.” *Id.* at 14.

The strongest reason for both the day-to-day influence of the Supreme Court and its overloaded docket, however, lies in its trial-level jurisdiction over administrative law cases under Article 146 of the Constitution. Such jurisdiction is only limited to annulment of administrative acts, as opposed to administrative litigation *au fond*. Be that as it may, there are a lot of administrative cases - infinitely more than what the drafters of the Constitution had in mind when they assigned them to the Constitutional Court. The Supreme Court justices spend more than half of their time—and almost all the time of the Court’s law clerks—judging administrative cases individually (an arrangement colloquially referred to as “single bench”). Whereas civil and criminal appeals are examined by three-member panels, appeals against Supreme Court trial judgments are considered by five (other) Justices (a panel which is characteristically, if not confusingly, called a “plenary bench” in the colloquial legal language of Cyprus). The entire Supreme Court may be called upon in cases of great interest.¹³¹

Requiring a senior judge, who has spent decades to reach appellate Olympus, to actually adjudicate *en masse* small trial-level cases would be hard on anyone from any legal system. But here all Justices have spent the better part of two decades or more sitting on anything but administrative cases. A lot of them have never studied administrative law prior to ascending to the Supreme Court bench. These circumstances have led to a stronger role for the Court’s law clerks or legal officers, who hold permanent positions as assistants to individual judges and tend to have studied in Greek law schools.

131. Among instances of the full bench sitting in trial instance for administrative litigation, *see, e.g.*, *Christodoulou v. Public Service Commission*, (2009) 3 C.L.R. 164, 3 LYSIAS 116 (2010). The case—in which the annulment of the appointment of the Supreme Court’s Chief Registrar was at stake—set a more formal rule regarding the extent to which the interview of candidates for appointment or promotion to public service may be taken into account. The President of the Court recused himself.

IV. SOURCES OF LAW

In Cyprus law, statutory law and case law coexist in virtually all legal fields. Written law could be said to be the principal source of law, somehow unlike a stereotypical common law jurisdiction (and even some notable mixed jurisdictions, such as South Africa and Scotland). Even prior to accession to the European Union, one could barely find a legal field without comprehensive statutory treatment.¹³² Cyprus judges are usually unequivocal in stating that their mission is to interpret—and be bound by—statutory law. At the same time, the existing legislation often shows its age, a factor that has contributed to the importance of both English common law and local case law, at least as much as the institutional dynamics and common law mentality pervasive among the traditional legal elites, and especially the judiciary.

A. Sources Superior to Legislation

Cyprus law follows a clear hierarchy of sources. The Constitution is the supreme law of the land.¹³³ The existential challenges that the Republic has faced from its very beginning have also made the Constitution the paramount factor in the political, as well as the legal, discourse.¹³⁴ Given that the Republic of Cyprus stakes its continued existence, and any hopes of territorial restoration, on international legality and European integration, it should come as no surprise that European and

132. Conflict of laws had constituted the principal exception, at least prior to EU accession. The law of domicile was however treated in arts. 5-13 of the Wills and Succession Law (Cap. 195) and a few specific provisions were found in other statutes.

133. CYPRUS CONST. art. 169. *See also* art. 188(2), *id.*

134. *See* Pavlos Neophytou Kourtellos, *Constitutional Law* in NEOCLEOUS, *supra* note 10, at 15-43; Papasavvas, *supra* note 45; ACHILLES EMILIANIDES, *RELIGION AND LAW IN CYPRUS* (Wolters Kluwer 2011). Among literature in Greek, most notable is the treatise by ANDREAS LOIZOU, *THE CONSTITUTION OF THE REPUBLIC OF CYPRUS* (2001), designed as an article-by-article commentary; ACHILLES EMILIANIDES, *BEYOND THE CONSTITUTION OF CYPRUS* (Sakkoulas Pubs. 2006).

international law also feature prominently in Cyprus law and politics.¹³⁵ In fact, upon accession to the European Union, the Constitution was modified so as to acknowledge the full supremacy of all European Union law (primary as well as derivative).¹³⁶ Constitutional provisions ought moreover to be interpreted in conformity to EU law.

International law is also an important direct source of law. Treaty law supersedes any legislative provision to the contrary.¹³⁷ Statutory provisions should be given, if possible, an interpretation conforming to international treaties.¹³⁸ It is less clear whether customary international law would be treated on a par with common law or by analogy to the status of treaty law.¹³⁹

B. The Stromata of Cyprus Legislation

From a constitutional point of view, the statutory law of Cyprus consists of legislation enacted during the colonial era and maintained in force in accordance with Article 188(1) of the Constitution¹⁴⁰ and legislation enacted subsequent to independence by the House of Representatives in accordance with Articles 61 *et*

135. On the role of international law in Cypriot appellate cases, *see* the cases reported and commented by Aristotle Constantinides in the *Oxford Reports on International Law in Domestic Courts – Cyprus* database, available at www.oxfordlawreports.com/subscriber_articles_by_category2?module=ildc&category=Cyprus (last visited Jul. 3, 2013). Among literature involving international law, usually with regard to the Cyprus problem, *see, e.g.*, Criton Tornaritis, *The Operation of the European Convention for the Protection of Human Rights in the Republic of Cyprus*, 3 CYPRUS L. REV. 455 (1983); KYPROS CHRYSOSTOMIDES, *THE REPUBLIC OF CYPRUS: A STUDY IN INTERNATIONAL LAW* (Springer 2000). On European law, *see* Constantinos Kombos, *Report on European Public Law in Cyprus*, 16(3) EUR. PUBL. L. 327-55 (2010); *STUDIES IN EUROPEAN PUBLIC LAW* at 101 (Constantinos Kombos ed., Sakkoulas Pubs. 2010).

136. *See* CYPRUS CONST. art. 1A (amended by L. 127(I)/2006).

137. CYPRUS CONST. art. 169(3).

138. *See* *Larkos v. Attorney General*, (1995) 1 C.L.R. 510, at 515; *Aristidou v. The Republic*, (1967) 2 C.L.R. 43.

139. *See* Aristotle Constantinides, *International Law in the Supreme Court of Cyprus* (2011, unpublished paper on file with author).

140. CYPRUS CONST. art. 188, *and* art. 29(1)(b) of the Administration of Justice Law 1960, *supra* note 110.

seq. of the Constitution.¹⁴¹ The few elements of religious law that survive in present-day Cyprus law—notably, the rules on the inalienable religious endowments known as Vakf—do so by virtue of their incorporation into statutory law.¹⁴²

A more useful approach would be to draw further distinctions between existing legislation enacted in different stages of Cyprus legal history. Identifying these *stromata* of legislation would allow us to better understand the evolutionary process that led to the present-day mixed or “hybrid” legal system and to perhaps predict its future development. A more practical reason, however, lies in the fact that the origins (and age) of legislative texts play an important role in determining the methods used in their interpretation. Legislation seen as a statement of common law principles is handled differently than legislation “indigenous” in origin or legislation deriving from continental legal systems.

We could accordingly discern five *stromata*, which correspond to five periods of the modern history of the island. The Colonial period could be subdivided into three stages: the first would range from 1878 until the official establishment of a colony of the Crown in 1925; the second from 1925 to World War Two; the third would cover the postwar colonial period, during which the long-term status of the island was continuously in question. The post-independence period could in its turn be subdivided by reference to accession to the European Union.

141. Article 29(1) (a) of the Administration of Justice Law 1960, *supra* note 110, in combination with CYPRUS CONST. arts. 78 and 179.

142. *See* the Evcaf and Vaqfs Law (Cap. 337, enacted by L. 32/55). As to divorce, modern statutory law provides a special statutory regime for members of the three religious groups recognized in the Constitution (Armenian, Maronite and Latin) which incorporates by reference the grounds provided in the respective religious law but also lists a number of mandatory grounds. *See* art. 11 of the Family Tribunals (Religious Groups) Law 1994 (enacted as L. 87(I)/1994) and Annex I thereto. Religious ceremony under the rules of the respective denomination constitutes valid form of marriage with no need for the involvement of a civil authority: art. 9(2) of the Marriage Law (L. 104(I)/2003).

1. Another Mixed Legal System Entirely: The Early Colonial Period

The first half-century of British colonial rule did not see much legislative reform of substantive law. The administration of the justice system was redrawn from early on, with colonial courts replacing Ottoman tribunals and chipping away at ecclesiastical jurisdiction over succession and marital property. However, Ottoman law (much of it in Westernized form, following the *Tanzimat* law reforms of the mid-nineteenth century) survived as the residual legal system, until the official introduction of the common law by the 1935 Courts of Justice Law. It goes without saying that the strong control of the courts of justice by British colonial lawyers mitigated this regime from the very beginning.¹⁴³

Much of the procedural law reforms of this period were significant, but most instruments were replaced by the interwar efforts to create a proper common law regime. However, much of the legislation on enforcement matters has survived, with little change, since 1885: the so-called Civil Procedure Law (Cap. 6), concerning precisely the enforcement of local judgments, is the principal example.¹⁴⁴ Specific performance of land contracts provided the other, until 2011.¹⁴⁵

2. Receiving the Common Law: The Interwar Period

In 1925, Cyprus became a formal Colony of the Crown and the reform of substantive law began in earnest. Turning Cyprus into a common-law jurisdiction would happen gradually: only in 1935 were “the common law and the doctrines of equity” officially made the residual law; even then, they were to apply as in force on

143. *See, e.g.*, *Ismail v. Attorney-General*, (1929) 16 C.L.R. 9, at 12 (“the rule of English law as to the binding nature of the decisions of appellate tribunals” must be followed “in the absence of a clear rule of Ottoman law in the subject”).

144. Enacted as L. 10/1885.

145. Sale of Land (Specific Performance) Law (Cap. 232) (enacted as L. 11/1885 and replaced by its namesake L. 81(I)/2011).

November 8, 1914 (the day Cyprus was annexed to the Crown, following the declaration of war between the British and Ottomans). An interesting example of the conservative attitudes of British colonial lawmaking from this period concerns the Evidence Law (Cap. 9): the colony's evidence rules were reformed into a consolidated statute in 1946; Cyprus courts were nonetheless to apply "in any civil or criminal proceeding . . . so far as circumstances permit, the law the statutes in question and rules of evidence as in force in England on the 5th day of November, 1914."¹⁴⁶ The fact that this provision is still in place (even though the Evidence Law was amended a few years ago) is also indicative of the traditionalist mentality of the country's legal elites to this day.

The interwar era's lasting contribution has been the transplantation, mostly from other colonies, of important legislation on the basic fields of substantive law. Commercial law statutes dating from that period and still in force today are the Bills of Exchange Law (Cap. 262)¹⁴⁷ and the Carriage of Goods by Sea Law (Cap. 263),¹⁴⁸ the Partnerships Law (Cap. 116)¹⁴⁹ and the Bankruptcy Law (Cap. 5).¹⁵⁰ The most notable interwar statutes are the three "codes" of Cyprus: the Criminal Code (Cap. 154),¹⁵¹ the Contract Law (Cap. 149)¹⁵² and the Civil Wrongs Law (Cap. 148).¹⁵³ Such legislation constituted an effective codification of common-law principles in their respective fields; the statutes in question are still in force today, often with little modification.

The lineage of these "codes" is worth a separate study. It is generally accepted that the Criminal Code and the Contract Law

146. Article 3. The full title of L. 14/46 was "A law to amend and consolidate certain provisions relating to the law of Evidence."

147. Enacted as L. 20/28. The Law was identical to the English Bills of Exchange Act 1882. Its provisions on cheques were reformed in 1997.

148. Enacted as L. 8/27.

149. Enacted as L. 18/28.

150. Enacted as L. 8/30.

151. Enacted in 1928, by an Order in Council.

152. Enacted as L. 24/30.

153. Enacted as L. 35/32.

are effective transplantations of the respective nineteenth-century Indian statutes, whereas the provenance of the Civil Wrongs Law is more of a mystery. However, the full lineage of colonial statutes is more complicated: it has for example been documented that the Cyprus Criminal Code traces its immediate ancestry to the Nigerian code, which in turn is a descendant of the Queensland Code.¹⁵⁴ As to the Civil Wrongs Law, the 1932 Cyprus statute appears to follow the 1927 draft of a Civil Wrongs Ordinance for Palestine, which in turn was based on the Civil Wrongs Bill prepared for India by Frederick Pollock.¹⁵⁵

But what does transplantation mean in this case? Let us use the example of the Contract Law, which appears almost a copy of the Indian Contract Act of 1872.¹⁵⁶ The primary differences between the two texts are technical. Certain of the Indian legislator's explanatory notes ("Explanations") have been moved into the main text, whereas the examples ("Illustrations") have been removed; the chapter on the sale of goods came last and was subsequently abolished. Specific performance is moreover provided for—in a single provision—in the Cyprus statute.¹⁵⁷ The principal

154. The Cyprus Criminal Code provided the original for the Palestinian Criminal Code Ordinance. See Norman Abrams, *Interpreting the Criminal Code Ordinance, 1936: the Untapped Well*, 7 ISRAEL L. REV. 25, 26-28 (1972), with a discussion of the origins of the Cyprus Criminal Code at 28-31.

155. On Pollock's influence, see Daniel Friedmann, *Infusion of the Common Law Into the Legal System of Israel*, 10 ISRAEL L. REV. 324, at 342 n.104 (1975). The Mandatory Civil Wrongs Ordinance, finally enacted in 1944, "reflects independent thinking and in many important points differs from both the Cyprus Ordinance and English law." *Id.*

156. On the history of the Indian Contract Act, see Stelios Tofaris, *A Historical Study of the Indian Contract Act 1872* (D.Phil. thesis, Cambridge University, 2010). The principal reference work on the Act is occasionally cited in Cyprus appellate cases to this day: NILIMA BHADBHADE, POLLOCK AND MULLA, *INDIAN CONTRACT AND SPECIFIC RELIEF ACTS* (14th ed., Lexis-Nexis 2012).

157. Article 76(1) of the Contract Law (Cap. 149): "A contract shall be capable of being specifically enforced by the Court if it is not a void contract under this or any other Law; and (b) it is expressed in writing; and (c) it is signed at the end thereof by the party to be charged herewith; and (d) the Court considers, having regard to all circumstances, that the enforcement of specific performance of the contract would not be unreasonable or otherwise inequitable or impracticable." A separate law, Sale of Land (Specific Performance) Law

substantive difference lies in the fact that the Cypriot statute provides explicitly that it be interpreted in accordance with English law,¹⁵⁸ even though in at least one occasion (namely the rule on *past consideration*), Cypriot, unlike Indian, courts have read the same text as deviating from the common law.¹⁵⁹

The sole substantive deviation of the Cyprus statute from the Indian prototype concerns the capacity of minors. Until 1970, English common law considered minors (“infants”) as all persons not having attained twenty-one years of age; capacity of minors was, and still is, governed by a series of intricate rules.¹⁶⁰ The Indian Contract Act espoused a clear-cut rule: capacity to contract depended upon the person reaching the age of majority according to his or her personal law (“the law to which he is subject”).¹⁶¹ The Cyprus Contract Law followed the Indian rule as to the non-capacity of minors, but avoided a similar reference to personal laws, simply fixing the age of majority at eighteen. In 1955, following a case in which incapacity was used as a defense by a minor against an action for breach of a promise to marry,¹⁶² article 11 was amended to include a reference to the English rules on capacity.¹⁶³

(Cap. 232), promulgated in 1885, governs specific performance over the sale of land. In contrast, specific performance in India is now governed by the Specific Relief Act 1963.

158. Article 2(1) of the Contract Law (Cap. 149), *supra* note 152.

159. *Raif v. Dervish*, (1971) 1 C.L.R. 158; *and Romanos v. Chrysanthou*, (1991) 1 C.L.R. 1991. The issue is discussed in *Etaireia Diatheseon Tsimentou Vasilikou Apollon Ltd v. Kathidjioti*, (1998) 1 C.L.R. 687 (notably in the dissent of Nicolaou, J.).

160. *See e.g.* JACK BEATSON ET AL., *ANSON’S LAW OF CONTRACT* 232-46 (29th ed., Oxford Univ. Press 2010). The age was lowered as of 1 January 1970 with the Family Law Reform Act 1969 (U.K.), §1.

161. Indian Contract Act 1872, art. 11.

162. *See Myrianthousis v. Petrou*, (1956) 21 C.L.R. 32.

163. Article 11(2) of the Contract Law (Cap. 149, as amended by L. 7/56): “The law in force in England for the time being relating to contracts to which an infant is a party shall apply to contracts in which a person who has not attained the age of eighteen years of age is a party.” The second sentence of art. 11(2), conferring capacity to contract on a married person who has not yet attained the age of eighteen years was maintained.

The merits of the new rule have been debatable: it may be superior in the fairness of the result in individual cases and weaker in predictability (at least, in contrast to the general rule on modern British legislation, the provision allows Cyprus courts to take into account British statutory reform of the common law regime under the Minors Contract Act 1987). It certainly perplexes law students, but then again, the whole issue of minors' contracts has lost most of its significance in the real world. But the story is indicative of the strong orientation of late colonial (and even post-colonial) Cyprus towards the English common law—and its rules.

3. *A Common Law Jurisdiction: The Postwar Period*

In the years following World War II and leading up to independence, the Colonial government sought to consolidate the British position in Cyprus and to promote law reform in subjects that had previously been left to the *status quo ante*. Legislation on the administration of justice was thoroughly reformed; the new Courts of Justice Law made applicable in Cyprus the common law (and equity) as currently in force; and legislation was imported from England and Wales. Leaving aside labor and administrative reform, the main area of such legislative activity was business and commercial law. The principal examples of statutes surviving from this period are the Companies Law (Cap. 113)¹⁶⁴ and the Trustee Law (Cap. 193).¹⁶⁵ To these we must add the Trade Marks Law (Cap. 268) of 1951, which replaced an earlier statute dating from 1910.¹⁶⁶ A new Sale of Goods Law (Cap. 267) was enacted in 1953, modeled after the English Sale of Goods Act 1893, and repealing the Contract Law chapter on the sale of goods (modeled

164. Enacted by L. 7/1951.

165. Enacted as L. 46/1955, as a transplantation of the English Trustee Act 1925.

166. Enacted as L. 2/51. The Law was subjected to several, relatively small amendments since 1962; it was seriously revised more recently, especially by L. 176(I)/2000 and 121(I)/2006, in the process of implementation of the EU directives on intellectual property). The Appellation (Cyprus Wines) Protection Law (Cap. 127; enacted by L. 2/50) still remains in force.

after the Indian Contract Act);¹⁶⁷ That statute has been itself recently repealed, just like most colonial-era legislation on intellectual property.¹⁶⁸

The increased participation of Greek and Turkish Cypriot lawyers in the colonial justice system also allowed, to a limited degree, the incorporation of continental legal institutions into Cyprus law: intestate succession follows the Roman-Byzantine norms,¹⁶⁹ whereas Turkish Cypriots are governed by the secular family law of Turkey, which has been transplanted in replacement of Islamic legal institutions of personal law.¹⁷⁰

4. A Post-colonial Legal System: First Decades of Independence

Following the consolidation of the Republic, and under the reign of the doctrine of necessity, the House of Representatives pushed “indigenous” legislation seeking to deal with local concerns and political issues. A second wave of such “indigenous” legislation followed the 1974 invasions. The needs of a modern bureaucratic state have also led to a lot of normative administrative acts derivative of statutory legislation.

Transplantation of English and Greek law also took place to a considerable degree. English legal transplants have notably dominated commercial and business law reform in this period. In 1963, shipping legislation (which had been left unreformed under

167. L. 25/1953.

168. See notably the Copyright Law (Cap. 264; enacted by Ordinance of April 25th, 1919, it arranged for the application in Cyprus of the (Imperial) Copyright Act 1911), repealed in 1976; the Merchandise Marks Law (Cap. 265; enacted as L.35/58), repealed in 1987; and the Patents Law (Cap. 266; enacted as L. 40/1957), repealed in 1998.

169. See the Wills and Succession Law (Cap. 195; enacted by L. 25/1945 and modified between 1951 and 1955); the law was subjected to minor amendments by L. 75/70 and L. 100/89 regarding forced heirship rules).

170. See the Turkish Family (Marriage and Divorce) Law (Cap. 339; enacted as L. 4/1951, amended by L. 63/54) and the Turkish Family Courts Law (Cap. 338; enacted by L. 43/1954, in replacement of L. 3/51).

British rule) was adopted in the mold of English law.¹⁷¹ Other transplants eventually replaced (or actually updated) previous English transplants: the Sale of Goods Act 1994 has effectively copied the English Sale of Goods Act 1979,¹⁷² the Trade Descriptions Law 1987 replicates its 1968 English namesake,¹⁷³ whereas the Copyright Law 1979 is inspired by the English Copyright Act 1956.¹⁷⁴ Other jurisdictions were used as models in matters of offshore finance: for example, the International Trusts Law 1992 reproduces much of the wording and concepts found in Caribbean common law jurisdictions.¹⁷⁵

Greek law claims a strong influence in public law and in non-commercial civil matters. As to the former, the General Principles of Administrative Law 1999, which was meant to codify the case law of the Supreme Court of Cyprus (itself strongly influenced by Greek academic writings and case law), relied heavily on Greek doctrinal works.¹⁷⁶ With regard to private law, two examples from different moments might give an idea of both influence and mutation. The Associations and Foundations Law 1972, which governs many, but by no means all, non-profit institutions, since it coexists with Colonial legislation on charitable companies, trusts and clubs is one example.¹⁷⁷ The Law effectively reprised Articles 61-120 of the Greek Civil Code, with one key difference, which is indicative of the strong role of the Cyprus civil service: in Greece,

171. L. 45/63, known as the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law 1963.

172. L. 10(I)/94, replacing Cap. 267.

173. L. 2/87, as subsequently amended between 1987 and 2002.

174. L. 59/76 (as subsequently amended), replacing Cap. 264.

175. L. 69(I)/92, as amended by L. 20(I)/2012. An English translation of the original statute (prior to its 2012 amendment), with notes is found on the web site of the Central Bank of Cyprus, http://www.centralbank.gov.cy/media/pdf/ITLWE_ITCSLAW.pdf (last visited Jul. 3, 2013).

176. L. 158(I)/1999: "Law codifying the general principles of administrative law that ought to govern the actions of the civil service." The treatises of Athens professor Prodromos Dagtoglou on administrative law and procedure supposedly provided most of the definitions used.

177. L. 57/72.

registration is a matter for District Courts, whereas in Cyprus it is dealt with by a specialized governmental official (*Registrar*).

But the primary field of Greek influence over private law has been family law. Originally, the law of marriage and divorce had been left to the personal law of Cypriots. In the 1990s, following the establishment of state-run Family Courts, the family law of Cyprus was rewritten in a series of statutes modeled after the 1982/1983 reform of Greek family law; application of the new family law was gradually extended to all Cyprus residents. Greek law was the direct influence for the law of marriage, divorce (including marital property), children and parenthood.¹⁷⁸ The principal exception concerned adoption, which had traditionally been dealt with in accordance with English law.¹⁷⁹ The primary reason was the fact that the reform of adoption law in Greece was still not completed at the time, but another reason may well have been the orientation of the committee member who was entrusted with producing a draft statute (the strong role in adoption matters of administrative services under the Ministry of Labor and Social Welfare may have also played its part). Another exception concerns the protection of adults, which had been left outside family jurisdiction.

5. A European Legal System: Accession to the E.U.

In 2004, after fifteen years of internal debates and international negotiations, Cyprus became a member of the European Union. Cyprus did not adopt the practice of some other EU Member States, where framework legislation authorizes the executive

178. The following statutes (as amended) constitute the corpus of Cyprus family law: the Family Courts Law 1990 (L. 23/90); the Relations Between Parents and Children Law 1990 (L. 216/90); the Pecuniary Relations Between Spouses Law 1990 (L. 232/91); Children (Relation and Legal Status) Law 1996 (L. 187/96); and the recast Marriage Law 2003 (L. 104(I)/2003). A draft Law on personal relations between spouses, again modeled after Greek law, died in parliamentary committee. See also Nicolaou, *supra* note 9898, at 125-33 (as of 1996).

179. L. 19(I)/95.

power to implement EU directives by presidential decrees. As a result, the implementation of European secondary law has come to constitute the principal task of the House of Representatives. Moreover, a constellation of independent regulatory authorities (Commissioners) was established in Cyprus: their impact is being felt rather slowly, but surely.¹⁸⁰

Most legislation adopted since the mid-1990s and especially the early 2000s appears to have been oriented towards preparing the country for European integration and implementing the community *acquis*. For example, the Unfair Terms in Consumer Contracts 1996 constituted an early implementation—at the time, perhaps more of a transplantation—of Directive 93/13/EEC.¹⁸¹

The accession in 2004 by Cyprus to the Vienna Convention on the International Sale of Goods (CISG) could also be seen in the light of European integration.¹⁸² The United Kingdom has not to this day adopted the CISG, so by implication much of the sale of goods in Cyprus has been separated from English law. The fact that Cyprus adopted as official text the translation prepared by Greece a few years prior has led to some degree of mutation of what had up to that point been a purely common-law subject:

180. Independent authorities include a Commissioner for Administration (Ombudsman); a Commissioner for Personal Data Protection; the Commission for the Protection of Competition; the Securities and Exchange Commission; the Cyprus Radio Television Authority; the Cyprus Energy Regulatory Authority; the Commissioner for Electronic Communication and Postal Regulation; and a Commissioner for Children's Rights (a position held by the Commissioner for Legislation: officially translated into English as "Law Commissioner", the office's powers are but a shadow of what similar institutions do in other common-law or even continental jurisdictions. This list does not include other "Commissioners," who hold in essence positions of junior cabinet members without portfolio.

Of these authorities, the Commissioner for Administration is frequently in the news; the market regulation commissions are fully functional, if understaffed. The authorities for energy and telecoms regulation have only recently begun to flex their muscle against the state-owned public utility companies, such as the Electricity Authority of Cyprus and the Cyprus Telecommunications Authority, which possess much stronger legal representation.

181. L. 93(I)/96.

182. L. 55(III)/2004.

moreover, Cyprus law may now claim, in several cases, two words in Greek for the same concept of the law of sales.

Cyprus' implementation of legislation has tended to follow prototypes from Greece and the United Kingdom. On certain occasions, however, implementation legislation has asserted a distinctive local touch.¹⁸³ The most common practice, however, has been to transpose the text of the directive into statute, with little attempt to consolidate EU derivative law. Consumer Sale of Goods is thus treated in a statute distinct from the Sale of Goods Law 1994;¹⁸⁴ two separate laws were enacted on the same day to implement the directives on contracts negotiated away from business premises and on distance contracts.¹⁸⁵

6. A Note on Statutory Interpretation

Statutory interpretation reflects the key characteristics of the legal system. Were we to give a one-sentence summary, we could say that legislation of common law origin is interpreted in accordance with common law cases and authorities, whereas in interpreting legislation of continental provenance, continental authorities—usually Greek—will be used. Upon closer inspection, however, it appears that the terms, concepts and authorities used will, to a considerable extent, vary depending upon the individual case and the actors involved (both counsel and judges). In a contract case, for example, counsel may or may not present helpful English (or Indian) authorities. The judge sitting on the case will certainly take note of authorities mentioned by counsel; on occasion, the judge in question will do further research on his own, but we can hardly expect this to happen very often.

183. For a case study on the implementation process, *see* CONSTANTINOS P. ILIOPOULOS, *THE EU-MEMBERSHIP OF THE REPUBLIC OF CYPRUS: THE HARMONIZATION OF THE COMPANY LAW AND THE LAW OF INTELLECTUAL PROPERTY* (Ant Sakkoulas, 2006, in Greek).

184. L. 7(I)/2000.

185. L. 13(I)/2000 in implementation of Directive 85/EEC; L. 14(I)/2000 in implementation of Directive 97/7/EC.

This raises the question of determining what influences judicial—and legal—reasoning. Undoubtedly, the common law nature of Cyprus court procedure and the common law mentality of most judges, as well as many legal practitioners, constitute a very important factor—perhaps the primary one. The system of the adversarial process helps maintain the common law attitude, even in fields of continental influence, such as family litigation. We must not underestimate, however, the impact of the quantity—and quality—of the caseload. An important factor has to do with numbers. On the one hand, the little variety in factual patterns incumbent upon a small jurisdiction means fewer complex issues for judicial decision-making; as a result, local authorities are very few compared to what is readily available from abroad. On the other hand, the lack of an intermediate appellate jurisdiction, which would act as a filter of cases on appeal, and thus allow Supreme Court justices more time for reasoning in depth, affects both mode and quality of judicial reasoning. It must be remembered that, unlike many of their brethren at the English High Court, few, if any, judges of the District Courts had a specialist legal practice prior to joining the judiciary—and they are certainly unable to specialize once on the bench. In their turn, Supreme Court justices, who spend a considerable amount of their time judging administrative cases at first instance, have effectively learned administrative law while on the Supreme Court bench. In short, Cypriot appellate judges deal with too many “easy” cases and too few guiding or landmark ones.

We must then consider the language factor: English was the original language of the system – in fact, until recently it had been the principal language. English terms and materials are still used—translated or not—in everyday practice. In certain legal proceedings, counsel appear to not have even read the statute, working instead straight out of the textbook used in their British law school studies. For example, in discussing the formation of contracts, the Contract Law speaks of *proposal* and *acceptance*.

The term *proposal* is regarded in Indian law as the equivalent of *offer*; it has been officially translated into Greek as *πρόταση*—a word that is both the exact linguistic equivalent of *proposal* and the established term used in Greek for *offer*.¹⁸⁶ The word *προσφορά*, used in colloquial Greek too as the equivalent of offer, is also used in correspondence to terms such as tender, or even bargain. All this has never been a matter of contention in Cyprus. Nonetheless, every once in a while an appellate judgment makes reference to “*προσφορά* (offer)” as the statutory term.¹⁸⁷

At the same time, for the past three or four decades, the majority of practitioners have been educated in Greece. Greek terms, concepts and authorities have also made their way into judicial reasoning. Modern Greek legal thinking has insisted on looking for the purpose and meaning of the statute: *teleological interpretation* often prevails over *grammatical interpretation*. In Cyprus, lawyers and judges are much fonder of invoking the letter of the law—which has the additional advantage of not having to rely on external authorities. In fact, they appear more likely to consult and cite a dictionary of Modern Greek than their brethren in Greece.¹⁸⁸ But Cyprus judges also frequently employ the teleological method—certainly more than their English brethren traditionally have.¹⁸⁹ This does not hold as true, of course, when dealing with statutory provisions seen as stating a common-law rule: such provisions are usually interpreted in the light of English

186. See, respectively, MICHAEL STATHOPOULOS, *CONTRACT LAW IN HELLAS* (Kluwer Law International 1995).

187. See, e.g., *Georgiou v. Cyprus Airways*, (1998) 1 C.L.R. 1794; *Aresti v. LOEL*, (2008) 1 C.L.R. 1305; 3 *LYSIAS* 47 (2010) (with a critical note by N. Hatzimihail, at 48-50).

188. See, e.g., *Pericleous v. Latsia Municipality*, (2002) 2 C.L.R. 459 (looking into two dictionaries for the “common and natural meaning” of the word “store” in a criminal appeal). A quick search at the CyLaw legal database reveals (as of February 20, 2013) a total of sixty-six Supreme Court judgments in the past fourteen years, with judge or counsel citing GEORGIOS BAMBINIOTIS, *DICTIONARY OF MODERN GREEK* (Lexicoloy Centre, 1998) or subsequent editions.

189. English law has somewhat moved towards purposive interpretation since *Pepper v. Hart*, AC 593 (1993).

cases and legal literature.¹⁹⁰ Even there, however, we observe interesting examples of mutation, such as Cypriot contracts cases where “teleological interpretation” is invoked as the method of interpretation of a contract,¹⁹¹ even though the term—certainly not used in the applicable English common law—is not really used in Greek law, either, with regard to contract interpretation.

B. Case Law is Paramount

If written law provides the Cyprus legal system with its foundations and building structures, it owes its actual shape to case law. The influence of English common law in Cyprus is such that the country is frequently regarded as a common law jurisdiction; local case law is important in all legal fields, especially those inspired by continental substantive law; and the European Union courts have been increasingly influential across the board.

A distinction should in principle be drawn between those legal fields which are regarded as falling under the English common law—notably procedural law, as well as most private law and criminal law—and fields where English common law is not regarded as applicable, granting its place to local case law and other authorities. The Supreme Court, however, has extended the doctrines on judicial precedent even with regard to the latter.¹⁹²

1. On the Legal and Political Foundations of Case Law

According to the Supreme Court, rule by judicial precedent is grounded on the principle of judicial hierarchy—and the need for

190. *See, e.g.,* Seamark Consultancy Services Ltd. v. Lasalle, (2007) 1 C.L.R. 162, reversing previous cases on the interpretation of art. 32 of the Courts of Justice Law 1960, *supra* note 79, with regard to worldwide effect of freezing orders, on the basis of new developments in English case law under the identical §45 of the Supreme Court of Judicature (Consolidation) Act 1925.

191. Club “Anorthosis” of Famagusta v. Apollon Athletic Football Club of Limassol (2002) 1 C.L.R. 518, at 525.

192. *See notably,* Republic of Cyprus v. Demetriades, (1977) 3 C.L.R. 213; Elefetheriou-Kanga v. The Republic, (1989) 3 C.L.R. 262.

predictability.¹⁹³ We will on the contrary search in vain the Constitution for an express legal basis for a case-law system, or even for the maintenance of English common law. This constitutional omission contrasts with the explicit constitutional provisions regarding the transitional maintenance in force of colonial statutes,¹⁹⁴ as well as the continued use of prerogative writs as a remedy granted by the High Court.¹⁹⁵ The colonial *status quo* was instead confirmed by the new Courts of Justice Law 1960,¹⁹⁶ which repeated most of the provisions of the colonial Court of Justice Law (Cap. 8) enacted in 1953.¹⁹⁷ Article 29 of L. 14/1960 has reprised Article 33 of L. 40/53 in stating the “law to be applied” by “every Court in the exercise of its civil or criminal jurisdiction.” According to article 29(1)(c) such law includes “common law and the principles of equity save in so far as other provision has been or shall be made by any Law and so far as not inconsistent with the Constitution.” With the exception of adding a reference to the new Constitution, the new provision is but the translation of Art. 33(1)(c) of L. 40/1953, with the original “doctrines of equity” translated into Greek as “principles of equity,” absent a more exact word.¹⁹⁸

The provision has been vividly criticized; in the words of Symeon Symeonides, it “went much further than the letter and

193. See *Republic of Cyprus v. Demetriades*, (1977) 3 C.L.R. 213.

194. CYPRUS CONST. art. 188(1).

195. CYPRUS CONST. art. 155(4).

196. L. 14/1960.

197. L. 40/1953.

198. It is worth noting that the numbering of section (1)(c) has been maintained by a conscious effort: the Colonial provision named “the Laws of the Colony;” the Ottoman laws still in force (namely the law on Vakfs and the Maritime Code); common law and equity; and the “Statutes of Her Imperial Parliament and Orders of Her Majesty in Council, applicable either to the colonies generally or to the Colony save in so far as the same may validly be modified or other provision made by any Law of the Colony.” The new post-independence provision names: first, the Constitution and laws produced by the Republic; second, the colonial legislation maintained under Art. 188 of the Constitution; third, common law and equity; fourth, the laws and principles on Wakf (*ahkamul evkhaf*); and fifth, British laws applicable in Cyprus immediately before independence.

spirit of the Constitution, and sought to tie the legal system of Cyprus surreptitiously and permanently to the English common law.”¹⁹⁹ There was no temporal limitation, and it meant that “a post-1960 decision of the House of Lords would be binding on the courts of Cyprus, and, what is more, even if a subsequent statute of the British Parliament had superseded that decision.”²⁰⁰

Symeonides notes that the whole statute was “drafted by a well-known former servant of Her Majesty’s government” and promulgated by an “inexperienced House of Representatives.”²⁰¹ In their defense, the Representatives took the easy way out in repeating the pre-existing provision. The Republic begun its life in an uneasy truce between realities and aspirations; its constituent communities were locked in an opposition that soon came to hinder the state’s very operation. Moreover, the various social groups, including the newly formed legal and political elites, were still trying to find their footing into the postcolonial era. It could be argued that neither the consensus nor the massive intellectual power needed to engage in large-scale law reform was there in 1960; on the contrary, maintaining the *status quo* would leave all options open for the future—and the *status quo* was a common law regime, with the probable exception of administrative law. It must be noted that, even though the right of appeal to the Privy Council was abolished upon independence, the new High Court was but the continuation of the colonial Supreme Court in law and in spirit: its foreign President had to be a Commonwealth national and its Cypriot members boasted of long service in the colonial judiciary.

Symeonides is nonetheless correct in pointing to personal biases, as well as what was to become a key conflict within the Greek Cypriot Bar. For the last thirty years of British colonial rule, membership to the Cyprus Bar had been effectively preserved for

199. Symeonides, *The Mixed Legal System of the Republic of Cyprus*, *supra* note 4, at 450.

200. *Id.*

201. *Id.*

people trained in England as barristers (many without a law degree).²⁰² Following independence, bar membership began expanding significantly. An increasing majority of the new lawyers came from non-legal families, and the vast majority of new entrants to the profession were holders of university degrees from Greek law schools (aided by scholarship policies, entrance exams, and especially the lack of university tuition). This resulted in a generational, as well as a “class”, conflict, whose traces are still visible today. Maintenance of the English common law thus became a vehicle for the dominance of the established group of colonial advocates, and their children, in the emerging legal profession of Cyprus. This internal conflict is best illustrated in the use of the English language: it took three decades after independence for the legal system to complete the transition from English to the Republic’s official languages (ironically, it took as much time for a graduate of a Greek law school to become an appellate judge); the basic colonial statutes were only translated in the 1990s. To this day, there has been no official translation of the principal instrument of civil litigation, the Civil Procedure Rules.²⁰³

2. *The Common Law in Practice*

Case law might rule Cyprus law in its entirety, but the sources used and the level of discretion permitted to judges depends on the subject at hand. We have already noted that colonial statutes seen as having codified the common law in the respective subject are to

202. See the original Advocates Law (Cap. 2), art. 3 (1955). Admission to practice as an advocate was reserved to those “entitled to practice” as a barrister-at-law or “admitted to practice” as a solicitor in England or Northern Ireland or as an advocate in Scotland.

203. *Civil Procedure Rules*, available at <http://www.cylaw.org/cpr.html> (last visited Jul. 3, 2013). All amendments since 1960 have been in the official languages (notably Greek), but the main body of the Rules has remained unchanged (and untranslated) since British rule. Legal practitioners make use of unofficial translations into Greek, notably by a former Registrar, which are not well regarded by many.

be interpreted in accordance with present-day English common law.²⁰⁴ Occasionally, the statutory provision is seen as simply the starting point for a discussion of more modern English authorities. Such legislation is certainly not “gapless.” *Lacunae* are directly filled by the common law: a number of common-law torts thus today co-exist with those expressly sanctioned in the Civil Wrongs Law.²⁰⁵ But we can also witness the contrary case, where the letter of a law normally seen as codifying the common law is applied in a manner such as to invent derogation from the common law.²⁰⁶

British legislation enacted after 1960 is regarded as not having any authority in Cyprus. Coupled with the reluctance of lawyers and legislators to reform basic laws, this actually means that English common law rules superseded by statute in the United Kingdom are still valid in Cyprus; an example that comes to mind concerns the common law doctrine of privity of contract and third-party rights. It might be possible, however, to “cheat” the court, using reference works and subsequent case law, into accepting that English law as modified by statute constitutes in effect English common law.²⁰⁷

The common law case law of other Commonwealth jurisdictions (notably Australia, New Zealand and Canada), and at times the United States of America, has persuasive authority.²⁰⁸

204. See, e.g., *Stylianou v. The Police*, (1962) 2 C.L.R. 152 (notably Josephides, J., at 171: “[I] am of the view that, as a general rule, our Court should as a matter of judicial comity follow decisions of the English Courts of Appeal on the construction of a statute, unless we are convinced that those decisions are wrong.”).

205. See *Universal Adver. and Publ’g Agency v. Vouros*, (1952) 19 C.L.R. 87 (Civil Wrongs Law does not preclude an action for passing-off of a business).

206. For example, the case of past consideration. See *Raif v. Dervish*, (1971) 1 C.L.R. 158; and *Romanos v. Chrysanthou*, (1991) 1 C.L.R. 1991. The issue is discussed in *Etaireia Diatheseon Tsimentou Vasilikou Apollon Ltd. v. Kathidjioti*, (1998) 1 C.L.R. 687 (notably in the dissent of Nicolaou, J.).

207. See, e.g., *VASILAKAKIS & PAPASAVVAS*, *supra* note 10, at 50.

208. See e.g. *Republic v. Alan Ford et al.*, (1995) 2 C.L.R. 232 (referring to “Canadian and American cases” regarding criminal procedure); *Jirkotis & Achilleos Co. Ltd. v. Paneuropean Ins. Co. Ltd.*, (2000) 1 C.L.R. 537, *citing* *The Esmeralda I*, (1988) 1 L.L.R. 206 (Aus.), as well as English treatises (among ordinary civil appeals (three-justice panel)); *Standard Fruit Co. (Berm.) Ltd. v.*

Especially in the early life of the Republic, U.S. case law was invoked in constitutional law matters.²⁰⁹ Given that Privy Council jurisdiction was abolished upon independence, Cyprus law should arguably follow the English approach, which regards decisions issued by the Judicial Committee (“Board”) of the Privy Council as of persuasive, and not of binding, authority.²¹⁰ “Authoritative” textbooks and other works on English law also have persuasive authority.²¹¹

3. *Precedent into Continental Law?*

Contrary to traditional stereotypes and despite pronouncements to the contrary, case law does form a source of law throughout the Western legal tradition, especially when actual legal practice is concerned. One might, in fact, speak of a neo-formalist streak in present-day continental legal tradition, where legal writers are reluctant to deviate or criticize established case law solutions. The case law of the European Court of Justice is especially authoritative and the anonymous long reasoning of its judgments is quoted as if stating the law, with little regard to fine concepts such as *obiter dicta* and distinguishing precedents. If common law judgments produce legal norms *auctoritate rationis*, continental

Gold Seal Shipping Co. Ltd., (1997) 1 C.L.R. 464) (citing U.S. and Canadian cases).

209. See, e.g., *Khadar v. The Republic*, (1978) 2 C.L.R. 130, at 230-33 (discussing *Furman v. Georgia*, 33 L.Ed.2d 349).

210. See, e.g., *R v. Blastland*, AC 41, at 58 (1986) (Privy Council decision in *Ratten's* case, All ER 801 (1971)) (“Not technically binding” but “of the highest persuasive authority” in view of the Board’s “constitution”). See also Simon Whittaker, *Precedent in English Law: A View from the Citadel*, 14 EUR. REV. PRIVATE L. 705, 721 (2006).

211. See *Standard Fruit Co. (Berm.) Ltd. v. Gold Seal Shipping Co. Ltd.*, (1997) 1 C.L.R. 464. The Court, in this admiralty case, uses English treatises on international trade and carriage of goods as primary authority, excerpting at length from THOMAS GILBERT CARVER & RAOUL P. COLINVAUX, *CARRIAGE BY SEA* (12th ed., 1971) and CLIVE M. SCHMITTHOFF & JOHN ADAMS, *SCHMITTHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE* (9th ed., Stevens 1990) (publication dates are not mentioned in the decision); cases are only cited in an incidental fashion.

case law produces norms *ratione auctoritatis*. The case law of superior courts is binding because of the hierarchical control they exercise over lower courts. Superior courts tend to affirm their own rules out of respect for legal certainty, but especially to economize judicial time.

The administrative law of Cyprus is a case in point. British colonial rule left behind a well-functioning civil service, at least in certain areas, and a lot of ad hoc legislation. With the exception of prerogative writs, however, it left little in terms of either judicial review of administrative action, or, more generally, administrative law doctrine. This can be easily explained in light of the development of administrative law in the United Kingdom: only in 1958 did British administrative tribunals begin to be regarded as judicial (“external”) rather than administrative (“internal”) bodies and only in 1959 was a theory of judicial review of administrative acts elaborated as a doctrine, with the appearance first of S.A. De Smith and then William Wade’s books.²¹²

The Constitution had provided for a separate Supreme Constitutional Court, with jurisdiction to hear, apart from constitutional cases, petitions for the annulment of administrative acts.²¹³ In the meantime, all traditional, “common law” subjects were left with the High Court. As a result, the Supreme Constitutional Court, finding itself more and more drawn towards administrative litigation, soon oriented itself, under the leadership of German professor Ernst Forsthoff, towards the “continental administrative system” and the “principles enunciated” in continental administrative courts.²¹⁴ The tenure of Forsthoff, whose judicial writings bear an unmistakably-German touch, was short-lived. In 1964, the Supreme Constitutional Court was merged with the High Court. The continental legacy of Cyprus

212. S.A. DESMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* (Stevens & Son, Ltd. 1959); H.W.R. WADE, *ADMINISTRATIVE LAW* (Clarendon Press 1961).

213. CYPRUS CONST. art. 146.

214. *Ioannides v. The Republic*, (1979) 3 C.L.R. 295.

administrative law continued, however, albeit with a decisive turn towards Greek administrative law. At the time, Greek administrative law was modeled after the French administrative law and essentially judge-made, with the Council of State elaborating “general principles” of administrative law.²¹⁵ The case law of the Greek Council of State thus became the predominant authority in the early years of the Republic, supported by Greek academic writings.

The Supreme Court still makes frequent reference to the Council of State case law (and occasionally, guiding cases from the Greek administrative appeals courts). Over time, however, it has developed its own corpus of landmark cases that decide many important questions. Under Greek administrative law, the basis for treating such case law as a source of law would be to consider the case law as embodying “general principles” of administrative law; moreover, the values of legal certainty and predictability, and especially the principle of judicial hierarchy, constitute convincing arguments in favor of adherence to precedent.²¹⁶ The Supreme Court has repeatedly held that the *stare decisis* principle does apply to administrative law cases, precisely on the basis of the principle of judicial hierarchy and predictability.²¹⁷

Where does this lead us? The decisions of the five-member Supreme Court panels sitting on administrative litigation appeals (erroneously called “plenary benches” in colloquial legal jargon) are clearly binding on individual Supreme Court justices sitting on

215. See EPAMINONDAS SPILIOTOPOULOS, GREEK ADMINISTRATIVE LAW (Sakkoulas Pubs. 2004). Under the 1975 Constitution, German influence over Greek administrative law has expanded, even though the French influence remains stronger to this day. Since 1977, two “trial” instances of regular Administrative Courts were created (replacing specialized jurisdictions such as Tax Courts), supervised by the Council of State, which, however, still retains much of its first-instance jurisdiction. After decades of rule by case law, a Code of Administrative Process (along with a Code of Administrative Litigation Procedure) was enacted in 1999.

216. *Amanuel v. Alexandros Shipping Co. Ltd.*, 1 All E.R. 278, at 282 (1986).

217. *Demetriades v. The Republic*, (1977) 3 C.L.R. 213, notably at 320 ; *Elefetheriou-Kanga v. The Republic*, (1989) 3 C.L.R. 262.

first instance.²¹⁸ The same rule certainly applies to judgments by the entire Supreme Court (which sits in full bench on cases involving constitutional questions, as well as on cases deemed of fundamental importance). The Supreme Court has adopted the English rules of *stare decisis*, as contrasted to the more liberal U.S. approach.²¹⁹ It has moreover reserved its right to reverse its own judgments—a judicial policy grounded on English judgments and *dicta*, but asserted more vigorously in Cyprus.²²⁰ A single Supreme Court justice sitting at first instance is not considered as an “inferior court,” but he is bound by the decisions of an appeals bench.²²¹ The full bench, however, may reverse its own case law. An appellate panel should accordingly be able to explicitly reject (or reverse) the rule created by another appellate panel. Consistency is usually sought after, but there are several examples where a line of precedent has been disregarded in some cases, leading to a contrary line of precedent co-existing with the established one.²²² It is moreover not always easy for practitioners and judges alike to draw a sharp distinction as to the binding authority of Supreme Court judgments in administrative first instance and appeals judgments. For example, in holding that the Advocates’ Pension Fund constituted a private-law rather than a public-law entity a civil appeals panel led by the Chief Justice referred to Supreme Court judgments in administrative first

218. *Elefetheriou-Kanga v. The Republic*, (1989) 3 C.L.R. 262. *See, e.g.*, *KEO Ltd. v. The Republic*, (1998) 4 C.L.R. 1023 (Nikitas, J. sitting at first instance, holding “the *stare decisis* principle” made “absolutely binding” on him an appellate ruling on the point in question, *citing* *Republic v. Costas Tymvios Ltd.*, (1994) 3 C.L.R. 553. In the case cited as authority, the appellate panel reversed the first-instance judgment of Nikitas, J.).

219. *See e.g.* *Republic v. Demetriades*, (1977) 3 C.L.R. 213 at 259-264 (Loizou, J.), and *especially* 296-320 (Triantafyllides, P.).

220. *See* an early case, *Papageorgiou v. Komodromou*, (1963) 2 C.L.R. 221; *Mavrogenis v. House of Representatives*, (1996) 1 C.L.R. 315.

221. *Republic v. Demetriades*, (1977) 3 C.L.R. 213, at 320. *See also* *KEO Ltd. v. The Republic*, (1998) 4 C.L.R. 1023.

222. *See, e.g.*, a note by Laris Vrahimis in 1 *LYSIAS* 56 (2008), on the conflicting case law regarding the possibility of changing the legal ground on which applications may be filed under Order 48 of the Civil Procedure Rules.

instance settling the issue.²²³ The practical result has a direct impact on the workload of Supreme Court Justices: in a civil case, the District Court would have first instance jurisdiction, with a three-justice panel on appeal, whereas in an administrative case, six justices would have been employed, one on first instance and five on appeal.

V. CONCLUSIONS

In his “Third Legal Family” project, Vernon Palmer set as the “lowest common denominator” of a mixed jurisdiction three characteristics.²²⁴ The legal system must be built upon “dual foundations” of common-law and civil-law materials.²²⁵ This duality must be “obvious to an ordinary observer”—a condition which probably requires “a quantitative threshold.”²²⁶ Palmer also emphasizes the *structural “allocation of content”*—that the civil and common laws dominate their respective spheres.²²⁷ In the case of Cyprus, civil law has made sufficient inroads since independence so that we can honestly speak of dual foundations; mutations and hybrid elements cannot hide the predominance of each legal tradition in the respective sphere.

In that same project, jurists from seven emblematic mixed jurisdictions²²⁸ were asked to respond to a detailed questionnaire divided into ten subjects: the founding of the system; the role of

223. *Raphael v. Advocates’ Pension Fund*, (2008) 1 C.L.R. 300, 1 LYSIAS 95 (2008) (Artemides, C.J., cited as previous authority); *Raphael and Hadjiprodromou v. Advocates Pension Fund*, (2000) 4 C.L.R. 1212 (Kronides, J., which *cited Koumas v. Advocates Pension Fund*, (2000) 4 C.L.R. 1167, where Artemides, J. referred to *Nicolaou v. The Republic*, (2000) 3 C.L.R. 221: that case actually concerned the government-controlled Surplus Personnel Fund, which dealt with redundant private sector employees, citing Greek authorities more than two decades old).

224. Palmer, *Introduction to MIXED JURISDICTIONS WORLDWIDE*, *supra* note 1, at 10.

225. *Id.* at 7.

226. *Id.* at 8.

227. *Id.* at 8-9.

228. Two more jurisdictions—Botswana and Malta—were added in a second (2012) edition to the book.

magistrates and the courts; judicial methodology; statutory interpretation; the shape of mercantile law; the role of procedure and evidence; judicial reception of common law; emergence of new legal creations; the internal opposition between “purists,” “pollutionists” and “pragmatists;” and the linguistic factor.²²⁹ This article has provided a first opportunity to explore these subjects.

Cyprus belongs to a small group of legal systems that were once part of the common law world, but have moved somewhat away from that legal family, since independence in 1960. European integration is further challenging the colonial status quo, but it may still be too early to assess its impact.

Yet Cyprus is still more of a common law jurisdiction than not. Most of private and criminal law clearly remain common law subjects; as far as mercantile law (the subject most easily taken over by the common law in mixed jurisdictions with private law of continental origin) is concerned, Cyprus law has seen new legislative transplants from England even decades after independence. Compared to the more populous—and popular—mixed jurisdictions with centuries of history, tiny Cyprus can claim less juristic innovation (except, of course, for the necessity doctrine in constitutional law); but it can also offer interesting case studies of hybridity and mutation of both common law and continental legal institutions.

The judiciary has been perhaps the singular most important factor in determining the fate or the exact “mix” of the legal system. Appellate courts have remained strongly attached to common-law notions: this has resulted in the use of common law judicial techniques, and especially the English doctrine of *stare decisis*, even in “continental” legal fields.²³⁰ At the same time,

229. See the Questionnaire, *id.* at 471-478.

230. In this article, I have avoided applying the conceptual map of purists, pollutionists and pragmatists on Cyprus jurists, even though I have personally found it illuminating in the study of historical mixed legal systems. Cyprus legal consciousness has traditionally identified a division, which is not absolute, between lawyers educated in Britain and those educated in Greece. “Purists” in

those same courts are responsible for the wholesale reception of continental administrative law. Continental notions and techniques have also been integrated into the system, notably with regard to statutory interpretation. The abundance of written law (even before accession to the European Union) and the clear hierarchy of legal sources have been crucial factors in this respect.

The linguistic factor constitutes the other pillar of legal mixity. English has maintained enough of its influence so that the common law elements of Cyprus law are in no danger of disappearing; at the same time, the expanding use of the Greek language has been the pivot of—direct and indirect—continental influence.

These thoughts are certainly more of a working hypothesis than a conclusion properly speaking. This very article, after all, constitutes an early effort at understanding a unique legal system. Yet this is not a simple academic exercise. Comparative law theory is a valuable tool to those of us dedicated to the understanding, doctrinal development and elaboration of Cyprus law. Perhaps we could in time offer our own small contribution in consideration.

historical mixed jurisdictions tend to defend local uniqueness against the global model of the common law; “pollutionists” have the support of an imperial, colonial or federal institutional machinery, as well as sheer numbers. In the case of Cyprus, the originally existing (common law) tradition has not been traditionally linked with the ethnic/national identity of the population at large; it is “pollution” that allows Cypriots to claim a local identity and, occasionally, assert their ethnic identity.

**SEMANTICS AND LEGAL INTERPRETATION:
A COMPARATIVE STUDY OF THE VALUE OF EMBRYONIC
LIFE UNDER ARGENTINE AND U.S. CONSTITUTIONAL
CASE LAW**

María del Pilar Zambrano* and Estela B. Sacristán†

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I. INTRODUCTION

The question regarding the legal status of the embryo hinges around a more conceptual —or, rather, more fundamental— legal distinction, namely, the distinction between “things” and “persons.” What is involved here is determining whether embryonic human life is personal life and, thus, whether the embryo has rights, or whether it is just the object of somebody else’s rights.

This radical discussion becomes apparent in other more technical and concrete debates about the relationship between the value of human life and its stage of biological development, or its viability perspectives.¹ The claim that the legal value of embryonic life depends upon its stage of development and its viability perspectives is, as shall be discussed later, one of the main

1. In statutory law, this claim has been performed by means of the much discussed conceptual distinction between embryos and “pre-embryos” as can be seen, for example, in Spanish legislation concerning the donation and use of embryos (Ley No. 42, 1988) for therapeutic or scientific research use, and the Law concerning assisted reproduction (Ley No. 35, 1988). For a critical review of the ethical and legal implications of this conceptual distinction in American Constitutional Law, *see, e.g.*, Joshua S. Vinciguerra, *Showing “Special Respect” – Permitting the Gestation of Abandoned Preembryos*, 9 ALB. L.J. SCI. & TECH. 399, 405 (1999); and more recently, Robert Stenger, *Embryos, Fetuses and Babies: Treated as Persons and Treated with Respect*, 2 J. HEALTH & BIOMED. L. 33, 33 (2006).

arguments in favor of the right to abortion in American constitutional case law and, extensively, in favor of the right—and sometimes duty—to discard embryos. This claim is grounded, at least, on two normative propositions. According to the first one, constitutional norms would admit the existence of legal personhood only after birth, and/or would make the legal value of non-personal unborn life depend on its viability. The second proposition states that, in the light of the un-personhood of the embryo, the constitutional principle of equality would not be applicable to them.

As shall be described, Argentine constitutional case law rejects—with some exceptions—those distinctions based upon the contrary normative premises, according to which constitutional principles admit the personal quality in each and every human being from the time of conception, which is, in turn, set at the moment of fertilization. On this basis, it is understood that these same norms would recognize equal dignity in every person and would proscribe making the legal value of human life—which is always the life of a person—depend on the stage of development or on the (chances of) viability inside or outside the mother’s womb.

Two mutually complementary analyses will be examined in the next paragraphs. An Argentine and U.S. case law review will be carried out in order to infer the arguments that have been posed in both constitutional practices regarding the acceptance or rejection of those conceptual distinctions (sections II & III).

This comparative approach is justified by the fact that, as it has been insistently pointed out by various *ius*-philosophical schools of thought, the abstract nature of constitutional language is an open door to political, ethical, and philosophical assessments or, in Rawlsian terms, to the “comprehensive conceptions” of those who interpret and adjudicate law. In this light, although the arguments for legal protection of embryonic life and the counterarguments for a lack of legal protection of embryonic life arise in different normative contexts, the creative nature of constitutional

interpretation justifies the comparative approach propounded in this review.

However, there is more to constitutional interpretation than mere creativity. In order to be framed within a particular legal practice, legal interpretation should confine itself to two kinds of requirements. On the one hand, it should be coherent with the values, goods or ends that should be common to all legal practices in order to distinguish themselves from sheer violence.² On the other hand, legal interpretation should conform to the way that the particular legal practice within which it finds itself determines those common values, goods or ends which are common to all legal practices. This means that it should take into account the semantic and syntactic rules that apply to the legal statements under interpretation.

Creativity in interpretation operates, accordingly, within the framework of two margins: the teleological one and the linguistic or, more generally, the semantic one. These restrictions to interpretative creativity also set logical limits to the transposition of arguments from one constitutional practice, such as that of the

2. See PILAR ZAMBRANO, LA INEVITABLE CREATIVIDAD EN LA INTERPRETACIÓN JURÍDICA. UNA APROXIMACIÓN IUSFILOSÓFICA A LA TESIS DE LA DISCRECIONALIDAD 65 (Instituto de Investigaciones Jurídicas 2009; no. 142 in the ESTUDIOS JURÍDICOS series) [hereinafter ZAMBRANO, LA INEVITABLE CREATIVIDAD]. Among the many authors who agree on the description of interpretation as a comprehensive task which includes a creative dimension, not to be confused with unrestricted discretion, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY at Ch. I-IV (Harvard Univ. Press 1977); RONALD DWORKIN, A MATTER OF PRINCIPLE at Ch. I-VI (Clarendon Press 1985); RONALD DWORKIN, LAW'S EMPIRE 65-68, 411-413 (Harvard Univ. Press 1986); RONALD DWORKIN, FREEDOM'S LAW. THE MORAL READING OF THE AMERICAN CONSTITUTION 10 (Harvard Univ. Press 1996); RONALD DWORKIN, JUSTICE IN ROBES 18-21 (Harvard Univ. Press 2006). For a critical review in Spanish language of Dworkin's proposal, see Pilar Zambrano, *Objetividad en la interpretación judicial y objetividad en el Derecho. Una reflexión a partir de las luces y sombras en la propuesta de Ronald Dworkin*, 56 PERSONA Y DERECHO 281 (2007), and ZAMBRANO, LA INEVITABLE CREATIVIDAD 37-53. The most relevant author insisting on the possible synthesis of creativity and objectivity in interpretation, outside the English language field, is perhaps ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION 17 (Ruth Adler & Neil MacCormick trans., Clarendon Press 1989).

U.S., to another, such as that of Argentina. Therefore, the benefit of the proposed comparative analysis will depend upon the adequacy of the questions that are posed. With these restrictions in mind, the questions that this comparative study aims to answer are:

Which is the justificatory or teleological perspective of interpretation assumed or postulated in each of these case law practices? (Section IV B(1))

Which is the semantic theory underlining the whole interpretative process in each of these case law practices? (Section IV B(2))

Which of these teleological and semantic postulates best fit the final aims or values of constitutional law? (Section V)

In the end, we aim to reflect upon the reciprocal influence between these two margins of interpretation. Particularly, we intend to test the coherence between, on the one side, the claim that fundamental rights are deontological and, on the other, the assumption of a constructive or criterial semantic theory of language in the interpretation of the concept of legal personhood (section V).

II. THE EMBRYO IN U.S. CONSTITUTIONAL CASE LAW

Although the status of the embryo is not regulated by federal statutory law, it may be induced from the federal Supreme Court decisions concerning the issue of abortion that, as a whole, establish the legal status of the unborn in its various gestational stages. The leading cases in this line are the well-known *Roe v. Wade*³ and *Casey*.⁴

A. *The Value of the Embryo's Life under Roe v. Wade*

The famous case of *Roe v. Wade*, argued before the United States Supreme Court, challenged a Texas criminal abortion statute

3. *Roe v. Wade*, 410 U.S. 113 (1973).

4. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

which penalized abortions in all cases, except when pregnancy meant a risk to the life of the mother.

The District Court found the Texas Act unconstitutional in the light of the 9th Amendment, which admits implicit rights stemming from the U.S. Constitution, but denied the injunction that would have allowed Roe to benefit from this unconstitutionality. Roe filed for an appeal to have the original decision upheld, and to obtain the injunction.⁵

The Supreme Court analyzed Roe's claim in the light of the fundamental right to privacy, a right that, even if not explicitly mentioned in the U.S. Constitution, had been recognized by the Court in previous cases as a necessary dimension of other liberty rights that were explicitly recognized.⁶ The Court, then, had to decide whether the choice to abort was one of the dimensions of that fundamental right or preferred freedom, what its extent was, and to which constitutional clause it was related. These decisions called for a previous determination as to the moment in which the U.S. Constitution admits the existence of personhood in law. In this sense, the Court asserted that:

The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. . . . If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.⁷

The majority solved this interpretative question by denying the fetus's personhood on the basis of semantic, syntactic and historical arguments. From both the semantic and the syntactic points of view, it was argued that none of the constitutional clauses define the meaning of the word "person," and that each time such word is used, it is with reference to human beings that have already

5. *Roe v. Wade*, 410 U.S. at 122.

6. *Id.* at 153-55.

7. *Id.* at 157.

been born.⁸ From the historical point of view, it was stated that at the time that the 14th Amendment was passed, and during most of the nineteenth century, state legislation relating to abortion was much more permissive than it currently was. This historical fact, combined with the presumption that the authors of the Texas legislation under review knew about this legal context, would indicate that the constitutional drafters had no intention to include the *unborn* as subject to the rights established in that Amendment.⁹ Relying on these arguments, the Court concluded that the term “person,” as used in the Constitution, does not apply to the unborn.¹⁰

Out of conceptual necessity, the denial of the personhood of the unborn became the denial of the right to life before birth. But this denial did not prevent the United States Supreme Court from recognizing a legitimate state interest in the protection of embryonic and fetal life, which was called “potential human life.” Nevertheless, as the right to abortion had been recognized as a “preferred freedom” or “fundamental right,” the constitutionality of the rules regulating abortion in view of this interest depended on whether or not they passed the strict scrutiny test: that is, the requirement that the states justify both the compelling nature of the interests at stake and the norms they are seeking to promote – i.e., that a compelling state interest exists, as well as the necessary relationship between them.¹¹

Based on this, the Court recognized the already renowned three-stage balancing of rights that is comprised of the right of the mother to abort, and the two state interests that have been deemed legitimate.¹² According to this three-stage concept, the Court understood that it is only during the third trimester that the state

8. *Id.* at 158.

9. *Id.*

10. *Id.*

11. *Id.* at 159.

12. *Id.* at 163-64.

interest in the protection of the “potential human life” acquires enough relevance so as to justify the criminalization of abortion.

B. Balancing the Right to Abortion and State Interest in Potential Human Life

Regarding our object of interest, *Roe’s* conceptual inheritance is that legal personhood is not recognized by constitutional text and practice until birth, but, nevertheless, there is a legitimate state interest in “potential human life” from the moment of conception.

Taking *Casey*¹³ as a landmark case in post-*Roe* case law, the balancing standards between the right of the mother to abort and the state interest in potential human life were constructed around the following issues: (a) whether states were or were not enabled to set forth a legal duty that women perform fetal viability tests prior to the abortive proceedings that were carried out during the second trimester; (b) what was the constitutionally admissible content of informed consent prior to abortive proceedings, and who had to provide it; and (c) whether or not the states were enabled to promote their interest in potential human life by means other than prohibiting abortion during the first two trimesters.

Regarding the issue of compulsory fetal viability exams, the Court issued contradictory statements, first banishing them and then opening the way to them.¹⁴ With varied grounds and a crucially tight majority, the Court cleared the way in *Webster*, affirming that state regulations could establish compulsory pre-procedure medical viability tests independent from the trimester in which the tests were ordered, under the sole condition that viability

13. *Casey*, 505 U.S. 833.

14. *See* *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 63-65 (1976), banishing State intrusion, *and* *Colautti v. Franklin*, 439 U.S. 379, 390-97 (1979), allowing it.

was possible according to ordinary medical criteria and the exams did not pose a risk to the mother's health.¹⁵

As to the content of informed consent, the Court found that any state regulations aimed at deterring the mother from her decision to abort rather than informing her about the risks involved in an abortion proceeding were contrary to the Constitution. These regulations were deemed to ignore the trimester scheme involved in *Roe*, and were therefore deemed unconstitutional.¹⁶

Finally, regarding the non-coercive use of the sovereign power, the Court held, invariably—although on a tight majority—that the states were not under an obligation to assign public funds to provide abortions nor were they under an obligation to perform abortive proceedings in public health institutions, even when either of those choices implicitly promoted childbirth over abortion.¹⁷ Along this line of thought, it was also held that a state could lawfully establish that human life starts at conception in so far as such statement did not have the practical effect of casting aside the balancing trimester schema.¹⁸

To sum up, as it was pointed out in the plurality opinion in *Webster*, the Court had progressively become a kind of medical committee, assisted by legislative powers, regarding the most varied implications of abortive proceedings: establishing how long of a waiting period prior to abortion procedures the law should set; what issues had to be included in the informed consent and which were to be excluded; who could provide the informed consent; when was it legitimate to conclude that the fetus was viable and

15. *Webster v. Reproductive Health Services*, 492 U.S. 490, 515-21 (opinion of Rehnquist, C.J., White, J. and Kennedy, J.); 526 (concurring opinion of O'Connor, J.); and 538 (concurring opinion of Scalia, J.) (1989).

16. See *Akron v. Akron Center for Reproductive Health*, 462 U.S. (1983), 443-45; later confirmed in *Thornburgh v. American College of Obst. & Gyn.*, 476 U.S. 747, 762-63 (1986).

17. See *Maher v. Roe*, 432 U.S. 464, 475-79 (1977); *Poelker v. Doe*, 432 U.S. 519, 521 (1977); *Harris v. McRae*, 448 U.S. 297, 325 (1980).

18. *Webster v. Reproductive Health Svcs.*, 492 U.S. at 513.

when was it legitimate to conclude it was not viable; what the consequences were; etc.¹⁹

Along this process, the function of the *Roe* tripartite schema became blurred and increasingly murky. It was expected that it would provide clear and precise criteria regarding the way in which the state's interests and the case law-based rights of the mother to abort were to be balanced; however, only case law dealing with informed consent stands as a seamless application of the schema. The remainder of the questions posed before the Court only succeeded in stretching the strings to the breaking point, as was highlighted particularly in *Webster*, in which four judges issued a dissenting opinion,²⁰ but no explicit majority was reached because there were not five judges reaffirming or holding the constitutional validity of *Roe*.

In addition to all this, the decisions of the Court were almost always made, as in *Roe*, with an extremely narrow majority that remained united at the level of the judgment, but at variance when it came to providing the reasoning for the decisions. Disparate grounds and miniscule majorities resulted in an unsurprisingly complex set of rules that offered, to the law community in general, and the states' highest courts in particular, confusion instead of clarity. This state of confusion was specifically acknowledged by the majority in *Casey*,²¹ and this is why it could be affirmed that the cards were, in a way, reshuffled.

Indeed, in *Casey*, the Court revised both the tripartite temporal schema and the rights and interests balancing criteria. Regarding the schema, it was decided that the viability of the fetus outside the mother's womb, and not the length of the pregnancy (i.e., the third trimester) is what established the point at which the state interest in protecting "potential human life" becomes compelling enough to

19. *Id.* at 517-18.

20. Blackmun, J. and Stevens, J. issued dissenting opinions, and Brennan, J. and Marshall, J. joined Blackmun, J.'s opinion.

21. *Casey*, 505 U.S. at 944-51.

legitimize a ban on abortion. Regarding the balancing criteria, it was admitted that, even prior to viability, the state interest in protecting and promoting potential human life is important enough to enable the states to legitimately promote said potential human life in an active manner, provided that this promotion did not presuppose an obstacle or an undue burden on the exercise of the right to abort. On these grounds, and contrary to prior decisions, it declared that state measures aimed at discouraging the mother from the decision to abort were constitutionally valid.²²

C. Some Conclusions

According to this review, it can be gathered that the value of human life is not uniform according to the United States Supreme Court case law regarding abortion, for it varies according to the development stage that the fetus may have reached. Three different stages can be individualized. The first would correspond to “non-viable potential human life,” which starts at conception and lasts until the moment when the fetus is viable *outside* the mother’s womb, with or without artificial assistance. The second stage would correspond to “viable potential human life,” and it would start at the beginning of viability outside the mother’s womb, until birth. The third stage is personal human life, which starts at birth and ends with natural death.

Embryos would fit into the first stage, “non-viable potential human life,” and this is why they could be classified as an object of a state interest, characterized by the United States Supreme Court in the following manner:

It is optional for states to promote state or local interests in potential human life.

As a state interest, it is not compelling enough so as to justify the limitation of the mother’s right to obtain an abortion, but it is

22. *Id.* at 874-76.

strong enough so as to justify compulsory measures aiming at deterring the decision to abort.

The states can overtly favor the promotion of embryonic life, as long as this does not pose an undue burden on the mother's right to abort prior to the moment of fetal viability outside the mother's womb.

D. The States' Case Law on Embryos

The optional status of both the promotion and the determination of the weight of the state interest in non-viable potential human life—within the limits established by the Court—becomes legally active, at both the federal and state levels, in a fabric that is woven with the most diverse criteria regarding the legal status of the embryo.

That status is defined by the states only on an exceptional basis, as would be the case in the state of Louisiana. In the case of the other states, as well as at the federal level, the status may be inferred from the regulation of different activities that are directly or indirectly related to the use or destination given to embryos conceived *in vitro*. The most relevant of these activities are those that have to do with assisted reproduction, and with the scientific and technological research that requires using, and possibly discarding, embryos. The embryo's status will depend, essentially, on the existence, or lack thereof, of limitations to embryo discard.

Only the legislation of the state of Louisiana and that of New Mexico establish a ban on the sale, destruction or any other process that does not involve embryo implantation for later development. This establishes a duty of care and custody on those clinics in which the embryos were created.²³ On the opposite side, states such as California, Connecticut, Maryland, Massachusetts and

23. LA. REV. STAT. § 9:126; N.M. STAT. § 24-9A-[1][g]. For a comparative study of these two statutes, see Diane K. Yang, *What's Mine is Mine but What's Yours Should Also Be Mine: An Analysis of State Statutes that Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587 (2002).

New Jersey expressly establish the duty of medical service providers to inform the patient of the possibility of discarding embryos that were not implanted. However, these same statutes prohibit the sale or commercialization of the embryos, whatever the final aim.²⁴ Other states, such as Oklahoma, take up an ambiguous attitude: even if they only allow for heterologous conception when performed with a reproductive aim, they omit establishing the same limitation in the field of homologous conception, and also fail to clarify what will be the final use of those embryos that, even if conceived for a reproductive purpose, were never implanted.²⁵

At the federal level, ever since the Clinton presidency, a ban has been in place on the use of federal funds for the creation of human embryos for research purposes or for research in which the human embryos were destroyed, discarded or intentionally subjected to a risk of damage or death greater than the risk allowed in research involving fetuses inside the uterus (commonly known as the “Dickey Amendment”).²⁶ This limitation was not extended to include privately funded or state funded, research. However, in March 2009, President Obama issued executive order 13505,

24. See CAL. HEALTH & SAFETY CODE § 125305; CONN. GEN. STAT. § 19a, 32d-32g; MD. CODE ECON. DEV. § 5-2B-10; MASS. GEN. LAWS ch. 111L; N.J. STAT. § 26:2 Z-2.

25. See OKLA. STAT. tit. 10, § 555. For a comparative synthesis of states’ legislation concerning assisted fertilization, see <http://www.ncsl.org/programs/health/genetics/embfet.htm> (last visited Jul. 12, 2013).

26. This prohibition was not included in a specific statute concerning scientific research on embryos, but was instead included, at the initiative of Senator Jay Dickey, in the Balanced Budget Down Payment Act, I, Pub. L. No. 104-99, § 128(2), 1.10 Stat. 26, 34 (1996), and reapproved each year until 2009. For a detailed and complete description of the federal politics concerning the funding of the use of embryos in scientific research, see *Monitoring Stem Cell Research. A Report of the President’s Council on Bioethics*, Washington D.C., January 2004, available at <http://bioethics.georgetown.edu/pcbe/reports/stemcell/> (last visited Jul. 17, 2013). A chronologic synthesis of American state law concerning stem cell research can be found at <http://liti-blog.blogspot.com/2009/08/lifting-ban-or-obfuscating-truth-bob.html> (a pro-life blog, last visited Jul. 12, 2013).

which removed limitations on the use of federal funds for research on new embryonic stem-cell lines.²⁷

Against this backdrop of complex, intertwined criteria, constitutional case law at the state level has basically hinged around the issue of who has the right to decide what the use of the non-implanted embryos or pre-embryos will be, and with what requirements, when there is no agreement between the parents in this respect.

I. Davis v. Davis and Kass v. Kass

The leading case in this matter was *Davis v. Davis*,²⁸ a famous case settled by the Tennessee Supreme Court in 1992. It involved the fate of seven embryos that had been conceived by *in vitro* fertilization. At the time when the progenitors divorced, the embryos were kept under cryopreservation in the clinic in which the progenitors had been given the corresponding treatment.

Initially, and contrary to the wishes of Mary Sue Davis, one of the progenitors, that the embryos be implanted in her uterus, Junior Lewis Davis, the other progenitor, wanted them to remain under cryopreservation until he came to a decision regarding their use. By the time the case reached the state Supreme Court, both parties had changed their claims. Mary Sue wanted the embryos to be donated to any couple that was willing to undergo fertility treatment, insisting on the personal nature (personhood) of the embryos. Junior Lewis wanted them to be discarded. Mary Sue's contention of embryonic personhood was accepted at the trial court level, explicitly rejected by the Court of Appeals, and, eventually, by the state Supreme Court.

Apart from denying the personal nature of the embryos on the basis of the *Roe v. Wade* ruling, the state Supreme Court also denied that the state interest in "potential human life,"

27. Exec. Order No. 13505, 74 Fed. Reg. 10667 (Mar. 11, 2009).

28. *Davis v. Davis*, 842 S.W.2d. 588 (Tenn. 1992).

acknowledged as legitimate and optional for states in *Roe v. Wade* and reaffirmed in *Webster*, was compelling enough as to settle the issue in favor of the implantation of the embryos. Relying on state precedents, and on civil and criminal law regulations regarding the fetus' status when it is inside the mother's womb, the Court concluded that the State of Tennessee had no adopted interest whatsoever in the "potential human life" of the un-implanted embryos.

Therefore, the un-implanted embryos were not the object of any state interest in potential human life, let alone persons. Even so, the Court conceptualized a new category for embryos that placed them in between property and personhood, to which a special respect was owed given its potential to become a person. In reality, this intermediate category was closer to property than to personhood, for the progenitors' rights on un-implanted embryos were deemed "in the nature of a property interest," and included the right to decide on their disposal.²⁹

On these grounds, the Court set forth a principle of interpretation, whereby whenever there is no agreement between the parties, the courts should decide the matter by balancing the opposing interests. Applying this principle to the case, the Court set forth the rule in which the interest of one of the parties in obviating fatherhood or motherhood (in this case, the father) is stronger or greater than the interest of the opposing party (in this case, the mother) in donating the embryos for future implantation.

*Kass v. Kass*³⁰ continued the development of state common law in the matter of determining the use of un-implanted embryos whenever there is disagreement between the progenitors. Unlike *Davis*, here there was a prior written agreement that established that if the parties became unable to agree on the use of the un-implanted embryos, they would be donated to be used in assisted reproduction scientific research.

29. *Id.* at 596.

30. *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

Although this agreement between the clinic and the parties was later ratified in the divorce decree, the woman asked that the embryos be implanted in her, against the husband's wish that the agreement be executed. In all of the judicial proceedings, the debate hinged on the correct interpretation of the agreement signed between the parties and the clinic.

The New York State Court of Appeals affirmed the decision of the trial court that the agreement was clear that in event of disagreement between the parties, the un-implanted embryos had to be used for scientific research, and so decreed that the embryos (described as pre-zygotes) be given for that use.³¹

2. Will as the Ultimate Determinant of the Embryo's Life Value

The binding nature of the common will of the couple, as expressed in the covenants written by them or as agreed upon between themselves and the clinic, was reaffirmed in *Litowitz*,³² even when the parties subsequently agree to deviate from the agreement.

In this case, what was at stake was the use of embryos that had been conceived with the husband's reproductive material, and an ovule donated to the couple by a female third party. The agreement between the Litowitzes and the clinic prescribed that, if the embryos were not implanted within five years' time after their conception, the clinic should thaw them; in effect, destroy them. Within a divorce context, and after the five-year deadline had expired, both parties communicated their decision that the embryos that were still frozen be implanted. The issue between the divorcing parties was not whether or not they should be implanted, but rather, in whom. Mrs. Litowitz wanted the embryos to be implanted in her, and the ex-husband wanted the embryos to be donated to another woman. The Washington state court did not

31. *Kass v. Kass*, 696 N.E.2d at 178.

32. *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002).

provide a solution for this problem, for no proof had been produced during the trial to show that the embryos were still alive. Even so, the Court ventured to say that, even if their existence were proven, their use should be regulated by the terms of the agreement; i.e., they should be thawed (destroyed).³³

In *A.Z. v. B.Z.*, the Massachusetts Supreme Court rejected the female progenitor's contention that the agreement signed by the clinic and both of the progenitors, according to which, in case of divorce, the embryos would be implanted at any of the parties' request, be enforced. This Court relied, among other grounds, on the theory that to compel a person to become a father or a mother against his or her will was contrary to public policy, even if they had contractually bound themselves to procreate.³⁴ This holding was later reapplied by the Iowa Supreme Court *In re Marriage of Witten*³⁵ and, by way of *obitum dictum*, by a Texas Court of Appeals, in *Roman v. Roman*.³⁶

3. Some Conclusions

a. Un-implanted embryos are not conceptually persons, either under federal or state constitutional case law. Nevertheless, they are considered the object of "special respect" because of their potential to become persons, which, although different from the respect owed to personal dignity, must be differentiated from the treatment that is owed to objects of interest or property rights.

b. The exclusive right of the mother to dispose of the embryo's life, acknowledged in *Roe* as a privacy right, only refers to embryos that are already implanted in the mother's womb. It excludes un-implanted embryos, and therefore, the mother has no right to obviate the father's interests to implant or discard embryos that are cryogenically stored.

33. *Id.* at 271.

34. *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).

35. *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

36. *Roman v. Roman*, 193 S.W.3d 40 (Tex.2006).

c. The use of un-implanted embryos is regulated, as a rule, by the progenitors' unanimous decision.

d. In case of disagreement, the written agreement prior to their conception is binding, provided that it is unambiguous.

e. However, the agreement lacks binding force regarding embryo implantation. In this respect, the present and concomitant meeting of minds of both progenitors is required, both concerning the fact of implantation and the body into which they should be implanted. Therefore, either progenitor has "veto power" regarding embryo implantation, be it in the womb of the mother or in that of a third party.

f. "Special respect" does not mitigate in any way the meeting of minds of the progenitors. It is only a relevant interpretative criterion to be used whenever the use of the embryos must be judicially settled, given a disagreement between the progenitors, and in the face of a lack of a previous written agreement settling the issue.

g. The "special respect" principle does not have enough weight in the "counterbalancing" of interests as to make the embryo implantation compulsory. On the contrary, in this counterbalancing, the interest of one party in not producing a child is heavier than the interest of the opposing party in gestating the embryo or donating the embryo for implantation.

III. THE EMBRYO IN ARGENTINE CONSTITUTIONAL CASE LAW

The Argentine case law on embryos offers a rich range of interpretations that seem to be firmly established. Young as this judicial experience may be, this short time is not an obstacle to reviewing the decisions issued by the Argentine Supreme Court, which is the highest national court in the federal order, as well as those issued by other Argentine courts.

A. *The Argentine Supreme Court (2001-2012): Tanus, Portal de Belén and Sánchez*³⁷

In *Tanus*³⁸ and *Portal de Belén*,³⁹ the Argentine Supreme Court determined the sense and scope of the constitutional principle of the fundamental right to life in relation to embryonic life. Both judicial decisions, considered as a whole, give rise to the following interpretative rule: this principle is binding in the case of embryos with the same scope, as if it were the case of an already-born person, and no differences based on its development stage or its viability prospects shall be established.

In *Tanus*, the majority of the Court affirmed the appealed decision, which had authorized the induction of labor of an anencephalic fetus in a public hospital. When providing the grounds for the decision, the Court pointed out that, even though the authorization to induce labor had been requested in the 20th week of pregnancy, by the time the case was to be decided by the Supreme Court, the mother had reached the 8th month of pregnancy. According to the Court, this temporal difference allowed for the differentiation of childbirth by induction of labor, on the one hand, and abortion on the other. It was argued that the death of an anencephalic fetus outside the mother's womb, when the stage of extra-uterine viability is reached, is not to be attributed

37. On Mar. 13, 2012, in the leading case *F.,A.L.* (CSJN, “F., A.L. s/ medida autosatisfactiva,” Fallos 259: XLVI (2012)), the Argentine Supreme Court issued a decision concerning women's legal right to abort in case of rape. Although this decision did not openly reject the assertions stated in *Portal* and *Tanus* concerning the legal personhood of the embryos, it did put in question its practical legal effects. It is therefore very likely that the case law era which started with *Tanus* has come to an end with *F.,A.L.* The purpose of this study being to compare the Argentine and the American case laws from the point of view of their respective coherence with the conceptual features of fundamental rights, this comparison only takes into account the era in which the former is relevantly different from the latter. That is, the era which ended in *F.,A.L.* and goes from *Tanus* to *Sanchez*.

38. CSJN, “*Tanus, Silvia c/ Gobierno de la Ciudad de Buenos Aires s/ amparo*,” Fallos 324: 5 (2001).

39. CSJN, “*Portal de Belén - Asociación Civil sin Fines de Lucro c/ Ministerio de Salud y Acción Social de la Nación s/amparo*,” Fallos 325: 292 (2002).

to the anticipated labor induction, but to the congenital condition of the fetus.

Therefore, according to the Court, the case didn't concern the constitutional validity of abortion, but the way in which two rights were to be counterbalanced: the mother's right to health, and the anencephalic fetus's exercise of its right to life and to health. Considering that in the eighth month, premature birth would not alter the unavoidable death of the child, the Court understood that inducing labor did not alter the essential content of the fetus's right to life or to health.

Leaving aside for the moment its logical validity, it should be noticed that the Court's reasoning asserted that the fundamental right to life is in force from the moment of conception under the American Convention for Human Rights, Law 23054, article 4.1., and under article 2, Law 23849, which affirms the Children's Rights Convention.⁴⁰

In *Portal de Belén*, the Court reaffirmed this normative interpretation, further specifying that conception takes place at the moment of fertilization. In stating this, the Court relied on the opinion of different geneticists and biologists that "it is a scientific fact that the 'genetic construction' of the person is there [at the

40. "Tanus," *supra* note 38, at cons. 11°. Art. 4 of the American Convention for Human Rights states: "Right to life. 1. Every person has a right to her life being respected. This right shall be granted by Law and, in general, from the moment of conception. Nobody shall be arbitrarily deprived of his life" (the translation is ours). In Spanish: "*Derecho a la vida. 1. Toda persona tiene derecho a que se respete su vida. Este derecho estará protegido por la ley y, en general, a partir del momento de la concepción. Nadie puede ser privado de la vida arbitrariamente*" (Ley No. 23054, B.O. del 27/2/1984). Article 2 of Law 23849 states: "When ratifying the Convention, the following reserves and declarations shall be stated: (...) In relation to article 1 of the Convention, the Argentine Republic declares that it shall be interpreted in the sense that the term "child" is understood to refer to all human being from the moment of conception and until eighteen years old" (The translation is ours). In Spanish: "*Al ratificar la Convención, deberán formularse las siguientes reservas y declaraciones: (...) Con relación al artículo 1° de la Convención sobre los Derechos del Niño, la República Argentina declara que el mismo debe interpretarse en el sentido que se entiende por niño todo ser humano desde el moment de su concepción y hasta los 18 años de edad*" (Ley No. 23849, B.O. del 22/11/1990).

time of conception], all set and ready to be biologically aimed, because ‘the egg’s’ (zygote’s) DNA contains the anticipated description of all the ontogenesis in its tiniest details.”⁴¹

From a factual point of view, the Court considered it proven that a contraceptive, the marketing and distribution of which had been authorized by the national Ministry of Health and Social Action, could operate under three subsidiary mechanisms. Contraception could: (i) prevent ovulation, or (ii) operate as a spermicide. Neither of these mechanisms posed a constitutional objection from the point of view of the embryo’s right to life. In a subsidiary manner, for the cases in which these two mechanisms had not been successfully activated, the contraceptive challenged in *Portal* would operate by (iii) modifying the endometrial tissue and preventing embryo implantation. The Court found that this subsidiary mechanism violated the embryo’s right to life.⁴²

Therefore, on the basis of these normative and factual premises, the Supreme Court revoked the appellate court’s decision, which considered it lawful for the National Ministry of Health and Social Action to authorize the marketing and distribution of the contraceptive under challenge.

After these decisions, the Supreme Court acknowledged the personhood of the *nasciturus* in *Sánchez*,⁴³ leaving aside any considerations related to a hypothetical abortion. When acknowledging the personhood, the Supreme Court qualified the unborn involved in the case as “a person ‘to be born’, this is to say,

41. “Portal de Belén,” *supra* note 39, at cons. 7°.

42. *Id.* at cons. 9° and 10°.

43. CSJN, “Sánchez, Elvira Berta c/ M° JyDDHH – art. 6° L. 24411 (resol. 409/01),” Fallos 330: 2304 (2007), in which the Court provided a reminder that article 30 of the Argentine Civil Code defines as “persons” all beings capable of acquiring rights and contracting debts, and art. 63 extends the concept of person to all unborn human beings who are conceived in the mother’s womb. Literally: “[E]l art. 30 del Código Civil define como personas a todos los entes susceptibles de adquirir derechos, o contraer obligaciones; mientras que el art. 63 señala como especie del género “persona” a las “personas por nacer,” definiéndolas como aquellas que, no habiendo nacido, están concebidas en el seno materno.” (cons. 9°).

one of the juridical species of the 'person genus' under our civil law"⁴⁴

B. Some Conclusions

The principles and rules acknowledged and established in both rulings regarding the legal status of the embryo could be summarized as follows:

1. Legal personhood is acknowledged, under Argentine constitutional law, from the moment of conception.
2. Conception is deemed to happen at the moment of fertilization.
3. Any action aimed at interrupting embryotic development after the moment fertilization occurs should be banned, even when this interruption is merely eventual or probable.
4. Therefore, the scientific debate regarding the distinction between pre-embryos and embryos, or between viable embryos and non-viable embryos, lacks legal significance.

C. Other Courts of Law and the Embryo

The case law of other courts regarding the legal status of the embryo has primarily hinged on the debate over two different series of issues: one is whether local birth control policies were constitutional, and the other on establishing the use that should be assigned to frozen embryos created during fertilization procedures. The legal context on which both debates are centered involves, primarily, local and federal statutes regulating sex and reproductive health. Let us review that debate.

1. Birth Control Questions

The trend to regulate the fundamental or constitutional right to health, especially as related to sexual and reproductive health, at

44. *Id.* cons. 11°.

the local or provincial (state) level started in the 1990s and has continued to grow ever since. Therefore, it is a process that started some years before the 1994 constitutional amendment, and at least a decade before the Supreme Court issued its opinion in the *Portal de Belén* case regarding whether the birth control policies allowing the disruption of implantation, or abortive methods in general, were constitutional.

Nevertheless, all statutes issued before and after the 1994 constitutional amendment made the medical prescription and provision of contraceptives dependent on the condition of their non-abortive effect. The same condition is set forth in national Law 25673, promulgated in 2002.⁴⁵ Although this law is automatically applicable to health services subject to the federal jurisdiction of the National Ministry of Health, it also empowers the provinces to join the health program created by it. Thus, be it effected directly or indirectly, local regulation of sexual and reproductive health includes a general ban on abortive methods of family planning.

Notwithstanding this ban, some of these norms, or the regulations issued under them, allow contraceptive methods regardless of the distinction between those which operate by inhibiting fertilization and those which potentially inhibit the implantation of the fertilized egg.

This lack of normative precision was subject to judicial debate on different occasions after *Portal de Belén*. A conclusion that can be drawn from this limited, and young, case law *corpus*, is that the debate, at the local or provincial level, does not revolve around embryonic personhood—an aspect that is never challenged—but rather on the details regarding how to adequately weigh it against the mother's right to reproductive health. Primarily, the debate is centered around the normative consequences of the scientific debate regarding the anti-implantation mechanism assigned to

45. Ley No. 25673, art. 6°, B.O. 30032 (Oct. 22, 2002).

emergency contraception and to the intra-uterine device, or to any contraceptive that happened to operate, or could operate, by obstructing the embryo's development. Regarding this issue, the different opinions are detailed in the following paragraphs.

2. A First Look at Portal: All "Emergency" Contraceptives are Held Abortive

In *Asociación Civil Familia y Vida*,⁴⁶ a provincial court of San Luis held that articles 1 and 2(c) of provincial Law No. 5344 regulating sexual and reproductive health, and article 4 of its regulatory decree 127/2003, were contrary to the Constitution. The first norm states that "the province of San Luis, by means of the Ministry of Health, shall provide to the inhabitants who apply for it, information, assistance and guidance for responsible parenthood, in order to secure and guarantee the human right to decide freely and responsibly about reproductive patterns and family planning".⁴⁷ The second establishes that medical providers in public health assistance institutions should prescribe and provide contraceptive methods.⁴⁸

The local Court understood that this normative plexus was contrary to the Constitution because it failed to expressly exclude the specific contraceptives that forestall implantation from the generic provincial duty of prescribing, providing and inserting contraceptives at public health facilities.⁴⁹ As grounds for this argument, the local Court relied on the rule, ostensibly established in *Portal de Belén*, in which any post-coital or emergency contraceptive method is to be deemed abortive.⁵⁰

46. Cámara Civil, Comercial, Minas y Laboral N° 2 de San Luis, "Familia y Vida Asociación Civil c/ Estado Provincial s/ amparo," Expte No. 18-F-2002, del 21/3/2005.

47. Ley No. 5344, art. 1° (Prov. de San Luis, Oct. 30, 2002).

48. Dto. 127/03, art. 4° (Prov. de San Luis, Jan. 21, 2003).

49. "Familia y Vida Asociación Civil," *supra* note 46, at cons. 3.3.

50. *Id.*

3. *A Second Look at Portal: Applying the pro homine Principle in Favor of the Embryo's Right to Life*

Similar to San Luis Law 5344, Córdoba Law 9073 establishes and regulates the so-called “Responsible Motherhood and Fatherhood Program,”⁵¹ generically making the prescription and delivery of contraceptives at health assistance centers depend on their non-abortive effect. However, Law 9073 differs from Law 5344 because the former excludes from the compulsory list of allowed contraceptives both emergency contraceptives and the intra-uterine device.⁵² And even if article 7 of Law 9073 allows enforcement officers to add new methods of contraception, it expressively states that these methods should coincide with those previously approved of by competent national authorities.

It was thus not the local statute, but the way in which it was enforced by the Executive Power, which included the free delivery of the so-called emergency contraceptives at public health assistance centers, that posed a constitutional problem.⁵³ The local Court found this enforcement illegal and unconstitutional. Its illegality was grounded precisely on the inconsistency between the *de facto* application and Law 9073, article 6. Its unconstitutionality was based almost exclusively on the principles and rules established by the Argentine Supreme Court in *Portal de Belén*, showing a partially different interpretation from that of the San Luis Court of appeals.

The main difference between the two holdings lies on the reasons for and the scope given to the rule by which emergency contraception should be prohibited due to its abortive effect. As

51. “Programa de maternidad y paternidad responsables,” Ley No. 9073 (Prov. de Córdoba, Dec. 18, 2002).

52. *Id.* at art. 6°.

53. Cámara de Apelaciones en lo Civil y Comercial de 1a. Nominación, sentencia no. 93, “Mujeres por la Vida - Asociación Civil sin Fines de Lucro — filial Córdoba— c/ Superior Gobierno de la Provincia de Córdoba s/ amparo — Recurso de apelación,” Expte No. 1270503/36, del 7/8/2008 (Majority: Justices Mario Sarsfield Novillo and Mario R. Lescano. Minority (denying the injunction): Justice Julio C. Sánchez Torres).

stated above, according to the San Luis Court of Appeals, the federal Supreme Court was said to have established, in *Portal de Belén*, a kind of *iure et de iure* presumption that every post-coital contraceptive operates via an anti-implantation mechanism. The Córdoba court, on the other hand, is slightly more cautious. It does not deny the scientific debate regarding the moment of implantation, nor does it consider that *Portal de Belén* has definitively solved its legal relevance. Rather, it establishes that the existence of scientific doubt over the moment of fertilization is a sufficient reason to justify the ban on emergency contraception, and it does so by applying the *pro homine* principle.⁵⁴

4. A Third Look at Portal: Applying the pro homine Principle in Favor of the Woman's Right to Reproductive Health

Holding a contrary view, other Justices have interpreted that the *pro homine* principle should be applied in favor of the woman's right to reproductive health, and, therefore, it should be unequivocally determined that an emergency contraceptive method has an abortive or anti-implantation nature in order to justify its prohibition.⁵⁵ Some other Justices have only required "sufficient proof" that the method's operation obstructs implantation in the specific case in which it is prescribed, which does not necessarily amount to certainty.⁵⁶

54. See opinion of Justice Sarsfield Novillo, who confirmed the majority's opinion, *id.* at cons. 11°.

55. Juzgado de 1ra. Instancia en lo Civil y Comercial de 5ta. nominación de Rosario, "Mayoraz, Nicolás Fernando c/ Municipalidad de Rosario," Expte. No. 1455/02 del 18/06/08, cons. V.

56. See opinion of Justice Sánchez Torres in "Mujeres por la Vida," *supra* note 53, at cons. 15°. Some Courts dismissed on formal grounds challenges to the constitutionality of decisions regarding sexual health and reproduction from the point of view of the embryo's right to life. See CSJN, "Morales, Rosa Nélida s/ aborto en Moreno" Causa no. 2785, Fallos 319: 3010 (1996); CSJN, "P., F. V. s/ amparo," Fallos 328: 339 (2005) (authorization to induce the labor of an anencephalic fetus). In another case it was ordered that an intra-uterine device be inserted in a minor child, absolutely regardless of the question of its anti-implantation or abortive effects. See Cámara de Apelación en lo Civil y Comercial-Sala I- La Matanza, "P. C. S. y C., L. A. s/ fuga del hogar," Expte. No. 167 / 1 Res. Def. No. 4/1, del 18/12/2001.

D. Embryo Status in the Debate Regarding in vitro Fertilization Techniques

Like the United States Supreme Court, the Argentine Supreme Court has not yet delivered an opinion on whether assisted human reproduction techniques which, directly or indirectly, lead to embryo discard—i.e., embryo destruction—are constitutional. Even though many bills⁵⁷ have been proposed, the issue has not, to date, been regulated by statutory Law. Nevertheless, the issue has been debated and resolved in the judicial realm in different instances.

I. Rabinovich

The first, and most well-known, judicial decision was issued in *Rabinovich*⁵⁸ by the Civil Court of Appeals located in the city of Buenos Aires. The case involved a series of measures aiming at enforcing the right to life and health of embryos which, up to the moment the judicial decision was issued, were held under cryopreservation by public or private health institutions in the aforementioned city. The judicial decision, issued unanimously, was grounded in reasoning that was analogous, though not identical, to that adopted two years later by the federal Supreme Court in *Tanus* and *Portal de Belén*.

First, it was found that, from the point of view of Argentine law, personal life starts at conception; this determination was based on a systematic reading of all of the International Human Rights Treaties and Conventions that take constitutional precedence under article 75.22 of the Argentine Constitution. It was also found that

57. As an example, *see* file No. 4423-D-2010, Trámite Parlamentario 080 (22/06/2010), Régimen de Reproducción Humana Asistida y de Crio conservación (Assisted Human Reproduction and Cryopreservation Regime), registered by Silvana M. Giudici, Silvia Storni, Agustín A. Portela and Juan P. Tunessi.

58. CNAC, Sala I, “Rabinovich, Ricardo David s/ medidas precautorias,” Expte No. 45882/93, del 3/12/1999.

the principle set forth in article 51 of the Argentine Civil Code,⁵⁹ according to which a person is every entity that may show characteristic human features, has constitutional value.

But even though anyone may be considered a person for constitutional purposes, the acknowledgement of the legal status of the embryo requires determining the precise moment when the lawful existence of every person starts. In order to resolve this issue, the Court of Appeals in Buenos Aires applied article 4.1 of the American Convention of Human Rights,⁶⁰ as the federal Supreme Court would later do in *Portal de Belén*. Nevertheless, the Court of Appeals, unlike the Supreme Court, paid heed to the devaluation of the protection of the *no nato* that could be seen in the expression “in general”, used in this norm. It decided this particular semantic incidence by means of a systematic interpretation that integrated this norm with the interpretative declaration by Argentina on the occasion of the ratification of Children’s Rights Convention, according to which, “child” is defined as any human being as of the moment of conception.⁶¹

The Court of Appeals, once again unlike the federal Supreme Court in *Portal*, considered the logical possibility that the declarations and reservations contained in international treaties may not have the same hierarchical legal status as the treaty itself. This possibility was neutralized by the phrase contained in article 75.22, Argentine Constitution, under which the treaties have constitutional value “under their actual enforcement conditions” (“*en las condiciones de su vigencia*”). Under the federal Supreme Court precedents, this expression ought to refer to the conditions

59. Art. 51, Cod. Civ. states that “[A]ll beings who show signs characteristic of human beings, without any distinction as to qualities or accidents, are persons of visible existence.” In Spanish: “*Todos los entes que presentasen signos característicos de humanidad, sin distinción de cualidades o accidentes, son personas de existencia visible.*”

60. Cited in *supra* note 40.

61. *Supra* note 40.

that effectively regulate the State's obligations at the international level.⁶²

As in *Portal*, it was asserted that conception takes place with fertilization. Nevertheless, while in *Portal* the federal Supreme Court grounded this interpretation almost exclusively on the authority of embryonic science, the opinion of the Court of Appeals in *Rabinovich* was based upon a sort of normative slippery slope argument. It stated that all arguments which link legal personhood to the emergence of a particular event, such as the moment of implantation, or the appearance of the nervous system, or even birth, imply that the law doesn't recognize an equal value to all human life.⁶³

Finally, the Court of Appeals held that the embryo and, eventually, the monozygotic twins that emerge from the splitting of the embryo, possess individual personhood. The Court also decided the issue of the humanity and the legal personhood of the pronuclear oocyte (i.e., an embryo at the stage that precedes the fusion of the female and male gametes' nuclei) in the following way: the oocyte had to be dealt with, by law, in the same way as a person, "not by virtue of asserting its personhood . . . but in the light of the doubt that arises from the impossibility to exclude it with certainty. [This doubt] . . . at the factual level, compels us to respect its life and integrity, as if it were a person, a subject of law enjoying those rights."⁶⁴

2. *Subsequent Cases*

In three cases that arose after *Rabinovich*, the debate regarding the embryonic legal status involved the parents' claim that the

62. See "Rabinovich," *supra* note 58, at cons. VI, *citing* CSJN, "Giroldi, Horacio D. y otro s/ recurso de casación - causa n° 32/93," Fallos, 318: 514 (1995).

63. *Supra* note 58, at cons. VI and VII.

64. *Id.* at cons. VII.

social care institution (“*obra social*”) ⁶⁵ they belonged to should cover the costs involved in assisted fertilization treatment. ⁶⁶ Opinions delivered in these cases can be ranked incrementally regarding the legal value of the embryo’s life, as follows:

a. The parents’ right to have *in vitro* fertilization procedures covered by medical insurance is affirmed, fully bypassing the problem of the use of un-implanted embryos; ⁶⁷ or explicitly eluding a decision on embryonic personhood on the basis that it would be a religious question, alien to the scope of intervention by the State; ⁶⁸ or else rejecting the abortive nature of any fertilization treatment, on the ground that, out of a conceptual necessity, it cannot be considered abortive. None of these opinions referred either to the Supreme Court precedent in *Portal*, or to *Rabinovich*. ⁶⁹

b. The parents’ ‘right to have the *in vitro* fertilization procedure covered by medical insurance is affirmed, and there is a proposal, but without binding force, regarding the possibility of donating the supernumerary or surplus embryos for their later implantation, or alternatively, for their therapeutic use or experimentation. ⁷⁰

c. The parents’ right to have the *in vitro* fertilization procedure covered by medical care insurance is affirmed, but it is

65. *Obras Sociales* are health insurance/health care programs that are primarily administered by trade unions for the benefit of the union members and their families (although there are other types of *obras sociales*, such as those administered by each Argentine province for workers in the public sector). They are funded by compulsory payroll contributions by employees and employers.

66. Juzg. CAyT N°6 de la C.A.B.A., “A.M.R. y otros c/ Obra Social de la Ciudad de Buenos Aires,” 20/11/07, LL 2008-A, 148, El Dial AA439C (reaffirmed by the CCAyT de la C.A.B.A.); Cámara de Apelaciones en lo Contencioso Administrativo de San Nicolás, “S.A.F y A.H.A c/ IOMA,” 15/12/08, LL 2009-A, 408; Cámara Federal de Apelaciones de Mar del Plata, “Loo, Hernán Alejandro y otra c/ IOMA y otra,” 29/12/08, available at <http://www.cij.gov.ar> (last visited Jul. 15, 2013).

67. See “A.M.R. y otros c/ Obra Social,” *supra* note 66 (opinion of Justice P. López Vergara).

68. See “S.A.F y A.H.A c. IOMA,” *supra* note 66, opinion of Justice Schreginger, cons. 5°, joined by Justice Cebey.

69. See “S.A.F y A.H.A c/ IOMA,” *supra* note 66, at cons. 5° (opinion of Justice Schreginger, joined by Justice Cebey).

70. See “Loo c/ IOMA,” *supra* note 66 (opinion of Justice Ferro).

simultaneously held that legal personhood is recognized from the moment of fertilization, and it is ordered that a guardian be appointed to safeguard their physical integrity, considering the precedent in *Portal* as valid and binding, and joining the opinion delivered by the Court in *Rabinovich*, but not finding that decision binding given the different jurisdictions involved, i.e., national and provincial.⁷¹

d. The parents' claim that the infertility treatment be covered by the social care plan is rejected on the basis that it represents a clear threat to the supernumerary or surplus un-implanted embryos' right to life, as interpreted after the *Portal* decision.⁷²

IV. A COMPARATIVE SYNTHESIS FROM THE TELEOLOGICAL AND SEMANTIC POINT OF VIEW

If there is any value in the orderly review of judicial decisions and the grounds for them, this doesn't rely either on their thoroughness or on their unattainable definitive nature. It relies, instead, on the possibility of drawing comparisons and contrasts of both legal practices regarding processes of conceptual construction and determination, in the light of the claim that fundamental rights are deontological, absolute and/or unconditional.

A. The "Practical" Legal Value of the Embryo's Life Compared

1. It should be pointed out that U.S. constitutional judicial law in the field of embryonic legal status is much older than the Argentine one. It was only in 2001 that the first judicial decision was issued in Argentina, while the first U.S. precedent, which set

71. *Id.* (opinion of Justices Tazza and Comparato).

72. *See* opinion of Justice Valdez, *id.* at cons. X and XI, especially cons. XI *in fine*. After these cases were decided, the province of Buenos Aires' legislature passed Statute 14208, B.O. 26507 (Jan. 3, 2011), regulated by Dto. 2080/2011, which classified human infertility as a disease, and therefore included *in vitro* fertilization in the so-called "compulsory medical assistance plan", according to which both private and public health insurance plans should include the treatment as a free service.

forth the position of the U.S. Supreme Court regarding the value of unborn (“potential”) human life, was issued in 1973.

2. Under the American case law reviewed, the legal value of human life is not uniform; it varies according to the stage of development that an unborn human being has reached. Such stages do not exist in the Argentine Supreme Court case law, which considers that there is a genre (“persons”) that embraces the one “to be born” from the moment of conception, and conception occurs on the occasion of fertilization. Not distinguishing stages implies that there is a ban on any action knowingly aimed at interrupting, either in an eventual or probable way, the development of the embryo after fertilization.

3. Embryos and pre-embryos in American case law fit in the first stage (“non-viable potential human life”) and are subject to state interest, according to the U.S. Supreme Court. This state interest in the protection of human life is independent from the interest that the holder of the right to life may have over his or her own life.⁷³ This independence is particularly relevant in order to

73. This principle was applied forty-four years later as grounds for denying a fundamental right to assisted suicide, in *Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Vacco v. Quill*, 521 U.S. 793 (1997). The grounds for state interest in human life are discussed in depth, both by those who approve of *Roe* and those who oppose it. Among many others, see Alec Walen, *The Constitutionality of States Extending Personhood to the Unborn*, 22 CONST. COMMENT. 161, 178 (2005), who highlights the way in which this claimed interest would threaten the rights stated in *Roe* for women. See also James Bopp & Richard Coleson, *Judicial Standard of Review and Webster*, 15 AM. J. L. & MED. 211, 216 (1989). The idea that states hold an interest in human life which is not conceptually linked to personhood was particularly developed by Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 CHICAGO L. REV. 381 (1992). This idea was then picked up by Justice Stevens in *Casey*, 505 U.S. at 913 n.2; and in *Washington v. Glucksberg*, 521 U.S. at 747. This same conceptual distinction is also present in other constitutional practices, as is shown in the famous leading Spanish case decriminalizing abortion, T.C., s. no. 53/1985 at FJ5, B.O.E. no. 119, May 18, 1985. For an academic discussion of the plausibility of this distinction see certain commentaries on DWORKIN, LIFE'S DOMINION, such as Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329 (1993); Alexander Morgan Capron, *Philosophy and Theory: Life's Sacred Value - Common Ground or Battleground?*, 92 MICH. L. REV. 1491 (1994); Abner S. Green, *Uncommon Ground*, 62 GEO. WASH. L. REV. 646 (1994); Frances M. Kamm, *Abortion and the Value of Life: A Discussion of Life's Dominion*, 95

protect the life of citizens that have not, as of yet, acquired the ability to express their own interests.

4. The state interest in non-viable potential human life is compelling enough as to justify the binding nature of certain measures aimed at discouraging the decision to abort, but no other practical effect is attached to it. For, although under U.S. case law, un-implanted embryos are said to not be included among property rights, there is no restriction governing the progenitors' will over embryos where even the will of only one of the parties is sufficient to legally justify their discard.

5. It is unarguable that judicial decisions issued in Argentina recognize more legal value in embryonic life than those in the U.S., which considers that legal value arises only once the time of non-viability is passed. In Argentina, however, even if the limited case law *corpus* in existence shows a generalized acceptance of the general principle that embryonic life is personal life before and after implantation, this uniformity disappears when it comes to determining the constitutionality of rules and courses of action which imply the potential or actual discarding of embryos.

6. In Argentina, the debate over the treatment owed to embryos is primarily focused on the legal effects of fertilization methods that could involve discarding embryos, and on the normative consequences of the scientific debate regarding the anti-implantation mechanism of the emergency contraceptive and the intrauterine device, or any other contraceptive that might operate to prevent embryotic implantation.

7. The discussion over contraceptive and fertilization methods in Argentina assumes—with or without reason, which is not evaluated here—the normative premise that women have a right of

COLUM. L. REV. 160 (1995) (book review); Eric Rakowski, *The Sanctity of Human Life*, 103 YALE L.J. 2049 (1994) (book review); Tom Stacy, *Reconciling Reason and Religion: On Dworkin and Religious Freedom*, 63 GEO. WASH. L. REV. 1 (1994); and more extensively, Richard Stith, *On Death and Dworkin: A Critique of his Theory of Inviolability*, 56 MD. L. REV. 289 (1997).

access to them. Courts differ in the way in which they weigh this perceived women's right with the embryo's right to life, as recognized in *Portal de Belén*, *Tanus* and *Rabinovich*. The contraceptive methods debate is centered upon the weight and sense of the *pro-homine* principle. In particular, it concerns how much certainty this principle requires regarding the anti-implantation element of these methods. Alternatively, this discussion does not arise from the U.S. case law, which, by acknowledging the concept of "non-viable potential human life" and by allowing for the disposal of the embryo itself, undermines the primary assertion of that principle.

B. The Justificatory and Semantic Postulates Compared

Judicial debates regarding the legal status of the embryo will continue unfolding and getting richer and richer, both on the U.S. and Argentine scenes, as long as the social factors that trigger it are present. Still, even at this early stage of development, this comparative synthesis makes evident the unfolding of a semantic-anthropological debate relating to the most radical conceptual distinction in the world of law: that which separates things on the one hand, and persons on the other.

The question at hand is to whom do we give the distinction of person or subject of law, and why. But this question cannot be resolved if there is no previously adopted viewpoint in relation to a more abstract and thus more fundamental, semantic debate: how are things classified in general in the world and, in particular, in the legal world? Are conceptual classifications the result of a reflexive, yet somehow explicit, social debate that the law is destined to adopt, at least as long as there prior consent exists? Are they an interested imposition of a social group that is picked up by the law and clothed with its coercive force? Or are they something similar to a representation of reality, which emerges before us already classified, if not thoroughly, at least partially?

Regarding the embryo's legal personhood, these questions could be restated in the following way: Do the constitutional judicial practices here reviewed find the personal or un-personal nature of the embryo as the product of some sort of social construction, or do they view it as something already given to understanding, as an *ob*-jectum? Which is the semantic theory implied in the interpretative arguments used in both of the practices here reviewed?

In what follows, we will address these issues by considering three consecutive and intertwined levels of approach: (a) the relation of interpretive arguments to moral and anthropological justificatory stances of interpretation (section 1); (b) the semantics grounding these anthropological and moral stances of interpretation (section 2); and (c) an evaluation of the coherence between the categorical nature of fundamental principles and these semantic approaches to the concept of legal personhood (title V).

1. The Justificatory Perspective of Interpretation Compared

The main interpretative argument sustaining the denial of legal personhood to the unborn in *Roe* was the *contrario sensu* argument: if the constitutional text does not entitle the unborn to legal personhood, then it should be excluded from this legal concept's system of reference.⁷⁴ But as it has frequently been noted, this same constitutional text does not mention either the right to abort, or even the right to privacy—of which abortion is considered to be a concrete application. Facing the silence of the constitutional text, there was space, at least from a logical point of view, both to recognize and to deny legal personhood to the unborn.⁷⁵ As was noted above, this interpretative argument

74. See *supra* notes 8-10.

75. Regarding the logical ambivalence of the *contrario sensu* argument see GEORGE KALINOWSKI, INTRODUCCIÓN A LA LÓGICA JURÍDICA 177-79 (J.A. Causabón trans., Eudeba 1973), and LUIGI LOMBARDI VALLAURI, CORSO DI FILOSOFIA DEL DIRITTO 95-100 (CEDAM 1981). Regarding the feeble legal grounds for neglecting constitutional personhood for the unborn, see, e.g.,

advanced in *Roe vs. Wade* against the acknowledgement of the legal personhood of the unborn was never revisited. All later cases assume, as part of *Roe*'s holding, that all unborn life is not to be considered "personal life" (and not even human life, but "potential human life").⁷⁶

The logical ambivalence of the interpretative argument shows that the actual reason sustaining the majority's decision in *Roe*—and in the subsequent cases which assume without discussion that the unborn is not a person according to the Constitution—is a moral and anthropological conception of the person, which is assumed as the obvious, and thus not explicitly stated, justificatory point of constitutional practices. A moral conception according to which the faculty for autonomy grounds the right to be treated with "equal respect and consideration," as assumed in the constitutional concept of "privacy."⁷⁷ And an anthropological concept of person, by which it is this same faculty (autonomy) that distinguishes human beings from other species.

Although the Argentine Supreme Court in *Tanus* and *Portal* had to deal with much more explicit texts regarding the legal status of the unborn (recognizing its legal personhood and a right to life from the moment of conception), none of these texts explicitly states the moment when conception takes place, nor which kind of legal protection is due to the unborn. Perhaps aiming to profit from the credibility of scientific discourse, the Argentine Supreme Court

Charles Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in the Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, at 361 (2006/2007); or Martin Ronheimer, *Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy: A Constitutionalist Approach to the Encyclical Evangelium Vitae*, 43 AM. J. JURIS. 135, 158-59 (1998). In any case, even some of those who approve of the decision in *Roe* notice that neglecting the constitutional personhood of the unborn is a main dimension of the case's holding. See Jack M. Balkin, *How Genetic Technologies will Transform Roe vs. Wade*, 56 EMORY L. J. 843-64, at 845 (2007).

76. See *supra* notes 13-22, 28-36.

77. This teleological assumption was explicitly stated in *Casey*, 505 U.S. at 852.

in *Portal* based its interpretation concerning the moment of conception almost exclusively on geneticists' findings.⁷⁸ Nevertheless, it should be noted that the American Supreme Court in *Roe*—and all the other Courts which relied upon this decision—utilized the same scientific concepts and findings, and still attributed to them different practical (moral and legal) consequences.

The availability of these scientific findings for all of the Courts—Argentine and North-American—dealing with the embryo's status shows the Argentine Supreme Court decision in *Portal* was not only grounded in the scientific description of human life, but also in the moral concept of "person," from which this scientific data was interpreted. For the main question being posed to all of the Courts was not, "when does genetics situate the appearance of a new human being?", but rather the anthropological and moral question, "when should dignity, and thus legal personhood, be recognized in a new human being?" The underlying reason sustaining the majority interpretative conclusion in *Portal* is thus the concrete answer to this question: the reference of the concept of dignity is co-extensive with the reference of the concept of human nature, independent of the factual possibilities of it being actualized.

2. Implied Semantics Theories Compared

The different legal status granted to the embryo in one constitutional case law practice or the other is due not only, nor primarily, to textual differences, but also to the use of different moral conceptions of the person as teleological or justificatory stances of interpretation. Stated in this way, it should be considered if and how the Courts link this justificatory stance of interpretation to the semantic meaning of the texts, and which are the epistemic

78. See *supra* notes 13-22, 28-36.

and semantic theories implied in the use of these justificatory stances. In fact, both questions are closely related.

Scientific, moral and anthropological approaches to the nature and value of human embryos are explicitly passed over in American case law concerning the legal status of the embryo. It is as if Wittgenstein's theory of "language games" had been radically interpreted and the "legal game" had been taken to be completely alien to other "language games" where the concept of personhood was also the object of discussion, and particularly, where an insight into an "outside" world seemed to be allowed.

This aspiration for the autonomy of legal language from other fields of language, be it morals or science, discloses at least two semantic assumptions. First, that the justificatory viewpoint of interpretation is internal to the legal practice, and second, that the frame of reference of legal concepts is absolutely determined by their use within the practice. In effect, if the legal concept of personhood bears no relation to the moral concept of the person, or even to scientific findings about human life, it seems that the legal concept is nothing more than a product of legal decisions. It is not surprising, then, that arguments determining the legal value of the embryo were always grounded on the way the Constitution "uses" the concept of person; or on the presumed intention of the Constitutional authors *when using* constitutional concepts; and on the absence of precedents recognizing legal personhood in unborn life, and thus, on the fact that the concept of legal personhood has not yet been used in reference to the embryo.⁷⁹

This semantic assumption, by which the use of legal concepts within the legal community is the only criteria for determining its frame of reference, also seems applicable to the concept of "special respect" that is owed to embryos as an intermediate category between things and persons. In effect, this concept, introduced to legal practice in *Davis v. Davis*, is not founded upon any insight

79. See *supra* notes 8-10.

into the value of human life as considered from a natural, metaphysical, or even a conventionally moral point of view. It is, instead, exclusively grounded on a kind of extension of other legal concepts, which have been used for a longer time. It is like a mix of the concepts of “property,” “born human life,” and “unborn but viable human life.”⁸⁰ And being a mix of all three, it has neither the same significance nor, of course, the same legal force, as the third of the three. That is why this “special respect” amounts to less than nothing from a practical point of view, for if there is a rule concerning the destiny of embryos, it is that they should be discarded in case of disagreement between the progenitors.

Argentine case law is not as uniform as the American one in the degree to which the connection is acknowledged between different “language games,” and the semantic theory implied therein. The metaphysical and moral perspectives of interpretation do not seem clearly acknowledged in *Portal* and *Tanus*, where the legal status of the embryo is asserted as a necessary conclusion based on scientific and legal statements.⁸¹ It is plainly stated in *Rabinovich*, where, in the face of both the textual indeterminacy concerning the embryo’s legal status and the fact of scientific discussions concerning the moment when a new human being appears, the Court of Appeals based its interpretation of the embryo as a legal person on the moral and legal *pro homine* principle.⁸²

In any case, this more or less open recognition that the legal “language game” is connected to the scientific and moral ones expresses both the conviction that legal concepts are not purely constructed from the inside of the legal practice, and that something exists prior to human social practices and language which claims respect.

80. See *supra* note 30.

81. See *supra* notes 38-41.

82. See *supra* notes 58-64.

Nevertheless, it should be noted that it is also clear that all of the Argentine Courts complemented this attention to the biological and moral nature of a human person with the actual use of the concept itself within the legal practice, when interpreting the concept of legal personhood. The role of use within the legal practice was particularly relevant when the question was not to determine the definition of legal personhood, but rather what the legal consequences of recognizing the entitlement to legal personhood are; or how the law should deal with scientific doubts concerning the moment when fecundation takes place;⁸³ or the way contraceptives operate. These questions were, in all cases, approached with interpretative rules internal to the Argentine legal practice, such as the principle of *pro homine*.

As mentioned above, not all Argentine Courts enforced this principle with the same consequences. Some of them applied it in favor of the mother's assumed right to conceive children, and others in favor of the life of the embryo. Two related explanations can be advanced for this disagreement. In the first place, the proposition referred to by the legal statement "*pro homine*" is not at all evident or manifest. It is not evident if the principle is an appropriate ground for determining who is entitled to its protection, nor is it clear who should benefit when its enforcement postpones another person's claimed rights.

Second, precisely because of this lack of manifestation, its practical significance differs according to the concept of justice from which each interpreter determines the global and final justificatory point of law. The more this concept of justice is attached to privacy and moral autonomy, the less value is attributed to the life of an embryo, which corresponds to less entitlement to legal protection. On the contrary, the more the concept of justice is attached to dignity as a universal and non-variable claim of respect—related to the concept of moral

83. See "Rabinovich," *supra* note 58.

autonomy, but not to be confused with it—the more value is attributed to embryotic life, resulting in a greater entitlement to legal protection.

V. WHICH SEMANTIC THEORY SHOULD GOVERN LEGAL PRACTICE?

Two semantic strategies and conceptions underlie the two legal practices compared here: a traditional, or “criterial,” semantics on one side, and a sort of “light”—with ample space for social construction—realist semantics on the other. The last question to be posed is: which of these is more coherent with the categorical and universal nature of fundamental rights?

The discussions regarding which is the semantic *praxis* that better fits these features of fundamental rights are too ample to be reviewed in this article. However, it seems appropriate, at least, to point out that they lead us back to the basic choice that was stated above, i.e., either the fundamental rights principles are social constructions that precede and determine their own frame of reference; or else their reference—some basic human good—precedes and determines its meaning.⁸⁴

84. As is well known, the alternative between giving priority to reference over meaning when determining the sense of concepts was stated and developed in the field of Philosophy of Language by SAUL KRIPKE, *NAMING AND NECESSITY* (Blackwell 1980), and Hillary Putnam, *Meaning and Reference*, 70 *J. OF PHIL.* 699 (1973). These theories were applied to the problem of legal interpretation by Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 59 *FORDHAM L. REV.* 2087, 2091 (2001), among other works; and, with some differences, by NICOS STAVROPOULOS, *OBJECTIVITY IN LAW* (Clarendon Press 1996), and David O. Brink, *Legal Interpretation, Objectivity and Morality* in *OBJECTIVITY IN LAW AND MORALS* 12-65 (Brian Leiter ed., Cambridge Univ. Press 2001). For a critical revision of these theories see Brian H. Bix, *Can Theories of Reference and Meaning Solve the Problem of Legal Determinacy?*, 16 *RATIO JURIS* 281-95 (2003). Regarding the limitative role of semantics in interpretation out of the English language field, see, e.g., JERZY WRÓBLEWSKI, *SENTIDO Y HECHO EN EL DERECHO* 108 (Francisco Javier Ezquiaga Ganuzas & Juan Igartua Salaverría trans., Fontamara 2001; vol. 9 in the *DOCTRINA JURÍDICA CONTEMPORÁNEA* series), and Pilar Zambrano, *Los derechos ius-fundamentales como alternativa a la violencia. Entre una teoría lingüística objetiva y una teoría objetiva de la justicia*, 60 *PERSONA Y DERECHO* 131-152 (2009).

If the meaning or concept of fundamental rights is exclusively the product of a more or less controlled social construction, and more importantly, if a construed meaning determines its own field of reference, it would be extremely hard to predicate the universality and absoluteness of fundamental rights principles. By contrast, their extension as its categorical or absolute nature would depend upon the will for a social construction of meaning to lead. Some political philosophers supporting this constructive approach to fundamental rights principles have openly admitted that it is irreconcilable with their categorical and universal nature, particularly when applied to the legal concept of personhood.⁸⁵

Others are much more reticent to admit this openly. Thus, Ronald Dworkin has expressly rejected what he deems to be a criterial semantic approach to law, according to which all legal concepts—including the concept of law itself—are constructed from inside the practice, with no other basis than the sheer fact of a convergence of their criteria in use within the practice. Against this claim, Dworkin contends that legal concepts are interpretative and thus there is no need of fundamental convergence in their use.⁸⁶ Additionally, he has pointed out that legal and political concepts are the product of a collective constructive practice in the light of moral and political values and, in the end, in the light of a substantive conception of what qualifies as a good life. In this sense, he aims to distinguish himself not only from classical positivistic approaches to law, which claim the neutral nature of the constructive process of legal concepts, but also from Rawls' Theory of Justice, which aspires to exclude "comprehensive conceptions" from the constructive process of political values.⁸⁷

Ronald Dworkin's answer to them both is that all interpretative concepts are the product of a holistic constructive practice that

85. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 20 (expanded ed., Columbia Univ. Press 2005).

86. See DWORKIN, *LAW'S EMPIRE*, *supra* note 2, at 46; DWORKIN, *JUSTICE IN ROBES*, *supra* note 2, at 12, 151.

87. See DWORKIN, *JUSTICE IN ROBES*, *supra* note 2, at 160-61, 225-26.

synthesizes natural, moral, legal, and political concepts. This holistic account seems much more faithful to legal practice than the “criterial one.” In effect, as has been shown above, both the Argentine and the American Courts rely on a holistic approach to the concept of legal personhood, no matter how much they both try to disguise this fact.

Now, as we have previously mentioned, it is obvious that criterial semantics implies a negative answer to the question of deference to reality. But the opposite is not obvious. For the question is not only to what degree are legal concepts related to moral, political or natural concepts, but also, if anything exists prior to the whole conceptual constructive process itself. To this Ronald Dworkin would answer “no,” or better, “it doesn’t matter”: the only basis for the whole constructive process is a “reflective equilibrium” between coherence and conviction.⁸⁸ But this mix of conviction and coherence is all that Dworkin claims for moral objectivism.

There is no place in his theory—nor any need, according to him—for self-evident or self-justified practical propositions, or for the claim that these propositions bear any relationship with human nature.⁸⁹ And it should be noted that although self-justified, practical propositions are generally the object of moral and political convictions, this is not always the case or, much more importantly, their epistemic justification.

Now, without reference to self-justified practical propositions, there is no critical instance with which to confront the whole conceptual constructive process.⁹⁰ Instead, if reference leads the

88. *Id.* at 162.

89. *Id.* at 226-27, and Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87, 118 (1996).

90. Both the possibility of grounding moral and legal objectivity in self-evident practical principles, and the possibility of acknowledging a connection between these principles and natural human ends, has constantly been defended by the New Natural Law school of thought and, especially in the field of law, by John Finnis. *See*, among many other works, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* Ch. 23-24 (Clarendon Press 2011); and John Finnis,

abstraction of meaning, when legal authorities construe intricate and obscure meanings (as, in fact, they have already done in relation to the legal concepts of “person” and “special respect”), the reality referred to by these legal and moral concepts would make clear that there is abuse in the use of language. For no matter how much *imperium* courts may have to construct and reconstruct concepts in the social sphere in general, and in the world of law in particular, they lack the power to transform, and least of all to deny, the referential frame of this construction. In other words, if reference precedes meaning, then human or fundamental rights principles and their characteristic universality—for each and every one—and absoluteness, in all cases, would be invulnerable to the abuses of language.⁹¹

Having reached this stage of the discussion, it is worthwhile to ask, one last time: which semantic practice better fits the conceptual, and therefore the necessary, characteristics of human rights? A practice that construes concepts from a vacuum, or a practice that construes them from a grasp of reality? In this latter case, how does the reality referred to by the concept of human rights narrow the construction of the legal concept of person? Is it not by imposing the only condition that its admittance be universal for every man, and absolute in each and every situation?

Introduction to 1 NATURAL LAW at xi (John Finnis & Carolyn Dever eds., Dartmouth Press 1991; published as part of THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW & LEGAL THEORY series).

91. For an approach to the constructivist semantics that underlies the line of cases following *Roe*, see John M. Breen & Michael A. Scaperlanda, *Never Get Out the Boat. Stenberg vs. Carhart and the Future of American Law*, 39 CONN. L. REV. 297, 304 (2006).

**TRANSFER OF IMMOVABLES AND SYSTEMS OF
PUBLICITY IN THE WESTERN WORLD: AN ECONOMIC
APPROACH**

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ABSTRACT

This paper aims to analyse the norms pertaining to the transfer and publicity of property rights from an economic perspective. It is a characteristic of this analysis that it puts the rules that regulate these rights in relation with their associated negotiation costs. This offers a new approach to the examination of the definition, content, and transfer of these rights. Legal norms that minimize the problem of conflicts of ownership increase the value of property in the hands of its owners. One of the instruments oriented to reduce uncertainties of this type is the Land Register, which promotes the exchange of rights, and acts in areas that are fundamental to the economic system, such as the delimitation, attribution, and protection of property rights. In Europe, different models for the regulation of the transfer of property rights coexist, along with different models for the registration of property, so although the underlying conflicts of interest are similar throughout Europe, the way in which each legal system attempts to achieve the greatest degree of efficiency possible varies.

I. GENERAL QUESTIONS: THE ROLE OF PROPERTY RIGHTS FROM THE PERSPECTIVE OF ECONOMIC THEORY

The regulation of private property provides a legal framework for the distribution of wealth in each State. This article will attempt to analyse these rules from an economic perspective, an analysis that, in the words of Posner, is fundamentally a common-sense approach to the question.¹

The classic theorem of Coase² is well known in the field of economic-juridical science. According to this theory, if property

1. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983).

2. This thesis is expounded in his well-known works, Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON 1 (1959); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON 1 (1960).

rights are well defined and there are no transaction costs, then the market will be in a perfect, efficient state of equilibrium. By well-defined property rights, Coase was referring to a hypothetical situation in which all goods and resources would have a titled owner, and the title would clearly specify the limits to ownership and the steps that would be necessary to remove these limits. By the absence of transaction costs, Coase meant that there would be no costs attached to an agreement that transferred a right from one holder to another. The costs that derive from transfer agreements can be grouped into three different types: (1) costs associated with the search made by those interested in acquiring property rights, or made to find a subject interested in acquiring property rights; (2) negotiation costs, or costs that derive from the design of the content of the transaction; and (3) execution costs, in case the agreement has not been complied with and needs to be enforced.

According to Coase, the law can facilitate negotiation by reducing the costs of transactions, and reduced transaction costs encourage the transmission of property, which in turn allows for the growth of a nation's wealth. The voluntary exchange of goods redistributes property, as it changes hands from those who attribute to it one value, to those who attribute to it another, higher value. Therefore, the rules that govern the exchange of property maximize wealth by protecting and encouraging the voluntary exchange of goods. The same rules also maximize wealth by permitting owners to claim the benefits derived from the use of a resource.³

The economic analysis of property rights is an interesting approach to their study, because it places property rights in relation with the costs associated with their transfer. This offers a different perspective from the traditional approach to their analysis that normally centres on the definition, content, delimitation, and forms of transmission of property rights, and it is also recognition of the

3. Concerning this question *see* R. COOTER & T. ULEN, *LAW AND ECONOMICS* 113 (4th ed., Pearson Education 2004).

fact that these elements are not independent from the costs and the practicalities of their commercial transfer.⁴

Property rights have a fundamental effect on decision making processes concerning the use of resources, and therefore have a profound impact on economic activity. They determine the identity of economic agents and define the distribution of wealth in a society. There are, therefore, clear advantages to having a secure system of property rights within a legal system. States pursue this objective of economic efficiency by regulating the transmission of property and by establishing mechanisms which provide publicity of property rights, both of which favour property transfer.

In economic theory, ownership is defined as the freedom or the capacity to adopt decisions over goods and these decisions may affect how goods are used, to whom their benefits should belong, and whether to effect changes in their form or substance.⁵ It is these same faculties that are conferred on a subject by the right of ownership according to the traditional definition given by article 348 of the Spanish Civil Code. There are essentially three characteristics that property rights need to have in order to be efficient:

1) They need to be universal. All goods and resources should be owned, with the exception of those that are so abundant that they can be freely consumed without becoming scarce.

2) They need to be exclusive. This means that it must be legally possible to exclude others from using or consuming them.

4. Fernando Pomar Gómez, *Derechos de propiedad y costs de transacción: ¿qué puede enseñar Coase a los juristas?*, 51 ANUARIO DE DERECHO CIVIL [ADC] 1035, 1067 (1998). In the Common Law tradition, see YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 2 (1st ed., Cambridge University Press 1989), who makes a connection between the concept of property rights and transaction costs.

5. O.E. WILLIAMSON, *THE ECONOMIC INSTITUTION OF CAPITALISM* 27 (The Free Press 1985).

3) They need to be transferable. This allows goods and resources to be passed on to users that are more efficient.⁶

A. Transaction Costs

Coase was one of the first economists to draw attention to the importance of the role played by transaction costs. Transaction costs may be defined as “the cost of transferring property rights.”⁷ Property rights always entail a cost, as our freedom to use goods and resources is always limited. Economic transactions are transfers of property rights. Transactions require a series of mechanisms to protect the agents that participate in them from the risks inherent in the exchange. The function of contracts is to plan an agreed response to future events that might affect the object of the transaction. All transactions involve costs. These costs often stem from the search for information. This search for information may relate to the object of the transaction, it may be a search for the best purchaser, or it may be a search for information about the purchaser’s circumstances and conduct. Negotiating an agreement to determine the positions of the parties and the price of the transfer results in costs, and so does drawing up a contract. Once the precise content of the agreement has been clearly defined, there is still the possibility that further costs will be incurred if one of the parties does not comply with its terms voluntarily and it is necessary to enforce the agreement.

When subjects agree to exchange goods, they do so because they believe that what they will obtain from the exchange is worth more than what they offer in return. The exchange of goods would have no costs if each party knew exactly what it wanted from the exchange (that is the use expected to be obtained from the goods to be exchanged) and to what extent these goods had the qualities that

6. Cándido Paz-Ares, *La economía política como jurisprudencia racional (Aproximación a la teoría económica del derecho)*, 34 ADC 601, 645 (1981).

7. Coase, *supra* note 2, at 18.

each sought to acquire.⁸ In the opinion of Barzel, in order for property rights to be clearly defined, it is necessary that both their owner, and any other party interested in their acquisition, should have access to information detailing the properties of the goods in question.⁹ This is more difficult in the case of goods that are unique (such as immovable goods) than in the case of standardized goods, and therefore negotiations over unique goods are more complex than negotiations over fungible goods. Cooter and Ulen comment that the negotiations over the sale of a melon are quite simple as there is very little that one needs to know about the melon.¹⁰ However, the negotiations necessary for the acquisition of a house are much more complex as they often include looking for finance, compiling information about the state of the property and settling on a price. The seller of a property is obviously far better informed about its condition than the purchaser is, and the purchaser is in a far better position to assess the likelihood that he will obtain the necessary finance for the purchase. It is for this reason that the rules on property rights create instruments that publicly state the ownership of goods, such as Land Registers. These are legal mechanisms that reduce the costs of the transfer of property rights.

B. The Faculty of Disposition and Acquisition a non domino

One of the faculties conferred on the owner of a property is the power of disposition over it. The definitions of the right of ownership provided by the Spanish, Italian and French Civil Codes all refer to this power of disposition over property. These Codes devote a great deal of attention to resolving the problems associated with the transmission of property from one subject to

8. On this subject in Spanish legal doctrine see Jesús Alfaro Águila-Real, *Los costs de transacción* in ESTUDIOS JURÍDICOS EN HOMENAJE AL PROFESSOR AURELIO MENÉNDEZ 131, 143 (Juan Luis Iglesias Prada 1996).

9. BARZEL, *supra* note 4, at 77.

10. R. Cooter & T. Ulen, DERECHO Y ECONOMÍA 411 (E. Suarez trans., Fondo de Cultura Económica 2008).

another. When a subject has the right of ownership, he wants to be certain that he effectively has the power of disposition over the property and have some guarantee that no other subject will appear who claims to have acquired the same right. The owner of the right requires that his title to the property be superior to the rights of the subject that transmitted it to him and any rights that a third party might claim to have over the same property. The information one receives concerning a property can never be fully guaranteed to be accurate,¹¹ and the legal system cannot always protect the interests of both the previous and the present owner of a property at the same time. A rule that prevents individuals from obtaining ownership of a property if there is a non-owner in the chain of transmission will protect the interests of the present owners to the detriment of potential future owners. However, this type of rule also places a burden on the present owners of the property, as it lays the onus on them to demonstrate to any potential buyers that they are in fact the genuine owners. Alternatively, the law can protect the subject that acquires a property from the risk that third parties have a prior legal claim to it (article 34 of the Spanish Mortgage Law is an example of this type of legislation). A law of this kind saves future purchasers the trouble of investigating the authenticity of the chain of transmissions, but the current owner cannot be sure that the property will not be taken away from him without his consent.

Regulation on these matters has to evaluate these risks and must try to minimize them for both parties as much as possible.¹² The law itself influences the quantity and quality of the

11. BENITO ARRUÑADA, *LA CONTRACCIÓN DE LOS DERECHOS DE PROPIEDAD: UN ANÁLISIS ECONÓMICO* 690 (Centro de Estudios Registrales 2004), who argues that:

The supposition that the information available is incomplete is essential. The registry of rights is designed to provide full and accurate information to protect both the previous and the present owner; and, if it is not able to protect the owners in a significant number of cases then its chances of survival are very limited.

12. Douglas G. Baird & Thomas H. Jackson, *Information, Uncertainty and the Transfer of Property*, 13 J. LEGAL STUD. 299, 301 (1984).

information available and therefore affects the distribution of risks. For example, in some States there is a Register in which all past holders of a legal title to a property have had to inscribe their right to the property. A law of this nature reduces the risk that a non-owner appears in the chain of transmissions. However, it also generates costs derived from the upkeep of the register. The law has to determine the information that is necessary for property rights to be delimited perfectly and for the risks to be distributed efficiently between the current owners and future buyers. It also has to strike a balance between providing incentives to increase the amount of information available about a property and the costs that these measures entail. In this way, the law can minimize the problem of conflicts between those who claim a valid title to the property, and increase the value of the property in the hands of the legally guaranteed title holders.

C. Legal Security and Security in the Commercial Transfer of Property

The problem just discussed could be considered part of what has been traditionally perceived as the dichotomy between the principle of legal security and trade security in commercial exchange. Ehrenberg, however, argues that this dichotomy does not really exist, as both principles seek to protect similar interests.¹³ The general idea is that legal security protects the holder of the legal title to a right (the subject that has this right) while the principle of trade security protects the subject that acquires this right (the subject that wishes to have the right). Both principles seek to protect the legitimate owner of a right.

In relation with the right to ownership, the notion of security refers to the ability of the title holder of the property right to exploit the economic value of the resource in question exclusively,

13. Victor Ehrenberg, *Rechtssicherheit und Verkehrssicherheit mit besondere Rücksicht auf das Handelsregister*, JHERINGS JAHRBÜCHER FÜR DIE DOGMATIK DES BÜRGERLICHEN RECHTS 273-338 (1903).

without being exposed to the constant risk that a third-party might dispossess or disturb him in the pacific possession of that right. Obviously, if this protection were only available from the private sector, then individuals would be forced to contract security firms, and the expense would be enormous and, in most cases, prohibitive. It makes sense, therefore, that this protection is provided more cheaply and in a simple manner by the legal system. Article 348 of the Spanish Civil Code grants legal actions to owners to enable them to reclaim property from third parties that have it in their possession and also to declare the absence or inexistence of encumbrances over their ownership rights. In this way, the Spanish legal system reduces the costs implicit in the determination and safeguard of property rights.¹⁴

Legal security tries to guarantee that the title holder to a right has the effective possession of that thing. This means that the title holder can appropriate the value of the use of that right and the value of the exchange of that right. Title holders therefore have the certainty that they alone may use or exchange the goods and resources over which their rights operate. Legal security also aims to prevent title holders from losing or being perturbed in their rights without their consent. The principle of legal security in this case can be equated with the prohibition of expropriation, as the aim is to ensure that the desired transmission takes place and is not frustrated by circumstances that are unknown to the subject wishing to acquire the rights to be exchanged. This is achieved when there are no market failures caused by inaccurate information that elevates transaction costs. When the information available is inaccurate, it results in economic inefficiency.

The price of resources is calculated as a function of the utility that can be obtained from them. If the holder of an ownership title

14. In the opinion of Cándido Paz Ares, *Seguridad juridical y seguridad del tráfico*, 175 REVISTA DE DERECHO MERCANTIL [RDM] 7, 12 (1985), “the creation of legal security allows for economies of scale, because as the volume of production increases there is a notable depreciation in the average cost of production.”

does not consent to its transfer then it is because the offer he receives is less than the benefit he obtains from keeping it under his ownership. If he were to consent to this transfer then this would lead to what Pareto describes as a sub-optimal distribution of resources.¹⁵ However, it might well be the case that an ownership title that has the value of 400 for its title holder X does not pass into the hands of Y, who assigns it a value of 500, because the transaction costs are greater than 100. The aim of the legal system, according to the thesis of Coase, is to reduce transaction costs and, in order to do this, it might sometimes be convenient to expropriate the title from X and assign it to Y, under whose ownership it has a greater value. X would be offered in exchange a price between 400 and 500, the market value. This is the logic behind the rules that govern trade security.

An alternative approach to the rules governing trade security is to make their objective that of avoiding the situation by which the rights of the subject that acquires ownership are negatively affected by circumstances that he could not have known about, due to a lack of information in the market.¹⁶ In this case, the rules of trade security are rules that limit the information necessary to acquire a right. These regulations attempt to reduce transaction costs that could interfere with efficient exchanges. An example of this is article 34 of the Spanish Mortgage Law. This article limits the information considered relevant to a transaction to that published in the Land Register. However, these types of regulations increase the costs incurred by the original ownership title holders in order to reduce the risk that their goods are transmitted without their consent. These regulations can therefore only be considered efficient when they generate greater savings than costs.

15. UGO MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION* 202 (Greenwood Press 2000).

16. See Paz Ares, *supra* note 14, at 19.

For an acquisition to be considered valid, the principle of legal security obliges the subject that acquires a title to establish that the subject from whom he acquires it is the genuine title holder, and that his acquisition forms part of a chain of legal acquisitions. However, the principle of trade security limits the information relevant for the valid acquisition of a right, and permits acquisitions *a non domino*. The first rule encourages the subject that acquires a right to verify that the transmitter is the real owner of the title in question, whilst the second rule provides a strong incentive for owners to protect themselves against the threat of dispossession.¹⁷

Four rules of Roman origin have proved to be efficient from the perspective of an economic analysis of the question under consideration. *Ubi rem meam invenio ibi vindico* (the goods may be claimed in the place they are located): this expression means that the legal action to reclaim property may be exercised against third parties in possession of those goods. *Id quod nostrum est, sine facto nostro ad alium transferri non potest* means literally “our goods may not be transferred to another except by virtue of our acts. *Res inter alios acta, aliis nec nocet nec prodest*: a contract cannot affect the rights of those who are not party to it. *Nemo plus iuris ad alium transferre potest, quam ipse haberet*: nobody is able to transmit more rights than those he possesses. These rules are efficient from an economic perspective because they enforce the idea that an economic resource should remain in the hands of its original owner¹⁸ except when special circumstances arise that necessitate a different course of action.

Under exceptional circumstances, it may be possible to permit the temporary expropriation of the goods of a title holder when conditions arise that allow one to suppose that it would be in the interests of the title holder for this temporary expropriation to take place. This can only be the case when the protection afforded by

17. COOTER & ULEN, *supra* note 3, at 151.

18. Concerning this topic see Paz-Ares, *supra* note 14, at 22-23.

trade security allows the subject the disposal of the right and when the benefit obtained from the change of ownership is greater than the value of the use of the right in question.

The rules relating to trade security are rules that transform the normal protection that the legal system gives to the title holder of a right: instead of protecting the subjective value that the right holds for its owner, these rules protect the objective market value of the right.¹⁹

II. INSTRUMENTS FOR THE PUBLICITY OF PROPERTY RIGHTS

When agreements concerning the transmission of rights are made, it is very important for the parties to be sure of the premises on which these agreements are to be based. Among these premises are those relating to the properties of the goods to be transmitted, and the authenticity of the title of ownership of the transmitter of the goods.

Any uncertainty surrounding the authenticity of an ownership title makes the sale of the goods difficult and reduces their value. As a necessary condition for economic efficiency in the transmission of goods, all doubts concerning ownership titles must be eliminated. To this end, the law creates instruments of publicity. A system of publicity can prevent the conclusion of fraudulent agreements.

19. With reference to this subject, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 (1972). In the opinion of these authors, the legal system can protect the property rights of a subject in two ways: by way of property rules or by the use of liability rules. The decision to implement one system or another will depend on the associated transaction costs. If the market functions without any appreciable transaction costs then it is preferable to protect the rights of the subject through property rules, whereas if there are externalities that affect the function of the market then it is preferable to use a system of liability rules.

A. Publicity of Possession

Taking possession of an immovable thing can sometimes be a necessary condition for the acquirer of a property to ascertain the superiority of his right over that of third parties. In some legal systems, as in the Spanish legal system, the handing over of the possession of a property is an integral part of the legal process of transmission. There is no doubt that the handing over of possession constitutes an instrument of publicity for property rights, as it is by this means that the title holder proclaims his legal ownership of the goods in question.

When the transmission of a property takes place but the subject that transmitted ownership retains the possession of the property, then this situation may generate a high degree of uncertainty among third parties as to the genuine owner of the property.

Establishing property rights by means of the possession of things can result in significant costs, for example, the costs occasioned by the need to investigate the chain of ownership. This type of investigation is often difficult to carry out further back than a generation, and this in turn increases the risk that a subject will appear with a legitimate claim and dispossess the purchaser.

Another legal function of possession is that it allows for the acquisition of property rights by acquisitive prescription (*usucapion*). The foundation for this mode of acquiring rights is the inactivity of the title holders: "If the owner sleeps on his rights, allowing trespass to age, the trespasser may acquire ownership of the property."²⁰

The advantages of acquisitive prescription from an economic perspective are that it eliminates doubts over the true title holder of things and allows ownership to be conferred on those that are really using things. The use of this mechanism eliminates the risk of legal actions to reclaim property based on titles held in the distant past. Another economic justification for acquisitive

20. COOTER & ULEN, *supra* note 3, at 154.

prescription is that it prevents the situation in which valuable economic resources are left unused over long periods of time. This is because it gives the “productive” user a means of acquiring the title to a property to the detriment of the “unproductive” user.

There is however, a cost to acquisitive prescription, as property owners have to be certain to safeguard their properties from the risk of losing it and expel any potential usurpers.

B. The Land Register

Given the deficiencies of the publicity mechanism based on possession, land registry systems have developed as the principal alternative to them.

One of the functions of the legal system is to regulate the institutions by which rights are exchanged so that these transactions are secure and foreseeable. One of these institutions is the land register, which collects information on the ownership, content, reliability, and expected revenue associated with rights over immovable property.²¹ The land register therefore operates over a fundamental element of the economic system, the delimitation, attribution, and protection of property rights.

By offering information on property rights, the land register reduces the costs associated with exchanges and favours the circulation of commodities, and it can therefore be described as an instrument in the creation of wealth. This view is endorsed in a report published by the World Bank, in the *World Development Report*.²²

21. See Gómez-Pomar, *supra* note 4, at 1067; Fernando P. Méndez González, *La función económica de los sistemas registrales*, 671 REVISTA CRITICA DE DERECHO INMOBILIARIO [RCDI] 857, 881 (2002).

22. World Bank, *World Development Report* 79-84 (2005). See also FROM PLAN TO MARKET. WORLD DEVELOPMENT REPORT 1996, at 89 (Oxford University Press 1996): “For pledging to work, lenders need a cheap and easy way to determine whether a prior security interest exists against the property. Some advanced legal systems do this by maintaining a publicly accessible registry.”

This same argument had been put forward many years before in the explanatory preamble to the Spanish Mortgage Law of 1861:

Our laws on mortgages are condemned both by science and by reason as they neither guarantee property sufficiently nor exercise a healthy influence on public property. Furthermore, they do not establish firm bases for credit secured by real estate, they do not encourage the circulation of wealth, they do not moderate interest on money, they do not facilitate the acquisition of immovable property and they do not provide sufficient assurance to those who lend money on the basis of this guarantee. Given this situation the need for reform is pressing and indispensable for the creation of mortgage banks, to create certainty regarding ownership and other property rights, to combat the effects of bad faith and to free owners from the yoke of merciless usurers.²³

The land register publishes information on the chain of transmissions of a property and reduces the risk of transfers being carried out without the agreement of the title holder. It also offers security to potential acquirers of a property by providing them with information concerning the temporal validity and the legitimacy of the transmitter's title to the property.

To summarize, the land register lowers the risk that the acquirer will obtain an invalid title without increasing the threat to the transmitter that he may lose his title to the property without his consent.

As we shall see a little later in this article, there are several different types of land registers (register of deeds, title register, etc.). Some of them attest to the ownership of a property whilst others offer mechanisms to protect property rights while leaving the question of establishing ownership to the rules governing possession. In some legal systems the land register is the exclusive source of information about the title holders of immovable

23. Spanish Mortgage Law (February 8, 1861), published in *LEYES HIPOTECARIAS Y REGISTRALES DE ESPAÑA. FUENTES Y EVOLUCIÓN. I. LEYES DE 1861 Y 1869*, at 223-395 (1974).

property, while in others the land register functions alongside a system of publicity based on possession.

From the perspective of an economic analysis, the publicity afforded by the land registry is of greater functional value than the publicity given by the mere possession of commodities when these are costly. For other types of commodities, the maintenance costs of this system of publicity exceed the benefits obtained from the reduction of the types of risk we have mentioned. Property registers are also more efficient when the registered items are not subject to frequent transmissions, when they have a long economic life, and when the registered properties are susceptible to economic exploitation by several persons at the same time (for example when it is possible to constitute limited real rights over the properties—such as a mortgage).

A property register is also efficient when the descriptions of the registered property it provides gives more information about it than mere possession can.

III. THE RULES FOR THE TRANSFER OF OWNERSHIP AS A RISK SHARING INSTRUMENT BETWEEN THE PARTIES

As a result of plural legal traditions, several types of systems are currently in use in Europe for the transmission of immovables.

These rules are important as they provide an answer to a series of fundamental questions that arise from the circulation of property rights. Some of the most important are: (1) who has the effective power of disposition over the property sold? (2) Who is responsible for damage caused to third parties by the property? (3) Does the property constitute a guarantee for the creditors of the transmitter or the acquirer of the property? (4) Who supports the risk in case the sold thing perishes? (5) Who has the right to obtain the benefits produced by the property sold?

Broadly speaking, the main systems of ownership transmission in Europe can be divided into the following categories:

1) Legal systems, such as the French and those that developed under its influence (e.g. the Italian, the Portuguese, and the Belgian legal systems), link the transfer of ownership to a contract, meaning that the agreement between the parties actually transfers ownership.

2) Legal systems such as the German and those it has exerted an influence on (e.g., the Austrian, the Swiss, and the Greek legal systems), where the conclusion of a contract must be accompanied by a contract on the actual transfer of ownership and the recordation of the transfer in the land registry.

In most legal systems influenced by the German model, the contract on the actual transfer of ownership has been substituted by recordation.

A characteristic of German law is that the contract on the actual transfer of ownership is disconnected causally from the contract that details the obligations of the parties, in such a way that nullity of the contract detailing the contractual obligations does not affect the validity of the transfer of ownership.

3) The Spanish legal system shares some of the characteristics of both systems previously cited. The Spanish system requires the conclusion of a contract (a title) and the *traditio* (the delivery of possession with the intention of passing ownership, which is the *modo* or correct form). These requirements are an example of how some aspects of the Spanish legal tradition have asserted themselves over the strong influence of the French.

A distinctive characteristic of the Spanish system is the causal relation between the contract and the transfer of title. If the contract is invalid, the transmission of ownership cannot be said to have taken place.

4) The common law system uses a complicated process known as “conveyance” to transfer ownership. This process consists of various stages, and in some countries (such as England and Wales) the acquisition process is only achieved with the inscription of the title in the land registry.

From an economic perspective,²⁴ the optimal system of transfer of title would be that in which a single subject could be said to have: (1) an interest in safeguarding and conserving the physical condition of the property; (2) the legal means to protect the property; and (3) physical contact with the property, so that the title holder would be in a position to see whatever steps might be necessary to take in order to safeguard and conserve it. However, it is not within the power of the legislator to condition the transmission of the property and the actions associated with the transfer in such a way as to ensure that these three conditions always coincide. The legislator is forced to choose between conflicting interests and distribute risk between the parties in one way or another.

The three conditions stated are not met in the solution provided by the French legal system. Sacco describes the French solution as “pseudo consensual”²⁵ and attributes it to an intense dislike on the part of its creators of the obligation to give.²⁶ This obligation is substituted by the automatic effect of the transmission of the property. The obligation to give is characterized by the fact that the creditor, who has an effective interest in the condition of the property, does not have any legal action at his disposal to protect it. The authority to do so is held by the owner, who has a number of legal actions available to him to protect the property (such as the action to recover the property from third parties in possession and the *actio negativa*).

As a consequence, the French legislature considered it advantageous to convert the buyer automatically into the owner rather than the creditor of an obligation to give. However, this consensual system has a weakness. While it transfers the authority

24. See Rodolfo Sacco, *Relazione di sintesi*, in VENDITA E TRASFERIMENTO DELLA PROPRIETÀ NELLA PROSPETTIVA STORICO-COMPARATISTICA ATTI DEL CONGRESSO INTERNAZIONALE PISA-VIAREGGIO-LUCCA, April 17-21, 1990, at 900 (Letizia Vacca ed., Giuffrè 1991).

25. *Id.*

26. *Id.* at 901.

to protect the property into the hands of the buyer, who is naturally the subject interested in preserving the property in good condition, it means that the ability to protect the property is conceded to a subject that does not have it at his disposal. This subject, who does not have the possession of the property in question, is therefore not in a position to detect potential threats to it.²⁷

A part of German legal doctrine has criticised the German model of property transfer. These authors feel that in the sale of immovable property, ownership should be transmitted on the payment of the price stipulated and the handover of the property.²⁸ This is the thesis held by members of the school of Karl Schimdt, who do not favour the current model of property transfer in the German Civil Code. They dispute the necessity to distinguish between obligational contracts and contracts on the actual transfer of property.

The critics of this model draw on a wide range of historical sources to support their critique, including Roman Law, ancient

27. Spanish legal doctrine has come to the same conclusion; *see, e.g.*, MARIANO ALONSO PÉREZ, *EL RIESGO EN EL CONTRATO DE COMPRAVENTA* 254 (Montecorvo 1972). This author considers the rule *res perit domino* to be a deviation from the original *periculum est emptoris* applied in Roman law, and claims it was a creation of the natural law school of rationalists. This school of thought maintained that it was against the laws of nature and therefore wrong for the buyer to have to assume all the risk of a transaction, as it had traditionally been believed was the case in Roman law, and that in fact Roman law had not actually imposed this burden on the buyer. Hugo Grotius drew attention to several passages from the Roman period that he felt clearly showed that ownership was able to be transmitted, even without the act of placing the property in the possession of the buyer (the *traditio*), by the mere consent of the parties. However, even the consecration of the maxim *res perit domino* does not eliminate the injustice of the rule *periculum est emptoris*, because making the buyer the owner of a property without handing over to him the possession and the use of it is effectively the same as making him a creditor of the right to the property. In both cases the property perishes to the detriment of the subject who has to pay the price.

28. This is the opinion of Hans Brandt, *Eigentumserwerb und Austauschgeschäft, der abstrakte dingliche Vertrag und das System des deutschen Umsatzrechts im Licht der Rechtswirklichkeit*, 120 LEIPZIGER RECHTSWISSENSCHAFTLICHE STUDIEN 322 (Th. Weicher 1940) which has been criticised by, Heinrich Lange, *Rechtswirklichkeit und Abstraktion*, 148 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [Acp] 188 (1943).

Germanic Law, natural law philosophy and nineteenth century Prussian Law.

Another controversial issue in the German system of property transfer is the principle of abstraction. This principle states that contracts on the transfer of property are independent from their cause, which means that they produce effects even if the accompanying obligational contract proves to be invalid. The decision to incorporate the principle of abstraction in the legal system is a political decision taken by the legislator in an attempt to balance the conflict of interests generated between the transmitter of the property, the acquirer and his creditors, the successors of both parties and the interests of commerce.²⁹

The principle of causality and the principle of abstraction are techniques used to distribute risk between the parties to a contract. The principle of causality better protects the interests of the creditors of both parties, because only the patrimony of their debtor is placed at their disposition and it does not protect the good faith of the acquirer's creditor based on the appearance of the situation created. In this way, a subject that has commodities at his disposal is able to retrieve them from the patrimony of a third party, without his interests being secondary to those of the acquirer's creditors.

The principle of abstraction guarantees equality between the parties, because both the subject that transmits the property and the subject that acquires it, and only them, have legal actions based on their contractual obligations. According to the principle of causality this would not be the case, as there exists a danger that the seller might stake a claim to the property by means of the revendicatory action (*reivindicativo*) (which is used to defend a property right), while the purchaser of the property would only

29. This principle was included in the German Civil Code due to the influence of Savigny. The celebrated German jurist considered just cause to be the agreement that the parties reach over the transmission of property whilst the property agreement itself (*Einigung*) is a separate legal act that does not depend on a contract outlining the obligations of the parties.

have legal actions based on the other party's contractual obligations.

In the opinion of Lange, the best property transfer system would be that which combined the principle of causality with a system of acquisition of property *a non domino*.³⁰ This would afford the parties protection against any possible defects in the underlying legal agreement and would also protect the interests of commerce.³¹ This is the solution that Spanish legislators have opted for. While the Spanish system of property transfer is causal it also protects those that acquired their right from a subject that appeared in the land register as the title holder of the property by maintaining the validity of their acquisition, even when the transmitter was not really the legitimate owner. It also protects the acquirer from any other resolution or revocation of rights that did not figure in the land registry at the time of transfer (Article 34 of the Spanish Mortgage Law).

IV. THE ECONOMIC FUNCTIONS OF THE LAND REGISTER: A COMPARATIVE ANALYSIS OF THE DIFFERENT LAND REGISTRATION SYSTEMS

A. Systems of Land Registration in Europe

The legal systems of Europe differ not only in the rules they employ to regulate property transfer but also in the organization and efficiency of their respective land registries.

In Germanic systems, the land registry is designed as a register of title. The land register has a fundamental role to play in transactions over immovable goods, as inscription in the registry

30. Lange, *supra* note 28, at 188.

31. In the words of Lange, *supra* note 28, at 226: *Ich habe deshalb stets gegen das Abstraktionsprinzip gekämpft und halte diesen Kampf auch heute noch aufrecht, obwohl ich die Begründung aus der Unvollständigkeit dieses gebildes heraus nicht mehr für zutreffend halte* ("That is why I have always fought against the abstraction principle and I maintain this fight even today, although I do not longer consider right the justification of the elimination of this institution").

has replaced the *traditio* or the act of handing over the physical possession of the property. In Germany, inscription in the land registry has to be preceded by an agreement over the act of transferring the property (abstracted from the separate agreement over the obligations of the parties). In Switzerland, however, the law requires a causal contract that has the specific aim of transferring ownership.³² In both systems inscription is necessary, as without inscription neither the agreement to transfer property nor the causal contract produce the effect of transmission.

In other European countries the land register is organized as a register of deeds. There are several types of registers of deeds; some of them are simple, rudimentary collections of unorganized deeds like the ones that exist in many parts of the U.S. Nevertheless other are well organized, improved like the French, the Scottish or the Dutch registers.³³

1. The Scottish Land Register

Registration has been mandatory in Scotland since 1617, in the sense that it is the final and essential step in the transfer of ownership of land.³⁴ As a result, virtually all land is registered, and the register is (and always has been) open to the public without restriction. The original register of 1617, known as the “Register of Sasines”, was a register of deeds, but it is now being phased out and replaced by a new register, the Land Register of Scotland, which operates as a system of registration of title.³⁵ Today, when

32. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE], arts. 657 (1) and 665 (1) (Switz.).

33. ROWTON SIMPSON would also consider them as “Title Registration”. STANHOPE ROWTON SIMPSON, *LAND LAW AND REGISTRATION* 22 (Cambridge University Press 1976).

34. Registration (Scotland) Act, 1617, c. 16.

35. The relevant legislation is the Land Registration (Scotland) Act, 1979, c.33. The 1979 Act is itself under review by the Scottish Law Commission, and there are likely to be major changes. See the Commission's Final Report on Land Registration (Scottish Law Commission, *Report on Land Registration*, report nr. 222 (February 2010, 2 v.), available at www.scotlawcom.gov.uk/download_file/view/186/ (vol. 1), and

land is sold, the transaction must be registered in the new register. As a result, the title to some 50% of properties is held in the Land Register, and the numbers are rising rapidly. Both registers are administered by Registers of Scotland, a government agency.³⁶

The Land Register is held in electronic form. For each property, there is a separate title sheet which shows the boundaries, the name of the owner, and the other real rights (such as rights in security “mortgages”) to which the property is subject. As a matter of law, the person named as owner on the title sheet *is* the owner.³⁷ So if the house in which A is interested is already on the Land Register, all A has to do is to consult the relevant title sheet. This can be done in person, by using an internet-based inquiry service,³⁸ or by employing a firm of professional searchers.³⁹

2. The English Land Register: The Journey to Title Registration

In England, in the early eighteenth century, systems of deed registration were introduced for some very limited areas of England. Title was based on the production of deeds, showing the owner’s and his predecessors’ entitlement to the land. A register of deeds made ownership more secure by removing the risk of lost

www.scotlawcom.gov.uk/download_file/view/187/ (vol. 2)), which contained a draft Bill that, if enacted, would repeal and replace the Land Registration (Scotland) Act 1979. The Land Registration (Scotland) Bill was introduced in the Scottish Parliament on 1 December 2011. The main objectives of the Bill are to reform and restate the law on the registration of rights to land in the land register; to enable electronic conveyancing and registration of electronic documents in the land register; to provide for the closure of the Register of Sasines in due course; to allow electronic documents to be used for certain contracts, unilateral obligations and trusts that must be constituted by writing; to provide about the formal validity of electronic documents and for their registration and for connected purposes.

36. See www.ros.gov.uk (last visited Apr. 12, 2013).

37. Land Registration (Scotland) Act, 1979, c.33, s.3(1)(a).

38. Known as Registers Direct. See www.ros.gov.uk/registerdirect (last visited Apr. 12, 2013).

39. See Kenneth Reid, *Report for Scottish Legal System*, TRANSFER OF IMMOVABLES. THE COMMON CORE OF EUROPEAN PRIVATE LAW (pending publication).

deeds, and the deeds registration statutes provided that unregistered deeds would have no effect upon a purchaser of the land (while remaining valid against the parties to them).

In the first half of the nineteenth century one of the reforms that were called for was the introduction of title registration. Title registration is an independent record of ownership wherein the state of the title can be consulted without the necessity for further investigation.

In 1862, a title registration statute, the Land Transfer Act, was enacted. The system failed, however, in part because the registration was not made compulsory: once a title was registered, off-register dispositions were allowed, preventing the register from remaining up to date.

Later, in 1925, the Land Registration Act configured a workable and efficient land registration system, which was modified by a 2002 statute. The act of inscription is currently a constitutive act in England and Wales, since the Land Registration Act 2002 came into force.

3. The French Land Register

In the so called “Latin” legal systems (such as the French, the Italian and the Belgian) inscription in the land registry does not form part of the mechanism of transmission, and the function of the land registry in these countries is primarily to give publicity to titles over property. The inscription of a right over an immovable is therefore only useful when a subject wishes to invoke that right against third parties.

In France as in the Netherlands, the registries of properties, which technically have the same function as a title register, are part of the *cadastre*. Both of them, for historic and fiscal reasons, are connected with the Ministry of Finance. The control of the

formalities is thus restricted, consequently limiting the legal impact of the land registration and of the *cadastre*.⁴⁰

The land registration is organized by a decree of January 4, 1955.⁴¹ It organizes the publicity of the diverse acts and facts that modify the legal status of an immovable property, in order to improve the information available to third parties. The core of this system consists in the obligation to publish acts, judicial resolutions and legal facts (such as the death of a person) which create or transfer any real right on an immovable. The act must be filed at a local office called “land registry”, under the responsibility of a Ministry of Finance officer, called a “land registrar”, who also collects taxes. The land registrar records acts on a logbook on a chronological basis, which allows establishing the order of publication of acts. He has to draw a record listing excerpts of the registered acts, by owners (personal index cards) and by properties (real index cards). This mixed system thus allows obtaining information either on the real rights of a given person, or on the rights and charges that pertain to a given property. To allow the establishment of the real index cards, the decree of January 4, 1955, created a correlation between the land registration and the *cadastre*, even if they are managed by two different services.

French law has no system of perfect proof of ownership, except by way of acquisitive prescription. Proof can be established by any means (title, possession, etc.), left to the sovereign estimation of the courts. The French land registration system (*publicité foncière*),

40. See Frédéric Planckeel, *Report for French Legal System*, in TRANSFER OF IMMOVABLES. THE COMMON CORE OF EUROPEAN PRIVATE LAW (forthcoming, Cambridge Univ. Press 2013).

41. Décret 55-22 du 4 janvier 1955 portant réforme de la publicité foncière [Decree nr. 55-22, of January 4, 1955, regarding the reform of land registration], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], January 7, 1955, p. 346; and by Décret 55-1350 du 14 octobre 1955 pris pour l'application du décret n° 55-22 du 4 janvier 1955 portant réforme de la publicité foncière [Decree nr. 55-1350, of October 14, 1955, applying the Decree nr. 55-22, of January 4, 1955, regarding the reform of land registration], J.O., October 15, 1955, p. 10125.

contrary to the German land register, is not attributive of ownership. According to French law, land registration is limited to proving against third parties that B acquired his right from A (*opposabilité du titre*), not to prove that A was himself the owner. The land registrar does not verify the content of the transferring contract: those who want to deal with B must know that his title can be challenged in an action in nullity, which may invalidate the act of disposition concluded with B.⁴²

Compulsory land registration has an incidental impact on the effects of contracts transferring immovable property. On the one hand, the contract must be certified by an authentic act for its publication, making the intervention of a notary necessary, often to reiterate a transfer already agreed on in a contract. On the other hand, the publication conditions the possibility of making the transfer effective as against interested third parties: the particular assignees of the same assignor, or of a common assignor, who would claim to have on the property a competing real right.⁴³ For example, A sells to B, then A sells again to C. B can make his transfer effective against C only if he publishes first. C will prevail over B if he publishes first, at a moment when A still appeared in the register as being the owner.

This rule offers limited protection. For instance, land registration does not protect the purchaser against a competitor who claims to have acquired his right from a third party having sought no registration of his title: it protects him only against the existence of occult transfers by his assignor. Furthermore, the Court of Cassation introduced an important adjustment based initially on fraud, and later extended to civil liability:⁴⁴ if C

42. Art. 28 of the decree of January 4, 1955, *supra* note 41, mitigates this inconvenience by imposing the publication of claims in nullity or termination of contract or act of disposition.

43. The heirs are not considered as third parties and are compared to their assignor.

44. Cass. 3e civ., January 30, 1974, D. 1974, 427 (note J. Penneau); Cass. 3e civ., January 30, 1974, JCP 1975, II, 18001 (note M. Dagot).

registers first a right that he has acquired from A knowing that A had already transferred it to B, C's fault deprives him of the benefit of land registration. However, if C resells to D, and D registers before B, D loses the benefit of land registration if he bought with full knowledge of the facts.⁴⁵ This application of civil liability thus restrains the automatic character of publicity.

Although its extent is thus limited, it is admitted that land registration provides sufficient security, because the conflicts settled by the decree of January 4, 1955 are the most common in practice.⁴⁶

The French reform of 1955 aimed at making registration an efficient instrument to help guarantee commercial security. The reform made it obligatory to register the creation or transfer of real rights in the land register but stopped short of making registration a constitutive act.⁴⁷

4. *The Spanish Land Register*

Spanish law differs from the French model in various ways as it incorporates a number of aspects of the German property transfer system. As in the French system, inscription is not a constitutive act, it is a declarative act. Transmission of property requires a

45. Cass. 3e civ., June 11, 1992, D. 1993, 528 (note A. Fournier).

46. MAZEAUD ET AL., III LEÇONS DE DROIT CIVIL, at 534 et seq. (2d., Montchrestien 1963); GABRIEL MARTY ET. AL., DROIT CIVIL LES SÛRETÉS LA PUBLICITÉ FONCIÈRE 324 (2d ed., Sirey 1987); PHILIPPE THÉRY, SÛRETÉS ET PUBLICITÉ FONCIÈRE 401 (PUF 1988); JEAN-PIERRE CHENU, DE LA TRANSCRIPTION À LA PUBLICITÉ FONCIÈRE 72 (Bordeaux Imprimeries Delmas 1960); PIERRE LECHÊNE & PATRICK STEINMANN, PUBLICITÉ FONCIÈRE: CONSERVATION DES HYPOTHÈQUES: SIÈGES ET RESSORTS DES BUREAUX, FORMALITÉS D'ENREGISTREMENT, TARIF ET SALAIRE DU CONSERVATEUR DES HYPOTHÈQUES 5 (2007).

47. The same obligation exists in Belgium, Luxembourg, Italy, and Sweden, where notaries and other public officials have to file for registration within a three month period starting from the date on which the document was presented. In France, this obligation appears in art. 33, decree of January 4th, 1955, *supra* note 41. In Sweden the same obligation is contained in Jordabalk [JB][Land Law Code] 20:3 (Swed.); in the Swedish system, if the required documents are not presented to the Registrar within three months, the party responsible may be fined, but the sale is valid and the effects of the transmission will have been consolidated.

contract to transfer ownership (or another type of valid title) and the act of handing over possession of the property (known in Spanish Law as the theory of title and mode). The effect of registration is threefold:⁴⁸

a) First, like in France, a person recording an act in the land registry cannot see his right opposed or adversely affected by any act of the transmitter that creates another, incompatible right.

b) Second, and this goes one step beyond the French model, when a right has been registered for at least two years (articles 28 and 207 Spanish Mortgage Law), the title holder is empowered, by virtue of registration, to exercise and enforce the registered right *erga omnes*.

c) Third, according to the principle of public good faith in the register, when a person registered a right acquired from an apparent title holder, his title will be upheld even if the transmitter was not the genuine title holder. This principle also protects the holder of the registered title if his title is threatened by a cause of termination that does not appear in the registry (article 34 of the Spanish Mortgage Law).

B. Systems of Land Register in the United States

In the U.S., the Land Registration systems vary widely from state to state regarding what has to be recorded, the way it is recorded and the legal consequences of it.

Some attempts to introduce more uniformity failed, such as the Uniform Simplification of Land Transfer Act of 1976. Due to the archaic and incomplete character of many official recordation institutions, the private insurance sector developed title insurance, providing purchasers with additional certainty in return for compensation. The introduction of the so-called “Torrens system” provided an

48. Regarding this matter, see Antonio Gordillo Cañas, *La inscripción en el Registro de la Propiedad (su contenido causal, su carácter voluntario y su función publicadora de la realidad jurídico-inmobiliaria o generadora de su apariencia jurídica)* in 1 ANUARIO DE DERECHO CIVIL 11 (Boletín Oficial del Estado 2001).

alternative to this combination of an official recording system with title insurance. The “Torrens system” became popular in the United States during the late nineteenth century. More than 20 states passed enabling acts for a Torrens system during the period 1895-1915. Prompted by the failure of three of four insurance companies in the state of New York during the 1930s, the New York Society engaged R. Powell of Columbia University in order to study an eventual introduction of the Torrens system in the state of New York. His report was highly critical about such an introduction stating that the recordation system, then prevailing in the state of New York and in 16 other states operated at lower cost than the Torrens system. His report gave a fatal blow to the hopes that the Torrens system would be generally accepted in the U.S. Many states which had adopted the system repealed the statutes. The discussion about the effectiveness and efficiency of both systems still looms in legal literature.⁴⁹

In the majority of U.S. legal systems, transfers of ownership of real property are not effected by contract, but by the execution and delivery of a deed. Deeds are formal documents that must contain specified information and declarations, and are often recorded or filed with a local land records office.

Most transfers of real property are preceded by a contract of sale, in which the seller agrees to transfer title at a later date in exchange for a payment by the buyer. Because they concern the transfer of real property, such contracts are subject to the writing requirement, according to the Statute of Frauds in force in some states.⁵⁰

49. BOUDEWIJN BOUCKAERT, *PROPERTY LAW AND ECONOMICS* 193 (Edward Elgar 2010) (on the other side, there is still discussion about the effectiveness of each system). See Matthew Baker et al., *Property Rights By Squatting: Land Ownership Risk And Adverse Possession Statutes* in 77 *LAND ECONOMICS* 360 (University of Wisconsin Press 2001) (who developed research on the optimal title search under recording system in the U.S. Although the focus of their research is not on an efficiency comparison between recording and registration systems, the result of their research strengthens the efficiency argument in favour of the recording system).

50. GREGORY KLASS, *CONTRACT LAW IN THE USA* 91 (Kluwer Law Int'l 2010). Contracts for the sale of land are to be distinguished from conveyances of land—that is, transactions in which title or ownership passes. Conveyances are governed by additional statutes, and are generally considered subject to property

Contracts for the sale of real property generally precede the buyer's investigation of title and often also his securing of financing for the purchase.

The buyer's obligations under such a contract of sale are therefore typically conditional first, on a satisfactory title report by a third party and second, on the buyer being able to obtain financing.

In the majority of states, the chain of title review is usually performed by a professional title abstractor or attorney, and the clear title is guaranteed either by a title insurance company or by an attorney, subject to some exclusions, which may be quite significant.

In many states, deeds or related documents are being recorded in land registration offices (which have different names: office of the recorder, country vault, recording office, land office). In these offices, track of transfers of property can be established by inspecting the land records. The offices are governmental organizations at the lowest governmental level, the county. Almost all U.S.-counties have two main complementing registrations: for property, the warranty deeds (for conveyances) and the deeds of trust (for mortgages). Cadastral mapping is carried out in a basic way or sometimes not at all. Project developers sometimes prepare maps of large tracts of land to be split up in parcels that are individually sold and these maps can be used in the land offices as a kind of geographical description of the newly formed individual lots.

law, as distinguished from the law of contract. The Statutes of Frauds applies to the transfer of any interest in land, which section 127 of the Second Restatement of contracts defines as "any right, privilege, power or immunity, or combination thereof, which is an interest in land under the law of property." This capacious definition includes not only the simple ownership (or a fee simple estate) of real property, but also options to purchase or sell The wording of some states' Statutes of Frauds makes it unclear whether the requirement applies only to promises to transfer an interest in land, or also to promises to buy such an interest. Most courts have held that it applies to both, which is the position adopted by the section 125 of the Second Restatement.

The fact that the public in general has to present documents for registration is one of the weak points in any land registration system. A land registration that is not updated by a constant flow of data to renew existing records will fail. To ensure that documents regarding conveyances are actually presented at the offices to be recorded as soon as possible, recorded facts get priority over unrecorded ones. This incentive to register is expressed in the recording statutes of the various states in the U.S. There are three types of statutes: race, notice, and race-notice statutes. In race statutes priority depends on the order in which documents and other instruments are registered. The winner of the race to registry gains priority even if he or she knew of a prior unregistered conveyance. Knowing this could lead to fraudulent practices, some states in the U.S. adopted the notice statute, in which case no premium is placed on the race to the registration office. The focus here is on whether the purchaser had notice of a prior conveyance or not. A *bona fide* purchaser will always win as long as he or she is without notice. The “race-notice” statute is composed of elements of both “race” and “notice” statutes. A purchaser can purchase without actual or constructive notice of an earlier claim and he or she must register first.⁵¹

In the United States, there is no nationwide or uniform system for the identification of properties.

For references to location of parcels the majority of states use the Federal Rectangular System (FRS). After the declaration of independence the federal state found itself with vast tracts of undeveloped and hardly inhabited land. There were few monuments suitable for the usual surveys and it was determined to devise a system that would facilitate location of land parcels. A commission headed by Thomas Jefferson evolved a plan for dividing the land in a series of rectangles which Continental Congress approved in April 1785. In this system a chosen baseline and a principal meridian form the basis of the reference system. The initial point, varying from state to state to avoid too

51. Simpson, *supra* note 33, at 96.

complicated referencing, is the point where these lines cross. Along the baseline the reference is made to 6-mile intervals known as ranges and along the meridian these 6-mile intervals are known as townships. The way in which references are made to these various base lines and meridians and the further division of the “squares” in sections that are formed on the bases of the baseline and meridians is similar and unique all over the U.S.

The FRS was a useful tool in granting land to settlers. Newly “discovered” conquered, or traded lands were divided in ranges and townships on the basis of the initial point. After the size of a parcel of land, suitable to feed a family was determined, each applicant could buy a “square” parcel of land of that size, of which the location would be uniquely identified in the FRS. Additional surveys were not necessary. It is remarkable that even today the reference to the FRS is often made in the registration, although, most of its initial usefulness is lost.

With the increasing urbanization the FRS system becomes often too coarse to serve as a good indicator for the small parcels of land that are common in urban areas. Nevertheless, references to the FRS system are maintained as much as possible as reference to the location of the parcels.

The FRS system is in use in 30 of the 50 states of the U.S. (and in provinces in Canada). There are 32 base lines and 35 meridians in the U.S. The original colonial states (mainly on the East coast and New England), Hawaii, Virginia, Kentucky and Texas do not use the FRS system (Florida is the only Atlantic coast state using the FRS).⁵²

Taking into account the technology available nowadays for computerizing registration and mapping, after analyzing this system of registration of rights to land in the U.S., it seems to be complex and somewhat unsophisticated. One of the reasons that explain this situation is without doubt the existence of title insurance provided by private insurance companies. For sure, this has reduced the urgency to modernize the land registration system.

52. HENRI A.L. DEKKER, *THE INVISIBLE LINE: LAND REFORM, LAND TENURE SECURITY AND LAND REGISTRATION* 182 (Ashgate Publ'g ltd. 2003).

Title insurance in the United States is indemnity insurance against financial loss from defects in title to real property and from the invalidity or unenforceability of mortgage liens. This type of insurance is meant to protect the financial interest of owners or lenders against losses due to title defects, liens or other matters. It will protect against a lawsuit attacking the title as it is insured, or reimburse the insured for the actual monetary loss incurred, up to the amount of insurance provided by the policy.

C. The Demand for Title Registration: An Economic Approach

According to the way in which registers are organized and the degree of effectiveness attributed to them, it is possible to divide them into two main categories.

1) The registration of deeds system. This type of system is also termed the “opposability system” and is currently used in France, Belgium, Portugal and Italy. The defining characteristic of this system is that documents are registered without the identification of the latest genuine title holder, that is to say the documents are not examined beforehand as part of a process to establish the identity of the title holder, but merely have to comply with certain formal requisites. The content of the register, therefore, only defines a group of possible title holders, and holds a complete set of all the documents pertaining to a property, which may be inspected on request.

Given the resulting lack of certainty of this system in some countries, like in the U.S., it is quite common to contract “title insurance” to provide holders with an indemnity should they be dispossessed of their title. The negative aspect of this measure is that while the indemnity provides economic security, an insurance contract obviously does not provide any degree of legal security, as the acquirer of the property may lose his title to it. Also, the measure of economic security provided is limited, as the title security does not cover the full value of the property, but only the

purchase price (or a percentage of the purchase price) and not other related costs of the purchase. In addition, the payment of any indemnity is subject to the exceptions and conditions stipulated in the insurance policy.

2) The registration of titles system, which is also referred to as the “the presumption of correctness system.” This system is currently in place in Germany, Austria, Switzerland, Spain and England. In this system, rights are inscribed in the registry, and it does not consist of a collection of original documentation pertaining to the property, as does the registration of deeds system. The registrar is responsible for carrying out a check on the legality of the claims presented and will not permit any inscription that contradicts a right already inscribed in the registry without the prior authorization of its title holder. In this system, the principles of exactness (the content of the Registry is presumed to be a true reflection of the legal situation) and priority (by which a posterior but registered act prevails over a previous but unregistered act) both apply.

Under the registration of deeds system, courts resolve disputes by adjudicating property rights according to the moment in which the deeds were recorded in the register. This creates a strong incentive for people to record the deeds to a property as soon as possible and for the parties or their intermediaries to gain the consent of the title holders of the rights affected in order to do so. In this way, the parties can voluntarily avoid possible future conflicts over the ownership of titles.

In the registration of titles system, private contracts are also accorded priority when recorded. However, the registrar is granted authority that is almost akin to that of a judge and will not inscribe a right if it negatively affects one previously inscribed, unless previously authorized by the title holder to do so. This eliminates a potential weakness of the registry and means that those legal systems that have this type of registry treat inscription as conclusive proof of the existence of the right, and establish a

system of responsibility for those exceptional cases in which there is an error in the register. As a consequence, those who acquire a property in good faith, trusting in the accuracy of the registry, will not be stripped of their rights over the property even if the genuine title holder subsequently appears.

The two registry systems incur different types of expenses and provide different kinds of benefits in terms of reducing the costs derived from the uncertainty and the risk of losing property rights.

The registration of deeds system is certainly cheaper than the registration of titles system, but it is generally considered less effective. The lower cost of the registration of deeds system is due to the fact that the examination of the deeds to establish the legality of the rights contained in them is purely voluntary and, under these systems, services to assess and insure the parties are provided by private companies. This has sometimes been cited as a benefit, because, as this system favours the intervention of the private sector, the resulting competition to provide services tends to minimize the cost of the services they provide.

However, in the opinion of Arruñada,⁵³ these advantages are more illusory than real. The cost of voluntarily insuring a right can be as much as and sometimes even higher than the cost occasioned by the inscription of the right in the public registry. The organization of this type of service by the private sector may also be inefficient in economic terms as they are often provided by monopolies and are normally tightly controlled by state regulations. The fees of a French notary are fixed by the state, and both the notary and the insurance company are subject to legislation that limits entrance to their profession and specifies the “products” they can offer and the procedures they must follow. As a consequence, this duplication of institutions (private companies and the deeds registry) to provide guarantees to the parties in a property transfer is not economically efficient.

53. Arruñada, *supra* note 11, at 70.

The registration of titles system requires a prior examination of the legality of the rights to be inscribed to be carried out by a public official. This requisite obviously increases the costs of the transaction. However, by organizing the property registry in a professional manner along the same lines as the organization of the judiciary, a high level of productivity can be achieved. This level of productivity is even higher when the registrar earns the benefits produced by the registry office (as is the case in Spain).

The costs of the registration of titles system are offset by the greater security it provides,⁵⁴ as it protects those who acquire property in good faith through rules that govern the responsibility for errors in the registry, by which subjects are compensated for losses caused by errors.⁵⁵

54. According to Harold Demsetz, *Toward a Theory of Property Rights* in 57 AM. ECON. REV. 347, 347 (1967) this improvement in the definition of the rights in question is only efficient when the benefits associated with it are greater than the costs it generates.

55. Benito Arruñada, Nuno Garoupa, *The Choice of Titling System in Land*, available at www.econ.upf.edu/docs/papers/downloads/607.pdf (last visited Apr. 12, 2013).

**ANYTHING BUT COMMON: THE ROLE OF LOUISIANA’S
CIVILIAN TRADITION IN THE DEVELOPMENT OF
FEDERAL CIVIL RIGHTS JURISPRUDENCE UNDER THE
FOURTEENTH AMENDMENT**

Jared Bianchi*

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ABSTRACT

The famed *Slaughterhouse Cases* were the first cases to interpret the Fourteenth Amendment. Those cases arose from a Louisiana controversy. This essay suggests that Fourteenth Amendment jurisprudence, including Substantive Due Process, is rooted in the civilian private law tradition as received in Louisiana and as argued by the butchers in the *Slaughterhouse Cases*. The essay explores the civil law roots of the Privileges and Immunities Clause, beginning with the Twelve Tables and the Code of Justinian. The essay explores how those early codes were appreciated by subsequent Louisiana jurists, and how the civil law approach became an integral part of subsequent Supreme Court rulings involving the Fourteenth Amendment. Throughout this process, both the factual matters at issue in the *Slaughterhouse Cases*, and also the philosophical underpinnings that created the framework for the butchers' complaint will be examined. The essay uses French and Roman legal texts, as well as Louisiana's own legal history, to show that the Act that established the centralized slaughterhouse and stock yards was an affront to the *ius commune* and *ius cogens* of the era, but that the dissents that agree with that interpretation, and not the majority opinion, served as precedent in many subsequent Fourteenth Amendment cases. Finally, the essay shows that while the civilian approach reached its zenith with the *Lochner* era, it remains relevant, and indeed central, to an understanding of modern Substantive Due Process case-law.

I. INTRODUCTION

If it be said that the civil law and not the common law is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI, in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds, and trading companies, and authorized every person to exercise, without restraint, his art, trade, or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that State of the civil law as the basis of her jurisprudence, freedom of pursuit has been always recognized as the common right of her citizens.¹

There exists among the members of the bar of most states a popular though misguided perception of Louisiana and her legal customs. Amongst these misconceptions is that while the rest of the country developed a common law based upon the Anglo-American legal tradition, Louisianans continued to adhere to some strange legal form known as the Napoleonic Code,² causing the two systems to develop separately and having little bearing upon one another.³ In fact, Louisiana's rich history has contributed a great deal to the common-law of the United States. There is perhaps no better illustration of this than the civil-rights jurisprudence that issued from the Supreme Court following the infamous Slaughterhouse Cases.

1. Slaughterhouse Cases, 83 U.S. 36, 105 (1872) (Field, J., dissenting).

2. The term "Napoleonic Code" is a common misnomer used by some to characterize the source of the Louisiana Civil Code. In fact, the "*Code Napoléon*," or French Civil Code, was never applied in Louisiana, as it was enacted in 1804, after the Louisiana Purchase (1803). When codification took place in Louisiana (Digest of 1808), Spanish law was in force. The Digest of 1808 and the Louisiana Civil Code, which codified Spanish law, borrowed the form of the French Civil Code, and its substance wherever it appeared to be identical to Spanish law.

3. The idea that the Louisiana Civil Code is a simple continuation of the *Code Napoléon* is a misconception. Louisiana had been a Spanish colony for several years before its brief cession to Napoleon and subsequent cession to the Americans, in 1804. See Symeon Symeonides, *An Introduction to "The Romanist Tradition of Louisiana": One Day in the Life of Louisiana Law*, 56 LA. L. REV. 249 (1995).

The purpose of this essay is to illustrate three points: that the civil law of Louisiana embodies a certain conception of civil rights and individual liberties, received from the *ius commune* and *ius cogens* of its civilian forebears; that the argument undertaken on behalf of the butchers in the Slaughterhouse Cases represents that conception of privileges and immunities; and that while the butchers lost their case, the arguments advanced on their behalf have had significant impact on federal civil rights jurisprudence, reaching a zenith during the *Lochner* era.⁴ In going through this process, it is my hope that the reader will gain a greater understanding of the evolution of the American conception of liberty. I hope that this will in turn raise awareness among members of the bar about the degree to which civilian legal thought has shaped that evolution. The purpose of this article is not to advocate for or against any conception of rights or liberties, *Lochnerian* or otherwise. That intriguing debate has produced a great deal of able research already.⁵

II. THE CIVILIAN CONCEPTION OF LIBERTY: *IUS COGENS*, *IUS COMMUNE*

A. Economic Liberty as a Feature of *Ius Cogens*, and *Ius Cogens* as a Feature of Domestic Law

Underlying many codified legal systems are the concepts of *ius cogens* and *ius commune*. *Ius cogens* may be best translated as peremptory norms, so normative as to be not susceptible to derogation.⁶ Although the term is generally thought to apply to the

4. The term “*Lochner* era” refers to a period during which substantive due process jurisprudence was characterized by an emphasis on economic rights, such as liberty of contract. The era is so named because of the landmark decision in *Lochner v. New York*, *infra* note 124, which typified the period. The *Lochner* era will be discussed in greater detail in a later section.

5. See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (Univ. of Chicago Press 2011).

6. See, e.g., Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331:

sphere of international law, is more correctly understood as a secular, civilian iteration of natural law.⁷ Although the subject of this paper is not specifically international, the law as received in Louisiana is the product of many centuries of dialogue between the nations who had adopted and refined a codified system of law, and those early Romanist thinkers and jurists from whom that law was received. The development of these civilian jurisdictions must therefore reflect the character of those several nations involved in these epochal dialogues. Louisiana was first the colony of a distant kingdom and, as a result, its jurisprudence is steeped in a tradition of international dealing. Specifically, the colony of Louisiana dealt extensively with its colonial masters in France and Spain respectively, but also with its common-law neighbor, the United States. Until the southern part of Louisiana became a territory (Territory of Orleans) and then finally a state (Louisiana), relations between Louisiana and her neighbors and various colonizers were necessarily international in nature. In order to have a peremptory norm as understood in the international context, that norm must be viewed as not susceptible to derogation in each individual country. *Ius cogens* can only apply internationally so long as each of the several countries upon whom it is to apply share a normative sense of the importance of the rights enshrined. For this reason there is no logic to barring *ius cogens* from the lexicon of the domestic civilian jurist.

With that in mind, our first task is to discern the nature of the civilian conception of liberty and rights. Noted contemporary

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

7. James S. Gifford, *Jus Cogens Fourteenth Amendment Privileges or Immunities*, 16 ARIZ. J. INT'L & COMP. L. 481, 485 (1999) (arguing that *jus cogens* is "essentially a secular articulation of natural law").

French intellectual Alexandre Kojève posits that human phenomenon generally, and *droit* specifically, arose from anthropogenic desires and the acts that accomplished the aim of those desires.⁸ Kojève states that this process is expressed as either war or economics. The duality is the result of the “risk of the master in the struggle [on the one hand] and on the other hand, the work of the slave which results from it.”⁹ To Kojève, justice as achieved by *droit* is a human phenomenon, and in order for a human to be fully realized, he must be a citizen who is neither a slave nor a master, “being one and the other simultaneously.”¹⁰ Through this discussion, we begin to see that the idea of liberty of labor, as expressed through work, is inseparable from a certain conception of the free citizen. To Kojève, a man who has no freedom of labor cannot be a fully realized human being and is therefore denied his humanity *per se*.¹¹ Personal and economic liberty are therefore features of a legal system that cannot be abrogated if the system is to retain its legitimacy. Although Kojève’s analysis is more recent, echoes of those same concerns are seen in many early civilian texts.

That certain rights of a man are not susceptible to derogation as a proper function of legitimate law is a known feature of *ius cogens*. By applying Kojève’s conception of the actualized human,

8. ALEXANDRE KOJÈVE, OUTLINE OF A PHENOMENOLOGY OF RIGHT 215 (Bryan-Paul Frost ed., Bryan-Paul Frost & Robert Howse trans., 2000) (dialectic concerning the source of *droit*) (“In other words, all human phenomena have as their basis War and Economics, based upon Work. It is economics and war which constitute the actuality of human reality, of the historical existence of humanity”).

9. *Id.*

10. *Id.* at 216 (“And if he is man, and not animal, as warrior, worker, or citizen, it is not only as such that he is so. He is just as human as a ‘religious subject’ or a ‘moral subject’ and so on, or finally as a ‘subject of *droit*’”).

11. *See id.* at 231:

Just as the Slave can only free himself by synthesizing mastery with his servitude, his *Droit* can only be actualized by being synthesized with the *Droit* of his master. And just as the freed slave (by resumption of the struggle and an acceptance of the risk) is neither Master or Slave, but Citizen, actualized slavish *Droit* is neither slavish nor aristocratic: it is the synthetic *Droit* of the Citizen based upon the Justice of equity.

we are shown that the nature of those fundamental rights requires that freedom of labor run to the citizens governed by valid law. In the French legal tradition, liberty and equality are both necessary to the proper operation of justice. It is the emphasis on equality that requires a high degree of economic liberty, as liberty and equality are seen as inseparable features of a just legal system.¹² Indeed, amongst the French, whose Civil Code served as the model for the Louisiana Civil Code, inequality is an “infringement” of common rights that results from unjust distinctions between the rich and poor.¹³ In the French tradition, the absence of privileges granted to a given caste is an imperative feature of a just civilian society and was a feature of the *ius cogens* which formed the opinions of the early Louisiana codifiers.

B. Ius Commune, Private Law, and the Presumptions of the Louisiana Civil Code

As rights and liberties belong to people, codification of private law places people on equal footing with respect to those rights. These rights, connected to peremptory norms within the *ius cogens*, are given force within the *ius commune* by way of the codified private law. That private law should be seen as a protection for the equal status of all citizens subject to the *ius commune* was so central to early French codifiers that in the case of the *Code Napoléon*, the general grant of rights to all French citizens falls under Title I, Chapter I.¹⁴ That the recognition of civil rights as a birthright for all Frenchmen precedes a code that is largely concerned with how those citizens structure their dealings under private law is relevant in two ways. Structurally, the

12. ALFRED FOULLÉE ET AL., Vol.VII MODERN LEGAL PHILOSOPHY SERIES: MODERN FRENCH LEGAL PHILOSOPHY 37 (Committee of the Association of American Law Schools ed., Franklin W. Scott & Joseph P. Camberlain trans., 1916) (“Yet for the French this is only the first foundation-stone of law; they do not comprehend liberty apart from *equality*. . .”).

13. *Id.* (“To the French, what is inequality, if not privilege for one man and servitude for another, and consequently a lack of liberty?”).

14. CODE CIVIL [C. CIV.], Title 1, chapter 1 (Fr.).

placement of these provisions reveals that the codifiers intended to place civil rights at the fore of any discussion of private law. Substantively, the *Code Napoléon* was promulgated in order to cement the legitimacy of the law.¹⁵ By placing these rights so prominently, the codifiers put the people of France on notice that the rights so enshrined should be expected and respected in their private dealings, allowing the citizen to take an individualized possession of, and responsibility for, his own rights. The promulgation of these early codes served to place all French citizens on equal footing with respect to the exercise of their rights, and in so doing secured those rights from abuse. An individualized realization of the protection of economic liberty is necessary to ensure the citizens' sense of security in their economic rights.¹⁶ Security is necessary to the development of wealth and democratic character, and that security is in turn protected as a function of the private law within the *ius commune*.¹⁷ The *ius commune* as expressed in the civil code, running from the Twelve Tables, through France and Spain, and ultimately to Louisiana, acts to promulgate these private rights, and serves to publicize the fact that each citizen has been put on equivalent footing with respect to rights against third parties.¹⁸

C. The Civil Law as Received in Louisiana

In 1806, the Louisiana Territorial Legislature attempted to pass an Act declaring the continued applicability of the civilian authorities, until such time as “the Legislature may form a civil

15. *Id.* at art. 1.

16. FOUILLÉE ET AL., *supra* note 12, at 420 (“neither wealth nor character can develop where the feeling of [moral and economic] security do not exist”).

17. *Id.* at 423–25 (discussing the features of private law “necessary to assure the validity of a right as against a third person”).

18. *See, e.g.*, JEREMY BENTHAM, *Of Promulgation of the Laws and Promulgation of the Reasons Thereof*, in THE WORKS OF JEREMY BENTHAM, PUBLISHED UNDER THE SUPERINTENDENCE OF HIS EXECUTOR, JOHN BOWRING 157, 157–58 (Simpkin, Marshal & Co. 1893) (discussing the importance of promulgating law in order to teach men how to live together without causing one another injury).

code for the territory.”¹⁹ The Act to Preserve the Civil Law was a direct rebuke to the American President, Thomas Jefferson, who had installed Governor C.C. Claiborne with direct instructions to implement the common law.²⁰ Although this Act was eventually repealed, it is useful as it specifies the authorities and customs that formed the Louisiana *ius commune*. Among those authorities mentioned explicitly within this Act were: (1) the “Roman Civil Code [sic], as being the foundation of the Spanish law,” described as being composed of the Code of Justinian, the work of the commentators and particularly Domat’s treatise on the civil law; (2) the Spanish law, consisting of recompilations and books listed in the Act.²¹ Louisianans of the period feared that the common law’s instability would result in a usurpation of property rights.²² The Act to Preserve the Civil Law was born out of a fear of the perceived uncertainty of the common law, and offers insight into precisely what civil law was received by the people of Louisiana.²³ The *Corpus Iuris Civilis* and the Twelve Tables upon which it was built, do describe a conception of the privileges and immunities

19. An Act declaring the laws which continue to be in force in the Territory of Orleans, and authors which may be recurred to as authorities within the same (1806), reprinted in 1 LOUISIANA CIVIL CODE at xxv (A.N. Yiannopolous ed., 2013) [hereinafter “The Act to Preserve the Civil Law” or “this Act”].

20. Edward F. Haas, *Louisiana’s Legal Heritage: An Introduction, to LOUISIANA’S LEGAL HERITAGE* 3 (Edward F. Haas ed., Perdido Bay Press 1983) (describing Gov. Claiborne and Pres. Jefferson’s stated goal as “assimilation” of the Louisiana Territory).

21. See The Act to Preserve the Civil Law, *supra* note 19, at 6.

22. The Act to Preserve the Civil Law was passed by the House of Representatives and the Legislative Council, but was vetoed by Governor William C.C. Claiborne. John A. Lovett, *On the Principle of Legal Certainty in the Louisiana Civil Law Tradition: From the Manifesto to the Great Repealing Act and Beyond*, 63 LA. L. REV. 1397, 1403 (2003).

23. See *id.* at 1408:

Because the authors of the Manifesto linked the survival of their land titles, and their closely interrelated property rights in the slaves who exploited those lands, to the survival of pre-cession Spanish (and French) law governing those property rights, it is hardly surprising that the Manifesto spoke with such intensity about the consequences of ‘overthrowing received [civil law].’

(quoting 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS 1803-1812 652–53 (Clarence E. Carter ed., U.S. Gov’t Printing Office 1940)).

afforded to a Roman of that period. That conception is rooted in the language of equality before the law. Using characteristically direct language, Law I of Table IX tells us that in ancient Rome, “[N]o privileges, or statutes, shall be enacted in favor of private persons, to the injury of others, contrary to the law common to all citizens, and which all individuals, no matter of what rank, have a right to use.”²⁴ The civilian tradition of enshrining those rights as a function of private law seems to have origins in the Roman characterization of law as being either public or private. It borders on the tautological to point out that in order for a right to run to an individual, it must have an individualized expression. Under the Roman approach, this could only be accomplished through the use of private law, as public law was only concerned with the welfare of the state.²⁵

This fundamental truth would have been understood by the drafters of the *Code Napoléon* and the subsequent Digest of the Civil Laws drafted by attorneys Louis Casimir Moreau Lislet and John Brown.²⁶ Whether the drafters of the “Old Code” (as the Digest was later called) intended to adopt a French or Spanish conception of the *ius commune* was the topic of a rollicking academic debate between two noted professors of law at Tulane University and Louisiana State University.²⁷ Professor Robert Pascal of Louisiana State University, and Professor Rodolfo Batiza

24. SAMUEL PARSONS SCOTT, *THE CIVIL LAW* 73 (AMS Press 1973).

25. See J. INST. 1.1.4 (INSTITUTES OF JUSTINIAN (John Baron Moyle trans., Oxford Univ. Press, 7th prtg. 1967)):

The study of law consists of two branches, law public, and law private. The former relates to the welfare of the Roman State; the latter to the advantage of the individual citizen. Of private law then we may say that it is of threefold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome.

26. See Haas, *supra* note 20, at 4 (stating that the Digest of 1808 was divided into three books dealing separately with persons, with estates and things, and with the acquisition of property, and describing the code’s drafters).

27. See A.N. Yiannopoulos, *Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in *LOUISIANA’S LEGAL HERITAGE*, *supra* note 20, at 87.

of Tulane University locked horns in 1972, with Professor Batiza arguing that the sources of the Louisiana Code were largely French;²⁸ both Professors contributed a great deal to the literature on this matter. Some within the academy did concur with Professor Batiza's approach for a time.²⁹ More recently, the view that the Louisiana Civil Code was inspired primarily by French law has faded from prominence as a result of further research and discovery.³⁰ Either approach is sufficient to establish that the drafters, and the Louisiana Digest of 1808, were rooted in the civilian notion of private law. The fact that the Digest is not illustrative of the French revolutionary ideas did not prevent French legal culture from being pervasive in Louisiana: the French notion of liberty through equality under the law would later prosper in doctrinal and court arguments.

D. The Constitution & Civil Code of Louisiana, circa 1870

Confusion about which earlier laws were to survive, as only those contradicted by the Digest had been abrogated, made clear the need for Louisiana's Digest to be re-codified.³¹ The redactors included Lislet, Edward Livingston, and others, who went about the task of crafting a coherent and complete civil code, this time

28. *Id.* at 98 (citing Batiza for the proposition that 70% of the provisions of the Louisiana Civil code of 1808 were derived from the *Projet du Gouvernement* and the *Code Napoléon*, and another 15% was Spanish and Roman and doctrinal works) ("Thus 1,837 of 2,160 articles (or about 85% of the whole) were derived from French sources while most of the remaining sources were derived from Spanish sources") (*internal quotes omitted*).

29. *Id.* at 101–2.

30. See Olivier Moréteau, *De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe*, 5 J. CIV. L. STUD. 31, 37 (2012) (discussing the evidence that the substance of the Louisiana Civil Code was not derived primarily from French law); see also Thomas J. Semmes, *History of the Laws of Louisiana and of the Civil Law*, 5 J. CIV. L. STUD. 313 (2012) (first published as a book in 1873; Semmes discusses the largely-Spanish sources for the Louisiana Civil Code).

31. See A.N. Yiannopoloulos, *The Civil Codes of Louisiana*, 1 CIV. L. COMMENT. 1, 11 (2008) (citing *Cottin v. Cottin*, 5 Mart.(o.s.) 93 (La. 1817) as representative of the problems that had thrown the system into an unworkable state of tumult).

abrogating the ancient laws on points addressed in the code.³² Many of those involved with the re-codification were in fact the same individuals who had clashed with President Jefferson over the original Act. Although the code was distinctly Louisianan, in that Roman and Spanish sources were used, these drafters brought a distinctly French conception of the civil law to their task, allowing us to infer the continued application of the principles discussed *supra*,³³ in doctrinal and court arguments. The Code was revised yet again after the Civil War. The Code of 1870 is largely the same as the Code of 1825, but for the removal of those parts dealing with slavery and the incorporation of other statutes passed subsequent to the 1825 Code.³⁴ This Code of 1870 is, in turn, applicable to the facts of the *Slaughterhouse Cases*.

E. Public and Private Law as Expressed in the Louisiana Constitution

Economic rights do not appear in any of the many revisions of Louisiana's Constitution until the most recent iteration, which was adopted in 1974.³⁵ The statement of economic rights appears in the preamble, which is an addition to the otherwise-similar preamble

32. *Id.*

33. *Id.* at 12:

The redactors of the 1825 Code followed the French Civil Code closely and relied heavily on French doctrine and jurisprudence They drew freely from the treatises of Domat, Pothier, and Toullier, but, at the same time, paid attention to the Digest of Justinian, the Siete Partidas, Febrero, and other Spanish materials. Even so, the Code of 1825 contains for the most part provisions that have an exact equivalent in the French Civil Code.

34. *Id.* at 14:

The Civil Code of 1870 is substantially the Code of 1825. The changes made relate merely to the elimination of provisions concerning slavery, the incorporation of amendments made since 1825, and the integration of acts passed since 1825, which dealt with matters regulated in the Code without officially amending it. These changes necessitated renumbering the articles of the Code, but they did not affect its structure, underlying theory, or the substance of most of its provisions.

35. LA. CONST. pmbl. ("We, the people of Louisiana, grateful to Almighty God for the civil, political, economic, and religious liberties we enjoy. . . .").

to the Louisiana Constitution of 1921.³⁶ Instead, the early constitutions appear to have followed the Justinian approach, treating the constitution as an instrument of public law and eschewing any mention of private rights or liberties.³⁷ The marked shift in approach coincides with the end of the Civil War and the beginning of the Radical Republican and carpetbagger³⁸ rule, which held sway over the State of Louisiana during the early reconstruction period.³⁹ With the influx of carpetbaggers and with minority suffrage militarily ensured, the Louisiana Constitution of 1868 reflects the Radical Republican ideals and echoes language found in the Thirteenth Amendment to the United States Constitution.⁴⁰ This 1868 document sees the first use of the Louisiana Constitution to enumerate individual rights and liberties, thereby blurring the once neat distinction between public and private law.⁴¹ Even though Louisiana had been weakened by a civil war and subjected to the importation of northern political actors, only some of the assimilation intended by Thomas Jefferson nearly seventy years prior was possible. It is a testament to the depth of the civil law importance to the Louisianans of the day that

36. LA. CONST. pmbl. (repealed 1972) (“We, the people of Louisiana, grateful to Almighty God for the civil, political, and religious liberties we enjoy....”).

37. *See, e.g.*, LA. CONST. pmbl. (repealed 1861) (“We the people of Louisiana, do ordain and establish this Constitution”).

38. “Carpetbagger” is a derogatory term used by Southerners for those Northerners who moved south after the Civil War. They were viewed as outsiders and opportunists in search of personal financial gain at the expense of the local population.

39. *See e.g.*, LEE HARGRAVE, *THE LOUISIANA STATE CONSTITUTION* 11–12 (Oxford Univ. Press 2011). The post-Civil War Reconstruction period in the former Confederate (southern) states lasted from 1863–1877. By 1876, only three of the eleven states subject to Reconstruction were still occupied by the federal military: Florida, Louisiana, and South Carolina; *see* ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877* (Harper & Row 1988).

40. LA. CONST. Title I Art. 3 (repealed 1879) (“There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of a crime, whereof the party shall have been duly convicted”).

41. LA. CONST. pmbl. (repealed 1879) (“We the people of Louisiana, in order to establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity. . . .”).

the civilian distinction between public and private law persisted as long as it did. It follows that, because the constitutions drafted under self-rule reflect the Roman distinction between public and private law, those pre-war instruments were a more true reflection of the civilian approach and, as a result, they are a more accurate reflection of the deeply held convictions of butchers of the era and their lawyers.

To those tradesmen and their attorneys, the right of self directed labor and economic liberty was so rooted in the civil law, and eventually in the Louisiana Civil Code, that there was no need to specify that right, as any act in contravention of those liberties would be repugnant to legitimate governance, and in derogation of the *ius cogens* and *ius commune*. There was no bill of rights in the original Louisiana Constitutions, not because the civilians had not considered rights at all, but because their approach was fundamentally different. A bill of rights was familiar to common law jurisdictions and would have been familiar to jurists in Louisiana. That such an enumeration was absent from the Louisiana Constitution until its addition by a reconstruction government, shows that it was previously omitted by choice; a fact that further supports the contention that the Civil Code, while private in nature, was intended to secure the liberties of the governed by way of equality before the law.

At this stage, it bears explicitly mentioning that thus far we have followed a clearly delineated path from the Twelve Tables and the *Corpus Iuris Civilis*, the foundational texts of civilian jurisprudence, to the French civil law, and now to the Louisiana law and custom, which would have been the custom and law governing those involved in the *Slaughterhouse* litigation.

III. THE SLAUGHTERHOUSE CASES

A. Historical Context: A Brief Detour through Corruption, a Monopoly and Reconstruction Politics

On March 8, 1869 the Louisiana legislature passed a bill prohibiting the slaughter of livestock within what are now known as Orleans, Jefferson, and St. Bernard Parishes.⁴² The ability to maintain livestock and butchering facilities was instead assigned to the seventeen-person Crescent City Live-Stock Landing and Slaughter-House Company.⁴³ The Act, entitled “An act to protect the health of the city of New Orleans, to locate the stock landings and slaughter-houses and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company” served to divest over 1000 local butchers and related workmen from their livelihoods.⁴⁴ While slaughtering operations in New Orleans had at one time been limited to a spit of land, now known as Algiers, on the opposite bank of the Mississippi river, the practice of *boucherie* spread quickly as the city grew.⁴⁵ This fast, unrestricted growth in a manifestly unsanitary trade led to some obvious risks and waste disposal issues. So acute was this problem, that not only was slaughtering sometimes done in the city streets, but improperly discarded livestock waste and butchering offal was left to fester in the streets and on the banks of the river.⁴⁶ The descriptions of those present at the time are predictable but shocking, as they describe a situation so putrid and unhealthy as to be unimaginable

42. JULIUS J. MARKE, *VIGNETTES OF LEGAL HISTORY* 170 (Fred B. Rothman & Co. 1965).

43. Referred to hereinafter as “the Company.”

44. Act of Mar. 8, 1869, No. 117, 1869 La. Acts 170 [hereinafter “the Act”]; MARKE, *supra* note 42, at 170.

45. RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* 38 (Univ. Press of Kansas 2003) (“Early in the century, slaughtering in New Orleans had been confined to a small area located directly across the Mississippi from the city and known as ‘Slaughterhouse Point’”).

46. *Id.* at 40.

and ultimately raising the question: why was the Act so vociferously opposed?⁴⁷

1. Bribery

The Slaughterhouse Act was not a new endeavor. The idea that the city ought to return to a centralized butcher model had been brought before the legislature, and was rejected and derided. The butchers had become a genuine political force, both organized and numerous.⁴⁸ To that end, it was difficult to pass effective regulation. Soon after the passage of the Act, it became clear that the various political roadblocks to regulatory reform had been cleared by the use of a well-established tactic: bribery. The legislators responsible for the passage of the Act had been given the opportunity to buy significant stock holdings in the new monopoly.⁴⁹ That pecuniary interest was sufficient to secure the passage of the Act. The question of the validity of an Act secured through bribery was central to the butcher's arguments at the state level.⁵⁰ Although the butchers argued that the Act was the result of a conspiracy to enrich private citizens, secured through deceit, fraud and bribery, an unfriendly Louisiana bench refused to rule on that issue.⁵¹ The butchers argued that as "an act for the emolument

47. *Id.* at 61:

The amount of filth thrown into the river above the source from which the city is supplied water, and coming from the slaughterhouses, is incredible. Barrels filled with entrails, livers, blood, urine, dung, and other refuse portions in an advanced stage of decomposition, are constantly being thrown into the river, but a short distance from the banks, poisoning the air with offensive smells and necessarily contaminating the water near the banks for miles.

(quoting testimony of a health officer of the third district, Louisiana House of Representatives Special Committee on the Removal of the Slaughterhouses, *Minute Book* (1867)).

48. *Id.* at 40–41 (discussing the butchers' considerable political influence, and explaining this as the cause for why reform failed).

49. MARKE, *supra* note 42, at 170.

50. *See, e.g.*, State ex rel. Belden v. Fagan, 22 La. Ann. 545, 547–48 (La. 1870).

51. *Id.*

of private individuals,” the Act was a private statute.⁵² As the Court saw it, the Act was a valid exercise of police powers, and as such was a matter of public law, not private, as the butcher’s had urged.⁵³ While there have been attempts by some more recent scholars to rescue the reputation of the legislators and the Courts who ruled that the exclusion of the evidence was proper, bribery in the legislature generally, and with respect to the Act specifically, was common knowledge at the time.⁵⁴

2. “[A] monopoly of a very odious character”⁵⁵

The public resentment generated by the Act also grew from the nature of the power granted to the Company. Because the monopoly was seen as a benefit granted to a cabal of corrupt profiteers, and secured through graft, the monopoly lacked the intrinsic fairness apparent in other exceptions to the rules against monopolies.⁵⁶ Justice Bradley, riding circuit in Louisiana at the time, wrote in his decision that it seemed difficult “to conceive of a more flagrant case of violation of the fundamental rights of labor than” the monopoly granted to the Company.⁵⁷ This “odious”⁵⁸

52. *Id.*

53. *Id.*

54. Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1306 (1984) (describing the evidence of bribery as the result of southern obsession with corruption and as having little evidentiary basis) *contra* LABBÉ & LURIE, *supra* note 45, at 97–99 (citing litigation records of the stockholders in the company for numerous clear examples of specific occasions of bribery connected to the passage of the Act).

55. *Live-Stock Dealer’s & Butcher’s Ass’n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F.Cas. 649, 652 (C.C.D. La. 1870) *rev’d sub nom. Slaughterhouse Cases*, 83 U.S. 36 (1872).

56. Michael Conant, *Anti-Monopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 823–24 (1982) (discussing *Live-Stock Dealer’s Ass’n*, 15 F.Cas. 649 (1870)).

57. *Live-Stock Dealer’s Ass’n*, 15 F.Cas. at 653:

So far as the act of the legislature of Louisiana is a police regulation, it is, of course, entirely within its power to enact it. It is claimed to be nothing more. But this pretense is too bald for a moment’s consideration. It certainly does confer on the defendant corporation a monopoly of a very odious character. . . . But it is not sufficient to

monopoly would have been seen as especially egregious to citizens in a civil law jurisdiction, where the preferential treatment granted to the members of certain social castes resulted in the strong protection of those rights within the ambit of private law.

In a brief submitted to the United States Supreme Court, lead attorney for the butchers, John Campbell argues this same point.⁵⁹ Citing Thierry and De Tocqueville, Campbell points out that it was precisely the eradication of preferential privileges in labor that was credited with the rise, and indeed the very existence, of civil liberty for all.⁶⁰ Campbell's brief makes clear that the monopoly granted to the company was a privilege that was expressly forbidden in the French civil law as received by Louisianans a generation earlier.⁶¹ The brief casts the monopoly as offensive to French and international history and human nature, arguing that what is now called *ius cogens* forbade unlawful servitude and restriction on the free practice of labor, and that the Constitution of the United States had adopted this peremptory norm through the ratification of the

show that it is a monopoly and void at common law, for the legislature may alter the common law, and may establish a monopoly, unless that monopoly be one which contravenes the fundamental rights of the citizen protected by the constitution. . . . [T]he fourteenth amendment of the constitution was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character. And it seems to us that it would be difficult to conceive of a more flagrant case of violation of the fundamental rights of labor than the one before us.

58. *Id.*

59. Plaintiffs' Brief upon the Re-argument at 5 Slaughterhouse Cases, 83 U.S. 36 (1872) (Nos. 470, 476, 480), 1872 WL 15118.

60. *Id.* (tracing unjust labor privileges from ancient times to *banalités* (payments from peasants to lords) paid to the French lords, and the eradication of *banalité* by the French legislative assembly in 1791):

These rights of Banalite (sic) were all suppressed in the 23d section of the decree of 1791 of the legislative assembly. It declares that all rights of Banalite (sic) of the oven, mill, winepress, slaughter house, forge, and the like, whether founded on custom, prescription, or recognized by judicial sentence, should be abolished without indemnity. Historical writers attribute to this legislature,(sic) the suppression of castes in France, and the existence of civil liberty for all.

61. *Id.*

Thirteenth Amendment.⁶² In an earlier supplemental brief to the Supreme Court, Campbell points out that much like the *ius cogens*, the assumptions that a worker could not be deprived of a right to apply their labor or craft to their own benefit “were recognized in the American customs and habitudes, and were assumed as valid in written law and judicial decisions, and in all the intercourse of society.”⁶³

Campbell uses that historical background to argue that the monopoly granted to the Company was an affront to the butchers and was no different than the hated *banalité*, or the involuntary servitude, prohibited under the Thirteenth Amendment.⁶⁴ Although there is a clear irony, as detailed below, in Campbell making these arguments, they do indeed reflect an understanding of the Louisianan civilian tradition. This is evidenced by the swift repeal of all monopolies in Louisiana, including the Company’s monopoly, by the new Louisiana Constitution of 1879.⁶⁵ This new Louisiana Constitution passed as the reconstruction influence in the south dwindled, allowing the civilian impulse to again assert itself. Notably, the Company sued the State, and again found itself in front of Justice Miller’s Supreme Court.⁶⁶ There, the Company argued that articles 248 and 258 of the new Constitution of

62. *Id.* at 6–8.

63. Supplemental Brief and Points of Plaintiffs in Error at 3 Slaughterhouse Cases, 83 U.S. 36 (1872), 1871 WL 14607.

64. Plaintiffs Brief upon the Re-argument, *supra* note 59, at 8–9.

65. See LA. CONST. art. 248 (repealed 1898):

The police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the state, shall alone have the power of regulating the slaughtering of cattle and other live-stock within their respective limits: Provided, no monopoly or exclusive privilege shall exist in this state, nor such business be restricted to the land or houses of any individual or corporation: provided, the ordinances designating places for slaughtering shall obtain the concurrent approval of the board of health or other sanitary organization.

See also LA. CONST. art. 258 (repealed 1898) (“[T]he monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby abolished”).

66. Butchers’ Union Slaughter-House & Live-Stock Landing Co., v. Crescent City Live-stock & Slaughter-House Co., 111 U.S. 746 (1884).

Louisiana were void as an impermissible infringement of their contract with an earlier legislature.⁶⁷ In that case, Justice Miller, again writing for the majority, deferred to the State and allowed the articles in question to stand.⁶⁸

3. The Politics of Reconstruction: Attorneys and Justices in the Slaughterhouse Cases

All of the foregoing discussion appears to be a principled debate over sound legal principles. Had the *Slaughterhouse Cases* arisen in a vacuum, this certainly would have been the case. Instead, the litigation arose while the dust of the American Civil War still hung in the air. The case featured some of the keenest and most influential legal minds of the day. Even more than today, the bar of the reconstruction era was an exclusive guild, and, especially at such a high level, its members could be expected to have interacted frequently. In the years surrounding the Civil War, this familiarity understandably bred some personal acrimony among the members of the bar. These pre-eminent legal minds were quick to involve themselves in the cause not out of a sincere interest in the appropriate setting for live-stock slaughter, but out of deep and divisive disagreements about the role of the federal government in the Deep South following the Civil War.

The chief attorney for the butchers, John Campbell, was a son of the South and had served as a United States Supreme Court Justice for several years before resigning upon Alabama's secession from the Union.⁶⁹ After a return to the practice of law in his adopted home of New Orleans, Campbell became disenchanted, even bitter, at the state of affairs in the

67. *Id.* at 749–50 (discussing the Company's argument that the Louisiana Constitution of 1879 included articles that were an impermissible infringement of a contractual obligation under U.S. CONST. Art. 1 § 10).

68. *Id.* at 754.

69. Jonathan Lurie, *Reflections on Justice Samuel F. Miller & the Slaughter-House Cases: Still a Meaty Subject*, 1 N.Y.U. J. L. & LIBERTY 355, 359–60 (2005) [hereinafter Lurie, *Reflections on Justice Miller*].

reconstruction South.⁷⁰ Campbell's ire eventually led him into the ironic position of arguing that federal law, in the form of a Constitutional Amendment passed for the benefit of blacks and former slaves, precluded the legislature of the State of Louisiana from enacting certain laws.⁷¹ Chief Justice Miller, author of the *Slaughterhouse* decision, had joined the Court the year after Campbell's resignation. In his correspondence, Miller had initially offered faint praise in support of Campbell.⁷² He had apparently changed his opinion of the man when he wrote of Campbell: "I have neither seen nor heard of any action of Judge Campbell's since the rebellion . . . which was aimed at healing the breach he contributed so much to make."⁷³ In addition, there was significant concern that the argument forwarded by Campbell would dilute the protections granted to the freed-men under the Fourteenth Amendment.⁷⁴ Miller's skepticism grew in part from the very real debates concerning federalism.⁷⁵ It was into this environment of

70. *Id.* at 360–61 (recounting Campbell's path from the Supreme Court, to Assistant Secretary of the War for the Confederacy, to prison and ultimately to New Orleans, as well as describing Campbell as bitter at the state corruption and racial integration in the South).

71. *Id.* at 361 ("Here the ex-Confederate official who had glorified states' rights now repudiated the idea 'that the Legislatures of the States have powers ... limited only by the express prohibitions of the [state and federal constitutions], or by necessary implication'") (citing LABBÉ & LURIE, *supra* note 45) (alteration in original).

72. LABBÉ & LURIE, *supra* note 45, at 108–09. ("I esteem him very highly and look upon him as a man of honor and an unfortunate one") (citing CHARLES FAIRMAN, MR. JUSTICE MILLER & THE SUPREME COURT 1862-1890 at 113 (Harvard Univ. Press 1939)).

73. *Id.* (calling Campbell a partisan and a leader of "the worst branch" of New Orleans politics).

74. Lurie, *Reflections on Justice Miller*, *supra* note 69, at 367.

75. See e.g., James W. Fox Jr., *Re-Readings & Misreadings: Slaughterhouse, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 86 (2002/2003):

For Miller, the only option other than his restrictive view of the Clause was one that destroyed federalism and dangerously empowered the Court. The very starkness of the alternatives, argued Miller, enabled him to accept what he considered an otherwise weak ('not always the most conclusive') argument: the parade of anti-federalism horrors. He saw no middle ground.

(quoting *Slaughterhouse Cases*, 83 U.S. 36, 78 (1872)).

war, graft, and personal strife that Campbell brought his arguments on behalf of the butchers.

B. The Arguments Advanced

1. By the Company

The Company maintained its simple yet effective argument at each level of appeal. First, they argued that the butcher's assertion that the legislature was bribed was unsupported by evidence.⁷⁶ The Company and the State maintained that the Act was a fair and legal application of the State's police power over the area of public health.⁷⁷ Lastly, these defendants also argued that the Privileges and Immunities clause of the Fourteenth Amendment was intended to extend only to the protection of rights received as the result of national citizenship, such as voting, *habeas corpus*, and other rights explicitly spelled-out in the Constitution.⁷⁸ This simple yet effective three part argument, while ultimately successful, finds little support in Louisiana's civilian jurisprudence. The continental understanding of the term "privileges and immunities" may even be couched in the Twelve Tables and its abolition of the

76. Transcript of Record at 18–19, *Slaughterhouse Cases*, 83 U.S. 36 (1872) (No. 466), 1870 WL 12597 (“That the allegations of said petition are impertinent (sic), scandalous, & criminous (sic); that it contains general, loose, & railing accusations against these defendants, without certainty, specification, or detail . . .”).

77. Brief of Counsel of Defendant in Error at 6–7, *Slaughterhouse Cases*, 83 U.S. 36 (1872) (No. 479), 1871 WL 14608:

In order to promote the health and comfort of the people, the State of Louisiana possesses all the power of sovereignty; the legislature might direct State officers to be appointed to inspect and superintend stock landings and slaughter-houses, as well as direct where such should be established. Laws of this character have been respected by Congress from the earliest period of the Government.

78. Brief of Counsel of Defendant in Error, *supra* note 77, at 5:

This amendment seeks to protect two classes of individuals: First, citizens of the United States; second, all persons whatever, whether citizens or aliens. The first portion plainly refers to political privileges, and shields only such privileges and immunities as individuals may have in their peculiar character as citizens of the United States . . .

privilegium and *immunitas* granted by royal edict.⁷⁹ This understanding was known in French law, and was reflected in the fact that the civil code, as a system of private law, understood rights and privileges to belong in first instance to the people.⁸⁰ The offense to that understanding is therefore two-fold: First, it is repugnant to the civilian jurist that the law would only protect those privileges granted by a sovereign, instead of those naturally belonging to the citizen as a matter of *ius cogens*. Second, that a private company consisting of seventeen private citizens, and not the government itself, would exercise privileges and recognize profits that rightfully belonged equally to the citizens of Louisiana. To this point, the state asserted that the right to engage in the profession of butchering was not infringed, but simply its place and manner was restricted.⁸¹ This ignores the fact that, properly read, the butchers' argument was not simply that their physical labor rights were infringed, but that the very granting of the privilege of operating a slaughterhouse to the Company was a violation of the equality of men before the civil code.

79. See Eberhard P. Deutsch, *Civil Liberties Under the Civil Law*, 12 TUL. L. REV. 331 (1938) (arguing that the foundation for American civil liberties is found in the civilian traditions of French and Roman law).

80. *Id.* at 335:

In Great Britain, in other words, privileges vested in the crown in the first instance, and the demand, never questioning the royal prerogative, sought simply a grant or concession. In France, however, the declaration was boldly made that rights and liberties belong in the first instance to the people; that privileges and immunities are attributes of citizenship, not of nobility.

81. Brief of Counsel of State of Louisiana, and of Crescent City Live Stock Landing & Slaughter House Co., Defendants in Error at 4, *Slaughterhouse Cases*, 83 U.S. 36 (1872) (Nos. 60, 61, 62), 1872 WL 15119:

The owner of the animal passed by the health inspector may then slaughter it for the market; he may do this either with his own hands, or by those of his own servants. The act of the legislature does not compel the owner of the animal to employ any State agent or corporation servant to slaughter the animal. All the act does is to say where it must be slaughtered.

2. *By the Butchers*

John Campbell had argued initially in the lower courts that the Act should be rescinded on the basis of it having been secured through graft, and improperly passed for not having been signed by the governor within the required time period. These arguments, while important, have been discussed above to the necessary extent, and will be, perhaps unfairly, de-prioritized so that the focus may be on the arguments before the Supreme Court. In arguments regarded by all of his contemporaries as masterful, Campbell retained his arguments that the Act was the product of bribery, but he also shifted his focus to what he saw as a violation of the civil rights of the butchers; rights that, as it happened, were now protected by the Thirteenth and Fourteenth Amendments to the United States Constitution.

In his oral arguments before the Supreme Court, Campbell invoked the Thirteenth Amendment and argued that the butchers were being compelled into specific performance on behalf of the company.⁸² He drew parallels between the newly-freed slaves, the butchers, and examples from French history. French history, he said, included “a number of instances of persons [whose servitude consisted of] their performance of ludicrous and debasing acts on particular days of the year for the entertainment of their masters.”⁸³ He posited that if “a legislature of a state were to pass a law that the emancipated slaves should appear before their masters, sing some of their native songs, or dance their country [sic] dances, it would at once be pronounced as a restoration of some remnant of their ancient servitude.”⁸⁴ This illustration highlights a key distinction. In the civilian tradition, involuntary servitude had been abolished by the civil code, and the protections of the private law

82. Transcript of the Oral Argument at 3, *Slaughterhouse Cases*, 83 U.S. 36 (1872), reprinted in 6 *LANDMARK BRIEFS & ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 733, 736 (Philip B. Kurland & Gerhard Casper eds., Univ. Pubs. of America 1975).

83. *Id.* at 5.

84. *Id.*

were thought to extend to any unjustly compelled act, especially those required by an edict of the sovereign. Campbell sought to cement this notion in the Court's understanding, when he argues that there are several forms of servitude that have little to do with any requirement of labor or production.⁸⁵ He supports his argument that the prohibition of involuntary servitude should be applied broadly, with a direct appeal to civilian tradition, saying that, upon the abolition of the feudal system at the time of the French Revolution, such honorific acts intended to assert the superiority of the lords over the inferior vassals had been abolished.⁸⁶ In this we see the clear parallel between an act imposed by an illegitimate feudal government, and an offense prescribed by an illegitimate corrupt legislature.

To the civilian it was not simply a matter of being required to undertake butchering in some particular manner, but that he was being compelled to engage in an act, by a sovereign using tyrannical means, which caused the act to become involuntary servitude. Campbell urged the Court to consider that the civilian tradition of the idea of servitude sounds in property law.⁸⁷ According to Campbell, the very use of the term servitude carries with it an invitation to consider property rights in oneself and one's

85. *Id.* at 6 (stating that the conditions of caste are a form of servitude; describing the servitude inherent in the Hindu caste system).

86. *Id.* at 15 (quoting Phillippe-Antoine Merlin de Douai).

87. Plaintiffs Brief upon the Re-argument, *supra* note 59, at 4–5:

What was involuntary servitude? The servitude (*servitus*) of the Roman law, and the continental law founded on it are relations of property. A right of one [sic], to deal with [sic], or to use the property of another, as an incident or accessory to his ownership of another property is a servitude. In strictness, the relations are those of immoveable property. The estate owing the servitude is Servient. The estate benefitted and the creditor is Dominant. When slaves become immoveable [sic], by destination and bound to the soil (*coloni, adscriptitii*) the servitude lost something of its strict character, and acts and duties were imposed upon the estate. Tythes are spoken of [sic], as a servitude combined with an obligation. There was a right to a part of the produce *adversus quemcunque* [sic], with a charge on the owner to set it apart, so in Scotland the teind. So the *Thirlage* which is classed as a servitude, and imposes the specific duty upon the inhabitant of the thirl to carry his grain to the mill to be ground.

labors. These were, he argued, liberties protected by the Constitution. In so doing, Campbell engages in an argument similar to that argued years later by Kojève.⁸⁸ Campbell argued that the butcher, bound to the soil of the Company, was no longer free as a result of the violation of his privileges of citizenship. Kojève would argue that the unequal status with respect to rights in labor denied the butcher his humanity.

The butchers' position was that the Fourteenth Amendment barred any state from passing any law abridging any privilege or immunity of a citizen.⁸⁹ They include in these privileges and immunities those protected by the civil code, including "life, liberty, property, or title of the plaintiffs to equal protection."⁹⁰ In his supplemental brief, Campbell, writing to the Court, points out that according to Turgot, privileges to rights of labor ran to every Frenchmen, and privileges to the contrary were abolished as far back as 1776.⁹¹ In the more expansive application of the Fourteenth Amendment urged by Campbell:

The State is commanded neither to make nor to enforce any law that deprives, or even abridges, any citizen of his enjoy-joyment [sic] of his privileges or immunities. To limit him in the choice of a trade, to deprive him of a business he has pursued, and to give to others the sole and exclusive right to follow that trade or to prosecute that business, violates this Constitution.⁹²

Throughout this brief there is the suggestion that the "enslaving" act of the Louisiana legislature was not just an affront

88. *See supra* Part II.A.

89. Supplemental Brief and Points of Plaintiffs in Error, *supra* note 63, at 2: The Constitution of the United States speaks to the State in the imperative. The State shall not make or enforce a law, nor pass a law, that shall work evil to any in the manner and in the particulars set forth.... The Government of the United States necessarily acquires a dominion over the State corresponding to the duty it has to perform.

90. *Id.* at 3.

91. *Id.* at 4 ("Therefore, every person was authorized to exercise his art, trade, or profession; and the privileges of corporations, guilds, and trading companies, to the contrary, were abolished").

92. *Id.*

to the Constitution, but to the centuries of civil law jurisprudence that had come together to protect the equality of men through an individually applicable code of private law.⁹³ Campbell even goes so far as to cite the *Recueil Dalloz*, a French law review in circulation at the time, for specific regulations pertaining to the slaughter of livestock.⁹⁴ He argues that these regulations, unlike the Act, accomplish the appropriate health protections without creating a monopoly and without infringing on the right of men to employ their services as a butcher.⁹⁵

Campbell goes on to cast the meaning of privileges and immunities as growing from the Roman tradition, as discussed above.⁹⁶ He argues that in Louisiana's cession to the United States, Louisianans were guaranteed the privileges and immunities inherently belonging to the citizens of the United States. These, he argued, are civil, not merely political rights.⁹⁷ To Campbell, and therefore to the butchers, the Fourteenth Amendment was intended to secure in every citizen all natural rights implied by the history of the civilian conception of liberty. Campbell's argument was, in essence, an appeal to the *ius cogens* of the era. His reliance on the civilian basis of privileges and immunities may be best understood

93. *See id.*:

The emancipating edict of Turgot, and the enslaving act of the Louisiana Legislature, in different ways, manifest the aim of the amendment to the Constitution. The spirit of the edict pervades the amendment, and it was framed to suppress all institutions of the kind. The Louisiana statute creates a corporation having all the odious features of those suppressed by the edict.

94. *Id.* at 4–5.

95. *Id.*

96. *Id.* at 6–7 (describing the genesis of the term “privileges and immunities” as a Roman reference to benefits or exemptions, and asserting that this remained the correct interpretation).

97. *Id.* at 7:

The terms are found in the fourth of the Articles of Confederation, and the second section of the fourth article of the Constitution of the United States; and evidently apply not to political, but civil rights. These rights are protection to life, personal freedom, property, religion, reputation; and, in the Treaty of Paris of 1803, providing for the cession of Louisiana, the United States promise to grant the natives of that territory the rights, advantages and immunities of citizens.

as an attempt to point out that the peremptory norms in operation at the time of the formation of the Fourteenth Amendment would have presumed those liberties recognized by the continental approach; namely, the liberty of labor, property, and self-direction.

C. The Decisions

1. The Majority Opinion

Unfortunately for Campbell, he was not arguing in a French court, and Justice Miller's opinion reflected this in no uncertain terms. The opinion holds that the Thirteenth and Fourteenth Amendments were intended to secure the rights and freedoms of newly-freed slaves.⁹⁸ Miller's opinion, as any first year law student will attest, quickly and assuredly limits the application of the privileges and immunities clause of the Fourteenth Amendment to granting the newly freed slave the right of citizenship and those other rights explicitly guaranteed by the Constitution.⁹⁹ Central to this limitation is Miller's contention that the privileges and immunities of the United States are distinguishable from those granted by operation of state citizenship. To Miller, the Fourteenth Amendment protects only the former, and not the latter.¹⁰⁰ It is

98. *Slaughterhouse Cases*, 83 U.S. 36, 71-72 (1872):

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

99. *Id.*

100. *Id.* at 75:

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter must rest for their security

unnecessary to undertake a full criticism of the opinion of the majority in this case. Such criticism is nearly universal, and was at the time as well.¹⁰¹ What is more important is to discern what the effect of that criticism has been on subsequent civil rights jurisprudence. This paper adopts and aims to support that body of scholarship which suggests that the rejection of the majority opinion invited subsequent courts to adhere to the reasoning of the dissenting opinions by Justices Field and Bradley.¹⁰²

2. *The Dissenting Opinions*

Three of the four Justices in the minority wrote dissenting opinions. Justices Field, Bradley, and Swayne each adopted and added upon the dissents of the other. Space is given here to the dissents of Justices Field and Bradley, while the dissent of Justice Swayne is respectfully omitted.¹⁰³

a. *Justice Field's Dissenting Opinion*

Justice Field's dissent is notable in that it adopts a great deal of the arguments forwarded by Campbell. To Field, the question at hand was nothing less than whether the Fourteenth Amendment protected the citizens of the several states from state legislation

and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

101. David S. Bogen, *Slaughter-House Five: Views on the Case*, 55 HASTINGS L.J. 333, 336 (2003) (stating that distaste for the opinion is shared by a range of jurists, including Justice Clarence Thomas and Professor Lawrence Tribe).

102. See, e.g., Hovenkamp, *supra* note 54, at 1292 (crediting Justice Field's dissent in the Slaughterhouse Cases as championing the view that developed into substantive due process); see also Wendy Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476, 481 (1996) (calling the majority opinion in the Slaughterhouse Cases a "trivialization" of the privileges and immunities clause, and crediting the dissent with "enunciating" the theory of substantive due process).

103. While all three dissents should be read together, only the first two are directly relevant to the purpose at hand.

that curtailed their rights.¹⁰⁴ While Field was not willing to apply the Thirteenth Amendment as broadly as the butchers had hoped, he adopted and indeed embellished the argument that privileges and immunities extended to those rights seen as innate.¹⁰⁵ Justice Field began his dissent by agreeing that the state police power does indisputably extend to regulations of health and safety.¹⁰⁶ According to Field however, there were only two provisions of the Act that pertained to an exercise of police power.¹⁰⁷ Under his reading, only the pronouncements that the animals be inspected and that the slaughtering must occur below the City of New Orleans were proper exercises of police power.¹⁰⁸ What is notable about Justice Field's dissent is his extensive reliance, not just upon case law, but on the history of the common law of England, and on the civil law of France. Engaging in a sort of comparativism, Justice Field argues that monopolies of the sort granted in the Act were long held to be repugnant to the rights and privileges of a citizen.¹⁰⁹ In a lengthy discussion of the English *Case of Monopolies* that arose during the rule of Queen Elizabeth I, Field asserts that the courts of England would have invalidated the Act as being "void at common law as destroying the freedom of

104. *Slaughterhouse Cases*, 83 U.S. 36, 91 (1872) (Field, J., dissenting).

105. *Id.*

106. *Id.* at 87 ("That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways").

107. *Id.*

108. *Id.* at 87–88:

The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such object could possibly justify legislation removing such buildings from a large part of the State for the benefit of a single corporation. The pretense of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice.

109. *See id.* at 104:

The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I, to which I have referred, only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

trade....”¹¹⁰ Field points out that the rights in question were seen as fundamental, inalienable rights under both the common law and civil law.¹¹¹ According to Field, the Fourteenth Amendment was intended to give operation to those inalienable rights recognized by the Constitution, but in fact conferred by “the Creator.”¹¹² What should be immediately apparent is that Field’s analysis did not only adopt the civilian view of economic rights and privileges; he argued that those rights were properly understood to be a peremptory norm in the English and French legal systems, and were therefore part of the *ius cogens* informing the creation of the American common law.¹¹³

b. Justice Bradley’s Dissenting Opinion

Justice Bradley not only adopts the dissent of Justice Field, but writes to dissent separately, saying that the rights in question are among the most inherent, fundamental rights protected by the Constitution.¹¹⁴ In making this argument, Justice Bradley engages in an analysis that looks a great deal like an early iteration of what will become substantive due process analysis. He argues that preservation of the rights to labor, property and self-determination are so fundamental that they are necessary to the operation of the liberty protected by the Constitution.¹¹⁵ That analysis asks the

110. *Id.* at 102.

111. *Id.* at 105.

112. *Id.*

113. *Id.* at 106:

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life, been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void.

114. *Slaughterhouse Cases*, 83 U.S. at 112–14 (Bradley, J., dissenting).

115. *Id.* at 116:

Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can

reader to understand that without the power to exercise dominion over one's own labor, one cannot be free.¹¹⁶ This sounds like nothing if not the argument, advanced by Campbell, that where one man or company has been granted a privilege, to the detriment of another, the party who holds the privilege becomes dominant, resulting in the servient party's inability to exercise their own freedom. According to Campbell, and now to Justices Bradley and Field, this was repugnant to the idea of equality before the civil code, and also to the Constitution of the United States.¹¹⁷ Notably, both Justice Field's and Justice Bradley's dissents display a marked sense of incredulity. The reader notices a sense of either shock or surprise, as well as a modicum of indignation, that such foundational concepts are being challenged. Put another way, the dissents evince an understanding of the law that sees individual rights to labor as being indistinguishable from any other fundamental individual rights. They view these rights as peremptory norms, fundamentally presumed in the laws of the day. The depth of this belief stands out in greater relief upon reading Justice Bradley's opinion below. In his opinion, Justice Bradley regards the Act as being antithetical to a republican form of

only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.

116. *Id.*:

For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

117. *See id.* at 119 (Bradley, J., writing that the right to follow the profession of one's choosing is the most fundamental of the privileges and immunities); *see also*, Plaintiff's Brief Upon Re-argument, *supra* note 59, at 1,10, 49 (calling liberty of profession, including that of *boucherie*, a fundamental principle of law).

government.¹¹⁸ These dissents, as well as the opinion below, display an adoption of the civilian sense of equality and economic liberty, as reflected in the *ius cogens* and *ius commune*. They supplement that understanding with support from natural law theory, and find that both systems require respect for economic liberty as being necessary for the law to operate in fidelity with fair and democratic governance.

IV. *ALLGEYER*, *LOCHNER*, AND THE DISTINCTLY CIVILIAN FLAVOR OF ECONOMIC LIBERTY AND SUBSTANTIVE DUE PROCESS

If the majority opinion in the *Slaughterhouse Cases* gave a *coup de grâce* to the privileges and immunities clause, the dissents articulated a clear path for the legion of jurists who would have decided the case differently. That path led plaintiffs seeking to vindicate their economic rights to assert them under the Due Process clause of the Fourteenth Amendment.¹¹⁹ This in turn led to the almost immediate development of substantive due process jurisprudence.¹²⁰ The opinion in *Allgeyer* is dually notable: first

118. *Live-Stock Dealers' and Butchers' Ass'n. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F.Cas. 649, 652 (C.C.D. La. 1870) *rev'd sub nom.*, *Slaughterhouse Cases*, 83 U.S. 36 (1872):

These privileges cannot be invaded without sapping the very foundations of republican government [a republican government is a free government]. Without being free, it is republican only in name, and not republican in truth, and any government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions . . . is tyrannical and un-republican. And if to enforce arbitrary restrictions made for the benefit of a favored few, it takes away and destroys the citizen's property without trial or condemnation, it is guilty of violating all the fundamental privileges to which I have referred, and one of the fundamental principles of free government. There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.

119. *See Munn v. Illinois*, 94 U.S. 113, 123 (1876) (applying the Due Process clause of the Fourteenth Amendment to regulations promulgated by the State of Illinois, and upholding those regulations as constitutional).

120. *See Allgeyer v. Louisiana*, 165 U.S. 578, 589–90 (1897) (citing Justice Bradley's concurring opinion in *Butchers' Union Slaughter-House & Live-Stock Landing Co., v. Crescent City Live-Stock & Slaughter-House Co.*, 111 U.S. 746, for the proposition that liberty under the Fourteenth Amendment is meant to include economic liberty).

because it is authored by Justice Peckham, who would go on to write the controversial *Lochner* opinion, and second, because it adopts Justice Bradley's civil law inflected privileges and immunities analysis from the *Slaughterhouse Cases* and applies them to the due process clause instead. This judicial sleight of hand is responsible for what would come to be known as "liberty of contract."¹²¹ Justice Peckham's reliance on Justice Bradley's description of economic liberty is deft in citing to the more recent case as good law, while relying on the concurring opinion which had essentially recapitulated the dissent from the original *Slaughterhouse Cases*. *Lochner*, in turn, cites *Allgeyer* for the proposition that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."¹²²

This broader understanding of the scope of rights protected by the Fourteenth Amendment has its basis in the arguments submitted to the Court by John Campbell. His analysis of the scope of the Fourteenth Amendment protections grew from his knowledge of the civilian tradition, and was adopted by Justice Bradley. Bradley's re-affirmation had in turn allowed Justice Peckham to author an opinion that, while based in the same jurisprudential tradition, accomplished those aims by way of the Due Process clause, all while avoiding the fatally hobbled privileges and immunities clause. Peckham's decisions in *Allgeyer* and *Lochner* are responsible for injecting the civil law and its approach to private law into American constitutional law. It seems at least worth mentioning that much of the subsequent debate over *Lochner* and *laissez faire* economic jurisprudence stems in part from the application of this distinct portion of the civilian private law, absent the context that served as a limiting principle to the

121. BERNSTEIN, *supra* note 5, at 41 (calling *Allgeyer* the first case to invoke liberty of contract while invalidating a state law for violating the Due Process clause of the Fourteenth Amendment).

122. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

economic interests of the individual. Seen in this light, there seems to be support for plaudits and the criticisms leveled against the *Lochner* decision, and those that followed it during the so-called *Lochner* era. Justice Peckham's approach in *Lochner* vindicated the full throated defense of the civil code offered by John Campbell and recognized that the liberties protected by the Fourteenth Amendment were the full range of rights represented in the *ius cogens*.

However well supported the *Lochner* decision was, it arose in a system vastly different than the one the butchers belonged to. In the absence of a unifying civil code, the opinion served to exacerbate inequalities laid bare by the growth of corporate interests in a newly industrialized economy. Where the Louisiana Civil Code had served to equalize dealings between individuals given equal standing through other parts of the code, *Lochnerian* jurisprudence would lack an equivalent leash until at least 1937.¹²³

The use of the Due Process clause to protect economic rights had begun its decline with the decisions in *West Coast Hotel*, and *Carolene Products*.¹²⁴ Perhaps fearing that laws protecting individual and civil rights would become vulnerable as a result of their decision, the Court in *Carolene* included the much discussed "Footnote Four" which bifurcated the standards of review for economic regulations from the more stringent review that is undertaken when a regulation may be an infringement on rights.¹²⁵

123. See *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937); see also *United States v. Carolene Products*, 304 U.S. 144 (1938) (both cases upheld regulatory limitations on liberty of contract as permissible under the Due Process clause, in order to protect public health and welfare).

124. *Id.*

125. See, e.g., Helen Garfield, *Privacy, Abortion, & Judicial Review*, 61 WASH. L. REV. 293, 301 (1986):

Having clothed economic legislation with so strong a presumption of constitutionality, Justice Stone recognized that he might be diluting the constitutional protection afforded individual rights. In the now-famous footnote four, he conceded that '[t]here may be narrower scope for operation of the presumption of constitutionality' when legislation (1) 'appears on its face to be within a specific prohibition of the Constitution,' or (2) 'restricts those political processes which can

That footnote helped to ensure that the substantive due process analysis that Campbell and the *Slaughterhouse* butchers helped elucidate would continue to be brought to bear on cases relating to individual rights. With the exceptionally consequential decision in *Griswold v. Connecticut*, the Court laid out its now controversial “penumbral” understanding of the rights ensured by the Constitution.¹²⁶ This expansive understanding of individual rights was central to the laudable decisions in *Roe v. Wade*¹²⁷ and *Lawrence v. Texas*,¹²⁸ all but guaranteeing that substantive due process will continue to feature heavily in the Court and in the culture wars.

V. CONCLUSION

Lochner has long been presumed dead, given the rise of the deferential rational basis review and the New Deal legislation that it permitted, but this does not mean that the civilian tradition that served as its incubator has been equally shunted aside. The rhetoric of Campbell, Bradley, and Peckham has become thoroughly enmeshed in any debate over the scope of governmental power. While the flood of cases governing the ebb and flow of economic due process have slowed, the past century has born witness to the renewed influence of the civilian tradition in the form of increased codification at the federal level, and with it, a new-found place for the doctrine of judicial restraint. The development of substantive due process remains central in the protection of individual civil

ordinarily be expected to bring about repeal of undesirable legislation,’ or (3) discriminates against minorities, since ‘prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.’ Thus the Court’s dual standard of review was born.

126. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

127. 410 U.S. 113 (1973).

128. 539 U.S. 558 (2003).

rights.¹²⁹ That such a formidable body of jurisprudence, on such important issues, is founded on ideas rooted in civilian legal thought is a testament to the salience of those ideas.

The close relationship between substantive due process and the butchers' arguments under the privileges and immunities clause continues to be relevant. The arguments advanced in support of substantive civil rights under the due process clause were just as comfortably made by John Campbell in support of economic rights under the privileges and immunities clause. Indeed, the operation of the Due Process clause and the Privileges and Immunities clause are now seen as effectively synonymous within the world of legal academia.¹³⁰ The rulings in *Lochner v. New York*, *Griswold v. Connecticut*, *Roe v. Wade* and *Lawrence v. Texas* all rely on the doctrine of substantive due process, which in turn owes its existence to the civilian butchers and the *ius commune* and *ius cogens* as reflected in the Louisiana Civil Code. It is impossible to know how Campbell would feel about the current iteration of his argument. One might think that he would feel vindicated but perplexed. To a civilian scholar like Campbell, the distinction made in "Footnote Four"¹³¹ would seem tortured and unnecessary. Then again, maybe that distinction lends us the context necessary to employ civilian privileges and immunities analysis, absent the context of the *ius commune*. In either case, it is clear that substantive due process is an appeal to the peremptory norms of our time, and that the civil law tradition of Louisiana has played a significant role in informing how those norms, in the form of individual rights, are protected.

129. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (discussing the importance of penumbral rights protected by the Due Process clause of the Fourteenth Amendment).

130. Kermit Roosevelt III, *What if Slaughter-House Had Been Decided Differently?*, 45 IND. L. REV. 61, 62–63 (describing the academic consensus that the *Slaughter-House Cases* were wrongly decided but that "overruling it would not change much about the current state of constitutional law").

131. *Carolene Products*, 304 U.S. at 152.

**FILLING THE GAPS: THE VALUE OF THE COMMON LAW
APPROACH TO GROSS NEGLIGENCE AND PUNITIVE
DAMAGES**

Justin Ward*

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I. INTRODUCTION

Under the American legal regime, criminal sanctions may only be imposed where expressly allowed by law. However, there are gaps in the law. Circumstances often arise which are not covered by criminal statute, but merit some level of punishment. Consider this scenario: a seventy-seven year old patient suffering from advanced Alzheimer's disease is placed in a nursing home after being hospitalized with pneumonia.¹ "The patient is bedridden, incontinent, and his limbs [are] contracted."² Upon his admission, the nursing home staff observes a very large, dark red area around his buttocks that is identified as a Stage I or II bedsore.³ The staff fails to take the appropriate action to treat the sore and, as a result, the condition worsens to a Stage III bedsore, which broke open after eleven days.⁴ The patient is finally removed from the care facility and hospitalized. By the time a doctor examines the patient, the bedsore has deteriorated to Stage IV, which means that the man's bones are exposed.⁵ The patient files suit, alleging that the caregivers were grossly negligent in their failure to properly treat the bedsore.⁶ The caregivers' grossly negligent conduct is unlikely to result in criminal sanction. It falls within a gap in the legal regime; a gray area in which punishment

1. See *Convalescent Services, Inc. v. Schultz*, 921 S.W.2d 731, 733-34 (Tex. App. 14th. Dist. 1996) (This factual hypothetical was taken from a case heard by a Texas court, in which the court held the defendants grossly negligent).

2. *Id.*

3. *Id.*

4. *Id.* (when a bedsore has progressed to this point, the skin breaks open and the sore becomes an open wound).

5. *Id.*

6. *Id.*

and deterrence is merited, but not provided for by law. Allowing the recovery of punitive damages for grossly negligent behavior allows for courts to fill these gaps in the law.

The concept of gross negligence is a highly malleable, ill-defined legal concept that falls somewhere on a scale between negligent and intentional conduct.⁷ It is generally defined as conduct that can be considered more blameworthy than simple negligence, but less blameworthy than intent.⁸ While it's generally accepted that gross negligence, willful, wanton and reckless conduct is an aggravated form of negligence, courts and scholars have had difficulty giving any firm definition to the concept.⁹ Prosser and Keeton have discussed gross negligence, and the difficulties associated therewith, at length. According to them, the terms "willful, wanton and reckless" have been applied to that degree of fault which lies "between intent to do harm . . . and the mere reasonable risk of harm involved in ordinary negligence":¹⁰

They apply to conduct, which is still merely negligent rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended The usual meaning assigned to [these terms] . . . is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.¹¹

7. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *LOUISIANA TORT LAW* § 1.06 (2d ed., LexisNexis 2009).

8. *Id.*

9. PROSSER & KEETON, *ON THE LAW OF TORTS* 209–11 (5th ed., W. Page Keeton et al. eds., West 1984) (Some scholars have tried to place gross negligence, willful, wanton, and reckless conduct at separate points on the scale of negligence and create a scheme in which each term describes a different form of conduct with varying degrees of liability. However, because this is such an unworkable scheme, most courts and scholars consider these phrases synonymous; all describing the same general type of conduct that can be considered more blameworthy than simple negligence, but less blameworthy than intent).

10. *Id.* at 212.

11. *Id.* at 212-13.

Louisiana courts have joined the collective cry and lamented the lack of clarity surrounding gross negligence.¹² In *Rosenblath's, Inc. v. Bakers Industries, Inc.*, the Louisiana Second Circuit Court of Appeals sought to distill a workable definition of gross negligence.¹³ The court discussed a number of Louisiana statutes that provide varying definitions of gross negligence.¹⁴ From its statutory consideration the court concluded that the legislature intended to define gross negligence as a reckless disregard, or careless indifference, which may involve a gross or substantial deviation from an expected standard of care.¹⁵ The court then moved on to judicial interpretations that yielded an even more muddled definition than that distilled from statute.¹⁶ From previous interpretations, the court found that gross negligence falls generally between negligence and intent.¹⁷ The court went on to conclude that Louisiana, through statutes and jurisprudence, generally defines gross negligence as conduct that falls below what is expected of a reasonably careful person under like circumstances, or less diligence than even a careless man is accustomed to exercise.¹⁸

Both the Louisiana bijural system and the majority of common law jurisdictions have arrived at a working theory of gross negligence as an extreme departure from the ordinary standard of care, which even a careless man would exercise, with complete disregard for the consequences of those actions.¹⁹ Although their definitions are similar, Louisiana's application of the gross negligence standard is remarkably different from that applied in

12. *Rosenblath's, Inc. v. Baker Industries, Inc.*, 634 So. 2d 969, 972 (La. App. 2d Cir. 1994).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 973 (The court went further to say that gross negligence is a reckless disregard or careless indifference and may involve a gross or substantial deviation from an expected or defined standard of care).

19. *See id.* at 972-3; KEETON, *supra* note 9, at 211-12.

her sister states. The common law employs gross negligence in a more aggressive fashion, allowing its use as an offensive weapon to create greater liability and allow recovery of punitive damages.²⁰ In Louisiana, gross negligence is primarily used in the context of the defense of immunity, when legislation promotes public policy by limiting liability for certain actors.

This article focuses on the traditional areas of development of gross negligence in tort law (immunities, contributory negligence, and punitive damages)²¹ and compares the practical application of the concept in Louisiana with its application in other common law jurisdictions. Although in many respects gross negligence operates in the same fashion regardless of the jurisdiction, there is one major point of distinction: Louisiana has chosen to limit the offensive utility of gross negligence by severely curtailing the availability of punitive damages. In so doing, Louisiana has chosen to focus on the use of gross negligence in the context of immunities, in order to raise the threshold of liability for certain actors.

Section II of this essay considers the historical development of gross negligence and its arrival into American and, more specifically, Louisiana law. Sections III and IV consider the application of gross negligence, in both common law jurisdictions and in Louisiana. Finally, after an examination of the distinctions in application in Louisiana and other common law jurisdictions, this essay argues that Louisiana should incorporate the common law application of gross negligence and punitive damages into its legal system to fill the gap between criminal and civil law.

20. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 491-93 (2008). Nebraska does not apply punitive damages under any circumstances. Louisiana, Massachusetts, Washington, and New Hampshire only allow recovery of punitive damage under certain limited circumstances prescribed by statute.

21. This essay focuses on the use of gross negligence in its traditional areas of tort development: immunities, punitive damages, and contributory negligence. Gross negligence is also applied to other areas of the law including contractual indemnity and workers compensation; however, these applications will not be addressed here.

II. LOOKING BACK: THE HISTORICAL DEVELOPMENT OF GROSS NEGLIGENCE

The concept of varying degrees of negligence has its origin in Roman law.²² Under the Roman scheme, there were three levels of negligence: *culpa lata*, gross negligence; *culpa levis*, ordinary negligence; and *culpa levissima*, slight negligence.²³ Although gross negligence in the common law and in Louisiana both trace their roots back to this original Roman concept, the theory made its way into each system through very different routes.²⁴

A. Bringing Gross Negligence into American Jurisprudence

Gross negligence made its way into American jurisprudence by way of the English writ system²⁵ from which the modern American common law developed.²⁶ Under the writ system, tort law developed on a case-by-case basis, as the need arose. Gross negligence entered the English common law in 1704 in *Coggs v. Bernard*.²⁷ Chief Justice Hold of the Kings Bench saw the need to establish varying degrees of fault in dealing with bailment cases.²⁸ To establish this system, he looked to the Roman tradition and adopted its concepts of gross negligence, ordinary negligence, and slight negligence.²⁹

American jurisprudence adopted the *Coggs* approach in 1822 with *Tracy v. Wood*.³⁰ Justice Story adopted gross negligence in

22. Patrick H. Martin, *The BP Spill and the Meaning of "Gross Negligence or Willful Misconduct"*, 71 LA. L. REV. 957, 977–78 (2011).

23. *Id.*

24. See WILLIAM E. CRAWFORD, 12 LOUISIANA CIVIL LAW TREATISE: TORT LAW 2–3 (2d ed., West 2009); Martin, *supra* note 22, at 977–78.

25. On the writ system, see EDGAR BODENHEIMER ET AL., AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM: READINGS AND CASES 26 (4th ed., West 2004).

26. *Id.*

27. (1703) 92 Eng. Rep. 107 (K.B); 2 Ld. Raym. 909.

28. *Id.*

29. *Id.*

30. Martin, *supra* note 22, at 1007.

Tracy as a means of limiting the liability for gratuitous bailees.³¹ Since *Tracy*, the American judiciary has developed gross negligence in relation to three different areas of tort law: punitive damages, contributory negligence, and immunity statutes.³² Under the modern common law approach, gross negligence can be used to justify an award of punitive damages, to overcome contributory negligence as a bar to a plaintiff's recovery, and to limit the liability of certain actors with legislative immunity statutes.

B. The Louisiana Perspective

Louisiana's civilian tort theory traces its origins directly to Roman law through the laws of France and the laws of Spain, applicable during the colonial period. The civil law notion of obligation is derived from Roman law, which defined an obligation as a *vinculum juris*, or bond of law, which obliges a person to do or to refrain from doing something.³³ The Roman law of delict was based on a simple overarching principle: "A man must see that he does not willfully invade another's right, or in breach of a duty, willfully or carelessly cause him pecuniary loss. If he does either of these things, he is answerable in damages."³⁴ It was under this Roman theory of tort law that separate levels of negligence first developed.³⁵

Roman law found its way into Louisiana through French and Spanish laws.³⁶ Antoine Crozat was granted a charter to develop Louisiana in the name of France in 1712.³⁷ The charter provided that the *Coutume de Paris*, along with all Royal Ordinances and

31. *Tracy v. Wood*, 24 F. Cas. 117 (C.C.D.R.I. 1822).

32. See Martin, *supra* note 22, at 992-1014.

33. See CRAWFORD, *supra* note 24, at 2.

34. *Id.* at 5 (this principle found its way into many modern civil codes, including the Louisiana Civil Code).

35. Martin, *supra* note 21, at 977-978. See also, discussion *supra* Part I.A (In Roman law, there were three levels of negligence: *culpa lata* (gross negligence), *culpa levis* (ordinary negligence), and *culpa levissima* (slight negligence)).

36. See CRAWFORD, *supra* note 24, at 10-11.

37. *Id.* at 8.

Edicts, would govern the territory.³⁸ This form of French law remained in effect until 1769, when Louisiana came under Spanish rule.³⁹ The transition from French to Spanish rule meant that, at least theoretically, Roman law, as received in Spain and codified in *Las Siete Partidas*, governed the Louisiana territory until 1808.⁴⁰ In 1808, the legislature of the Territory of Orleans tasked James Brown and Louis Moreau-Lislet with collecting and codifying the civil laws of the Territory, as Spanish law had been maintained after the Louisiana Purchase.⁴¹ Moreau-Lislet and Brown produced the Digest of 1808, which the Legislative Council adopted on March 31, 1808.⁴² There has been a great deal of debate over whether the Digest of 1808 was based on the *Code Napoléon* of France or *Las Siete Partidas* of Spain.⁴³ Regardless of which source the Digest of 1808 more closely resembles, both the *Code Napoléon* and *Las Siete Partidas* find their roots in the Roman tradition.

Under modern civilian theory, legislation is the law and is to be treated as the solemn will of the legislature.⁴⁴ Judicial opinion is nothing more than the interpretation of the law.⁴⁵ However, because the code articles governing delicts are very limited, Louisiana courts have been forced to write the majority of tort law under the guise of interpretation.⁴⁶ Louisiana courts have thus developed the state's modern tort law, including the concept of

38. *Id.*

39. *Id.* at 10.

40. *Id.* at 7, 10.

41. *Id.* at 10-11.

42. *Id.*

43. *Id.*

44. LA. CIV. CODE ANN. art. 2 (2010) (“Legislation is a solemn expression of legislative will”).

45. LA. CIV. CODE ANN. art. 1 (2010) (“The sources of law are legislation and custom”).

46. *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1156 (La. 1988) (“The framers conceived of fault as a breach of a preexisting obligation, for which the law orders reparation, when it causes damage to another, and they left it to the court to determine in each case the existence of an anterior obligation which would make an act constitute fault”).

gross negligence. Like the common law, Louisiana adopted gross negligence from the Roman law and then developed the concept through jurisprudence, focusing on punitive damages, contributory negligence, and immunity statutes, just as in the common law states.

III. GROSS NEGLIGENCE IN THE COMMON LAW

After the adoption of gross negligence into American jurisprudence in 1822, the judiciary began to develop the concept in the context of punitive damages, contributory fault, and immunity statutes.⁴⁷ Punitive damages are employed to punish certain behavior just as immunities are employed by the legislature to promote certain behavior.⁴⁸ On the one hand, a plaintiff is allowed to recover punitive damages upon a showing of gross negligence while on the other, legislatures use gross negligence as a limit to the defense of immunity, allowing the plaintiff to recover when establishing that the defendant has been grossly negligent.

A. Gross Negligence and Punitive Damages in the American Common Law

The idea of punishment as a civil mechanism can be traced back to a number of ancient legal systems, including the *Twelve Tables*—the original codification of ancient Roman law.⁴⁹ The English common law adopted the concept of extra damages to punish reprehensible conduct in the 1763 case of *Wilkes v. Wood*.⁵⁰ In *Wilkes*, the court granted an award for “more than the injury received” against the Secretary of State for conducting an unlawful

47. See Martin, *supra* note 22, at 1007.

48. See *BMW of North America v. Gore*, 517 U.S. 559 (1996) (The Supreme Court recognized that states have a legitimate interest in protecting their citizens from extra blameworthy behavior and affirmed the use of punitive damages to punish the actor and deter future conduct of a similar nature).

49. John W. deGravelles, J. Neale deGravelles, *Louisiana Punitive Damages—A Conflict of Traditions*, 70 LA. L. REV. 579, 580 (2010).

50. *Id.* at 581.

search of the plaintiff's papers.⁵¹ Afterwards, the English courts began to routinely grant awards in excess of a plaintiff's actual damages when the defendant's actions merited punishment.⁵²

In 1784, punitive damages crossed the Atlantic and entered American case law in *Genay v. Norris*.⁵³ Since the adoption of punitive damages into American law, the Supreme Court has evaluated the appropriate use of the concept. In *BMW of North America v. Gore*, the Court observed that some wrongs are more blameworthy than others.⁵⁴ The Court affirmed that states have a legitimate interest in protecting their citizens from extraordinarily blameworthy behavior by allowing punitive damages, which the Justices reasoned would serve to punish the actor and function as a deterrent of future behavior of a similar nature.⁵⁵ In a later decision, the Court was forced to address exactly what type of conduct was worthy of civil punishment.⁵⁶ The Court determined that punitive damages should only be used to punish a defendant who was guilty of outrageous conduct, and affirmed the traditional notion that gross negligence was the threshold for punitive damages liability.⁵⁷ Many states have chosen to follow the Supreme Court's example.⁵⁸ Nevertheless, the availability of punitive damages varies on a state-by-state basis.⁵⁹ This being said, most states will allow the plaintiff to recover punitive damages upon a showing of gross negligence.⁶⁰ In fact, this application has become so entrenched in the American judicial

51. (1763) 98 Eng. Rep. 489, (K.B.) 498.

52. *Huckle v. Money*, (1763) 95 Eng. Rep. 768, (K.B.) 768-69.

53. *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 410 (2009) (citing *Genay v. Norris*, 1 S. C. L. 6, 7, 1784 WL 26 (C. P. and Gen. Sess. (1784))).

54. 517 U.S. 559, 575-76 (1996).

55. *See id.* at 569.

56. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493 (2008).

57. *Id.*

58. *See id.* at 492-94.

59. *Id.* at 494. (Nebraska does not apply punitive damages under any circumstances. Louisiana, Massachusetts, Washington, and New Hampshire only allow recovery of punitive damage under certain limited circumstances prescribed by statute).

60. *Martin, supra* note 22, at 994.

mind that the Seventh Circuit has speculated that the primary function of gross negligence is to justify an award of punitive damages.⁶¹

Georgia and New York are representative of the common law approach to punitive damages and gross negligence.⁶² Georgia employs a statutory regime that governs the application of gross negligence and punitive damages,⁶³ while in contrast, punitive damages in New York are governed exclusively by case law.⁶⁴ A consideration of the application of gross negligence to punitive damages in Georgia and New York is illustrative of the broader common law approach.

1. Punitive Damages under Georgia Law

The availability of punitive damages in Georgia is governed by statute. State law allows the recovery of punitive damages where the plaintiff can establish that the defendant's actions showed "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences."⁶⁵ Under Georgia law, punitive damages are primarily used to deter similar conduct in the future by punishing a guilty actor in the present.⁶⁶ If the court finds a defendant to be merely negligent, then damages are limited to the amount necessary to make the plaintiff whole.⁶⁷ Punitive damages

61. *Kelly v. Malott*, 135 F. 74 (7th Cir. 1905).

62. Both Georgia and New York set the minimum threshold for punitive damages at gross negligence.

63. GA. CODE ANN. § 51-12-5(a) (LexisNexis 2011); *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734 (5th Cir. 1980).

64. *See Welch v. Mr. Christmas, Inc.*, 440 N.E.2d 1317 (1982).

65. GA. CODE ANN. § 51-12-5.1(b) (LexisNexis 2011).

66. *WMH, Inc. v. Thomas*, 398 S.E.2d 196, 198 (Ga. 1990) (the court insisted that the primary goal of punitive damages is deterrence, and a jury award which had the sole purpose of punishing wrongful behavior cannot be upheld).

67. *Molton v. Commercial Credit Corp.*, 193 S.E.2d 629, 633 (Ga. Ct. App. 1972).

are only recoverable when the defendant's conduct is worthy of deterrence.⁶⁸

Under this standard, a Georgia court awarded punitive damages in *Comcast Corporation et al. v. Warren*.⁶⁹ The plaintiff in this case sustained severe injuries in an automobile accident when the defendant's employees failed to properly warn of an obstruction they had created in the roadway.⁷⁰ After coming to an immediate stop to avoid the obstruction, Mr. Warren was struck in the rear by another vehicle.⁷¹ The jury awarded Mr. Warren \$280,000 in compensatory damages and \$720,000 in punitive damages.⁷² The trial court subsequently reduced the award of punitive damages to \$250,000, to bring the award amount within the appropriate statutory guidelines.⁷³ On appeal, the Georgia Court of Appeals considered the scenario and determined that the employees of Comcast had behaved "negligently, recklessly, wantonly, and with a conscious disregard for the consequences" of their actions in their failure to warn of the obstruction they had created.⁷⁴ If the court had determined that the defendants were merely negligent, the plaintiffs would have been limited to compensatory damages.⁷⁵ But, because the court concluded that the defendants were grossly negligent, punitive damages were appropriate.⁷⁶

2. *Punitive Damages under New York Law*

In contrast to Georgia, punitive damages in New York are governed primarily by case law. Under the New York standard, punitive damages are to be employed to punish the defendant for

68. *Id.*

69. 650 S.E.2d 307 (Ga. Ct. App. 2007).

70. *Id.* at 309.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 312–13.

75. *Molton v. Commercial Credit Corp.*, 193 S.E.2d 629, 633 (Ga. Ct. App. 1972).

76. *Id.*

his conduct and to deter similar future behavior.⁷⁷ To sustain a claim for punitive damages, the plaintiff must show that his or her damages were the result of “intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of others.”⁷⁸ If the plaintiff can establish one of these aggravating factors, punitive damages may be awarded.⁷⁹

Under this standard, the Supreme Court of New York’s Kings County upheld an award of punitive damages in *Hall v. Consolidated Edison Corporation*.⁸⁰ In *Hall*, Consolidated Edison employees entered a building on a Friday afternoon under the pretense of being elevator repairmen.⁸¹ Once inside, the employees shut off electrical service to the common hallways and elevators of the apartment building, which held over 500 tenants.⁸² The plaintiff, attempting to care for elderly and bedridden patients, slipped on wax drippings in a darkened stairway and sustained injuries from a fall.⁸³ The jury returned a verdict of gross negligence and awarded punitive damages in the amount of \$5,000,000.⁸⁴ On appeal the court upheld the lower court’s finding of gross negligence and the award of punitive damages, but reduced the amount of damages awarded by the jury.⁸⁵

3. A Final Look at Punitive Damages

In the end, punitive damages are only awarded when the actions of the defendant go far beyond the pale of reasonable conduct. In 2005, punitive damages were only pled in an estimated

77. *Le Mistral, Inc. v. Columbia Broad. Sys.*, 402 N.Y.S.2d 815, 817 (N.Y. App. Div. 1978).

78. *Don Buchwald & Assocs. v. Rich*, 723 N.Y.S.2d 8, 9 (N.Y. App. Div. 2001).

79. *See Le Mistral, Inc.*, 402 N.Y.S.2d at 817–18.

80. *Hall v. Consol. Edison Corp.*, 428 N.Y.S.2d 837 (N.Y. 1980).

81. *Id.* at 842.

82. *Id.* at 838.

83. *Id.*

84. *Id.* at 838–39.

85. *Id.* at 842–43.

twelve percent of state court trials nationwide,⁸⁶ and awarded in only five percent of all cases where the plaintiff won.⁸⁷ As these statistics indicate, courts reserve punitive damage awards for the limited circumstances where punishment is merited and deterrence is necessary.⁸⁸ Most states consider gross negligence as meriting punishment. In the majority of common law states, just as in New York and Georgia, grossly negligent behavior will give the plaintiff an opportunity to pursue an award of punitive damages.

B. Contributory Negligence in the Common Law

A second historical application of gross negligence has been in the realm of contributory negligence.⁸⁹ Under the theory of contributory negligence, any conduct on the part of the plaintiff, which contributes to his injuries, bars the plaintiff from recovery.⁹⁰ Many courts were dissatisfied with the traditional contributory negligence rule, but were unable to abolish it without stepping into the shoes of the legislature.⁹¹ Instead, the courts developed gross negligence as a means of overcoming contributory negligence as a bar to the plaintiff's recovery.⁹² Courts concluded that wherever it appeared that the plaintiff's negligence was comparatively slight and the defendant was guilty of gross negligence, the plaintiff should not be denied recovery.⁹³

Recognizing the harsh nature of contributory negligence, most states have moved toward some form of comparative fault.⁹⁴ Under

86. Thomas H. Cohen & Kyle Harbacek, U.S. Department of Justice, *Special Report: Punitive Damage Awards in State Courts, 2005* (March 2011), available at <http://permanent.access.gpo.gov/gpo35184/pdasc05.pdf>.

87. *Id.* at 4.

88. *BMW of North America v. Gore*, 517 U.S. 559, 568 (U.S. 1996).

89. *Martin*, *supra* note 22, at 1002.

90. *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1230 (Cal. 1975).

91. *Martin*, *supra* note 22, at 1002.

92. Comment, *Negligence: Exceptions to the Rule that Contributory Negligence Is a Defense: Gross Negligence*, 17 CAL. L. REV. 65, 66 (1928).

93. *Id.*

94. *North Carolina's Contributory Negligence Rules Outdated and Unfair*, Disabled World (August 13, 2010), www.disabledworld.com/news/america/nc/negligence-laws.php (last visited Jul. 30, 2013).

a pure comparative fault scheme, liability is apportioned according to fault.⁹⁵ For example, if the plaintiff is ninety percent at fault and the defendant only ten percent, the plaintiff is still entitled to recover ten percent of his damages from the defendant.⁹⁶ In contrast, under an ordinary comparative fault scheme, liability is apportioned up to the point at which the plaintiff's fault is greater than or equal to that of the defendant's.⁹⁷ Under an ordinary comparative fault scheme, the plaintiff is entitled to recover for his or her damages up until the point at which he or she is forty-nine percent at fault, and the defendant fifty-one percent at fault.⁹⁸ If it reaches the point where the plaintiff is fifty percent or more at fault, recovery is barred.⁹⁹ Thirteen states have a pure comparative fault scheme and thirty-three states have chosen to follow an ordinary comparative fault scheme.¹⁰⁰ Only four have chosen to continue applying contributory negligence.¹⁰¹

The decline of contributory negligence has lessened the need for courts to use gross negligence as a means of awarding damages despite a plaintiff's negligence. However, in the few jurisdictions that continue to apply the doctrine of contributory negligence, gross negligence can still be used to circumvent a bar to recovery. For example, under North Carolina law, contributory negligence still serves as a bar to recovery and gross negligence is still used as a means of overcoming it.¹⁰²

C. Immunity Statutes in the Common Law

95. *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1242–43 (Cal. 1975).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *North Carolina's Contributory Negligence Rules Outdated and Unfair*, *supra* note 96.

101. *Id.*

102. *Yancey v. Lea*, 550 S.E.2d 155, 157 (N.C. 2001) (The court accepted the jury's finding that negligence on the part of both the plaintiff and defendant were a cause of the plaintiff's injuries and denied the plaintiff's recovery on the grounds of contributory fault).

A third significant source of development of gross negligence has been its use in conjunction with immunity statutes.¹⁰³ Many scholars believe the use of gross negligence to overcome immunity statutes is best seen as an “escape route” that allows a court to avoid the absurd results that could be reached with unqualified immunity.¹⁰⁴ Professor Fredrick Schauer proposed that:

Legal systems must provide some escape route from the occasional absurdity generated by literal application because applying the literal meaning of a rule can at times produce a result which is plainly silly, clearly at odds with the purpose behind the regulation, or clearly inconsistent with any conception of wise policy.¹⁰⁵

Using gross negligence in conjunction with immunity statutes provides a heightened threshold of liability for a defendant; however, it also allows courts the option of permitting the plaintiff to recover when the defendant’s actions are of such a nature that to deny damages would be absurd.¹⁰⁶

Traditionally, legislatures have granted broad immunity to actors whose conduct is considered valuable to society.¹⁰⁷ These statutes are enacted under the theory that, while the defendant may be a wrongdoer, there is greater social utility derived from protecting him than in making an injured plaintiff whole.¹⁰⁸ Therefore, when legislatures view an actor’s activity as beneficial to society, they may wish to protect that actor by limiting his or her liability in tort action.¹⁰⁹

Immunity statutes provide an affirmative defense to certain tortious conduct.¹¹⁰ Most states do not provide unqualified immunity for privileged actors.¹¹¹ Rather, they raise the threshold

103. Martin, *supra* note 22, at 1006.

104. *Id.* at 1007.

105. Fredrick Schauer, *Formalism*, 97 Yale L.J. 509, 525 (1988).

106. Martin, *supra* note 22, at 1007.

107. PROSSER & KEETON, *supra* note 9, at 1032.

108. *Id.*

109. Martin, *supra* note 22, at 1007.

110. *Id.*

111. *Id.*

of their liability from negligence to gross negligence.¹¹² Plaintiffs have to prove that the otherwise-immune defendants were grossly negligent for recovery to be available.

Although there is some variation from state to state, almost all common law jurisdictions employ governmental immunity statutes, automotive guest statutes, recreational activity statutes, and Good Samaritan legislation.¹¹³ The recreational land use statute is one of the most common immunity statutes in effect.¹¹⁴ It encourages landowners to open their property for public recreational use, free of charge, by limiting the owner's liability for accidents that occur on the property.¹¹⁵

Georgia's recreational land use law illustrates how common law immunity statutes operate to promote the governmental goal of encouraging certain behavior by limiting an actor's liability for injuries that may occur on the property.¹¹⁶ Under Georgia law, a land owner generally owes no duty to keep his or her property safe for recreational users;¹¹⁷ however, the owner will be liable for injuries if he or she was grossly negligent in failing to warn or guard against a dangerous condition, use, or activity.¹¹⁸

A Georgia court addressed the state's recreational use laws in *Spivey v. City of Baxley*.¹¹⁹ The plaintiff brought suit for injuries sustained while attending a softball game at a field maintained by the County Recreation Board.¹²⁰ Mrs. Spivey alleged that she fell after stepping from a concrete slab covering a drainage ditch.¹²¹

112. *Id.*

113. *Id.*

114. See The University of Vermont, *Recreational Use Statutes*, <http://asci.uvm.edu/equine/law/recreate/recreate.htm> (last visited Oct. 2, 2011).

115. *Id.*

116. GA. CODE ANN. § 51-3-20 (LexisNexis 2011) (Georgia takes a traditional, middle-of-the-road view of gross negligence. The way the state's legal regime employs the concept in punitive damages and immunity statutes is representative of how other common law jurisdictions treat gross negligence.).

117. GA. CODE ANN. § 51-3-22 (LexisNexis 2011).

118. GA. CODE ANN. § 51-3-25 (LexisNexis 2011).

119. 437 S.E.2d 623 (Ga. Ct. App. 1993).

120. *Id.* at 624.

121. *Id.*

She maintained that her injuries were a result of the defendant's failure to correct a dangerous condition existing on the property.¹²² In answer to Mrs. Spivey's claims, the defendant asserted its immunity under Georgia's recreational land use statute.¹²³

The court recognized that, under Georgia law, a defendant who allows free access to the property can only be held liable if the plaintiff established that the defendant's actions showed a "willful failure to guard or warn."¹²⁴ The court stated that for the defendant to be found grossly negligent, he or she must have knowledge that a condition which posed an unreasonable risk of death or serious bodily harm existed, that the condition was not apparent to those using the property, and that the owner chose not to guard or warn against the danger in disregard of the consequences.¹²⁵

The *Spivey* court considered that, while Georgia's recreation land use statute did not expressly include spectators at athletic events, the purpose of the statute clearly encompassed this sort of use; therefore, the recreational land use statute was applicable.¹²⁶ The court concluded that the defendant was not guilty of grossly negligent conduct and could not be held liable.¹²⁷

As the Georgia land use statute illustrates, immunity statutes operate as an affirmative defense by allowing a negligent plaintiff to escape liability. Had a state immunity statute not covered the landowner in *Spivey*, it would have been liable to the plaintiff for negligently failing to warn of the obstruction. However, because the immunity statute was in play, the landowner was able to plead as a defense that, because he was not grossly negligent, he could not be held liable.

Immunity statutes are employed by the legislature to encourage certain behavior just as punitive damages are awarded to

122. *Id.*

123. *Id.* at 625.

124. *Id.*

125. *Id.*

126. *Id.* at 625-26.

127. *Id.* at 626.

discourage certain behavior. Immunities raise the threshold of liability from negligence to gross negligence. If an immunity statute covers the defendant, he or she will escape liability if the plaintiff is unable to prove that the defendant was grossly negligent. This applies in Louisiana in the same manner as in common law states.

IV. THE LOUISIANA APPROACH TO GROSS NEGLIGENCE

Like the common law, Louisiana's law of gross negligence traces its origins to the Roman legal system.¹²⁸ Similarly, the framework of Louisiana's gross negligence law was generally developed in the context of punitive damages, contributory negligence, and immunity statutes.¹²⁹ However, the end result differs slightly from that of common law jurisdictions. Unlike common law jurisdictions, Louisiana has chosen to severely curtail the use of gross negligence in the context of punitive damages. However, it is still very much alive within the state in the context of immunities.

A. *Gross Negligence and Punitive Damages in Louisiana*

Prior to 1917, Louisiana took an approach to punitive damage that was identical to that of common law jurisdictions.¹³⁰ Courts allowed recovery upon a showing of gross negligence, even though early versions of the Louisiana Civil Code contained no punitive damages provisions.¹³¹ Louisiana courts acknowledged the conflict between the state's civilian heritage, which did not recognize punitive damages, and this approach.¹³² In *Dirmeyer v. O'Hern*, the Louisiana Supreme Court observed that punitive damages were

128. See discussion, *supra* Part II.B.

129. *Id.*

130. deGravelles, *supra* note 49, at 584–85.

131. *Id.*

132. *Dirmeyer v. O'Hern*, 3 So. 132, 134 (La. 1887).

borrowed from the common law¹³³ and that Louisiana's practice of granting this form of recovery was against the long-standing rule in civilian jurisdictions that the purpose of awarding damages was to repair the harm sustained by the victim, not to punish the conduct of the wrongdoer.¹³⁴ In 1917, the Louisiana Supreme Court sought to rectify this discrepancy in *Vincent v. Morgan's Louisiana*.¹³⁵ The court held that pecuniary penalties intended to punish the tortfeasor would no longer be recoverable in Louisiana unless expressly allowed by statute.¹³⁶

As a result of the *Vincent* decision, modern Louisiana law only allows recovery of punitive damages where expressly authorized by statute.¹³⁷ The statutory basis for punitive damages can be found in the Civil Code, which provides instances where "exemplary" damages may be recoverable.¹³⁸ The code allows recovery of exemplary damages for child pornography, intoxicated driving, and criminal sexual activity occurring during childhood.¹³⁹ Using the words "exemplary damages," these Code articles allow recovery of punitive damages upon a showing that the damages were caused by a "wanton and reckless disregard for the rights and safety of others,"¹⁴⁰ or gross negligence. If a plaintiff's claim does not fall within one of these narrowly defined categories, punitive damages are unavailable, regardless of the depravity of the defendant's conduct.

133. *Id.*

134. deGravelles, *supra* note 49, at 580.

135. 74 So. 541 (La. 1917).

136. *See id.* at 548.

137. *See id.* at 548-49.

138. *See* LA. CIV. CODE. ANN. art. 2315.3 (2010); LA. CIV. CODE. ANN. art. 2315.4 (2010); LA. CIV. CODE ANN. art. 2315.7 (2010) (The legislature set forth three codal provisions outlining circumstances in which punitive or exemplary damages may be awarded: 1) Article 2315.3, additional damages for child pornography; 2) Article 2315.4, additional damages for intoxicated defendant; and 3) Article 2315.7, liability for damages caused by criminal sexual activity occurring when the victim was 17 years old or younger).

139. *Id.*

140. *See id.*

In *Mosing v. Domas*, a Louisiana court addressed the purpose of punitive damages in Louisiana: “[Punitive damages] . . . are given to the plaintiff over and above full compensation for his injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant’s example.”¹⁴¹

Following this line of reasoning, the Louisiana legislature enacted a limited set of laws detailing under what circumstances the defendant’s actions are sufficiently blameworthy to merit punitive damages.¹⁴² Each of Louisiana’s punitive damage provisions makes a textual reference to gross negligence; however, courts have moved away from requiring the plaintiff to make an actual showing of gross negligence.¹⁴³ Instead, courts often presume that the defendant was grossly negligent if the plaintiff can establish certain facts and causation.¹⁴⁴

1. Gross Negligence and Louisiana Civil Code Article 2315.4

141. *Mosing v. Dumas*, 798 So. 2d 1105, 1113 (La. Ct. App. 3d Cir. 2001) (citing *Rivera v. United Gas Pipeline Co.*, 697 So. 2d 327 (La. Ct. App. 5th Cir. 1997)).

142. See LA. CIV. CODE ANN. art. 2315.3 (2010); LA. CIV. CODE ANN. art. 2315.4 (2010); LA. CIV. CODE ANN. art. 2315.7 (2010).

143. See *Bourgeois v. State Farm*, 562 So. 2d 1177, 1182 (La. Ct. App. 4th Cir. 1990) (“Several courts have . . . indicated that a presumption of recklessness can be made when the intoxication of the defendant is the cause in fact of the accident”); *Myres v. Nunsett*, 511 So. 2d 1287, 1289 (La. Ct. App. 2d Cir. 1987):

A number of other states take the position that operating a motor vehicle on the public road after voluntary intoxication in and of itself constitutes sufficient reckless disregard to warrant an award of exemplary damages. Our codal article requires an additional showing that the accident resulting in injury was caused by the voluntary intoxication of a defendant;

McDaniel v. DeJean, 556 So. 2d 1336, 1340 (La. Ct. App. 3d Cir. 1990) (“[The defendant] acted with a wanton or reckless disregard for the rights and safety of others by getting intoxicated and driving We find the evidence preponderates that his intoxication was a cause in fact of the accident; therefore, the exemplary damage award was proper”).

144. See *Bourgeois*, 562 So. 2d at 1182 (a defendant’s gross negligence will be presumed upon a showing that the defendant was intoxicated and that his intoxication was a cause in fact of the plaintiffs’ injuries).

Louisiana Civil Code article 2315.4 allows a plaintiff to recover punitive damages upon showing that his injuries were caused by the defendant's gross negligence in operating a vehicle while intoxicated.¹⁴⁵ The text of the article requires that the plaintiff prove the defendant was grossly negligent; however, in *Bourgeois v. State Farm*, the Louisiana Fourth Circuit stated that some Louisiana courts would presume recklessness upon a showing that the plaintiff's injuries were caused by the defendant's intoxication.¹⁴⁶

After consideration of the statutory requirements of 2315.4, the *Bourgeois* court broke the article down into the three elements that a plaintiff must establish in order to recover punitive damages.¹⁴⁷ These elements are: 1) that the defendant was intoxicated or had a "sufficient quantity of intoxicants to make him lose normal control of his mental and physical facilities;" 2) that the drinking was a cause in fact of the accident; and 3) that the injuries were caused by a wanton and reckless disregard for the rights and safety of others.¹⁴⁸ The court focused on the third element necessary for recovery—proof that the plaintiff's injuries were caused by the defendant's grossly negligent conduct.¹⁴⁹ The court noted that many Louisiana courts employ a presumption of gross negligence if the intoxication of the defendant was a cause in fact of the plaintiff's injuries.¹⁵⁰ The court concluded that, while the Fourth Circuit generally required a separate showing of wanton and reckless disregard, most Louisiana courts would assume gross

145. LA. CIV. CODE ANN. art. 2315.4 (2010):

In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries.

146. *Bourgeois*, 562 So. 2d at 1179–80.

147. *Id.*

148. *Id.* at 1180.

149. *Id.*

150. *Id.* at 1182.

negligence upon a showing that the defendant's intoxication was to blame for the plaintiff's injuries.¹⁵¹

Following *Bourgeois*, the circuit courts split on what a plaintiff was required to prove to recover punitive damages under article 2315.4.¹⁵² Some circuits maintained that a plaintiff was required to establish not only that the defendant was intoxicated and his intoxication was a cause in fact of his injuries, but also that the injuries were caused by the defendant's wanton and reckless disregard for the safety of others. Other circuits believed that by proving that the defendant was intoxicated and his intoxication was the cause in fact of the injuries, the plaintiff had satisfied his burden. By taking the latter approach, courts have removed the burden on the plaintiff that required him to prove the defendant was grossly negligent when seeking punitive damages. The award of punitive damages is not truly predicated upon gross negligence in circumstances where there is obviously voluntary intoxication.

2. *Gross Negligence and Louisiana Civil Code Article 2315.7*

The legislature enacted Louisiana Civil Code article 2315.7 to provide for damages suffered as a result of criminal sexual activity occurring while the victim was a minor and for "related matters."¹⁵³ Article 2315.7 allows for an award of punitive damages upon a showing that the plaintiff's injuries were caused by a "wanton and reckless disregard for the rights and safety" of the plaintiff through criminal sexual conduct, which occurred while the plaintiff was seventeen years old or younger.¹⁵⁴

151. *Id.* at 1184.

152. deGravelles, *supra* note 49, at 595.

153. 1993 La. Acts no. 831.

154. LA. CIV. CODE ANN. art. 2315.7 (2010):

In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through criminal sexual activity which occurred when the victim was seventeen years old or younger, regardless of whether the

Louisiana state courts have had limited opportunity to interpret and apply article 2315.7. However, a federal court in Louisiana applied the article in *Capdeboscq v. Francis*.¹⁵⁵ In *Capdeboscq*, the plaintiffs alleged that they had voluntarily posed topless for a photo after the defendants assured them that they would not appear in a *Girls Gone Wild* video.¹⁵⁶ The plaintiffs complained that, even after they were assured they “had nothing to worry about,” they were featured on the cover of *Girls Gone Wild: Doggy Style*.¹⁵⁷

The plaintiffs sought punitive damages under article 2315.7.¹⁵⁸ The court, however, found that the plaintiffs had failed to state a basis upon which their claim could be predicated.¹⁵⁹ The court held that, because the plaintiffs had failed to allege a violation of an applicable criminal statute, there was no basis for recovery under article 2315.7.¹⁶⁰ The *Capdeboscq* court’s brief analysis provides little guidance on what constitutes gross negligence and grounds for recovery under the article.¹⁶¹ However, the court indicated that violation of a criminal statute dealing with sexual misconduct was necessary to allow a plaintiff to recover under article 2315.7.¹⁶²

If liability is predicated upon violation of a criminal statute, then recklessness will likely be presumed upon a showing that the defendant’s conduct violated the applicable criminal law. If this is true, then the plaintiff will not be required to make a separate showing of gross negligence to recover punitive damages.

3. Gross Negligence and Louisiana Civil Code Article 2315.3

defendant was prosecuted for his or her acts. The provisions of this Article shall be applicable only to criminal sexual activity.

155. *Capdeboscq v. Francis*, CIV.A.03-0556, 2004 WL 463316 (E.D. La. Mar. 10, 2004).

156. *Id.* at 1.

157. *Id.*

158. *Capdeboscq v. Francis*, CIV.A. 03-0556, 2003 WL 21418499 (E.D. La. June 16, 2003).

159. *Id.*

160. *Id.*

161. *See id.*

162. *See id.*

Louisiana Civil Code article 2315.3 allows for recovery of punitive damages if the plaintiff can establish that his injuries were caused by the defendant's "wanton and reckless disregard . . . through an act of pornography involving juveniles as defined by R.S. 18:81.1."¹⁶³ The Louisiana legislature enacted article 2315.3 in 2009 to allow the recovery of punitive damages by victims of child pornography, even if the person responsible for the damages was never criminally prosecuted.¹⁶⁴ Louisiana courts have not yet had occasion to apply article 2315.3. Because the courts have not addressed punitive damages within the context of the child pornography article, there is no indication of whether this article will be interpreted to require a showing of gross negligence or if it will be presumed upon a showing that the defendant violated the state's child pornography statute.¹⁶⁵ However, given the construction of the article, it seems likely that to constitute wanton or reckless conduct, the defendant's actions must, at the very least, violate the state's juvenile pornography statute.¹⁶⁶

*4. A Final Look at Louisiana's Law on Gross Negligence and Punitive Damages*¹⁶⁷

163. LA. CIV. CODE ANN. art. 2315.3 (2010):

In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through an act of pornography involving juveniles, as defined by R.S. 14:81.1, regardless of whether the defendant was prosecuted for his acts.

164. 2009 La. Acts no. 382.

165. LA. REV. STAT. ANN. § 14:81.1 (2012).

166. *See id.*

167. Louisiana also employs the Louisiana's Drug Dealer Liability Act, which is the fourth and final punitive damages statute in use. The purpose of the Louisiana Drug Dealer Liability Act is to provide a civil remedy for damages to persons in a community injured by an individual's use of illegal drugs by establishing a cause of action against drug dealers for monetary, noneconomic, and physical losses. The idea was to shift the cost of the damage caused by the marketing of illegal drugs to those who profit from the market, while at the same time deterring others from entering the market. The act allows certain categories of persons, injured by an individual's use of an illegal controlled substance, to recover punitive damages. The statute allows for any persons injured as a result

Louisiana has chosen to severely curtail the availability of punitive damages under state law by restricting their availability to circumstances in which they are specifically authorized by statute, all of which require some form of criminal conduct. However, each provision authorizing punitive damages predicates recovery upon a finding that the defendant was grossly negligent. In many instances, the courts have interpreted these articles in such a way as to relieve the plaintiff of the burden of actually proving that the defendant was grossly negligent, voluntary criminal conduct presuming that the action was based on a wanton and reckless disregard for the victim's safety or interest. This creates a situation similar to *res ipsa loquitur* where the court will presume negligence even without conclusive proof where justified by the circumstances.¹⁶⁸

B. Gross Negligence and Contributory Fault in Louisiana

Prior to 1980, Louisiana employed a contributory negligence scheme¹⁶⁹ similar to that in effect in the common law.¹⁷⁰ Under this standard, any conduct on the part of the plaintiff that was a legally contributing factor to his injuries was sufficient to bar recovery.¹⁷¹ Louisiana adopted this system in *Fleytas v. Pontchartrain Railroad Co.*, before there was an organized body of civilian doctrine on comparative fault.¹⁷² In 1980, the legislature

of the individual user's gross negligence to recover punitive damages. The plaintiff must establish by a preponderance of the evidence that their injuries were caused by the use of illegal drugs; however, no further showing of gross negligence is necessary for recovery. *See* LA. REV. STAT. ANN. § 9:2800.61 (2009); LA. REV. STAT. ANN. § 9:2800.63 (2009); *Kemp v. Metabolife Int'l., Inc.*, 2003 U.S. Dist. LEXIS 17770 (E.D. La. 2003).

168. *See* MARAIST, *supra* note 7, at § 8.06.

169. *See* *Dumas v. State*, 828 So.2d 530, 532-33 (La. 2002).

170. *Id.* *See also* discussion *supra*, Part III.B (on the common law rule of contributory fault as a bar to a plaintiff's recovery).

171. *Dumas*, 828 So. 2d at 533.

172. *Id.*, citing *Fleytas v. Pontchartrain R. Co.*, 18 La. 339 (1841); *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 169 (La. 1985).

amended Louisiana Civil Code article 2323 to replace contributory negligence with a pure comparative fault scheme.¹⁷³ Article 2323 states that:

If a person suffers injury, death, or loss as the result partly of his own negligence and partly of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.¹⁷⁴

The legislature chose to adopt a comparative standard to mitigate the harshness of the contributory negligence doctrine.¹⁷⁵ Rather than denying recovery outright if the plaintiff contributed to his injuries at all, the legislature adopted a pure comparative fault scheme that apportions liability in direct proportion to fault.¹⁷⁶ Under this scheme, if the plaintiff is ninety percent at fault in causing his or her injuries, he or she may still recover ten percent of the damages, the portion sustained due to the defendant's fault.¹⁷⁷ When Louisiana shifted from a contributory negligence to a comparative fault scheme, the application of the gross negligence standard within this context was severally curtailed because plaintiffs were no longer required to overcome contributory negligence as a bar to recovery.

C. Gross Negligence and Immunities in Louisiana

Immunities represent the predominant use of gross negligence in Louisiana. As in the common law, immunity statutes are intended to protect certain actors from liability when the legislature determines that their conduct is so beneficial to society that the value of their actions outweighs other societal interests that dictate

173. *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1132 (La. 1988).

174. LA. CIV. CODE ANN. art. 2323 (2010).

175. *Id.*

176. *See* discussion *supra*, Part III.B.

177. *See* discussion *supra*, Part III.B.

tortfeasors should compensate their victims.¹⁷⁸ Louisiana adopted traditional immunity statutes including: governmental immunity; automotive guest statutes; recreational activity statutes; and Good Samaritan legislation.¹⁷⁹ However, Louisiana also has immunity statutes that reflect its unique culture, including a statute limiting the liability of Mardi Gras krewes.¹⁸⁰ In all, Louisiana has more than forty immunity statutes that cover a wide range of actors and generally raise the level of liability from negligence to gross negligence.¹⁸¹

In Louisiana, immunity statutes are an affirmative defense to be pled by the actor after the tort has occurred.¹⁸² If the actor's conduct is covered by the statute, he will escape liability where it would otherwise be imposed.¹⁸³ Louisiana applies immunity statutes in essentially the same fashion as common law jurisdictions.¹⁸⁴ The distinction, if any, lies in the actors that Louisiana chooses to protect and the number of immunities that have been enacted.¹⁸⁵

The immunity for Mardi Gras krewes is unique to Louisiana.¹⁸⁶ Mardi Gras parades are an important part of Louisiana's culture and a major element of the state's tourism industry. The legislature recognized the potential liability facing parade participants and

178. MARAIST, *supra* note 7, at § 11.01; *see also* discussion *supra*, Part III.B.

179. *See* CRAWFORD, *supra* note 24, at 833–37.

180. *Id.*; LA. REV. STAT. ANN. § 9:2796 (Supp. 2011).

181. *See* CRAWFORD, *supra* note 24, at 833–37.

182. MARAIST, *supra* note 7, at § 11.01.

183. *Id.*

184. *See* discussion *supra* Part III.C (Common law jurisdictions employ immunity statutes to protect actors whose conduct is seen as so beneficial to society that the societal interest in protecting the actor is greater than the societal interest in having a tortfeasor make his victim whole. Louisiana follows the same approach. In both the common law and Louisiana, immunities represent an affirmative defense that often raises the threshold of liability from negligence to gross negligence and allows an actor to escape liability).

185. *See* CRAWFORD, *supra* note 24, at 833–37 (Louisiana has over 40 immunity statutes covering a span of actors from charities and money managers to Mardi Gras krewes).

186. *See* LA. REV. STAT. ANN. § 9:2796 (Supp. 2011).

enacted Louisiana Revised Statute Section 9:2796, which limits the liability of parade participants to gross negligence.¹⁸⁷

With this plethora of immunity statutes, gross negligence is very much alive in Louisiana. It allows a plaintiff to override the defense of immunity when proving the defendant's gross negligence.

V. COMPARING GROSS NEGLIGENCE IN LOUISIANA AND THE COMMON LAW

Gross negligence can be used by plaintiffs to recover punitive damages and, when necessary, to overcome contributory negligence as a bar to recovery. It is also used in conjunction with immunity statutes to limit the scope of the defense to cases of simple negligence.¹⁸⁸ Louisiana makes a nominal use of gross negligence in the context of punitive damages,¹⁸⁹ and continues to employ the concept when dealing with immunities.¹⁹⁰

Louisiana and the common law diverge in the context of punitive damages. The common law will generally allow recovery of punitive damages in circumstances where the defendant was grossly negligent. In Louisiana, if the actor is negligent, the plaintiff will recover compensatory damages but nothing more, no matter how egregious the actor's behavior, unless one of the state's limited punitive damages provisions apply, requesting recklessness, though gross negligence can be presumed as these are situations of intentional criminal conduct. These divergent applications can lead to dramatically different results.

187. *Id.*

188. *See supra* Part III.C.

189. *See supra* Part IV.A (Louisiana has limited punitive damage awards to circumstances expressly outlined by the legislature through statute or code article. These statutes, as interpreted by the Louisiana judiciary, generally do not require a true showing of gross negligence. In many circumstances, the requisite mindset can be presumed upon proof of causation).

190. *See supra* Part IV.C (discussion of Louisiana's use of gross negligence in conjunction with immunity statutes).

Louisiana's decision to change from the traditional common law application of punitive damages was based largely on the state's civilian heritage.¹⁹¹ Punitive damages were, and remain, largely rejected by the civilian jurisdictions of continental Europe.¹⁹² The refusal by the German Supreme Court to enforce in Germany an American court's decision awarding a juvenile \$400,000 in punitive damages on the basis that it was against public order is illustrative of the general European perspective.¹⁹³ Dr. Koziol discussed the general European distaste for punitive damages in his 2008 article, *Punitive Damages—A European Perspective*.¹⁹⁴ Dr. Koziol's discussion illuminates a number of the prevailing arguments against the award of punitive damages.¹⁹⁵ The primary concern is that the private law is neither geared towards nor equipped to punish actors for their wrongdoing.¹⁹⁶ Rather than stretching private law beyond its intended bounds, criminal law should be improved to meet any outstanding needs.¹⁹⁷

A number of American scholars have joined in the criticism of punitive damages.¹⁹⁸ Consider Anthony Sebok's attack of punitive

191. See, e.g., *Dirmeyer v. O'Hern*, 3 So. 132, 134 (La. 1887) (Where the Louisiana Supreme Court recognized the discrepancy between Louisiana's approach to the application of punitive damages and traditional Civilian theory); *Vincent v. Morgan's Louisiana*, 74 So. 541 (La. 1917) (where the Louisiana Supreme Court made the decision to limit the award of punitive damages to situations where they had been specifically authorized by statute); discussion *supra* Part IV.

192. Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741, 751 (2008).

193. *Id.* at 742.

194. *Id.*

195. *Id.* at 751–58.

196. *Id.* at 751–52, 763 (Dr. Koziol argues that the private law fails at adequately punishing and deterring blameworthy behavior because there is no corresponding relationship between the injury suffered by the plaintiff and the amount of recovery. He argues that punishing the defendant with punitive damages allows a windfall for the plaintiff who has suffered no corresponding injury. He goes on to say that, if the defendant is going to be held liable for punitive damages, the only way to justify their award is to place the damages that go beyond compensation into a public fund in such a way that they amount more to a fine than extra compensatory damages).

197. *Id.*

198. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007); Thomas B. Colby, *Beyond the Multiple Punishment*

damages in his article, *Punitive Damages: From Myth to Theory*.¹⁹⁹ Professor Sebok concedes that punitive damages must have some deterrent effects, but argues that they fail as a mechanism of efficient deterrence because research suggests that juries produce awards that are neither certain nor likely to bear a reasonable relationship to the amount of money that incentivizes investment in appropriate safety measures.²⁰⁰ Yet another scholar, Dan B. Dobbs, argues that punitive damages are not subject to accurate measurement and therefore not subject to effective limits.²⁰¹ Professor Dobbs goes on to discuss a number of other criticisms.²⁰² In particular he argues that punishment should be reserved for criminal law and that allowing punitive damages could lead to an unfair application that may over-deter some conduct while under-detering other conduct.²⁰³

While it is true there are a number of arguments against punitive damages, they do serve an invaluable gap filling function in American law. Reconsider the factual scenario from the beginning of this article in which the seventy-seven year old man was allowed to suffer from an extremely painful condition while his caregivers took little to no action to alleviate his pain.²⁰⁴ Under the American legal regime, the caregivers' actions fall outside the scope of criminal law, thus the only available remedy is in tort. Given the caregivers' recognition of the condition, their failure to treat the condition, and their choice to allow the condition to progress to such a life-threatening level, it seems reasonable to

Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 MINN. L. REV. 583 (2003); Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425 (2003); Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831 (1988).

199. *Id.*

200. *Id.* at 984.

201. Dobbs, *supra* note 198, at 834.

202. *Id.* at 837-39.

203. *Id.*

204. *See supra* Part I.

conclude that the caregivers were grossly negligent.²⁰⁵ Because the actors were grossly negligent, the damages awarded to the patient depend upon the jurisdiction in which the suit is brought. Under the prevailing common law approach, the caregivers' grossly negligent actions would allow the plaintiff to recover punitive damages.²⁰⁶ Had this case been brought before a court in Louisiana, no punitive damages would have been awarded because the factual scenario is not expressly provided for by the legislature. Under Louisiana law, the conduct would go undeterred and the defendants would escape any form of punishment.²⁰⁷

The caregivers' behavior was extremely blameworthy. They recognized that the patient was suffering from a minor bedsore that could have been easily treated; but rather than following the proper procedure to treat the condition, they allowed the bedsore to progress to a serious, life threatening condition.²⁰⁸ Is it right for these actors to escape punishment simply because their conduct falls through a gap between private and criminal law? Is this not the type of behavior that a state has a legitimate interest in deterring?

The flexibility afforded by allowing the award of punitive damages upon a showing of gross negligence is what makes the common law approach so appealing. Under the common law system, punitive damages serve as a "gap-filler" that allows for the punishment and deterrence of blameworthy behavior, without

205. Gross negligence is an extreme departure from the ordinary standard of care. *See supra* Part I.

206. *See id.* This fact pattern was presented to a Texas Appellate Court in *Convalescent Services, Inc. v. Schultz*, 921 S.W.2d, 739-40 (Tex. App. 1996) (the Texas court determined that the caregivers' actions were grossly negligent and upheld the trial court's award of punitive damages).

207. *See* MARAIST, *supra* note 7, at § 7.02 ("Compensatory damages are divided into two broad categories: special and general damages." Special damages are those that have a quantifiable value, general damages are those which are speculative in nature and include pain and suffering, mental anguish, and loss of enjoyment of life).

208. *See* *Convalescent Services*, 921 S.W.2d at 733.

requiring the legislature to pass specific legislation covering every conceivable scenario.

The United States Supreme Court has declared that punitive damages are civil penalties intended to punish actors for extraordinarily blameworthy behavior and deter similar actions in the future, and that they are justified by a state's legitimate interest in protecting its citizenry from extraordinarily blameworthy behavior.²⁰⁹ The Louisiana legislature recognized the value of civil punishment with its adoption of limited punitive damages statutes. However, because the legislature must enact a statute specifically authorizing punitive damages before they can be awarded, many actors whose behavior should be punished will escape retribution unless the legislature has expressly provided otherwise.

The benefit of having punitive damages available to punish grossly negligent conduct is that they provide an extra tool for courts to employ when the circumstances merit punishment but fall outside the scope of criminal law. Louisiana should enact legislation allowing courts to grant punitive damages in case of gross negligence, similar to most common law sister states. Doing so places the responsibility of monitoring awards of punitive damages in the hands of the state's judiciary, who would be responsible for gauging the blameworthiness of a defendant's behavior and making a determination of whether his conduct is grossly negligent and merits punishment. Giving courts this ability would allow for punishment as merited by the circumstances without forcing the legislature to predict every possible scenario.

VI. CONCLUSION

The common law applies a relatively balanced approach to its application of gross negligence, both in the context of punitive damages and immunities. Louisiana has essentially abandoned the component of gross negligence in the context of punitive damages,

209. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996).

but maintains its application in the context of immunities. Louisiana does not allow punitive damages for a showing of gross negligence unless specifically authorized by statute, Civil Code provisions to this effect being limited to cases of intentional criminal conduct. Louisiana's approach to gross negligence and punitive damages leaves a gap between criminal and private law. By requiring the legislature to pre-legislate punitive damages recovery, Louisiana has eliminated the flexibility that makes the common law system so attractive. Allowing courts to impose punishment for grossly negligent behavior fills the void left between criminal law and private law. It allows the court to punish, and thereby deter, egregious behavior as it arises, rather than requiring the legislature to pass specific statutes governing every sort of action. It is impossible for the legislature to preconceive every blameworthy action before it occurs. The common law approach of allowing the judiciary leeway to assess punitive damages for grossly negligent behavior insures that blameworthy behavior is subject to some form of punishment, even if it is outside the scope of criminal law. Even European opponents to punitive damages, including Dr. Koziol, have recognized that European criminal law covers a broader swath of activity than the American counterpart,²¹⁰ and therefore punitive damages may be necessary to fill voids in the law.

Louisiana is a hybrid jurisdiction that employs a distinct version of the civil law, like few other legal systems in the world. This offers an opportunity to administer justice and punish grossly negligent actors who are guilty of conduct that goes far beyond the pale of reasonableness, while preventing the miscarriage of justice associated with grossly disproportionate punitive damage awards. The legislature could adopt a statutory scheme that allows the judiciary more freedom in applying punitive damages for grossly

210. Koziol, *supra* note 192, at 760 (Dr. Koziol points out that, in many situations, circumstances that would merit punitive damages under American law are punishable by criminal law in many European systems).

negligent actions, but which maintains a narrow enough scope to prevent the miscarriage of justice associated with disproportionate exemplary damage awards.

***HORTON V. BROWNE, ILLUSTRATING CONFUSION
(LITERALLY) IN THE CIVIL CODE***

Brian Flanagan*

I. BACKGROUND

In *Horton v. Browne*,¹ the plaintiffs, three siblings, sought declaratory judgment recognizing them as owners of mineral rights.

Initially, plaintiffs' mother had full ownership of a 40 acre tract in Red River Parish. In 1997, the mother executed a donation that divided the land into three separate tracts, and gave each sibling ownership of a particular tract. In the same donation, the mother stated each sibling was to receive an undivided one third interest in the minerals covering the entirety of the 40 acres.²

In the following years, a series of transactions occurred. One sibling was no longer involved after she sold her interest to another sibling in 2002. In 2003, the remaining two siblings sold their interest (collectively, the entirety of the 40 acres) to a third party, reserving their mineral interests.³ In 2004, the third party conveyed her rights in the property (again, the surface of the 40 acres) to the defendant, Donald O. Browne. In 2005, the siblings and Donald Browne executed a mineral lease in favor of Pride Oil and Gas Properties, Inc.⁴ No wells were spud until 2010.⁵

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1. *Horton v. Browne*, 47,253 (La. App. 2 Cir. 6/29/12) 94 So. 3d 1034.

2. *Id.* at 1036. While the act of donation could have been more specific, it arguably created a mineral servitude over the entirety of the 40 acres, and each sibling received a one third interest in the mineral servitude. *Id.* Thus, each sibling owned the surface of his particular tract, and a one third undivided interest in the mineral servitude covering the entirety of the 40 acres.

3. *Id.*

4. *Id.*

A dispute arose as to who owned the mineral rights at the time the first well was spud in 2010. Defendant Donald Browne, the owner of the surface, argued that the siblings' mineral servitude prescribed in 2007 for 10 years non-use, and therefore, he owned the mineral rights. The plaintiffs contended that the original donation by the mother failed to create a valid mineral servitude, or alternatively, confusion occurred between their fractional interest in the servitude and their rights in the surface.⁶

II. DECISION OF THE COURT

The trial court ruled that the mother's donation in 1997 created a single servitude, which prescribed in 2007.⁷ The court of appeal affirmed the trial court's ruling.⁸

Article 66 of the Mineral Code provides, "[t]he owners of several contiguous tracts of land may establish a single mineral servitude in favor of one or more of them or of a third party."⁹ Plaintiffs argued that the article was inapplicable, as it refers to "owners" and, at the time of the donation, the mother was the only owner. The court of appeal, however, looked to the intent of the mother, and determined that she intended to create a single mineral servitude.¹⁰ Further, the court found that "by agreeing to the terms in the conveyance, each plaintiff intended to be subject to a mineral servitude in favor of the others."¹¹ The donations of the surface and mineral rights were separate and distinct donations, even though they were executed by means of the same instrument.¹²

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. LA. REV. STAT. ANN. § 31:66 (1974).

10. *Horton v. Browne*, 94 So. 3d at 1037.

11. *Id.*

12. *Id.*

As to the confusion argument, the court ruled that confusion did not occur with regard to the mineral servitude.¹³ Article 27(2) of the Mineral Code states, “a mineral servitude is extinguished by confusion.”¹⁴ However, the Mineral Code does not have specific articles regarding confusion of mineral servitudes. Thus the court applied by analogy the Civil Code articles regarding predial servitudes.¹⁵ The court cited Civil Code article 765, which states that a predial servitude is extinguished by confusion “when the dominant estate and servient estates are acquired in their entirety by the same person.”¹⁶

Applying this article by analogy, the court found that because the landowner did not acquire the entirety of the dominant estate, but rather only a fractional interest, the servitude was not extinguished by confusion.¹⁷ This was so because the rights were unequal between the two estates; as a landowner in full ownership, one would have an independent right for the exploration of minerals, but as a co-owner of a mineral servitude, consent by all of the co-owners was required for mineral operations on the property.¹⁸ Accordingly, defendant Donald Browne was declared

13. *Id.*

14. LA. REV. STAT. ANN. § 31:27(2) (2000).

15. A similar question was presented in *Allied Chemical Corp. v. Dye*, 441 So. 2d 776 (La. App. 2 Cir. 1983). The question was, “when a person has full ownership of a contiguous tract and also a fractional mineral servitude in the same land, are not the full ownership and servitude merged together and the servitude extinguished by confusion?” The court in *Allied Chemical Corp.* analogized former Civil Code article 805, an article on predial servitudes, which required that the two estates be of equal quality for confusion to occur. The court then found that full ownership and servitudes were not of equal quality, and therefore confusion did not occur. *Horton v. Browne*, 94 So. 3d at 1038. (Title IV of Book II of the Louisiana Civil Code of 1870, which formerly contained art. 805 as cited by the court in *Allied Chemical Corp. v. Dye*, was revised, amended, and reenacted by Acts 1977, No. 514, effective January 1, 1978.)

16. In this case, the dominant estate would be the mineral servitude, and the servient estate would be the surface servitude. *Id.*

17. The court also cited Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, in support of the outcome.

18. *Horton v. Browne*, 94 So. 3d at 1038.

the owner of the mineral rights to the 40 acres, as the mineral servitude created in 1997 had prescribed for non-use in 2007.

III. COMMENTARY

The determination of when and to what extent confusion occurs is nuanced. On confusion with respect to predial servitudes, Professor Saul Litvinoff writes:

Confusion may take place only in part, as when the owner of the dominant estate acquires only a part of the servient estate the whole of which is burdened by the servitude, in which case the servitude continues burdening the rest of the servient estate if in doing so it affords any benefit to the dominant estate. On the other hand, confusion does not take place at all when the owner of the servient estate acquires a part of the dominant estate, in which case the servitude continues to exist in favor of the remaining part of the dominant estate.¹⁹

Horton illustrates this distinction by analogy to mineral servitudes. Although each sibling owned the entirety of a particular tract of land (the servient estate), the *entirety* of the mineral servitude (the dominant estate) was not acquired by the same person, as each sibling only had a fractional interest in the mineral servitude. Therefore, based on analogy, the requirements of Civil Code article 765 were not met, so confusion did not occur at all.²⁰

It is interesting to note that article 66 of the Mineral Code provides an exception to this rule in that it allows owners of several contiguous tracts of land to establish a single mineral servitude in favor of one of them.²¹ For example, if the three siblings decided to create a mineral servitude in favor of one of the

19. SAUL LITVINOFF, 5 LOUISIANA CIVIL LAW TREATISE, OBLIGATIONS 641-42, (2d ed., West 2001) (footnotes omitted). *See also* ATHANASSIOS N. YIANNPOULOS, 4 LOUISIANA CIVIL LAW TREATISE, PREDIAL SERVITUDES 453 (West 1983).

20. *Horton v. Browne*, 94 So. 3d at 1038.

21. LA. REV. STAT. ANN. § 31:66 (2000). The rule of Civil Code article 765 is also codified in Mineral Code article 27. LA. REV. STAT. ANN. § 31:27(2) (2000).

siblings, confusion would not extinguish the mineral servitude burdening his particular tract, despite the fact that the dominant estate and servient estate would be owned in their entirety by the same person.²²

In a situation like the one in *Horton*, a challenge arises when one of the landowners decides to sell but wants to reserve his interest in the mineral rights. In this case, reserving the mineral rights would only reserve the interest in the existing mineral servitude. Of course, the prescription of non-use will accrue ten years from the date it was created, not from the date of sale of the land.²³ As a practical matter, the siblings could have partitioned the mineral servitude. A partition would divide the servitude and result in each sibling having full ownership of the land and mineral rights in his particular tract. This would allow a sibling to create a new mineral servitude from the date of sale of the land. Alternatively, the siblings could have executed an acknowledgment of the servitude, pursuant to Mineral Code article 54, which would have extended the date of prescription for non-use.²⁴

22. See LA. REV. STAT. ANN. § 31:66 (2000) and LA. CIV. CODE art. 765.

23. LA. REV. STAT. ANN. § 31:28 (2000).

24. LA. REV. STAT. ANN. § 31:54 (2000).

PEÑA V. SIMEON, AND THE MEANING OF CONSENT

William Gaskins*

The Louisiana Civil Code states that contracts are formed by consent established through offer and acceptance. But what exactly is the consent that the offer and acceptance establish? This article discusses the question with reference to *Peña v. Simeon*,¹ a Louisiana case in which a woman with a poor understanding of English is nonetheless held to have given her consent to an English-language contract that she signed.

I. BACKGROUND

The facts of *Peña v. Simeon* are as follows: plaintiff Rosa Peña went to USAgencies to buy an automobile insurance policy for Fausto Justo, with whom she lived, and who was also the father of her two children. Neither Peña nor Fausto spoke English very well. Although Peña stated at trial that the insurance policy was for Justo, who was in fact the principal “Insured” in the policy document, both Fausto and Peña were listed on the policy as “Covered Persons” and “Operators,” and Peña signed her name on both pages of the document. Peña also signed her initials (Fausto did not) next to the waiver paragraph that stated: “I do not want UMBI coverage,” where UMBI refers to Uninsured Motorist Bodily Injury coverage, which would provide compensation if an uninsured driver caused an accident with the insured party. After procuring the policy, Peña got into a car wreck, and then sought to invoke UMBI coverage on the policy; USAgencies replied that she had waived UMBI coverage, and that it therefore owed no UMBI payments to her. Peña sued for those payments based on several

* J.D., D.C.L., Louisiana State University Law Center (2013). He would like to thank Olivier Moréteau, Jennifer Lane, and Daniel On for their help.

1. *Peña v. Simeon*, 11-1083 (La. App. 5 Cir. 5/22/12), 96 So. 3d 547.

theories, and lost in a trial court pre-trial summary judgment in favor of the other party.

II. DECISION OF THE COURT OF APPEAL

In the appeal of the trial court's summary judgment, Peña essentially made two arguments: first, that she did not have authority to reject the UMBI coverage; and second, that she could not understand the contract because she did not have a very good understanding of English. The court of appeal first treated the question of whether someone with Peña's relation to Fausto—someone living with the principal "Insured," and the mother of his children, but not legally his wife—could waive all UMBI coverage under an insurance policy. Louisiana has a strong public policy in favor of finding UMBI coverage to exist even in doubtful cases.² However, citing a Louisiana law that says "any named insured in the policy" can reject coverage,³ and two cases that ruled a wife could waive UMBI coverage on behalf of her husband,⁴ the court of appeal found that Peña had the right to waive UMBI coverage in the insurance contract. As for the second issue, the court decided that Peña's weakness in the English language did not invalidate her waiver of UMBI coverage for two reasons. First, the court determined that there was no vice of consent, and thus Peña's consent to the waiver was not altered. Second, the court decided that Peña sufficiently understood her rejection of the UMBI policy because she knew the purpose of the visit to the insurer, because she could read English well enough to recognize what the insurance contract was, and because she signed the document. Thus, the court found that she was bound by the waiver of UMBI coverage.

2. *Id.* at 550.

3. LA. REV. STAT. ANN. § 22:1295(1)(a)(i) (2009).

4. *Bonnette v. Robles*, 740 So. 2d 261 (La. App. 2 Cir. 1999); *Tucker v. Valentin*, 807 So. 2d 292 (La. App. 5 Cir. 2001).

III. COMMENTARY

The Court of Appeal's decision as to whether someone of Peña's relationship to the principal insured and to the insurance contract could validly waive UMBI coverage is straightforward and needs no comment here. As for the second issue of the trial, that concerning Peña's understanding of the contract, there is more reason for close inspection.

A. Vices of Consent

The court stated toward the end of its opinion that, “[Peña] makes no claim of fraud, duress, or misconduct on the part of the insurance agent.”⁵ Here, the court seems to have had in mind the vices of consent, which according to Louisiana Civil Code article 1948 are error, fraud, and duress. The court wrote explicitly that there was no claim of the second two vices, fraud or duress, and in fact it appears that neither vice existed in case. Misconduct seems to fall under fraud or duress, but for whatever reason it is added to the list. Oddly, there is no explicit mention of error. If the court ignored the issue of error because Peña failed to plead it, this is unfortunate for her. The *Duong*⁶ case cited by the court decided that, for purposes of an error analysis, “coverage for uninsured motorist risk as statutorily provided is a ‘cause’ within the meaning of La. C.C. art. 1949.”⁷ Because error vitiates consent when the

5. Peña v. Simeon, 96 So. 3d at 552.

6. Duong v. Salas, 877 So. 2d 269.

7. *Id.* at 273. *Duong* did not state the exact reason for which coverage for uninsured motorist risk is a cause, but the most likely reason is that it bears on the nature of the law. Some potential ways in which error may concern cause are listed in Louisiana Civil Code art. 1950:

Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.

error concerns cause,⁸ the *Duong* finding, that lack of UMBI coverage is a cause, shows that Peña might have succeeded if she had pled error. Perhaps if Peña had asserted the defense, the court would have found that she too made an error as to cause when she signed the UMBI waiver, although the fact that the court found her mastery of English better than Duong's makes it seem unlikely that an error pleading would have yielded a different result from that which she received. But even if the basis of a vice of consent did exist, there is a more principal question, one that the court did not directly discuss: did Peña consent to the contract in the first place? To answer that question, consent must first be defined.

B. The Meaning of Consent

The Louisiana Civil Code says that, "A contract is formed by the consent of the parties established through offer and acceptance."⁹ Despite the importance of consent in the civil law of contracts, the law refers to consent without ever defining it. Louisiana Civil Code article 11 states that, "The words of a law must be given their generally prevailing meaning." What is the generally prevailing meaning of consent? The obvious definition is that consent means something like a manifestation of agreement; and indeed, a reference to various dictionaries reveals that to be so.¹⁰ Similar definitions are "acquiescence," "permission," "approval," or "agreement" from Merriam Webster's Dictionary,¹¹ with the latter three also given by Black's Law Dictionary.¹²

8. LA. CIV. CODE art. 1949: "Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party."

9. LA. CIV. CODE art. 1927.

10. BLACK'S LAW DICTIONARY 346 (Bryan A. Garner et al. eds., 9th ed. 2009); LE PETIT ROBERT 371 (Paul Robert ed., 1983); OXFORD LATIN DICTIONARY 412 (P.G.W. Glare et al. eds., 1968); 3 THE OXFORD ENGLISH DICTIONARY 760-61 (Robert Burchfield ed., 2nd ed. 1991); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE ENCYCLOPEDIA EDITION 312 (Joseph Friend et al. ed., 1960).

11. WEBSTER'S, *supra* note 10, at 312.

12. BLACK'S LAW DICTIONARY, *supra* note 10, at 346.

Likewise, the Petit Robert's translation of French *consentement* as "acquiescence," "agreement," or "acceptance,"¹³ tends to show that consent means something like an outward manifestation of agreement. And indeed, the fact that the method of showing consent—that is, offer and acceptance—is an external manifestation is made clearer by the following sentence: "Unless the law prescribes a certain formality for the intended contract, offer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent."¹⁴ But there is also support for an opposite definition: that consent is not an outward manifestation at all, but rather something internal. The Oxford English Dictionary suggests consent may mean "common feeling," "sympathy," or "accord."¹⁵ The CNRTL French dictionary suggests for *consentement* something translating to a "free act of thought,"¹⁶ and the Oxford Latin Dictionary suggests for *consensus* "concord" or "unanimity," though also an "agreement in action."¹⁷ From this subtle difference, it appears that in its generally prevailing meaning, consent as outward manifestation can be lexically separated from consent as an event within the person who shows it, but that both meanings are present in the common notion of consent.

From inward consent, a further distinction can be made. In classical Latin, the verb *sentire* could mean both what we call "to feel" and "to think." Although it will seem odd to moderns, Romans probably found there was no distinction to be needed when they used the word, so that a translation of *sentire* sometimes yields "to feel," sometimes "to think", and sometimes it is unclear

13. LE PETIT ROBERT, *supra* note 10, at 371.

14. *Id.*

15. 3 THE OXFORD ENGLISH DICTIONARY, *supra* note 10, at 412.

16. CENTRE NATIONAL DE RESSOURCES TEXTUELLES ET LEXICALES, <http://www.cnrtl.fr/definition/consentement>: «Acte libre de la pensée» (Jul. 8, 2013).

17. OXFORD LATIN DICTIONARY, *supra* note 10, 412.

which is intended, or whether both meanings are present.¹⁸ This is vexing for the present purpose, as to feel oneself bound (which, through reference to the word *sententia* may be better translated here as a “will” or “desire” to be bound)¹⁹ and to understand exactly how one is bound are two very different things. It is here that the word “unanimity” is a perfect translation of consent,²⁰ but also an unhelpful one; for *uni-* corresponds to the idea of togetherness like *cum-*, and *animus* and *anima* can mean either mind or soul, just as *sensus* means either thought or feeling. Altogether, if consent is to be taken with its full general meaning, then it must be defined to include both a feeling or will to be bound, and also an understanding of what one is bound to, for both are included in the meaning of consent, just as the idea of external manifestation is.

Can the different kinds of consent exist apart from one another? It would seem that whenever an external manifestation of consent is freely and intentionally (that is, not accidentally) given, the person who consents must perform the external manifestation as an effect of his internal feeling (here, “will” is a good substitute) of consent. In other words, if the manifestation does not arise from the will, nor is forced, nor is an accident, then how can it arise at all? There must be some cause. But whereas consent of will is necessary for a free and purposeful external manifestation of consent, understanding can easily be shown not to be necessary for it: one may sign a contract without reading it or otherwise learning

18. CLIVE STAPLES LEWIS, *STUDIES IN WORDS* 136-38 (Cambridge Univ. Press, 1960).

19. See CHARLTON T. LEWIS, *AN ELEMENTARY LATIN DICTIONARY* 769 (Oxford Univ. Press, reprint 1999); see also ST. THOMAS AQUINAS, *17 SUMMA THEOLOGICAE* 158-63 (Thomas Gilby O.P. ed. and English trans., 1970): Although consent arises in the reason (and thus animals do not have consent), consent is an appetitive power because it is an impulse to join oneself with an object which can be felt when present. This appetitive power is the will (*voluntas*). Thus the feeling element, the desire to move toward the object, may be called will.

20. H.W. FOWLER, *A DICTIONARY OF MODERN ENGLISH USAGE* 105-6 (Sir Ernest Gowers ed., 2nd ed. 1965); 3 *THE OXFORD ENGLISH DICTIONARY*, *supra* note 10, at 760-61; *OXFORD LATIN DICTIONARY*, *supra* note 10, at 412.

of its terms. Thus, it appears to be a rule for the general meaning of consent that where there is a free and purposeful external manifestation of consent, the manifestation always arises from the will; but understanding may or may not be present.

C. The Law of Consent and its Application to Peña

The law only explicitly requires the external manifestation of consent, as seen in Civil Code article 1927, which speaks of “offer,” “acceptance,” and various acceptable forms therefor.²¹ If the external manifestations of consent necessarily arise from the internal will, then the law must also implicitly require that there be consent of the will. As for consent in understanding, although the Civil Code does not require it explicitly or even implicitly, the Louisiana jurisprudence requires it. The Peña court states the doctrine thus: “[i]t is well settled that a party who signs a written instrument is presumed to know its contents.”²² That is, if a party gives an external manifestation of consent, then courts presume that he also consents in understanding.

The reason for the presumption that consent in understanding accompanies consent in manifestation is easy to see: neither courts nor other people can see whether a party understands a contract except by what he shows through his manifestations. If one could not trust that another party’s manifestations of consent were valid for a contract, then the formation of reliable contracts would be impossible. But if there is only a presumption that understanding accompanies the external manifestation, rather than a strict rule that it does, then can the presumption in some circumstances be overturned? And if so, when? The strong language from some Louisiana jurisprudence makes it seem that the presumption can never be overturned. *Tweedel v. Basseaux* states that, “The law of Louisiana is that one who signs an

21. LA. CIV. CODE art. 1927.

22. Peña v. Simeon, 96 So. 3d at 552.

instrument without reading it has no complaint.”²³ *Aguillard v. Auction Management Corp.* likewise states that, “It is well settled that a party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, that he did not understand it, or that the other party failed to explain it to him.”²⁴ Again in *Coleman v. Jim Walter Homes, Inc.*:

Having signed this agreement, Mr. Coleman cannot seek to avoid its obligations by contending that he did not read or understand it. . . [T]he law does not compel people to read or to inform themselves of the contents of instruments which they may choose to sign, but, save in certain exceptional cases, it holds them to the consequences.²⁵

The rule is strict; but there apparently are, according to *Coleman*, unnamed exceptional situations. *Tweedel* also seems to contradict itself by making an exception for rebuttal of the presumption, saying that proof that a party was deceived can overturn the presumption of understanding.²⁶

Probably a large majority of cases that involve misunderstanding or mistake about a signed contract are cases of error as a vice of consent. In the normal case, a party has consented to enter a contract, but his understanding of some aspect of it is deficient or wrong. If his lack of understanding is a designated cause,²⁷ then the law regards the consent that he gave as vitiated and made ineffective. But sometimes consent is more than merely vitiated. Sometimes the parties are so far from agreeing with one another that consent cannot be said to ever have existed at all, even if the parties signed a contractual document. The problem in such a situation is known in French doctrine as *error obstacle*, or error resulting from an obstacle. *Error obstacle* is a radical

23. *Tweedel v. Brasseaux*, 433 So. 2d 133, 138 (La. 1983).

24. *Aguillard v. Auction Management Corp.*, 908 So. 2d 1 (La. 2005).

25. *Coleman v. Jim Walter Homes, Inc.*, 6 So. 3d 184 (La. 2009).

26. *Tweedel v. Brasseaux*, 433 So. 2d at 137.

27. LA. CIV. CODE art. 1950, *supra* note 7.

misunderstanding as to the nature or the cause of a contract. Even though the parties seemed in many ways to agree, there was in fact no actual meeting of the minds. There was no agreement whatsoever because the parties “did not actually want the same thing. An essential condition to the formation of the contract is missing: the common intent, the true mutual understanding.”²⁸ In such a case, it would not make sense to say that consent has been vitiated, for there never was any consent except in appearance. Or we may say that there was an external manifestation of consent, but neither understanding of the terms nor any will to be bound to the terms as they were. Under *error obstacle* theory, external consent by itself is not enough to overcome a complete lack of will to be bound, so that the parties are simply not bound.

If, as in *Peña*, a party signs his name to a contractual document, but does not—or for the most part does not—understand the language in which the contract is written, then is he bound to the contract by law? Such a party manifests his consent to the contract when he signs the document, and his free and purposeful manifestation shows that he consents in will, too. As for his understanding, there are three main possibilities: first, that he does not understand the contested terms as printed, but that he gains understanding of them through a translation from some source outside of the contract; second, that he does not understand the contested contractual terms at all; and third, that he has a partial understanding of the contractual terms at issue. The first situation occurred in *Rizzo v. Ward*,²⁹ a case in which a native speaker of Spanish with below average ability in English signed the UMBI waiver in an English-language insurance contract, but discussed the document with an insurance agent in Spanish. Rizzo pleaded in court that his waiver of UMBI coverage was void

28. FRANÇOIS TERRÉ ET AL., *DROIT CIVIL: LES OBLIGATIONS* 216 (9th ed., Dalloz 2005); trans. in e-mail from Olivier Moréteau, Professor, Paul M. Hebert Law Center, to author (April 24, 2013) (on file with author).

29. *Rizzo v. Ward*, 32 So. 3d 986 (La. App. 4 Cir. 2010).

because he did not understand the contract. But the court cited the presumption that parties understand the contracts that they sign, and found that, while inability to understand the language might by itself overturn the presumption of understanding, the fact that the insurance agent explained the contract in Spanish counterweighed his difficulty with English, so that the presumption was upheld. The second situation occurred in the *Duong* case, in which a Vietnamese man who spoke almost no English rejected UMBI coverage in an insurance contract. Here, the party visited the insurance agent with a friend who spoke more English, but even the friend's English was very bad. The court ruled that Duong's inability to understand the language of the contract was sufficient reason to invalidate the contract.³⁰ However, unlike *Rizzo*, the court turned to vice of consent, and found that the party had consented, but that his consent was vitiated by an error concerning cause. Although the *Duong* analysis seems to have reached the right conclusion (for the party indeed had almost no understanding of the details of his insurance contract), it is unfortunate that the court does not discuss the issue of whether or not there was full consent in the first place. And the third situation, that in which the party had some understanding of the language of the contract, is the one at issue in *Peña v. Simeon*.

In the present case, Peña externally manifested her consent when she signed her initials by the waiver of UMBI coverage in the insurance contract. At the same time, she must have consented in will to be bound to the provision. As for the understanding aspect of consent, the court concluded that Peña understood the waiver because she knew she was at the insurance office to buy insurance with Fausto, because she could read English well enough to understand that the document was an insurance contract, and because Peña signed her initials to the waiver. The first two of these reasons make at best only a weak argument that Peña

30. *Duong v. Salas*, 877 So. 2d at 273.

understood the waiver. The fact that Peña was at the office for the purpose of buying insurance seems likelier to make Peña think the waiver clause would provide insurance coverage rather than take it away, and Peña's ability to recognize the document as an insurance contract was probably helped by her knowledge of the purpose of her visit. But, importantly, Peña signed her initials next to the UMBI waiver, and this signature created the presumption that she understood the clause. After weighing the evidence regarding her comprehension of the English language, the court found that the facts were not sufficient to reverse the presumption of understanding, and held that Peña consented to the waiver of UMBI coverage. Peña signed the waiver, of her free accord, and, by the un rebutted legal presumption, she understood the waiver; thus her consent was whole and valid.

Given the facts as the court took them, the result in *Peña* is the right one: for the law must presume that parties understand their contracts, and Peña offered little evidence to prove that she did not understand hers. Perhaps Louisiana could do more to make sure that people with a poor comprehension of English understand their contracts, both for their own sakes, and for the sakes of those who contract with them. However, it is difficult to think of a solution that would prove helpful in more than a few cases. One example of such a rule helping non-English-speakers is California's policy that requires people who conduct business primarily in one of the five foreign languages most-used in California to offer the other party a translation of some types of contracts into the language in which the contract was negotiated.³¹ Such a rule would help a party like the one in *Rizzo*, who pleaded in court that he did not understand his English UMBI waiver even though the insurance agent discussed the contract with him in his native language. But the law would not help the parties in *Peña* or in *Duong* because their insurance agents discussed their contracts

31. CAL. CIV. CODE ANN. § 1632 (2011).

only in English, and easily may not have spoken the parties' native languages of Spanish and Vietnamese, respectively. Furthermore, requiring provision of full translations of contracts would likely make the cost of contracting prohibitive for many people, and would likely lead to many problems arising from inaccurate translations. It may be true that a law requiring foreign language translation of some contracts would help some parties, but the first step is for Louisiana courts to clarify their doctrine of the difference between the vices of consent and a total lack of consent due to *error obstacle*. Only in so doing can Louisiana courts set straight this basic aspect of the rights and duties of contracting parties, both in cases of linguistic inability and elsewhere.

IV. CONCLUSION

Consent is necessary for all contracts under Louisiana law; but the law does not define consent, and its subtler intentions must be taken from its generally prevailing meaning. Consent contains both an external and an internal element, with the internal comprising both an idea of feeling or will and of knowing or understanding. The Louisiana courts presume that parties understand their contracts when they have manifested consent through their signatures. The presumption of understanding has been overturned on grounds of error in a case in which a party knew no English whatsoever; but it would be better for courts to find in such cases that lack of understanding, supported by enough evidence to overturn the presumption, prevents full consent in the first place. In *Peña*, where the party understood some English, the presumption that she understood the provision was rightly upheld. But Louisiana courts have yet to make clear their doctrine on the distinction between vices of consent and the full lack thereof, and cases involving linguistic inability will remain on unsteady ground until they do.

**LEND ME AN EAR: GRADUAL OCCUPATIONAL HEARING
LOSS AND RECOVERY UNDER THE THEORY OF *CONTRA
NON VALENTEM* IN *MCCARTHY V. ENERGY GULF
STATES, INC.***

Leigh Hill*

The recent Louisiana Third Circuit Court of Appeal case, *McCarthy v. Entergy Gulf States, Inc.*, addresses several issues involved in situations where plaintiffs are injured in the course of their employment, but are unaware of this injury and its accumulation until many years, if not decades, later.¹ The Third Circuit first addresses the issue of *contra non valentem* and how it applies to this injury, gradual in nature. The third circuit further discusses, though not in as great a detail, the questions of contributory negligence and exclusivity of a remedy in Workers' Compensation, both of which are found not to apply to this case.

I. BACKGROUND

While this litigation began with three original plaintiffs, only two plaintiffs took part in this appeal: Alexander Valerie, Jr. and Milton Pharr.² Valerie and Pharr were employed at the Nelson Station Facility of Entergy/Gulf States (EGS) and undisputedly suffered hearing loss between the time of their employment and their respective retirements from EGS.³ Their hearing loss was found to be caused by the noise levels generated at this facility and

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1. *McCarthy v. Entergy Gulf States, Inc.*, 2011-600 (La. App. 3 Cir. 12/7/11), 82 So. 3d 336, *writ denied*, 84 So. 3d 553 (La. 2012).

2. *Id.* at 339; *see* Original Brief of Appellees Milton Pharr and Alexander Valerie, *McCarthy v. Entergy Gulf States, Inc.*, 82 So. 3d 336 (La. App. 3 Cir.), No. 11-00600-LA, 2011 WL 2700135.

3. *McCarthy v. Entergy Gulf States, Inc.*, 82 So. 3d at 342.

EGS's failure to provide adequate protection and information to Valerie and Pharr.⁴

Both men spent over three decades working at this facility. Valerie's employment with EGS lasted 34 years, from 1952 to 1986.⁵ Pharr worked in these conditions for 36 years, from 1959 to 1995.⁶ While EGS was aware of the relationship between industrial noise levels and the possibility of hearing loss at the time that the plaintiffs began working at the facility, evidence showed that EGS failed to acknowledge this problem until the 1970s, almost twenty years after Valerie and Pharr had already been exposed to dangerous levels of noise.⁷ But, even with EGS's acknowledgement of this danger, the use of hearing protection did not become mandatory in the facility until about 1980.⁸ This mandatory policy was effectively useless, however, as it was never enforced, nor were employees instructed on when, where, and how protection should be used or why the protection was necessary.⁹

EGS had Valerie and Pharr undergo multiple audiograms, which revealed that both employees suffered significant hearing loss. Valerie testified to having received a letter with this information stating that EGS would address the issue to the Corporate Occupational Health and Safety Group (COHS).¹⁰ However, Valerie never heard anything from COHS.¹¹ It was not until April 1999, when Mr. Valerie's attorney arranged for him to have an audiogram that Mr. Valerie actually became aware this damage to his hearing.¹² Pharr testified to retaining copies of his

4. *Id.*

5. *Id.* at 344.

6. *Id.* at 345.

7. *Id.* at 341.

8. *Id.* at 344.

9. *Id.* at 344, 346.

10. *Id.* at 345.

11. *Id.*

12. *Id.* at 344.

tests, but he did not think, nor was he told that, his hearing loss was related to the noise generated at the facility.¹³

Judge Clayton Davis of the Fourteenth Judicial District Court (JDC) of Calcasieu Parish entered a judgment for plaintiffs, Mr. Valerie and Mr. Pharr, on the grounds that prescription had effectively been halted by the doctrine of *contra non valentem*; there was no evidence that either plaintiff was contributorily negligent for the hearing loss he suffered. Also, the court ruled that the Workers' Compensation Act did not bar recovery from the employer in this case.

II. DECISION OF THE COURT

The Court of Appeal of Louisiana, Third Circuit, in an opinion authored by Judge Peters, affirmed the decision of the Fourteenth Judicial District Court. The Third Circuit found that plaintiffs' evidence sufficiently showed that damages had resulted from noise levels generated in the Nelson Station Facility and that the Fourteenth JDC had not abused its discretion in its findings or in the award of general damages. The Third Circuit further affirmed that neither employee was barred any recovery through contributory negligence or by the Workers' Compensation Act exclusivity remedy.¹⁴ Moreover, the doctrine of *contra non valentem* suspended the running of prescription and plaintiffs' claims were preserved and afforded remedy.

13. *Id.* at 346.

14. Generally, unintentional acts causing injury to an employee while in the workplace is the basis for an employee's exclusive remedy provided under the Worker's Compensation Act. Because of the nature of plaintiffs' injuries, the Workers' Compensation Act exclusivity did not bar plaintiffs from suing their employer for damages that would also be covered or partially covered under the Workers' Compensation Act.

III. COMMENTARY

As with all lawsuits, the rules of prescription must be adhered to and enforced so as not to prejudice a defendant and to further judicial efficiency. Prescription begins to run once a potential plaintiff knows or should have been aware of the wrongful conduct, the damage this conduct caused, and the causation between the damage and conduct.¹⁵ The necessity of awareness of a connection between the damage and conduct is the crux of occupational disease cases. The question in these cases, specifically those cases in which damage caused by certain characteristics of a job site is gradual and diagnosis is likely to be made years after a plaintiff's first exposure, is when should a plaintiff become aware that the exposure during employment caused him damage? When a plaintiff becomes aware of damages caused during employment, prescription begins to run.¹⁶

In *Broussard v. Union Pacific*, the Louisiana Second Circuit Court of Appeal analyzed a test laid out by the Supreme Court of the United States that provides great assistance with the issue of prescription in occupational disease cases involving long-term hearing loss.¹⁷ This analysis states:

A hearing loss not specifically related to an incident or trauma has no identifiable moment of occurrence. Thus, no cause of action can accrue with respect to a hearing loss that develops over a substantial period of time until the injury is fully evolved and an employee knows or should have know of the conditions and its cause. The time limitation for filing a cause of action for an occupational disease does not start until the harmful consequences of the employer's negligence manifest themselves to the employee to the extent that a diagnosis is possible of the

15. Original Brief of Appellees, *supra* note 2, at 3.

16. *Id.* at 5. (The Louisiana Second Circuit Court of Appeal found that the running of prescription did not commence until the victim's disease had been diagnosed and the victim had realized the relationship between his diagnosis and his working condition. See *Broussard v. Union Pacific*, 700 So. 2d 542 (La. App. 2 Cir. 1997)).

17. 700 So. 2d 542, 544.

injury and its causal connection to the work environment.¹⁸

Using this test developed by the Supreme Court, it seems clear that the Third Circuit Court of Appeal in deciding *McCarthy*, diligently applied the principles of prescription and respected the delicate nature these rules have when applied to cases involving occupational disease. In *McCarthy*, plaintiffs Pharr and Valerie were exposed to damaging amount of noise during a span of approximately thirty-five years. During this time, each man's hearing was affected so gradually, albeit harmfully. Therefore, he had no reason to believe that his hearing was deteriorating and did not know the cause of this deterioration until it was diagnosed by a physician.¹⁹

That fact that a relationship between damage that has been diagnosed or realized and the conduct that caused the damage requires that the doctrine of *contra non valentem non currit praescriptio (contra non valentem)* be applied in the *McCarthy* case. This doctrine halts the running of prescription against a tort victim who has not yet been able to bring a suit for reasons beyond his personal will.²⁰ *Contra non valentem* should be used to suspend prescription in the following circumstances:

- (1) where there was some legal cause which prevented courts or their officers from taking cognizance of or acting on plaintiff's actions, (2) where there was some condition with a contract with the proceedings which prevented the

18. *Id.*, citing *Urie v. Thompson*, 337 U.S. 163 (1949). See Original Brief of Appellees, *supra* note 2, at 5.

19. Original Brief By Appellees, *supra* note 2, at 7. (Mr. Pharr testified that during his time with GSU he received no explanation of the importance of wearing hearing protection. While Mr. Pharr did received periodic hearing tests, the results of these tests were not explained to him by a GSU physician, nor was he told to seek the assistance of a specialist. Mr. Valerie, who had a very limited education, had also never been instructed on using hearing protection, nor had he been informed of the harm associated with noise exposure. Further, Mr. Valerie and his wife testified to having never received the results of his hearing tests at their home).

20. LA. PRAC. CIV. PRETRIAL § 6:98 (2012 – 2013 ed.). See also Benjamin West Janke & François-Xavier Licari, *Contra Non Valentem in France and Louisiana: Revealing the Parenthood, Breaking a Myth*, 71 LA. L. REV. 503 (2011).

creditor from suing or acting, (3) where defendant himself has done some act effectually to prevent plaintiff from availing himself or his cause of action, and (4) where some cause of action is not known or reasonably knowable by plaintiff, even though his ignorance is not induced by defendant.²¹

Mr. Valerie and Mr. Pharr did not have knowledge and, specifically as nonmedical professionals and because of EGS's failure to provide adequate information to their employees, had no reason to know of the connection between the hazardous noise conditions of the Nelson Station Facility and their diagnosis, which took place decades after they began their careers at EGS.²² The Third Circuit points out prescription starts running "when plaintiff has reasonable basis to pursue claim against specific defendant."²³ This Court further explains that it is sufficient for the inaction to be reasonable in order to have the benefit of *contra non valentem*.²⁴ Until Mr. Valerie and Mr. Pharr had reasonable knowledge that the damage they were suffering was connected to their employment conditions, they had no reasonable knowledge or claim to bring in court. While it may be difficult to understand that plaintiffs had no knowledge of their hearing loss, as one would presumably recognize that his hearing is deteriorating, the appellate court emphasizes the fact that both plaintiffs are nonmedical professionals who were continuously exposed to noise that very gradually and very negatively affected each man's hearing. The trial court record supports this.²⁵

21. *Id.* at § 6:100.

22. *See* McCarthy v. Entergy Gulf States, Inc., 82 So. 2d at 343.

23. *Id.* at 344, citing Jordan v. Employee Transfer Corp., 509 So. 2d 420, 424 (La. 1987).

24. *Id.*

25. Original Brief of Appellees, *supra* note 2, at 7. ("Moreover, [Mr. Valerie] did not even know he had a hearing loss until shortly before he filed a lawsuit.").

IV. CONCLUSION

Occupational disease cases can present particularly complex issues of prescription. When an injury has accrued almost seamlessly throughout a span of years, determining a date of injury can be next to impossible. To protect victims in these instances the doctrine of *contra non valentem* acts to keep their claims alive so that they will not be prohibited from seeking recovery when their claims would have otherwise prescribed due to no fault of their own. This is exactly the way the doctrine worked for Messrs. Pharr and Valerie. The Louisiana Third Circuit Court of Appeal determined that, because the evidence showed Pharr and Valerie had no conclusive personal or medical knowledge of their hearing loss until decades after their first exposure to dangerous levels of noise, their claims were preserved by this doctrine. Prescription on their claims would thus not begin until they obtained this knowledge and understood the connection between their loss of hearing and their work at the EGS facility.

**DETERMINATION OF CHILD CUSTODY: “SHARED
CUSTODY V. JOINT CUSTODY” REFLECTED IN
*BROUSSARD V. ROGERS***

Aster Lee*

When a couple with children divorces, child custody and support become significant. If the couple does not reach consensus on those issues, they must bring them to a trial court to determine. The recent case of *Broussard v. Rogers*¹ illustrates some of the difficulties that arise in making awards for child support. This case note will explore the standards considered by Louisiana trial courts when determining whether custody is “shared” or “joint”—a threshold question for the calculation of the amount of child support owed. This determination, it will be shown, properly focuses on the percentage of time spent by the children with each of their divorced parents.

I. BACKGROUND

Ms. Broussard and Mr. Rogers married in 1997 and had their first child in 2000.² In 2003, Ms. Broussard and Mr. Rogers entered into a joint custody agreement (“Agreement”) and were divorced thereafter.³ The contents of the Agreement were as follows: 1) The parties shared legal joint custody with alternating one week periods; 2) The agreement did not designate either party

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1. *Broussard v. Rogers*, 54 So. 3d 826 (La. Ct. App. 5 Cir. 2011).
2. *Id.* at 828.
3. *Id.*

as a custodial parent; and 3) The agreement did not mention anything about the issue of child support.⁴

Approximately five and half years after the divorce, Ms. Broussard filed a Rule to Change Custody, requesting that the court change the custody status of her child because the previous agreement was no longer workable.⁵ Specifically, she requested that the court designate her as a custodial parent.⁶ Ms. Broussard also filed a Rule to Establish Child Support, requesting that the court award support based on her status as the custodial parent.⁷ The trial court granted both motions.⁸ With respect to custody, the court allowed Mr. Rogers visitation every other weekend from the end of the school day on Friday until 6 p.m. on Sunday, plus every Tuesday and Thursday from the school day's end until 8 p.m., plus two unnamed days per week with overnight visitation.⁹ Child support was awarded in the amount of \$225.00 per month based upon the court's determination that custody was "shared" under the meaning of Louisiana Revised Statutes [hereinafter L.R.S.] section 9:315.9 and its application of the corresponding calculation schedule. Ms. Broussard appealed this decision, alleging that the trial court erred in calculating child support based on the argument that the trial court used the wrong schedule.

II. DECISION OF THE COURT

The Louisiana Fifth Circuit Court of Appeal in *Broussard* focused on the issue of whether the custody of the child was shared

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. This visitation schedule is reflected in the court's interim judgment. *Id.* An interim judgment, or interlocutory judgment, is an intermediate judgment that determines a preliminary or subordinate point or plea but does not make a final determination in the case. A final judgment is a court's last action, which settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment. *Judgment*, BLACK'S LAW DICTIONARY (9th ed. 2009).

custody under the meaning of L.R.S. 9:315.9 or joint custody under L.R.S. 9:315.8.¹⁰ The Louisiana Revised Statutes provide differing methods for the calculation of child support depending upon whether custody is “joint” or “shared” as defined by law. According to L.R.S. 9:315.9, when custody is “shared,” each parent has physical custody of the child for an *approximately equal amount of time*.¹¹ In cases of shared custody, Schedule B is utilized to calculate support.¹² For all other “joint” custody arrangements in which custody is not “shared,” support is determined according to Schedule A. However, there is no statutory guideline to determine the issue of “an approximately equal amount of time.”¹³ Louisiana Revised Statute 9:315.9 does not bind the trial court to a threshold percentage determined solely on the number of days spent with the child.¹⁴ Instead, the trial court has discretion in determining whether a particular arrangement constitutes “shared custody,” justifying the application of L.R.S. 9:315.9.¹⁵

The trial court in *Broussard* held that the custody agreement between Ms. Broussard and Mr. Rogers, which provided Mr. Rogers every other weekend and 2 days a week visitation, constituted “shared custody.”¹⁶ On appeal, Ms. Broussard argued that the trial court erred on this point based on the calculation that Mr. Rogers had custody for only 42.85% of the

10. *Broussard*, 54 So. 3d at 829. At first glance, the issue seems to be related to the child support issue rather than child custody (Ms. Broussard alleged that the trial court used the wrong schedule because the trial court used Schedule B (LA. REV. STAT. ANN. § 9:315.9 (2012)) instead of Schedule A (LA. REV. STAT. ANN. § 9:315.8 (2004)). However, the real issue is the type of child custody, because the court’s determination of which schedule to use ultimately depends on the determination of which type of child custody the court recognizes. (e.g., the court shall utilize Schedule A when the type of the child custody is shared custody under L.R.S. 9:315.8.).

11. LA. REV. STAT. ANN. § 9:315.9 (2012) (emphasis added).

12. *Id.*

13. *Broussard*, 54 So. 3d at 829.

14. *Id.*

15. *Id.*

16. *Id.*

time, arguing that the Friday and Sunday visitations constituted one-half day each.¹⁷

The Court acknowledged that there is no definition of a “day” for the purposes of custody in L.R.S. 9:315.8 and L.R.S. 9:315.9, but noted that L.R.S. 9:315.8(E)(2) provides that the court may determine what constitutes a day for the purposes of support, as long as it consists at least 4 hours.¹⁸ Although there is no statutory basis to allow a court to use L.R.S. 9:315.8(E)(2) in determining the meaning of a “day” for the purposes of support, the majority of the Court found that there is no provision to prohibit it, either.¹⁹

Thus, based on its review of the trial court’s custody decree, the Court did not find any abuse of discretion in the trial court’s finding of shared custody.²⁰ As long as the trial court’s ruling on the determination of shared custody was correct, the hearing officer’s use of Schedule B to calculate the child support was appropriate.

III. COMMENTARY

The Court’s decision in *Broussard* can only be evaluated in light of the history of Louisiana’s statutory scheme for child support. Prior to the 1989 enactment of uniform guidelines for determining child support awards, Louisiana, like many other states, conferred wide judicial discretion to a trial court to determine support on a case-by-case basis.²¹ In order to curtail potential divergent results among states and within a state due to the provided judicial discretion, Congress aimed at creating more uniform child support awards.²² As a result of this effort, Congress

17. *Id.* at 829-830.

18. However, the trial court did not state that it used L.R.S. 9:315.8(E)(2) in determining the custody. *Id.* at 830.

19. *Id.* at 830. (Note, however, that in the dissent, Judge Rothschild pointed out that there is no provision to allow the trial court to use 9:315.8(E)(2) to determine what constitutes a day for the purposes of custody. *Id.* at 832.)

20. *Id.* at 830.

21. *Guillot v. Munn*, 756 So. 2d 290, 294 (La. 2000).

22. *Id.* at 295.

enacted the Support Enforcement Amendments of 1984, which required states to establish numeric guidelines to determine appropriate amounts of child support.²³ However, the federal legislation did not require that the state guidelines be binding, and thus did not operate as a powerful enforcement mechanism for the state judiciary.²⁴ Subsequently, Congress enacted the Family Support Act of 1988, *mandating* that states establish presumptive guidelines no later than October 13, 1989.²⁵ In response to 1988 legislation, the Louisiana legislature adopted presumptive guidelines to establish or modify child support.²⁶ The purposes of the Louisiana's guidelines were: (i) to address the inconsistency in the amounts of child support awards; and (ii) to solve the problem of inadequate amounts of child support awards.²⁷

Since the federal law mandated that the guidelines be presumptive, the presumption is rebuttable when the court finds the application of the guidelines to the circumstances unjust or inappropriate.²⁸ The Louisiana Supreme Court in *Guillot* explicitly provides a three-prong test for Louisiana trial courts if they are to deviate from the uniform guideline.²⁹ First, the trial court must determine whether the visitation by the non-domiciliary parent is in fact extraordinary.³⁰ If a non-domiciliary father visits merely a

23. *Id.*

24. *Id.*

25. *Id.*

26. 2001 La. Acts No. 1082, §1.

27. The underlying public policy as a foundation for the guidelines was the best interest of the child. But more specifically, Louisiana's guidelines use an "income shares model" to determine and calculate the appropriate amount of child support. The "income shares model" is founded upon the tenet that the children should receive the same level of parental income that would have been provided to them as if their parents had lived together with them. Thus this approach focuses on the contribution by each parent in proportion to his or her resources. In other words, Louisiana has established its standard to determine the appropriate amount of support: the parent obligation to support their children is conjoint upon the economic capability of the parent. *Stogner v. Stogner*, 739 So. 2d 762, 766 (La. 1999).

28. *Guillot v. Munn*, 756 So. 2d at 296.

29. *Id.*

30. *Id.* at 299.

few days more than typical visitation under the guideline, it will usually not be considered extraordinary visitation warranting deviation.³¹ Second, the trial court must consider whether the extra time spent with the non-domiciliary parent causes him or her to bear a greater financial burden and consequently causes the domiciliary parent to bear a lesser financial burden.³² This consideration closely conforms to the Louisiana legislature's intent in enacting L.R.S. 9:315.8.³³ Last, it seems that the Louisiana Supreme Court wanted to provide a safe harbor by setting up minimum requirements for the trial court's discretion.³⁴ It requires the trial court to determine that the application of the guidelines in the particular circumstances under consideration would not be in the best interest of the child or would be inequitable to the parties, thus emphasizing fundamental policy and equity in child custody and support.³⁵ The Louisiana Supreme Court in *Guillot* did not intend to draw a bright line as to what constitutes mathematical formula in determining shared custody, but it still warned the trial court to deviate "only to the extent not assumed in the statute."³⁶

Subsequent to *Guillot*, the Louisiana legislature codified the requirements of *Guillot* in cases where physical custody of a non-domiciliary parent reaches extraordinary levels; in other words, in cases of shared custody.³⁷ The newly-enacted L.R.S. 9:315.9 established the threshold percentage for shared custody at 49% for cases where the "approximately same amount of time" was spent with the non-domiciliary parent.³⁸

However, even when the children live with one parent for less than 49% of their time, the status of shared custody is not automatically denied. The Louisiana Supreme Court in *Guillot*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 301.

37. LA. REV. STAT. ANN. § 9:315.8 (2001).

38. LA. REV. STAT. ANN. § 9:315.9, cmt.(a) (2012).

provided a long explanation about the circumstances in which the trial court may deviate from the amount of child support provided for by the guidelines. The Louisiana Supreme Court presumed that the intention of the legislative branch in enacting child custody and support laws was to achieve a consistent body of law.³⁹ In most cases, it is in the child's best interest to have regular contact with both parents and to split the custody equally between the parents.⁴⁰ Accordingly, the Louisiana Supreme Court distinguished joint custody and shared custody: in a joint custody scheme, a domiciliary parent shares most of the time with the children, but he or she should allow a typical amount of visitation based on the guidelines conferred by statutes; and in a shared custody scheme, the non-domiciliary parent spends a non-typical, or extraordinary, amount of time with the children so that the amount reaches the heightened level required by statute. On this point—of determining whether the non-domiciliary parent spends as much time as the domiciliary parent with the child—the trial court is offered ample discretion to deviate from the guideline's threshold percentage. The Louisiana Supreme Court in *Guillot* confirmed this wide discretion allowed to the trial court in such circumstances as consistent with legislative intent.⁴¹

Since *Guillot* and the promulgation of L.R.S. 9:315.9, courts have wrestled with the threshold percentage and its exceptions, as applied for characterizing custody as shared or joint.⁴² For example, in *Lea v. Sanders*, the Louisiana Third Circuit Court of Appeals found that L.R.S. 9.319.9 requires 50%–50% (same) or 49%–51% (approximately same) as the “threshold” percentage for shared custody.⁴³ The *Lea* court held that 43% was insufficient to

39. *Guillot v. Mund*, 756 So. 2d at 298.

40. *Id.*

41. *Id.* at 300.

42. Robert C. Lowe, *Steps for calculating total support obligation—Shared custody arrangement and child support under 2001, 2002, and 2003 legislation*, in 1 LA. PRAC. DIVORCE § 8:47 (West 2012 ed.)

43. *Id.* (citing *Lea v. Sanders*, 890 So. 2d 764 (La. Ct. App. 3d Cir. 2004)).

establish shared custody.⁴⁴ However, in the year following the *Lea* decision, the Louisiana Third Circuit Court of Appeals held that a 45.5%–54.5% sharing was sufficient to trigger Schedule B, which was to be utilized for a shared custody situation.⁴⁵ There has not been a Supreme Court case after *Guillot* on this issue. In *Janney*, the Louisiana First Circuit Court of Appeals held that 45.3% of the year was sufficient for shared custody, and this is the lowest percentile for the recognition of shared custody before *Broussard*.⁴⁶

In *Broussard vs. Rogers*, Ms. Broussard calculated that Mr. Rogers had custody for 42.85% of the time.⁴⁷ This percentile was far higher than the 37% which the Louisiana Supreme Court in *Guillot* declined to categorize as shared custody, but still lower than any Louisiana case acknowledging shared custody status. *Broussard v. Rogers* thus expands the limitations of the shared custody designation beyond the existing jurisprudence.

The majority's justification for this rests on a calculation of days spent by the child with Mr. Rogers based on L.R.S. 9:315.8(E)(2), which states that a day consists of at least 4 hours for the purposes of *support*. As the dissent pointed out, there is no legal support for the use of such a calculation—which was supposed to be utilized in determining child *support*—to be used in order to determine child *custody*.⁴⁸ The dissenting opinion in *Broussard* has some legal merits since there is no statutory basis for the trial court in *Broussard* to find that a “day” consists of 4 or more hours for the purposes of custody. However, the majority's position, in a practical sense, provides a uniform measurement for the counting of a “day” for both child custody and child support. If

44. *Id.*

45. *Id.* (citing *DeSoto v. DeSoto*, 893 So. 2d 175 (La. Ct. App. 3d Cir. 2005)).

46. *Id.* (citing *Janney v. Janney*, 943 So. 2d 396 (La. Ct. App. 1st Cir. 2005)).

47. 54 So. 3d at 830-31.

48. *Id.* at 832.

there are two different methods of counting a “day” for custody and support, there would be less legal consistency between them and it might lead to a myriad of redundant arguments by attorneys who attempt to count a “day” in the manner most advantageous to their clients. In addition, the legislative intent is to provide wide discretion to trial courts, so long as this does not severely erode the uniformity of the guidelines conferred by the statutes. Generally, the trial court is the best place to balance several pertinent factors in determining whether, and how much, to deviate from the guidelines, especially on the issue of measuring the time spent by each parent with the child. As a result, this case is a good example to show that a case-by-case approach provides better flexibility for courts to find the most appropriate ways to achieve the best interest of the child.

**TWENTY-EIGHT YEARS LATER: *DELANEY v. MCCOY*
AND SUPPLEMENTAL PARTITIONS OF COMMUNITY
PROPERTY IN LOUISIANA**

Claire Murray*

Twenty-eight years after Mack McCoy's divorce, his ex-wife, Claudine McCoy Delaney, filed a supplemental petition for partition of community property.¹ Ms. Delaney sought a pro rata share of Mr. McCoy's retirement benefits. The Second Circuit Court of Appeal held that Ms. Delaney's supplemental partition was not barred by *res judicata* because when an asset is omitted from a community property settlement by mutual oversight, the matter has not yet been adjudicated and is properly subject to modification.

I. BACKGROUND

Mack Allen McCoy and Claudine Mason McCoy Delaney married on November 16, 1973. On June 27, 1979, Mr. McCoy filed a petition for separation. After termination of the community property regime, Ms. Delaney filed a petition for settlement of the parties' community property. Ms. Delaney propounded interrogatories to Mr. McCoy regarding the existence of a retirement plan related to his employment at the Shreveport Fire Department. He answered, "The parties have no vested interest in any retirement plan."²

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1. *Delaney v. McCoy*, 47,240 (La. App. 2 Cir. 6/20/12), 93 So. 3d 845. The Second Circuit Court of Appeal heard this dispute twice. The 2012 opinion, *Delaney v. McCoy*, 93 So. 3d 845, is the subject of this case note.

2. *Delaney*, 93 So. 3d at 847.

Following a trial, the court entered a judgment partitioning the community property. The judgment set forth which items of the former community were to be partitioned in kind and which were to be partitioned by licitation, yet the judgment made no mention of retirement benefits.

Twenty-seven years later, Mr. McCoy retired from the fire department. The following year, Ms. Delaney filed a supplemental petition for partition of community property, alleging that the retirement benefits that had accrued during the marriage had been omitted from the prior community property partition. Mr. McCoy filed exceptions of *res judicata* and no right and no cause of action. The trial court denied the exceptions. Mr. McCoy then filed a petition for rehearing. Upon rehearing, the court granted Mr. McCoy's exception of *res judicata*, reasoning that the existence of a settlement agreement itself indicated intent to settle all claims that either party had or may have against the former community of acquets and gains.³

Ms. Delaney appealed the trial court decision granting Mr. McCoy's exception of *res judicata*. Because Mr. McCoy failed to introduce critical documents into evidence, the Second Circuit Court of Appeal found he had not met his burden of proof. The court remanded for further proceedings.

On remand, the trial court held a hearing in June 2011. With all the required documentation admitted into evidence, the trial court again granted Mr. McCoy's exception of *res judicata*. Ms. Delaney again appealed.

II. DECISION OF THE COURT

The Second Circuit Court of Appeal held that Ms. Delaney's action was not barred by *res judicata*. Because the retirement benefits were never specifically mentioned in the community

3. See *Delaney v. McCoy*, 63 So. 3d 327 (La. App. 2 Cir. 2011) (the Second Circuit Court of Appeal's first opinion in this matter).

property settlement, the partitioning of the asset had not been formerly adjudicated. Accordingly, the issue was not barred by *res judicata*. Ms. Delaney was entitled to file a supplementary petition for partition of community property.

III. COMMENTARY

Under Louisiana's community property regime, each spouse owns a present, undivided one-half interest in the community during its existence.⁴ If a property right results from a spouse's employment during the existence of the community, then it is a community asset and is subject to division upon dissolution of the marriage.⁵ When the community terminates, the employee's spouse is the owner of one-half of the amount attributable to the pension or retirement benefit earned during the existence of the community.⁶

Upon termination of the community property regime, the spouses, as co-owners, may extra-judicially partition the community property,⁷ or may seek judicial partition under the aggregate theory.⁸ Under this theory, the court allocates the community assets and liabilities so that each spouse receives property of equal net value.⁹ If the allocation results in an unequal net distribution, the court will order payment of an equalizing sum of money.¹⁰ The *Delaney* parties partitioned their community property voluntarily.

The question presented in *Delaney* concerns how to appropriately treat a community property settlement agreement that fails to mention retirement benefits correspondent to a portion of time during the existence of the community property regime.

4. LA. CIV. CODE ANN. art. 2336 (2012).

5. See LA. CIV. CODE ANN. art. 2338 (2012).

6. Day v. Day, 858 So. 2d 483, 491 (La. App. 1 Cir. 2003).

7. 16 KATHERINE S. SPAHT & RICHARD D. MORENO, LOUISIANA CIVIL LAW TREATISE: MATRIMONIAL REGIMES 661 (3d ed., West 2007).

8. *Id.* at 688.

9. LA. REV. STAT. ANN. 9:2801(A)(4)(b) (2012).

10. LA. REV. STAT. ANN. 9:2801(A)(4)(d) (2012).

Louisiana jurisprudence provides that, when an agreement does not expressly address the employee spouse's pension, the issue of whether the agreement divests the other spouse of any community property right to the pension depends on the intent of the parties.¹¹ In order to determine the intent of the parties, the court will examine the agreement and other evidence to see whether the non-employee spouse appears to have intended to abandon any future claims to the former community property.¹² The resolution of the intent question determines the applicability of *res judicata*; if a non-employee spouse did not intend to divest him or herself of a right to the benefit, then the matter has not yet been adjudicated and *res judicata* does not apply.

To ascertain the intent of the parties, the court will look for an indication that the parties discussed the asset during the events leading up to the drafting of the agreement. A lack of discussion regarding the asset tends to indicate that the non-employee spouse did not waive his or her right in the asset. In *Robinson v. Robinson*, the Louisiana Supreme Court recognized that supplementary partitions like Ms. Delaney's have been allowed where the spouses had not discussed the pension or retirement benefits before confecting their community property settlements.¹³ In *Robinson*, the parties' partition settlement did not address the division of the former husband's pension plan. Moreover, both parties testified that they did not discuss the benefits in the context of their settlement.¹⁴ The court found that, since the benefits were never discussed, the former wife could not have intended to transfer her right in the pension plan.¹⁵

In *Adams v. Adams*, the Second Circuit Court of Appeal held that a community property settlement could not be declared null

11. *Jennings v. Turner*, 803 So. 2d 963, 965 (La. 2001); see LA. CIV. CODE ANN. art. 2045 (2012).

12. See *Robinson v. Robinson*, 778 So. 2d 1105, 1120 (La. 2001).

13. *Id.* at 1119-21.

14. *Id.* at 1120.

15. *Id.*

based on the erroneous omission of an asset neither party knew they owned.¹⁶ In that case, the parties were unaware that a parcel of land was part of their community property. Accordingly, the parties made no mention of the parcel in their community property settlement. When the former wife tried to nullify the agreement on the basis of error, the court found that the agreement reflected only an intent to change their ownership interests as to the assets listed.¹⁷

The original trial court in *Delaney* found that the settlement indicated an intent of the parties to settle all claims the parties may have had or will have in the future relating to the former community of acquets and gains.¹⁸ The Second Circuit, in its second *Delaney* opinion, adhered more strictly to the jurisprudential rule: even when an original partition expressly purports to be a full and final property settlement between the spouses, courts have allowed supplemental partitions of omitted assets when the facts and the intent of the parties warrant it.¹⁹ The court examined the record and found no evidence of a discussion beyond Mr. McCoy's answer that there was no "vested interest" in retirement benefits.²⁰ The court explained that, when neither party mentions retirement pay during negotiations and settlement, the failure to include the retirement pay in the settlement is a "mere omission" which can be amended by supplemental petition.²¹

The law of *res judicata* has changed since the *Delaney* parties entered into their settlement. The changes were substantive and the court was required to apply the previous law. Under former Louisiana Civil Code article 2286:

The authority of the thing adjudged takes place only with respect to what was the object of the judgment. *The thing*

16. *Adams v. Adams*, 503 So. 2d 1052, 1056 (La. Ct. App., 1987).

17. *Adams*, 503 So. 2d at 1056.

18. *Delaney*, 93 So. 3d at 848.

19. *Id.* at 850.

20. *Id.*

21. *Id.*

demand must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.²²

Because Mr. McCoy was the party urging the exception, he had the burden of proving each essential element by a preponderance of the evidence. The Second Circuit held that the “thing demanded” was not the same.²³ Because the parties did not discuss the benefits and Ms. Delaney did not expressly waive her right to them, the court found there was no adjudication of the particular asset at all. If any retirement benefits accrued during the marriage of the parties, Ms. Delaney has remained a co-owner and is entitled to a partition of the property.

Though Ms. Delaney did not move to supplement the agreement until twenty-eight years after settlement, her right has not prescribed. Under Louisiana law, items omitted from judicial and extra-judicial partitions are always subject to supplementary partition; the right *never* prescribes.²⁴ Under the successions section of the Civil Code, the mere omission of a thing belonging to the succession is not ground for rescission, but only for supplementary partition.²⁵ By analogy, Louisiana courts have incorporated the successions rule into the matrimonial regimes context; when a plaintiff moves to file a supplementary petition of a community asset omitted from the original community property settlement through “mutual oversight,”²⁶ he or she is entitled to do so and the right does not prescribe.

Though the Second Circuit’s decision is legally sound, whether the decision is the right one is a more difficult determination. *Delaney* illustrates a clash between two important societal

22. *Id.* at 849 (emphasis added).

23. *Delaney*, 93 So. 3d at 851.

24. *Succession of Tucker*, 445 So. 2d 510 (La. Ct. App. 1984).

25. LA. CIV. CODE ANN. art. 1401 (2012).

26. *Succession of Tucker*, 445 So. 2d at 513.

interests: the doctrine of *res judicata* and Louisiana's commitment to the community property regime.

The doctrine of *res judicata* prohibits the re-litigation of claims that have been processed to final judgment in an action between the parties.²⁷ In part, the doctrine exists to ensure judicial economy;²⁸ courts simply do not have the time or resources to hear cases multiple times. Perhaps more importantly, *res judicata* guarantees the finality of judgment.²⁹ In the *Delaney* case, it may seem unfair that Ms. Delaney sought a share of Mr. McCoy's retirement benefits twenty-eight years after their separation, as *res judicata* is meant to impart a sense of certainty after the resolution of a legal dispute. But *res judicata* is not implicated when the judgment is not indeed final, even when the parties believe it to be.

The facts in *Delaney* are unusual. Twenty-eight years had passed before Ms. Delaney brought this action seeking her share of Mr. McCoy's retirement benefits. At first blush, the court's decision would seem to defy the policy goals underlying *res judicata*: neither judicial economy nor fairness to Mr. McCoy would be served by allowing Ms. Delaney's action to proceed. But the law is clear: a community property settlement, from which an asset was inadvertently omitted, is subject to supplemental partition at any time. On the facts of *Delaney*, however, the result appears to be absurd.

Suppose a couple divorced after thirty years of marriage. Upon divorce, the couple voluntarily partitioned their community property. Due to a mutual oversight, the couple neglected to account for a particular community asset. If one of the former spouses realized his or her mistake just a year later, few would argue that the holdings of *Delaney* and its progeny would produce

27. FRANK L. MARAIST, 1A LOUISIANA CIVIL LAW TREATISE: CIVIL PROCEDURE – SPECIAL PROCEDURES 52 (West 2005).

28. *Id.* at n.8.

29. *Id.*

an unfair result by allowing the spouse to supplement the agreement.

Suppose the neglected asset were exceptionally valuable. Even if the disadvantaged spouse did not realize the error until ten years later, most would find that fairness would be better served if he or she were allowed to supplement the agreement.

Consider a couple married for just two years prior to divorce. If their community property settlement neglected to include an asset of even nominal value, few would argue that the disadvantaged spouse should not be able to supplement the agreement.

The facts in *Delaney* distract from how fair the law actually is. Mr. McCoy and Ms. Delaney were married for less than six years, she initiated her action twenty-eight years after they settled their community property agreement, and the amount in question is likely minimal. Though the law applied in this case produced an unusual result, it is not difficult to imagine situations in which the law would be applied so as to adequately protect Louisiana's community property regime.

SHALL DOES NOT MEAN SHALL IN *SHORT V. SHORT*

Taheera Sabreen Randolph*

I. BACKGROUND

The case of *Short v. Short*¹ is the first reported decision regarding an award of interim spousal support since the enactment of Louisiana Revised Statute 9:326² in 2009. The statute mandates certain documentation be provided by both parties in a full evidentiary hearing on the determination of income for spousal support.³ A key issue in the case was whether a claimant spouse who fails to comply with the mandatory provisions in the statute, as a consequence, fails to prove entitlement to interim spousal support.⁴

On remand from the Louisiana Fifth Circuit Court of Appeal due to the district court's lack of a full evidentiary hearing on the matter in the first instance,⁵ the district court determined that Pamela Short was entitled to interim spousal support from her husband, David Short, from the time Mr. Short left the family home in April 2006 until the extinguishment of the obligation on

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1. *Short v. Short*, 11-1084 (La. App. 5 Cir. 5/22/12), 96 So. 3d 552.

2. LA. REV. STAT. ANN. §9:326 (2013 supp.).

3. See ROBERT C. LOWE, 1 LOUISIANA PRACTICE DIVORCE § 8:150 (2013 ed.). The author points out the new requirements concerning evidence of income for spousal support apply to both interim and final spousal support.

4. *Short*, 96 So. 3d at 557. (A claimant has the burden of proving his or her need to spousal support by proving a lack of sufficient income or the ability to earn a sufficient income to maintain the standard of living comparable to that enjoyed by the parties during their marriage.)

5. *Short v. Short*, 33 So. 3d 988, 995. The case was remanded because the district court did not allow both parties to introduce certain evidence before awarding interim spousal support. Although a district court has the discretion to award interim spousal support, it has a statutory duty imposed by Louisiana Civil Code art. 113 to consider the needs of the claimant spouse, the ability of the other spouse to pay and the standard of living the parties enjoyed during the marriage, which is accomplished by a full evidentiary hearing on the matter.

March 27, 2008.⁶ As evidence of her need, Ms. Short submitted only a copy of an income and expense form that indicated her expenses severely outweighed her income. However, she admitted that the amounts were mere estimates, and also relied on documentation submitted by Mr. Short regarding the family expenses during the marriage.⁷ During the evidentiary hearing, Mr. Short argued that the court should consider Ms. Short's entire financial situation, which included additional income from personal injury settlements and loans from her family.⁸ The district court disagreed with Mr. Short and stated that the amount of interim spousal support is not to be reduced or offset using the separate assets of either spouse because there is a statutory duty⁹ for each spouse to support each other during marriage.¹⁰ Adopting the figures submitted by Ms. Short on her income and expense form as a means of calculating her net monthly income (although unsupported by any documentation, as required under Louisiana Revised Statute 9:326), the district court stated that the expenses she enumerated were reasonable and not excessive.¹¹ The district court ultimately held the amount of \$44,968.71 as an appropriate total for the relevant time period, asserting that Ms. Short proved sufficient need for interim spousal support.¹²

6. *Id.* The extinguishment of the obligation was due to the judicial determination that Ms. Short's admitted cohabitation with another man was sufficient grounds to grant a divorce to Mr. Short.

7. Short, 96 So. 3d at 557.

8. *Id.* at 555. (In his brief to the appellate court, Mr. Short pointed to prior jurisprudence that held that a claimant spouse's entire financial circumstances must be considered, including all sources of income from which the claimant's expenses can be met, in determining a claimant's need for interim spousal support.)

9. LA. CIV. CODE art. 98.

10. Short, 96 So. 3d at 555.

11. *Id.* at 557.

12. *Id.*

II. JUDGMENT OF THE COURT

On a subsequent appeal to the Louisiana Fifth Circuit, Mr. Short's foremost argument was that the district court erred in its judgment because Ms. Short¹³ failed to comply with mandates prescribed in Louisiana Revised Statute 9:326 regarding evidence required to be submitted to a court in order to correctly calculate income in the determination of an award for interim spousal support.¹⁴ Ms. Short responded that her failure to comply with the statute was due to her inability to earn the requisite amount of income necessary to file a 2006 and 2007 tax return during their separation and, furthermore, that at the time of their separation she was a full-time stay-at-home mom.¹⁵ The Fifth Circuit Court of Appeal upheld the district court's award of interim spousal support, despite Ms. Short's failure to comply with the mandates in the statute.¹⁶ The court began its analysis with provisions from the Louisiana Civil Code, noting that a trial court has significant discretion¹⁷ to award interim spousal support based on the needs of the claimant, the ability of the other spouse to pay, and the

13. *Id.* at 554. At the time of this appeal, Ms. Short reverted back to her maiden name Marinovich which the court used throughout the opinion. However, for the purposes of this analysis, the author will continue to use Ms. Short out of mere convenience and for lack of confusion.

14. *Id.* at 556. In his original brief to the appellate court, Mr. Short contended that the evidence required under the statute is for the purposes of corroborating statements of income made to the court by each party. He contended that Ms. Short did not meet the burden of proving her need because she did not comply with the statute.

15. *Id.* at 558. Mr. Short noted in his original brief to the appellate court that Ms. Short admitted in the evidentiary proceeding to being self-employed as a calligrapher of wedding invitations and working at St. Tammany Parish Hospital in 2007. He argued that Ms. Short should be required to produce paycheck stubs from the hospital to corroborate her income and she should also be mandated to produce the documentation required by the IRS used to determine if she owed self-employment tax.

16. *Id.*

17. *Id.* at 556 (citing *Lambert v. Lambert*, 960 So.2d 921, 928 that the standard of review is an abuse of discretion and the district court's conclusion will only be reversed if there is a reasonable factual basis in the record for doing so and the finding in the record is clearly or manifestly erroneous.

standard of living of both spouses during the marriage.¹⁸ The court reiterated that a spouse's right to claim spousal support is grounded in the statutorily imposed duty that spouses are to support each other during marriage,¹⁹ and that the definitive purpose behind a judgment of interim spousal support is to assist the claimant in maintaining the status quo and sustaining the lifestyle enjoyed by both spouses during the marriage while the divorce litigation is pending.²⁰

The court cited the pertinent portion of Louisiana Revised Statute 9:326(A), outlining the mandates therein, yet apparently accepting Ms. Short's assertion that she was unable to produce tax returns for 2006 and 2007 because she did not earn enough money so as to require her to file.²¹ The court subsequently upheld the district court's adoption of the estimated figures from Ms. Short's expense list, and did not address whether the separate assets of the spouses should be assessed in order to reduce or offset any spousal support judgment; nor did the court address the implications of the failure on the part of Ms. Short to comply with the mandates in the statute, even after she admitted to having been employed during the time in which she was awarded interim spousal support.²² The Fifth Circuit Court of Appeal ultimately found no abuse of discretion in the judgment of the district court, and upheld the award of interim spousal support.²³

III. COMMENTARY

The Fifth Circuit Court of Appeal adhered to the standard set prior to enactment of Louisiana Revised Statute 9:326, and reinforced the notion that an abuse of discretion will only be found if the record supports the trial court's conclusions about the means

18. LA. CIV. CODE art. 113.

19. LA. CIV. CODE art. 98.

20. Short, 96 So. 3d at 556.

21. *Id.* at 557.

22. *Id.* at 557-58.

23. *Id.* at 558.

of the payor spouse and his ability to pay.²⁴ Besides quoting the statute in its opinion, the appellate court made no mention regarding how its enactment impacts any analysis of the needs of the claimant generally or its impact on Ms. Short's claim in particular. Thus, the legal analysis in *Short v. Short* did not fully take into account the implications of the newly enacted evidentiary standards in the statute in determining interim spousal support.

Louisiana Revised Statute 9:326(A) lays out, in clear and unambiguous language,²⁵ the documentation that is required to be produced by each party as evidence of income in a court proceeding on the determination of spousal support. The statute expressly states that both parties “shall provide to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings” and provides examples of what constitutes suitable documentation.²⁶ The statute uses the word “shall” a total of four times in the pertinent part of subsection A, and mandates that each party in an evidentiary hearing for spousal support provide the court with a verified income statement showing gross and adjusted gross income along with *documentation of current and past earnings*.²⁷ The statute also stipulates that both parties shall submit their “most recent federal tax return.”²⁸ There is no time restriction or constraint in the language of this requirement which leads to the reasonable conclusion that Ms. Short had a statutory duty to

24. See, e.g., *Derouen v. Derouen*, 893 So.2d 981, 984 (stating there is no abuse of discretion “if the record supports the trial court’s conclusions about the means of the payor spouse and his or her ability to pay,” and also establishing that any award of interim spousal support requires a finding that the expenses claimed are reasonable); *Lambert*, 960 So.2d at 928 (citing *Derouen*).

25. See LA. CIV. CODE art. 9: “When a law is clear and unambiguous and its application does not lead to absurd consequences, *the law shall be applied as written* and no further interpretation may be made in search of the intent of the legislature” (emphasis added).

26. LA. REV. STAT. ANN. 9:326(A) (2013 supp.): “Suitable documentation of current earnings shall include but not be limited to pay stubs or employer statements” (emphasis added).

27. *Id.* (emphasis added).

28. LA. REV. STAT. ANN. §9:326(A) (2013 supp.) (emphasis added).

produce her most recent tax return, which was in 2005, to serve as verification of income from her employment as a part-time nurse until August of that year.²⁹ Nowhere in the statute does it state that a party is not required to produce his or her most recent tax return simply due to a status of voluntary or involuntary unemployment at the time of separation.³⁰ Moreover, on its face, it appears Ms. Short was statutorily required to produce paycheck stubs from her employment with St. Tammany Parish Hospital during 2007, in addition to any documentation she provided to the Internal Revenue Service regarding her income from her business as a calligrapher of wedding invitations.³¹

Commentary on the statute provides insight into how a court may interpret the mandatory provisions, and points out the fact that the language in Subsection A is almost identical to the language in Louisiana Revised Statute 9:315.2(A), which lays out the evidentiary requirements for calculating child support obligations; the latter statute was amended by the same act that enacted Revised Statute 9:326.³² An appellate court placed in the Fifth Circuit's position should inquire into the intent behind the Louisiana legislature's enactment of a spousal support statute with language almost identical to that of the child support determination statute. Furthermore, an inquiry into case precedent that determines what happens to a claim for child support when the evidentiary requirements under the child support statute are not adhered to might also help interpret and apply the spousal support statute.

29. Short, 96 So. 3d at 557.

30. Ms. Short argued she could not produce any verification of income because at the time of separation she had been unemployed for several months due to her role as a full-time stay at home mother. Short, 96 So.3d at 558.

31. Mr. Short noted in his reply brief to the appellate court that Ms. Short admitted to being employed and consequently should have been required to provide a copy of her 1099 form from St. Tammany Parish Hospital along with any paycheck stubs to corroborate her income. He also noted she did not produce any financial documentation from her own business in the form of tax documents, business expenses, receipts, customer checks, etc.

32. 2009 La. Sess. Law Serv. Act 378 (WEST); *See also* LA. CIV. CODE art. 13 (laws on the same subject matter should be interpreted *in pari materia*).

Louisiana Revised Statute 9:315.2(A) requires each party to provide the identical documentation now required under Louisiana Revised Statute 9:326.³³ Therefore, any case precedent interpreting the child support evidentiary obligations prior to 2009 are relevant for the interpretation of the statutory language currently in effect. In *Drury v. Drury*,³⁴ the Louisiana First Circuit Court of Appeals vacated a judgment signed by a district court directing a spouse to pay child support because the record was devoid of the supporting documentation required by Louisiana Revised Statute 9:315.2. The court made reference to the essential nature of documentation in calculating child support payment obligations, even in the interim setting, and to the fact that judgments for child support cannot be based on contingencies.³⁵ Moreover, the court recognized the inherent requirement of equity in determining child support obligations achieved only through the examination of the complete financial status of both parties,³⁶ which is directly relevant to Mr. Short's argument regarding the failure of the district court to take into account the entirety of Ms. Short's economic situation and sources of income. The First Circuit in *Drury* held that due to the district court's failure in requiring the parties to submit the documentation clearly set out under the statute, the district court could not properly apply the appropriate guidelines under the law and its judgment could not be affirmed.³⁷

33. LA. REV. STAT. ANN §9:315.2(A) (2013 supp.):

Each party *shall* provide to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings. . . . Suitable documentation of current earnings shall include but not be limited to pay stubs or employer statements. The documentation shall include a copy of the party's most recent federal tax return. A copy of the statement and documentation shall be provided to the other party. (emphasis added)

The amendment to this statute in 2009 did not change this pertinent language in the calculation of basic child support obligations and simply aligned the language with that of La. R.S. 9:326(A).

34. 835 So. 2d 533, 539 (La. App. 1 Cir. 2002).

35. *Id.* at 538-39.

36. *Id.* at 539.

37. *Id.* "In the instant case, *both* parties failed to submit verified statements as to their respective incomes, documentation of current and past earnings,

In *Harris v. Harris*,³⁸ a husband appealed the amount of child support awarded to his wife based on the incorrect calculation of his monthly income, which was a combination of his employment wages and the rent he received from some of his properties. His monthly employment income was calculated based on pay records supplied by his employer and his monthly rental income was calculated based on a spreadsheet Mr. Harris prepared himself.³⁹ The Louisiana Fourth Circuit Court of Appeal immediately noted that “neither party complied with the mandatory requirement . . . that they submit a copy of their most recent tax return”⁴⁰ and held that the record contained insufficient evidence in order to determine what the rental income should be and the case was remanded for recalculation of Mr. Harris’ monthly rental income.⁴¹

The language under Louisiana Revised Statute 9:326(A) for the determination of interim spousal support calls for the exact documentation that was required in *Drury* and *Harris* in the context of child support. Without submission of the requisite documentation, the district court’s judgment in *Drury* could not be upheld, nor could the calculation of monthly rental income be upheld in *Harris*. There is no reason to set a different standard for the evidence required to calculate a party’s income in spousal support determinations when the language of Louisiana Revised Statute 9:326(A) is clear, unambiguous and precisely mimics the language for the required documentation under the child support statute. Thus, perhaps the intent of the legislature was to make spousal support determinations more equitable to both parties. It accomplished this by placing a fixed and mandatory evidentiary

copies of their most recent tax returns, as well as other evidence mandated by La. R.S. 9:315.2”.

38. 976 So. 2d 347 (La. App. 4 Cir. 2008).

39. *Id.* at 348.

40. *Id.* at 351.

41. *Id.* The court upheld the calculation of his monthly employment income because the documentation used to make the calculation were pay records provided by his employer.

standard on the claimant's burden to show need, in addition to the payor spouse's ability to pay, which constituted the exclusive focus in the past. The author is of the opinion that "shall" should mean "shall" in *Short v. Short*.

PETRIE V. MICHETTI, AND THE INDELIBLE NATURE OF DONATIONS INTER VIVOS

Morgan Romero*

Donations *inter vivos* are subject to a special set of rules in the Louisiana Civil Code, in addition to the law of conventional obligations.¹ The grounds for revocation of donations have been the subject of extensive debate among Louisiana courts, civil law scholars, and attorneys. As this note will demonstrate through the lens of *Petrie v. Michetti*,² a recent case decided by the Louisiana Fifth Circuit Court of Appeal, Louisiana law makes donations *inter vivos* irrevocable save exceptional circumstances where the law provides grounds for nullification in order to prevent obstructions that meddle with the free agency of the donation, and revocation on account of ingratitude.³ This case note considers the vices of duress and undue influence and revocation for ingratitude, and discusses how the jurisprudence has resolved these difficult issues when presented with challenging factual circumstances.⁴

I. BACKGROUND

Plaintiff Maxine Rearick (Ms. Rearick) filed suit⁵ to revoke a donation of immovable property she had made to her daughter,

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1. Donations are governed by the provisions of Title II of Book III, whereas conventional obligations are addressed in Title IV.

2. *Petrie v. Michetti*, 10-122 (La. App. 5 Cir. 2011), 59 So. 3d 430.

3. See LA. CIV. CODE art. 1468.

4. See LA. CIV. CODE arts. 1478 (nullification due to fraud and duress), 1479 (nullification due to undue influence), and 1556 (revocation for the donee's ingratitude).

5. "Maxine Rearick died on May 21, 2010, during the course of the litigation. On August 26, 2010, Patricia Rearick Petrie, Joanne Rearick Belflower, and Linda Rearick Tillman, Ms. Rearick's daughters, were

Dixie Rearick Michetti (Ms. Michetti). Ms. Michetti was Ms. Rearick's principal caregiver for five years. During this time, she lived with her mother on the property which was made the object of the donation.

Several arguments transpired between Ms. Michetti and her sisters. One such argument caused Ms. Michetti to leave Ms. Rearick's home for several weeks. Ms. Michetti told Ms. Rearick that "she would move out of the Cedar Avenue property if her mother did not donate the property to her because she could not afford to be a caregiver without assurances that she would not be forced to leave."⁶ At trial, Ms. Rearick testified that she donated the property to Ms. Michetti because "she felt sorry for her."⁷

The evidence presented at trial revealed the tension in the relationships between mother and daughter, although the source of the discord was disputed. Ms. Rearick claimed that Ms. Michetti kicked a stool that her feet were resting on, placed a blood pressure monitor on her stomach against her will, and regulated her visitors.⁸ Ms. Rearick also contended that Ms. Michetti threatened to place her in a nursing home absent the donation.

One of the sisters accused Ms. Michetti of raising her voice at Ms. Rearick. Ms. Michetti acknowledged that she sometimes had to speak loudly so that her mother could hear her. One of the sisters admitted calling Elderly Protective Services with complaints on nearly forty occasions. The Elderly Protective Services representative found that the allegations of abuse were "unsubstantiated."⁹ Another one of Ms. Rearick's daughters said that she never witnessed Ms. Michetti mistreat her mother. However, she admitted that she was angry when she learned of the

substituted as parties appellants in the litigation." *Petrie v. Michetti*, 59 So. 3d at 432, n.1.

6. *Petrie v. Michetti*, 59 So. 3d at 433.

7. *Id.*

8. *Id.*

9. *Id.*

donation to her sister, and a fiery message that she left on her mother's answering machine reflecting her resentment was played at trial.

Ms. Rearick later admitted that for five years Ms. Michetti "applied for and picked up all her medicines, was a constant companion, sometimes cooked meals, bought groceries, helped her getting dressed, performed various household tasks, and took her to all of her hospital and doctor appointments."¹⁰ The attorney who effected the donation testified that she observed no indications of duress. She stated that Ms. Rearick contemplated making the donation to Ms. Michetti multiple times during the few years preceding the act of donation. Ms. Rearick's physician testified that he recalled no indications of abuse in the twenty-five years he had administered care to Ms. Rearick and that from Ms. Michetti, he had "seen only care and concern for [Ms. Rearick's] well-being and comfort."¹¹ He described Ms. Rearick's family relationships as "strained."¹² Michetti's son-in-law also testified as to an absence of ill-treatment.

Ms. Rearick claimed that her consent to the donation was a product of duress, rendering it a nullity and, in the alternative, that the court should revoke the donation due to her daughter's ingratitude. The trial court denied Ms. Rearick's petition, holding that she failed to prove duress and that she failed to prove that Ms. Michetti had been guilty of cruel treatment, crimes, or grievous injuries.¹³

II. DECISION OF THE COURT

The Fifth Circuit affirmed the decision of the trial court, finding the donation valid after a *de novo* review of the duress claim and applying the manifest error, or clearly wrong standard,

10. *Id.* at 434.
11. *Id.* at 435.
12. *Id.*
13. *Id.* at 440.

to the revocation for ingratitude claim.¹⁴ The court also mentioned the vice of undue influence, but dismissed it finding it was not present.¹⁵

As to the claim of duress, the court applied the “clear and convincing evidence” standard.¹⁶ Based on the facts and testimony that the court deemed credible, the court concluded that the evidence was insufficient for a finding of duress.¹⁷ The court based its holding on Louisiana Civil Code article 1959.¹⁸

The court recognized that Ms. Rearick relied “heavily on her testimony to the effect that Ms. Michetti threatened to place her in a nursing home if she did not donate the property to her.”¹⁹ However, the court noted that Ms. Rearick also testified that she made the donation because she felt sorry for Ms. Michetti.²⁰ With respect to the nursing home allegation, which Ms. Michetti denied, the court held that there was no evidence that the donation was a product of the threat.²¹ Ms. Michetti argued that her comment about having to move out if the property was not donated to her, since she needed guarantees that she would not be forced out of Ms. Rearick’s home, contemplated a lawful act.²² The court concluded that the nursing home allegation, even if proved, constituted a lawful act and thus could not be grounds for nullification due to duress.²³

With regard to plaintiff’s claim for revocation on account of ingratitude, the court held that the plaintiff had not carried her burden of proof. The court determined that the facts of the case, the lack of proof regarding Ms. Rearick’s accusations, and the trial

14. *Id.* at 439. (The trial court, in error, applied the Code articles on undue influence to the duress issue).

15. *Id.*

16. LA. CIV. CODE art. 1483.

17. LA. CIV. CODE art. 1478.

18. *See* LA. CIV. CODE art. 1959.

19. Petrie, 59 So. 3d at 438.

20. *Id.*

21. *Id.*

22. *Id.* at 439.

23. *Id.* *See also* LA. CIV. CODE art. 1962.

testimony supported a finding that “Ms. Michetti’s actions did not rise to the level of cruel treatment and grievous injury under La. C.C. art. 1557.”²⁴

III. COMMENTARY

Louisiana’s strong policy to enforce parties’ contractual obligations is manifest in this case. In the exceptional cases where fraud, duress, undue influence, or the ingratitude of the donee can be proven by heightened evidentiary standards, the law provides access to the safeguards of nullification and revocation. Cases that involve challenging the validity of donations *inter vivos* are fact-intensive and largely a matter of degree. These cases are especially difficult to resolve since the evidence is often purely circumstantial. The *Petrie* case reflects the courts’ robust reluctance to interfere with facially valid donations and demonstrates the difficulty of surmounting such high evidentiary standards.

A. Duress

The *Petrie* court relied primarily on Louisiana Civil Code Article 1959, finding no evidence creating “a reasonable fear of unjust or considerable injury to [Ms. Rearick’s] person, property, or reputation.”²⁵ The courts found no evidence of “threats of imprisonment or great physical injury or death,” nor were such allegations made.²⁶ The only purported threats were Ms. Michetti’s ultimatum to her mother about moving out and the comment about placing her in a nursing home. Moreover, the court found no causal connection between the supposed threat and the donation. Since consent to the act of donation is vitiated by duress, the duress has to have influenced the act. Ms. Rearick did not seem to be deprived

24. *Petrie v. Michetti*, 59 So. 3d at 440, 441; LA. CIV. CODE art. 1557.

25. LA. CIV. CODE art. 1959.

26. LA. CIV. CODE art. 1959 cmt.(b) (citing BLACK’S LAW DICTIONARY (Rev. 4th ed. 1968)).

of her liberty such that she was forced to submit to the donation. Finally, while Ms. Rearick suffered mild dementia, there was no evidence suggesting, nor did anyone argue, lack of capacity.²⁷ The evidence as a whole tended to reveal Ms. Rearick's unimpeded donative intent.

The court also based its decision on the notion that threatening to do a lawful act cannot constitute legal duress.²⁸ Moving out of a home and placing an older woman in a nursing home are both lawful acts. The court held that the alleged nursing home threat was entirely lawful.²⁹ The *Petrie* court analogized the facts of the instant case to those of *Guerin v. Guerin*.³⁰ In that case, the court held that a husband's threat to leave his wife if she refused to sign an act of sale was "patently insufficient" to prove duress that would vitiate the wife's consent.³¹ The court similarly found that Ms. Michetti's ultimatum fell short of duress.³²

Duress is very difficult to prove. Ms. Rearick failed to establish that the donation was procured by duress by clear and convincing evidence.³³ However, if the court had characterized Ms. Rearick's donation as a remunerative donation, given in return for past services rendered, the evidentiary standard would have been merely a preponderance of the evidence.³⁴ This is worth noting since the attorney who prepared the donation testified that Ms. Rearick told her that she wanted to donate the property because Ms. Michetti had been her caregiver for so long.³⁵ However, the court deemed the donation gratuitous based on its findings regarding what prompted Ms. Rearick to make the donation.³⁶

27. See, e.g., *Rose v. Johnson*, 940 So. 2d 181 (La. App. 3 Cir. 2006).

28. See LA. CIV. CODE art. 1962.

29. *Petrie v. Michetti*, 59 So. 3d at 439.

30. *Id.* at 438.

31. *Guerin v. Guerin*, 49 So. 2d 1053 (La. App. 1 Cir. 1984).

32. *Petrie v. Michetti*, 59 So. 3d at 438.

33. See LA. CIV. CODE art. 1483.

34. See LA. CIV. CODE art. 1527.

35. *Petrie v. Michetti*, 59 So. 3d at 434.

36. KATHYRN VENTURATOS LORIO, 10 LOUISIANA CIVIL LAW TREATISE, SUCCESSIONS AND DONATIONS §8.13 (West 2009) (stating that if "gratitude and

B. Revocation on Account of Ingratitude

In holding that the plaintiff failed to prove Ms. Michetti's ingratitude, the court relied on Louisiana Civil Code articles 1556 and 1557. According to those provisions, two cases permit revocation of a donation *inter vivos* for the donee's ingratitude: "[i]f the donee has attempted to take the life of the donor; or [i]f he has been guilty towards him of cruel treatment, crimes, or grievous injuries."³⁷ As to what constitutes the latter ground, Louisiana case law is sparse.³⁸ Relying predominantly on the writings of French writers Aubry and Rau, courts generally state that "injuries include any act naturally offensive to the donor."³⁹

In *Porter v. Porter*, for example, the Second Circuit upheld a donation where actions of the donees, including purposefully crashing into the donor's vehicle, were provoked by the donor and were therefore justified defensive measures.⁴⁰ As *Porter* demonstrates, the context of the actions is important. For example, Ms. Michetti hid Ms. Rearick's medication, but the doctor said this was reasonable to ensure that Ms. Rearick did not exceed the proper dosage. Also, Ms. Michetti spoke in a loud tone to her mother because she had trouble hearing.

Other cases illustrate that acts of ingratitude are often quite severe. In *Erikson v. Feller*, the Third Circuit revoked a donation of immovable property for ingratitude where the donee, grandson of the donor, accused the donor of molesting his child.⁴¹ The grandson's molestation allegation was unsubstantiated. Moreover,

love" rather than a desire to pay back influenced the donor, the donation should be deemed gratuitous and thus the rules for donations *inter vivos* apply.) It seems that the *Petrie* court adopted this view.

37. LA. CIV. CODE art. 1557.

38. *Petrie v. Michetti*, 59 So. 3d at 440 (citing *Salassi v. Salassi*, 08-510 (La. App. 5 Cir. 2009) 13 So. 3d 670, 673).

39. *Id.* (citing 4 C. AUBRY & C. RAU, COURS DE DROIT CIVIL FRANÇAIS §708 (La. State Law Institute Trans. Vol. 3, 1965)).

40. *Porter v. Porter*, 821 So. 2d 663 (La. App 2 Cir. 2002).

41. *Erikson v. Feller*, 889 So. 2d 430 (La. App. 3 Cir. 2004).

the grandson tried to evict his grandfather from the property over which the grandfather retained a usufruct. Similarly, in *Sanders v. Sanders*, the Second Circuit revoked a donation for ingratitude when the donee son told his father, the donor, that he wished his parents would die, wrote a letter slandering his parents, and renounced his father.⁴² Given the very limited circumstances in which Louisiana courts will revoke donations for the donee's ingratitude, the evidence in *Petrie* was simply inadequate.⁴³

C. Undue Influence and the Civil Law

Louisiana Civil Code article 1479 states:

A donation inter vivos or mortis causa shall be declared null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.⁴⁴

Imported from the common law in 1991, the law of undue influence is fairly new in Louisiana. As a result, the scope of the doctrine and its place in Louisiana law is unclear. What is intriguing about *Petrie v. Michetti* is that the court dismissed undue influence very quickly. Ms. Rearick oddly did not plead it in her petition. In fact, "Ms. Rearick admitted that she 'was not attempting to prove that she had lost her volition to [Ms. Michetti], but rather that she was indeed aware at the time of the donation that she was being coerced into the action.'"⁴⁵

Ms. Rearick's reluctance to plead undue influence may be related to the fact that few such claims have been successful. The

42. *Sanders v. Sanders*, 768 So. 2d 739 (La. App. 2 Cir. 2000).

43. *See also* *Perry v. Perry*, 507 So. 2d 881 (La. App. 4 Cir. 1987) (revoking a donation by parents in favor of son after son had his parents' property seized to satisfy a debt that they owed him, causing his parents much distress); *Haydel v. Haydel*, 2008-0245 (La. App. 1 Cir. 10/31/08), 2008 WL 4763503 (revoking donations from a husband to a wife who, *inter alia*, questioned his masculinity, harassed him, called the police on him, and told him she did not love him; finding that these actions constituted cruel treatment and grievous injury).

44. LA. CIV. CODE art. 1479.

45. *Petrie v. Michetti*, 59 So. 3d at 439.

difficulty in defining the scope of undue influence is partially due to its inherent subjectivity.⁴⁶ Comment (b) to Louisiana Civil Code article 1479, cited frequently by the courts, describes undue influence as being “of such a nature that it destroys the free agency of the donor.”⁴⁷ Moreover, “mere advice or persuasion, or kindness and assistance, should not constitute influence that would destroy the free agency of a donor and substitute someone else’s volition for his own.”⁴⁸ The evidence characteristic of undue influence cases is predominantly circumstantial.

One of the few Louisiana cases holding a donation invalid due to undue influence is *Succession of Sidney Lounsberry*.⁴⁹ In that case, Sidney Lounsberry died, leaving everything to a son who lived with him. The sons left with nothing sought to nullify the will, arguing that the son who inherited the estate exercised undue influence over their father, who was suffering from mental problems. The court held in favor of the plaintiff brothers, finding undue influence, and revoked the will.⁵⁰ The court found that the son named in the will preyed upon his father’s weaknesses and encouraged his father’s irrational frustrations against his brothers.

In *Petrie*, the facts do not reveal a hindrance on Ms. Rearick’s free agency. Especially in light of the attorney’s testimony and bolstered by the physician’s testimony, Ms. Rearick exhibited clear donative intent. Furthermore, Ms. Michetti is “a natural object of [Ms. Rearick’s] bounty” as the daughter who took care of her for years, and there is no evidence that Ms. Michetti caused her mother to harbor bitterness against her sisters.⁵¹

46. LA. CIV. CODE art. 1479, cmt.(b).

47. *Id.*

48. *Id.*

49. *Succession of Sidney Lounsberry*, 824 So. 2d 409 (La. App. 3 Cir. 2002).

50. *Id.*

51. LA. CIV. CODE art. 1479, cmt.(b); See Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT’L L. 41, 58 (2008-2009) (“the catalyst and strength of all undue influence cases is the perceived ‘unnaturalness’ of the testamentary disposition”); *Cf.*

Since the law of undue influence does not have its roots in the civil law and it is a rather new import, the courts delineate the meaning of the doctrine in practice. The *Petrie* court stated *in dicta* that it would not have found undue influence had it been properly raised.⁵² Nevertheless, since undue influence is a relative nullity and it was not pleaded, there was no opportunity for analysis, and thus clarification of the doctrine, in this case.

Lounsberry, 824 So. 2d at 409 (revoking a donation finding that the donee exacerbated resentment on the part of his father (donor) against his brothers).

52. *Petrie v. Michetti*, 59 So. 3d at 439.

**AN OVERVIEW OF ASSIGNMENTS AND SUBLEASES OF
MINERAL LEASES AND THE MOST-FAVORED NATION
CLAUSE: *HOOVER TREE FARM, L.L.C. v. GOODRICH
PETROLEUM COMPANY, L.L.C.***

Marion Peter Roy, III*

Oil and Gas lessees have long assigned and subleased all or part of their interests in those leases to third parties. While much early Louisiana jurisprudence in the area centered merely on identifying the language that distinguishes assignments from subleases, and on analyzing the legal effects of that difference, the importance of correctly assessing the relationship either between lessee and assignee or between lessee and sublessee takes on an even *more* significant meaning when examining the issue through the lens of an existing so-called “most-favored nation clause” (hereinafter “MFN clause”) in the original oil and gas lease. In the fervent rush to secure leasehold acreage in a profitable shale “play” (such as the Haynesville shale of North Louisiana, the area at issue in this case), many exploration and production (hereinafter E&P) companies eventually pay exponentially more both in per-acre bonus amounts and royalty percentage amounts in lease conveyances than did the original E&P company party to the lease as a lessee. Usually, this common form of speculation creates no additional payments owed to the lessor. However, as it will be seen in the coming discussion of *Hoover Tree Farm v. Goodrich Petroleum*,¹ a lease containing an MFN clause serves to place liability *in solido* both on the original lessee and the transferee, obliging them together to compensate the lessor the amount in

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1. *Hoover Tree Farm, L.L.C. v. Goodrich Petroleum Co., L.L.C.*, 46,153 (La. App. 2 Cir. 3/23/11), 63 So. 3d 159.

difference between the price of the original lease and that of the partial assignment, both in per-acre bonus and royalty percentage payments, if in fact the transfer at issue is deemed to be an assignment rather than a sublease, or if the two lessees may be deemed to be “co-owners” of the lease.

I. BACKGROUND

Hoover Tree Farm, L.L.C. (“Hoover”) leased 317 acres of land in Caddo Parish to Goodrich Petroleum Company, L.L.C. (“Goodrich”) in 2008, for whom Petroleo Properties, L.L.C. (“Petroleo”) acted as a broker in negotiating the lease. The final negotiated terms of the Oil, Gas and Mineral Lease² granted Hoover a 25% royalty and a \$1,000 per acre lease bonus.³ After early revisions of the MFN clause by Hoover’s attorney, its final version, and the source of this case’s litigation, provides as follows:

Lessee and Goodrich Petroleum Company, L.L.C., which joins herein, each guarantee that no lessor of either Lessee or Goodrich Petroleum or their successors and assigns shall receive a higher royalty and/or bonus than the Lessor under this Lease. Should any lessor receive such higher bonus and/or royalty, the Lessor under this Lease shall receive from Goodrich Petroleum Company, L.L.C. the difference between the higher bonus and the bonus paid to Lessor at the inception of this Lease, and the difference between the higher royalty and the royalty paid to Lessor under this Lease. This clause will remain in effect separately with respect to each Section covered by this Lease, and with respect to each such Section, this clause will remain in full force and effect until the end of the Primary Term of this Lease. This clause covers every lease which may be made by Lessee, Goodrich Petroleum Company, L.L.C., Sendero

2. *Id.* at 161-62.

3. While the lease initially listed Petroleo, L.L.C. as the Lessee, paragraph 27 of the Lease clearly provides that Goodrich is to be deemed the original Lessee since it was always Petroleo’s intent as broker to assign the lease to Goodrich. On May 7, 2008, Petroleo assigned to Goodrich “all of the Assignor’s right, title and interest” in and to the lease. *See Hoover*, 63 So. 3d at 162, n.4.

Resources Incorporated and/or Caddo Resources LP, as Lessee, and their respective successors and assigns, in any section in any of the following townships and ranges in Caddo Parish, Louisiana: (19N–16W), (19N–15W), (18N–16W), and (18N–15W).⁴

On June 6, 2008, Goodrich and Chesapeake Louisiana, LP (“Chesapeake”) executed an “Assignment, Conveyance, and Bill of Sale,” in which Goodrich “Granted, Sold, Assigned, Conveyed, and Delivered” to Chesapeake an undivided 50% interest in the Hoover lease and other leases to all depths below the “Cotton Valley Formation.” The transfer did not contain any forms of payment that resembled an overriding royalty for Goodrich.⁵ Soon after this agreement, Chesapeake acquired other oil and gas leases (“third party leases”) in the area within the established bounds of the Hoover lease’s MFN clause for a counter-performance of \$25,000 per acre bonus payments and a 30% lease royalty. Hoover then filed suit against Petroleo, Goodrich, and Chesapeake, asserting these third party leases triggered application of the MFN clause in its own lease. Hoover contended that, because Chesapeake was an “assign” of Goodrich and entered into other mineral leases in the range covered by the lease’s MFN clause, it (Hoover) is owed the difference between the bonus and royalty it received initially and the amount of bonus and royalty Chesapeake paid for the third party leases. Hoover’s September 28, 2009 Motion for Summary Judgment sought \$7,608,000 (317 acres x \$24,000) and a 30% royalty. In response, Chesapeake’s and Goodrich’s opposing summary judgments asserted the transfer between them was a sublease rather than an assignment, thereby not triggering the MFN clause. In the alternative, Chesapeake also contended that even if the clause would be deemed to come into effect, that Goodrich alone would be liable for breach of the clause.⁶

4. Hoover, 63 So. 3d at 162.

5. *Id.* at 162.

6. *Id.* at 163-64.

The trial court, after receiving the arguments from all parties, granted Hoover's Motion for Summary Judgment, holding that the transfer between Goodrich and Chesapeake was an assignment and that the MFN clause's application would be allowed because of Chesapeake's third party lease acquisitions. The court thus increased the Hoover royalty to 30%, denied Goodrich's cross-motion for summary judgment, and granted Chesapeake's summary judgment, holding that Goodrich was the only party accountable for the higher bonus under the Hoover lease's MFN clause. Hoover and Goodrich both appealed following the judgment; Hoover also sought to hold Chesapeake liable along with Goodrich for the \$7.6 million judgment in its favor.⁷

II. DECISION OF THE COURT OF APPEAL

The Court of Appeal of Louisiana, Second Circuit, amended the lower court's judgment, affirming in part and reversing in part, holding that Chesapeake was obligated *in solido* with Goodrich to satisfy the higher bonus payment under the most-favored nation clause,⁸ and that the transfer executed between Chesapeake and Goodrich was an assignment rather than a sublease.⁹ Despite the court's recognition of the fact that the case's primary issue is the interpretation of the MFN clause, it nevertheless first addresses the issue of the *in solido* obligation of both Goodrich and Chesapeake

7. *Id.* at 164.

8. See the block quotation *supra* for the exact terms of the most-favored nation clause at issue in this case. While there are many available published attempts to precisely define MFN clauses as they are modernly used, the exact definition depends upon the circumstances in which they are employed and the type of obligations they modify. A basic MFN clause definition is as follows: "a contractual agreement between a buyer and a seller that the price paid by the buyer will be at least as low as the price paid by other buyers who purchase the same commodities from the seller." Arnold Celnicker, *A Competitive Analysis of Most Favored Nations Clauses in Contracts between Health Care Providers and Insurers*, 69 N.C. L. REV. 863, 864 (1991). In the instant case, the MFN clause provides that the lessor will receive the *highest* prices paid by other lessees within a strictly defined geographic area of mineral exploration.

9. Hoover, 63 So. 3d at 181.

(with regards to their having to pay the \$7.6 million). After briefly but clearly noting that mineral leases are real rights governed by Louisiana's Mineral Code,¹⁰ the court states that Article 128¹¹ provides that the assignees or sublessees acquire the rights and powers of the original lessee to the extent conveyed by the partial assignment or sublease. Noting the lower court's inconsistency in holding that Goodrich alone was liable under the judgment, but also somehow holding that both Goodrich and Chesapeake would be jointly affected by the lease's royalty obligation increasing for 30%, the appellate court rejected the notion that Goodrich is solely liable for the payment of the \$7.6 million judgment to Hoover. The court thus held that since Article 128 makes clear that both Goodrich and Chesapeake are co-owners of the lease's operational rights, that both companies are therefore liable for payment to Hoover.¹²

Regarding the appeal's principal issue (whether the transfer between Goodrich and Chesapeake was an assignment or sublease), the court provides a thorough jurisprudential history of the long-litigated difference between the two forms of lease conveyances, starting with a basic examination of the importance of a contract's interpretation being clear and unambiguous, if possible.¹³ Eventually, the court outlines the Civil Code's definitions for successors and assigns, concluding that within the meaning of Civil Code article 3506,¹⁴ Chesapeake was an assign of Goodrich; however, since the transaction involved a mineral lease, the court further examines the unique law and Louisiana jurisprudence surrounding subleases and assignments as they pertain to mineral leases. Although the Louisiana Supreme Court has decided many cases on the issue, the most important cases, and

10. *See, generally*, LA. REV. STAT. ANN. § 31 (2012).

11. Hoover, 63 So. 3d at 163. *See also* LA. REV. STAT. ANN. § 31:128 (2012).

12. Hoover, 63 So. 3d at 167.

13. *Id.* at 168.

14. *Id.* at 170. *See also* LA. CIV. CODE art. 3506.

the two which this court considers the most,¹⁵ are *Roberson v. Pioneer Gas Co.*¹⁶ and *Smith v. Sun Oil.*¹⁷ Noting the inconsistencies in jurisprudence because of a lack of the code's guidance on the issue, the court holds that the "lease upon a lease" concept as first presented in *Sun Oil* became relaxed and broadened to mean that the sublease test became "any retained measure"—that is, for a sublease to exist, the transferor has to retain a "measure," now commonly called an "override," of the original lease. Importantly, the court states in *dicta* in footnote 20 that "we have not uncovered a Louisiana decision where a tenant conveyed an undivided interest in his lease and became faced with the claim that a sublease had occurred."¹⁸ The court again reiterates that in all prior cases involving the transfer of an undivided interest in a mineral lease, such as what happened between Goodrich and Chesapeake, courts have not found the transfers to be subleases.¹⁹ Thus, despite both Chesapeake's and Goodrich's claims that their transfer was a sublease, the court holds that "we cannot find that the Transfer from Goodrich to Chesapeake was a sublease, causing them to be in a sublessor/sublessee relationship."²⁰

However, after this thorough legal and jurisprudential framework of the assignment vs. sublease realm, the court seems to shift entirely to a separate (if related) legal topic—co-ownership. Ultimately, despite definitively declaring the transfer as an assignment, the court declares "the relationship between Goodrich and Chesapeake after the transfer falls squarely within the Louisiana Law of co-ownership."²¹ Therefore, the assignment of the leasehold rights to Chesapeake made it responsible directly to

15. *Id.* at 175-76.

16. *Roberson v. Pioneer Gas Co.*, 137 So. 46 (La. 1931).

17. *Smith v. Sun Oil Co.*, 116 So. 379 (La. 1928).

18. *Hoover*, 65 So. 3d at 176.

19. *Id.* at 177.

20. *Id.* at 179.

21. *Id.*

the original lessor, Hoover.²² In the final analysis, the court's holding seems to hinge more on the finding that Chesapeake and Goodrich were co-owners of the lease, rather than on the finding that Chesapeake was an assignee instead of a sublessee after the transfer. Both findings, however, are clearly stated in the reasons given by the court.²³

III. COMMENTARY

This brief commentary will argue that the Second Circuit Court of Appeals made the correct holding regarding both the MFN clause issue and the assignment/sublease issue present in *Hoover Tree Farm v. Goodrich Petroleum Company*, but that it was unnecessary, superfluous, and confusing for the court to cite the law of co-ownership at the end of its discussion in support of its holding. Put simply, the court arrived at the correct holding after it accurately concluded that, since Chesapeake was a partial assignee in the lease transfer, Chesapeake along with Goodrich were liable to Hoover—the court should have concluded the opinion following assignment/sublease analysis instead of proceeding to discuss co-ownership as well. While some of the points of this commentary's straightforward argument are perhaps touched upon in the court's discussion, the argument *infra* attempts to lay out a simpler, more direct means of getting to the same, correct holding(s) as did the court in its opinion.

Article 114 of the Mineral Code provides that “a mineral lease is a *contract* by which the lessee is granted the right to explore for and produce minerals.”²⁴ While the Mineral Code makes abundantly clear that the mineral lease is notably different than most other contracts in that it creates a real right (rather than a

22. *Id.* at 180.

23. *Id.*

24. LA. REV. STAT. ANN. § 31:114 (2012) (emphasis added).

personal obligation),²⁵ a mineral lease is nevertheless a legally effective agreement between parties, regulating rights and obligations like any other personal contract.²⁶ Accordingly, the interpretation of mineral leases operates exactly like that of any other contract: the words used in the lease are to be given their prevailing meaning (unless they are words of art or technical),²⁷ and no further interpretation should be made in search of the parties' intent if the lease's words are "clear, explicit, and lead to no absurd consequences."²⁸ In this case, the disputed clause in the original lease between Hoover and Goodrich, and the initial reason for the litigation, is its most-favored nation clause. The first sentence of the MFN clause clearly and unambiguously states that Goodrich "guarantee[s] that no lessor or lessee of either entity *or their successors and assigns* shall receive a higher royalty and/or bonus than the Lessor under this Lease."²⁹ The concluding sentence provides clearly and unambiguously that the clause covers every lease within a specified geographic range made by Goodrich and their respective successors and assigns.³⁰ If, therefore, in conjunction with the language from the above-mentioned civil code articles discussing contract language interpretation, the terms in this MFN clause can be given their prevailing meaning, no further interpretation of the clause is necessary if that interpretation does not lead to absurd consequences. Here, then, if Chesapeake can be deemed an "assign" of Goodrich, the MFN is therefore triggered, and Chesapeake as an assign would be liable for payment along with Goodrich for that guarantee of the difference of bonus and royalty amounts to the lessor, Hoover.

25. LA. REV. STAT. ANN. § 31:16 (2012). *See also* LA. REV. STAT. ANN. § 31:18 (2012).

26. *See, generally*, Stephenson v Petrohawk Properties, L.P., 37 So. 3d 1145 (La. App. Ct. 2d 2010); Winnon v Davis 759 So. 2d 321 (La. App. Ct. 2d 2000).

27. LA. CIV. CODE art. 2047 (2012).

28. LA. CIV. CODE art. 2046 (2012).

29. Hoover, 65 So. 3d at 162 (emphasis added).

30. *Id.*

Determining whether Chesapeake is a partial assignee, and therefore liable *in solido* with Goodrich, or a sublessee, and therefore not liable, involves a slightly more complex and involved analysis than that of the interpretation of the language of the MFN clause. However, it quickly becomes clear after reading the Mineral Code, relevant jurisprudence,³¹ and secondary sources³² that it is highly unlikely that this transfer between Goodrich and Chesapeake would make the latter a sublessee rather than an assignee. In the law of mineral leases in Louisiana, a unifying trait present in subleases, and not in assignments, is the presence of a reservation of an interest of some kind by the original lessee; an assignment of a lease, however, is generally viewed merely as a kind of sale of all or part of the lease.³³ The distinction is well-established through several decades of the development of Louisiana oil and gas law³⁴ and is clearly laid out in this excerpt from Leslie Moses' 1940 law review article on the matter:

There is a difference under the Louisiana law between an assignment and a sublease of an oil and gas lease. An assignment is the conveying of all or a part of the entire lease for the whole of the unexpired term. The assignee secures the same interest that his assignor had at the time of

31. *Mire v. Sunray DX Oil Co.*, 285 F. Supp. 885, 890 (W.D. La. 1968): There is a sharp distinction between an assignment of a lease and a sublease, recognized in the jurisprudence. In the case of a sublease a new and, in a sense, separate contractual relationship of lease exists between the original lessee and the sublessee. There can be no actions on the contract between the original lessor and the sublessee because there is no privity between them; there are two contracts, the original lease and the sublease, only the original lessee is a party to both... *Where there is an assignment of the lease...the assignee is liable to the original lessor for the obligations of the original lessee which he has assumed completely. To sublease is to lease in whole or in part the thing of which one is the lessee, with reservation of an interest in it by the original lessee, or sublessor; while to assign a lease is to sell it* (emphasis added).

32. See generally Leslie Moses, *The Distinction between a Sublease and an Assignment of a Mineral Lease in Louisiana*, 18 TEX. L. REV. 159 (1940).

33. See the emphasized portion of the quotation, *supra* note 31.

34. See *Broussard v. Hassie Hunt Trust*, 91 So. 2d 762 (La. 1956); see also *Roberson v. Pioneer Gas Co.*, 137 So. 46 (La. 1931); *Smith v. Sun Oil Company*, 116 So. 379 (La. 1928).

the assignment. Any instrument transferring less than this, or a part of lessee's rights or obligations under the original lease, is a sublease.

In Bouvier's *Law Dictionary* a sublease, or an underlease, is defined as: "An alienation by a tenant of a part of his lease, reserving to himself a reversion; it differs from an assignment which is a transfer of all the tenant's interest in the lease. And even a conveyance of the *whole* estate by the lessee, reserving to himself the rent, with a power of reentry for nonpayment, was held to be not an assignment but an underlease."³⁵

In the instant case, the transfer between Goodrich and Chesapeake was an assignment, rather than a sublease, because the terms of the transfer were such that Chesapeake received "an undivided 50% interest in the Lease . . . as to all depths below the Cotton Valley formation. The Transfer contained no provisions for payment to Goodrich in the nature of an overriding royalty."³⁶ Nothing about this transfer mirrors the mechanisms of a sublease, or an "underlease" (to use the original civilian term), since Goodrich reserved no interest or overriding royalty, as made clear in the court's observation quoted immediately above. Rather, this is an assignment in which the conveyance is of "all or a part of the entire lease for the whole of the unexpired term"³⁷—in this partial assignment, the lessee transferred all the rights associated with half of the lease's interest. Indeed, the assignee (Chesapeake) has secured "the same interest that his assignor had at the time of the assignment."³⁸

Thus, Chesapeake, as an assignee rather than sublessee, should be held liable *in solido* with Goodrich for both the \$7.6 million judgment and the higher royalty amount. The MFN clause, read clearly and unambiguously as the language in any mineral lease should be, was triggered when Goodrich executed the 50% partial assignment to Chesapeake. According to Mineral Code

35. Moses, *supra* note 32, at 159-60 (citations omitted).

36. Hoover, 63 So. 3d at 162.

37. Moses, *supra* note 32, at 159.

38. *Id.*

Article 128, the partial assignee (Chesapeake) is directly responsible to the lessor (Hoover). The Second Circuit thus correctly held that Hoover shall recover from both Goodrich and Chesapeake. The opinion, however, could have ended after the court's conclusion that Chesapeake is an assignee. By adding at the end of its analysis that Chesapeake and Goodrich were co-owners of the lease, and therefore liable *in solido* for that reason as well, the Court is opening another can of worms: though the Mineral Code provides that mineral rights are real rights, can one "own" these rights, and therefore be co-owner of them? It is good news that the case could be solved without answering to this tricky question.

HILLMAN V. ANDRUS: THE GHOST OF CIVIL POSSESSION

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This case presents unresolved issues in Louisiana property law with respect to acquisitive prescription and possession of immovables. Particularly, *Hillman* requires consideration of the relationship, or lack thereof, between the doctrine of civil possession and the vice of discontinuity. Although undecided definitively by Louisiana courts, the issue has largely been a subject of academic discussion among French and Louisiana commentators. This case note seeks to identify the solution used by the Louisiana Third Circuit Court of Appeals in *Hillman* as well as two other possible solutions that have gained academic support.

I. BACKGROUND

This case involves a property dispute over the ownership of a .94 acre tract of land.¹ The parties were record owners of two contiguous tracts.² The plaintiff purchased the northern tract in 2007.³ The act of sale specifically described the .94 acre tract as one of three tracts being conveyed.⁴ The act of sale also identified the property as being located in Evangeline Parish and referenced a survey map annexed thereto.⁵

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1. *Hillman v. Andrus*, 2011-5 (La. App. 3d Cir. 5/4/11), 63 So. 3d 1164.
2. *Id.* at 1166.
3. *Id.* at 1165.
4. *Id.*
5. *Id.* at 1172.

The defendants purchased the southern tract in 1977.⁶ The act of sale conveyed 2.07 acres of land located in St. Landry Parish.⁷ The document included a list of calls and specifically provided that “said property being bounded now or formerly as follows: North by Bayou DeCannes.”⁸

Sometime later, the plaintiff asserted that the defendants were encroaching on the .94 acre tract of land.⁹ He filed the action to have the boundary between the two tracts designated as the line dividing Evangeline Parish and St. Landry Parish.¹⁰ The defendants reconvened asserting ownership of the .94 acre tract by title or alternatively by thirty-year acquisitive prescription.¹¹ The parties agreed that Bayou DeCannes was rerouted to the north from its original location some time prior to the defendant’s acquisition.¹² To prove possession, the defendants claimed that they had maintained the property for thirty years and that their children had periodically used the land for recreational purposes.¹³ However, the record also indicated that in 1981 the defendants moved away from their property for six years.¹⁴ During this time, other individuals lived in the defendants’ home but never entered the disputed .94 acre tract.¹⁵

6. In 1994, the defendant purchased an adjacent tract increasing his ownership to four acres. The act of sale similarly described the property as lying within St. Landry Parish and being bound on the north by Bayou DeCannes. A list of calls was likewise provided.

7. *Id.* at 1166.

8. *Id.*

9. *Id.*

10. *Id.* The line dividing the two parishes is also the former centerline of Bayou DeCannes.

11. *Id.* at 1167.

12. *Id.* at 1166-67. The disputed .94 acre tract was that piece of land bound on the south by the former channel of the bayou and on the north by the current channel.

13. *Id.* at 1170.

14. *Id.* at 1171.

15. *Id.* The Court did not explore the relationship between these individuals and the defendants. However, the language of the opinion appears to treat them as precarious possessors. The only mention of these individuals was that “no evidence existed regarding the extent these individuals may have ‘possessed’ the property during that period.” In any event, they were likewise treated as if they

II. DECISION OF THE COURT

The trial court sustained the defendants' exception of prescription for two reasons.¹⁶ First, the trial court determined that the defendants had acquired ownership of the .94 acre tract by thirty year acquisitive prescription.¹⁷ Second, the trial court concluded that the defendants were entitled to a presumption of ownership by virtue of having possessed the tract in excess of one year free from vice.¹⁸ For these reasons, the trial court declared the defendants to be owners of the .94 acre tract and dismissed the plaintiff's suit.¹⁹

The 3rd Circuit Court of Appeals reversed the trial court's determination of acquisitive prescription, concluding that the defendants' possession²⁰ had been tainted by discontinuity.²¹ The Court's decision rested firmly on the fact that the defendants had left their home for six years.²² Critically, the majority found that the defendants' "lack of evidence regarding this period of time" precluded a finding of continuous possession for thirty years.²³

The Court then addressed the plaintiff's demand to fix the boundary and the defendants' alternative argument of ownership by title. The Court held that the plaintiff's title "very clearly includes the disputed property."²⁴ In support of that conclusion, the

never stepped foot on the disputed tract. Thus, they remained within the defendants' record boundaries. For that reason, precarious possession analysis and eviction analysis are made irrelevant in the context of possessing the disputed tract. *See id.* at 1171.

16. *Id.* at 1167-68.

17. *Id.*

18. *Id.* at 1168.

19. *Id.* at 1169. The trial court's acquisitive prescription determination rendered it unnecessary to address defendant's alternative argument of ownership by title.

20. In fact, the Court questioned whether the defendants ever engaged in acts sufficient to support corporeal possession, but simply assumed it as fact for the sake of analysis and discussion. *Id.* at 1170.

21. *Id.* at 1170.

22. *Id.* at 1171.

23. *Id.*

24. *Id.* at 1172.

Court emphasized that the plaintiff's deed of acquisition referenced a survey naming the .94 tract as one of three tracts being sold and showing the southern border as the *old* centerline of Bayou DeCannes.²⁵ The Court also pointed to the deficiency of evidence presented by the defendants to prove that the disputed tract was included within his call list measurements or that his northern border fell within Evangeline Parish.²⁶ However, the Court declined to "fix"²⁷ the boundary.²⁸ Rather, the Court simply recognized that the plaintiff's title, which designated the southern boundary as the old centerline of Bayou DeCannes, was superior to the defendants' title.²⁹

III. COMMENTARY

The troubling feature of this opinion is the Court's determination that possession was not continuous during the defendants' six-year absence without any discussion of civil possession. Louisiana Civil Code article 3476 provides that possession must be continuous. Possession is discontinuous when it is not exercised at regular intervals, and possession that is discontinuous has no legal effect.³⁰ However, Louisiana Civil Code article 3431 instructs that "once acquired, possession is retained by the intent to possess as owner [*animus domini*] even if the possessor ceases to possess corporeally."³¹ Further, the intent to retain possession is presumed unless there is clear proof of a contrary intention.³²

25. *Id.*

26. *Id.* at 1172-73.

27. After considering the evidence, including the testimony and exhibits of a surveyor or other expert appointed by the court or by a party, the court shall render judgment fixing the boundary between the contiguous lands in accordance with the ownership or possession of the parties. LA. C.C.P. Art. 3693.

28. *Id.* at 1173.

29. *Id.*

30. LA. CIV. CODE art. 3435 and 3436.

31. Emphasis added.

32. LA. CIV. CODE art. 3432.

As stated in the introductory remarks, legal commentators have identified at least three possible solutions to resolve the apparent tension between civil possession and the vice of discontinuity. The first solution is the traditional French view, which treats the doctrine of civil possession and the vice of discontinuity as two wholly distinct and separate concepts. This is the solution that the court in *Hillman* appeared to use. The second solution, supported by Professor A.N. Yiannopoulos, recognizes a relationship between civil possession and the vice of discontinuity whereby a possessor's *animus*, sufficient to support civil possession, is affected by subsequent acts of corporeal possession or a lack thereof. The third solution is the modern French view, which also recognizes a relationship between civil possession and the vice of discontinuity. Under this view, civil possession requires acts of corpus by a precarious possessor in the actual owner or possessor's absence.

A. The Traditional French View

Although the Third Circuit in *Hillman* did not expressly identify the position underlying their judgment, the reasoning seems to align with the traditional French view. Under that theory, as explained by Planiol:

Possession exists just as soon as its two essential elements, the *corpus* and the *animus* are united. It, however, can be affected by certain vices that make it useless, principally for the bringing of possessory actions and for the acquisition of ownership by prescription. These two effects, which are the principal advantages of possession, are attached solely to a possession free of vices (or defects). A vice of possession is therefore a certain state of affairs which, without destroying possession, makes it juridically valueless.³³

33. MARCEL PLANIOL. 1 PLANIOL CIVIL LAW TREATISE (PART 2) 346-47 (West 1939).

Thus, according to Planiol, the acquisition and maintenance of possession, whether it be by corporeal, civil, or constructive possession, is a matter wholly independent from the determination of whether such possession can result in ownership by acquisitive prescription. In that sense, it may very well be that a party satisfies the requirements of civil possession. However, for purposes of acquisitive prescription, that civil possession remains subject to the ordinary vices of possession—namely, discontinuity.

Broadly speaking, the traditional French view posits that no relationship exists between civil possession and the vice of discontinuity. Subsequent gaps between acts of *corpus* sufficient to trigger the vice of discontinuity will not then destroy a civil possession. Rather, those gaps simply preclude the possibility of having civil possession blossom into ownership by prescription. This appears to be the view adopted by the court in *Hillman*, and under those facts, the result would appear correct. However, one would be apt to question whether the Louisiana Civil Code supports the traditional French view. Under Louisiana Civil Code article 3476, the possessor must have corporeal possession,³⁴ *or civil possession preceded by corporeal possession*, to acquire a thing by prescription. Thus, the Civil Code seems to suggest that some relationship exists between civil possession and the vice of discontinuity for purposes of acquisitive prescription.

B. Professor Yiannopoulos' View

Professor Yiannopoulos' view promotes a logical relationship between the doctrine of civil possession and the vice of discontinuity.³⁵ Again, it is important to note that civil possession is the retention of possession solely by the intent to possess as owner.³⁶ That intent is presumed in the absence of a clear proof of

34. Corporeal possession is the exercise of physical acts of use, detention, or enjoyment over a thing. LA. CIV. CODE. art. 3425.

35. A.N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523, 528 (1991).

36. LA. CIV. CODE art. 3431.

a contrary intention.³⁷ On the other hand, possession must be continuous for purposes of acquisitive prescription,³⁸ and discontinuous possession has no legal effect.³⁹ Referring to these principles, Professor Yiannopoulos observes that:

There is an apparent conflict between the notion of civil possession and the requirement that possession be continuous. . . . Properly understood, the two sets of provisions are fully reconcilable. In the first place, continuity of possession is more significant in cases involving the issue of whether possession has been acquired rather than retained. Second, depending on the nature of the property, long intervals in the exercise of possession may constitute sufficient evidence to rebut the presumption of retention of possession.⁴⁰

There are three main ideas to take away from Professor Yiannopoulos' commentary. First, he recognizes a relationship between civil possession and the vice of discontinuity. His view is phrased in terms of the affirmative requirement of continuity under Louisiana Civil Code article 3476. This notion reflects the reciprocal paradigm of possession attributes within the Louisiana Civil Code. Louisiana Civil Code article 3476 affirmatively requires that possession be continuous for purposes of acquisitive prescription. Conversely, Louisiana Civil Code article 3435 provides that discontinuous possession, possession not exercised at regular intervals, has no legal effect.

Following this idea, he recognizes that long intervals in the exercise of *corpus* may be used to prove that the possessor no longer has the requisite *animus* sufficient to support civil possession.⁴¹ As a result, civil possession would cease altogether under Louisiana Civil Code article 3433, which provides that

37. LA. CIV. CODE art. 3432.

38. LA. CIV. CODE art. 3476.

39. LA. CIV. CODE art. 3435.

40. Yiannopoulos, *supra* note 35, at 550.

41. It should be noted that this view does not purport to require *corpus* to sustain civil possession, but, rather, that corporeal acts are simply used as proof of the existence or lack thereof of *animus*.

possession is lost upon a corresponding loss of *animus*. This is precisely the relationship that the Louisiana Civil Code seems to suggest when evaluating civil possession sufficient to support acquisitive prescription.

Third, his observations can be understood as altering the continuity standard between the successive acts of *corpus* required to obtain corporeal possession and the successive acts of *corpus* required to retain possession through civil possession. Stated simply, the continuity standard is relaxed once the possessor has acquired corporeal possession and is subsequently attempting to lean on civil possession. Thus, under Yiannopoulos' view, the primary issue is how lengthy the gaps in between successive acts of *corpus* can be in order to support civil possession. The issue does not lend itself to any black letter rule of law largely due to the fact-sensitive nature of possession disputes.⁴² Nevertheless, there is some guidance.

Article 3444 of the Louisiana Civil Code of 1870 provided that the presumption of intent to retain possession existed no longer than ten years without "actual possession."⁴³ However, this article was subsequently repealed by the legislature, and the Civil Code continues to lack any express limitation on the length of civil possession. The reason for removing former article 3444 is unclear, but one might speculate that it was intended to accommodate current Louisiana Civil Code article 3433. Tracking the language of article 3433,⁴⁴ Professor Yiannopoulos explains when civil possession is lost:

With respect to corporeal things, civil possession is presumed to exist and to last until possession is abandoned or the possessor is evicted by another person. Like ownership, which cannot be lost by non-use, possession

42. Rathborne v. Hale, 667 So. 2d 1197, 1201.

43. Comment (c), LA. CIV. CODE art. 3432. Corporeal possession is likely the intended equivalent of "actual possession."

44. Possession is lost when the possessor manifests his intention to abandon it or when he is evicted by another by force or usurpation. LA. CIV. CODE art. 3433.

continues for an indeterminate period of time as civil possession. However, civil possession may be affected by the vice of discontinuity (abandonment). Possession may be maintained by the intent to have the thing as one's own for as long as the thing remains materially at the disposal of the possessor (eviction).⁴⁵

Thus, civil possession is extinguished as a consequence of either: (1) abandonment,⁴⁶ or the loss of *animus* as affected by the vice of discontinuity or (2) eviction. The concept of abandonment and Yiannopoulos' view that *animus* can be destroyed by long intervals in the exercise of possession are consistent with the idea of civil possession from the Civil Code. "Abandonment is predicated on a manifestation of the intent to abandon, which may be established in light of objective criteria." That objective criteria includes whether the possessor has exercised sufficient acts of possession on the land as determined by the very nature of the land in question.

"The nature of the land or the *use to which it is destined* governs the possession necessary to support prescription."⁴⁷ That is to say that the nature of the land or the use to which it is destined may provide insight into what a "regular interval" is under Louisiana Civil Code article 3436,⁴⁸ such that possession does not become discontinuous. Under Yiannopoulos' view, the regular intervals between successive acts of *corpus* necessary to "retain" possession may be longer than those intervals required in order to "acquire" possession.

45. Yiannopoulos, *supra* note 43, at 528.

46. Comment (c), LA. CIV. CODE art. 3433.

47. *McDaniel v. Roy O. Martin Lumber Co., Inc.*, 560 So. 2d 676, 680 (La. App. 3d Cir. 1990) (emphasis added). *See also* *Chevron U.S.A. Inc. v. Landry*, 558 So.2d 242, 244 (La. 1990).

48. "Possession is...discontinuous when it is not exercised at regular intervals..." LA. CIV. CODE. art. 3436.

C. Modern French View

In France, a school of thought emerged suggesting that, in addition to the intent to possess as owner, possession always requires *corpus*. The physical presence may be accomplished by the original possessor or through a precarious possessor.⁴⁹ In case of precarious possession, the original possessor retains possession through his intent to possess as owner in addition to the precarious possessor's actual physical presence. This does not mean that possession is exercised without *corpus*. *Corpus* is exercised by someone else. Modern French doctrine has made a very subtle distinction between possession *solo animo*, and discontinuous possession:

One may legitimately believe that the one who possesses by his sole intent, *animo solo*, cannot exert possession in a continuous manner, that is to say in all occasions and at all moments where it should be continuous. One may also say that possession *solo animo* comes close to discontinuous possession. As a matter of fact, it seems that the rule of *solo animo* possession acknowledges that possession may be kept even in the absence of acts of possession. This may be true, but only in the absence of discontinuity, namely in those instances where the owner, once in possession, would not have normally accomplished acts of possession, due to the nature of the premises and their prevailing use.... [I]ntermittent acts do not exclude continuity, provided they do not result in a discrepancy that goes against the idea of possession, and if they are covered by anterior or subsequent acts of possession.⁵⁰

Although the argument could be made under the language of Louisiana Civil Code article 3431, it is unlikely that the modern French view could find support in light of the judicial interpretation given to article 3431. It is worth noting, once again,

49. By "precarious possession" I mean the exercise of possession over a thing with the permission of or on behalf of the owner or possessor (LA. CIV. CODE art. 3437).

50. Jamel Djoudi, *Possession*, at no. 49, published in 9 RÉPERTOIRE DE DROIT CIVIL (Daloz 2012) (citations omitted).

that Louisiana Civil Code article 3431 *expressly* provides that “Once acquired, possession is retained by the intent to possess as owner even if the possessor ceases to possess corporeally.” Also, the Louisiana Civil Code *expressly* allows that acquisitive prescription run in favor of a civil possessor who previously held corporeal possession.⁵¹

Louisiana Civil Code article 3429 provides that “possession may be exercised by the possessor or by another who holds the thing for him and in his name. Thus a lessor possesses through his lessee.” However, nowhere in the code or the cases interpreting Louisiana Civil Code article 3431 is it required that precarious possession support civil possession (*solo animo*). In fact, quite the contrary is indicated throughout. Comment (c) Louisiana Civil Code article 3431 is instructive and provides that:

Civil possession is the retention of the possession of a thing *merely by virtue of the intent to own it*, as when a person, without intending to abandon possession ceases to reside in a house or on the land which he previously occupied or when a person ceases to exercise physical control over a movable without intending to abandon possession.⁵²

Further, acts sufficient to support civil possession are those such as payment of taxes or the execution of juridical acts affecting the thing, such as a lease. Moreover, vestiges of works, such as the ruins of a house, may signify civil possession. These activities require no actual presence on the land by anyone and appear to indicate that the modern French view is quite different to the requirements under the Louisiana Civil Code.

IV. CONCLUSION

As a practical matter, in *Hillman*, the court’s apparent use of the traditional French view had a compelling and arguably prejudicial effect on the litigation. Generally, the party pleading

51. LA. CIV. CODE art. 3476.

52. Emphasis added.

acquisitive prescription bears the burden of proving all essential facts.⁵³ Indeed, in *Hillman* the court based its judgment on a lack of evidence presented by the *defendants* proving corporeal possession during their six-year absence. Had the civil possession articles been employed, the defendants would have only needed to prove that they had *acquired* possession of the disputed tract. As a result, the plaintiff would have the burden of proving a contrary intention by clear proof—a much more burdensome standard than a preponderance. Unfortunately for the defendants in *Hillman*, they were left carrying the burden of proof at trial, affording the plaintiff a substantial litigious advantage.

53. See *Hooper v. Hooper*, 941 So. 2d 726.

QUÉBEC'S PARTNERSHIP: *UNE SOCIÉTÉ DISTINCTE*

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The distinctive character of Québec's civil law does not need to be demonstrated once again. Its unique chronotope,¹ its recodification, and its lifelong *vie commune* with the common law² are all factors that have been brilliantly examined³ and will be taken for granted in this text. What is at stake—and surely all of these unique factors will be brought out during this study—is simply the peculiar nature of one of its institutions: partnership.

Québec's partnership has, without a doubt, a certain *je ne sais quoi* that might be of interest to others struggling with this juridical notion and its effects. Indeed, the histories of partnership in the

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1. This term is used by the language philosopher, Mikhail Bakhtin, to express the way time and space are inscribed in language. See Mikhail Bakhtin, *Forms of Time and of the Chronotope in the Novel*, in *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 84 (University of Texas Press 1981).

2. For an analysis of this proximity and a take on “société distincte” understood as a distinctive society, see Patrice Garant, *Code civil du Québec, Code de procédure civile et société distincte*, 37 *LES CAHIERS DE DROIT* 141 (1996).

3. John E.C. Brierley, *The Renewal of Québec's Distinct Legal Culture: The New Civil Code of Québec*, 42 *U. TORONTO L. J.* 484 (1992).

civil law as well as in the common law have revealed a fascinating ambivalence about the nature of the institution, an institution that, even if it can be said to have existed forever, never found its grounding and still oscillates between legal personality, a modality of ownership and a mere contractual relationship.

In Québec, the legislature was thought, until recently, to have taken a stance. After ambiguity remained under the Civil Code of Lower Canada,⁴ and after it was recommended that partnerships should be granted legal personality,⁵ it was clearly stated that a partnership is not a legal person under the current Civil Code of Québec.⁶ Indeed, the Civil Code of Québec defines partnership, in French “*société*,” as a contract akin to what is understood as a partnership elsewhere in Canada. In doing so, the presumption seemed clear: the importance was placed on the relationship between the partners who, together, were the owners of the combined property held in some joint undivided manner and thus were solidarily liable for its debts.

Yet, recent developments have shed new light on this presumption: in *Ferme CGR enr, senc.*,⁷ the Québec Court of Appeal held that it was not necessary for the partners of a Québec general partnership to be placed in bankruptcy for the partnership itself to go bankrupt. Analyzing partnership as a *distinct and autonomous patrimony*, the Court modified—or at least bespoke—the presumed ownership structure of partnerships in Québec, making it difficult to contend, with any certainty, that partners are the owners of the combined property and thus personally responsible for its debts.

4. See *Québec (ville de) c Compagnie d'immeubles Allard ltée* [1996] R.J.Q. 1566.

5. Civil Code Revision Office, Committee on the Contract of Partnership, *Report on the Contract of Partnership*, XXIV, (1974). See <http://digital.library.mcgill.ca/ccro> for further reference.

6. See art. 2186 and 2188 Civil Code of Québec [hereinafter CCQ].

7. *Ferme CGR enr., s.e.n.c. (Syndic de)* 2010 Q.C.C.A. 719.

Thus, the question now is very simple: who owns a Québec partnership?⁸ This question is important. At stake is not only the juridical nature of partnership in Québec, but also what is understood as personality, patrimony and, ultimately, civil liability in this mixed jurisdiction. One must recall that personality has lost its primacy in Québec as the possibility of patrimony by appropriation has come into force. Indeed, by choosing patrimony by appropriation as the vehicle to recast the trust in the Civil Code of Québec,⁹ the legislature has not only changed the framework of the trust as understood in the Civil Code of Lower Canada, it literally changed the overall juridical plan: patrimonial rights today have two means of being in the Civil Code of Québec: they either belong to persons, or they are appropriated to a purpose.¹⁰ This transformation is fundamental, and has the power of transforming old stories into completely new ones. In our case, the prospect of patrimony by appropriation has clearly created a new angle within the old debate about partnership: the question is not only if a partnership has a distinct legal personality from its partners; now a partnership can be understood as not having legal personality, yet as having a distinct patrimony containing rights and obligations of its own.¹¹

The questions then become: What is a distinct patrimony? Is it the same thing as a patrimony by appropriation? Is it the right vehicle for civil law partnerships? What distinguishes patrimony from legal personality? Can there be liability without personality or even without patrimony? Why are we having so much trouble defining such an old institution? What is really at stake here?

8. Martin Boodman, *Who owns a Québec partnership?*, 5 BUSINESS LAW QUARTERLY—MCCARTHY TÉTRAULT (November 29, 2010), available at www.mccarthy.ca/article_detail.aspx?id=5201.

9. See Title 6, “Certain patrimonies by appropriation,” art. 1256 et seq. CCQ.

10. Article 915 CCQ.

11. *Ferme CGR*, *supra* note 7, para. 70.

This text has two principal aims: first, to give an overview of the debate concerning the nature of general partnerships in Québec; second, to use this debate in order to better understand the key concepts at play and their role in Québec's civilian imagination today.

The text will unfold in four parts. I will first examine the roots of the notion and its iteration in the common and civil law. I will then turn to Québec and give a brief overview of the debate surrounding the nature of partnership since its first codification. At that point, I will examine the law in force today, and its jurisprudential interpretation, which understands partnership as a distinct and autonomous patrimony, in order to finally go back to the basics and to examine what a partnership is in Québec and what makes Québec law so distinctive.

I. *SOCIETAS*, PARTNERSHIPS & *SOCIÉTÉS*

Partnerships have been around. Roman law knew this form of organization which grew out of the need—should we say universal need—to bring resources together to achieve a certain goal. The nature of the Roman *societas* is still under scrutiny today. Some scholars think about it in terms of civil status, others in pure contractual form.¹² Both ways have repercussions for our understanding of the institution today, because both are about the capacity bestowed upon a partner in regard to the collective property, in regard to the other partners and in regard to third parties.

The contractual nature of the *societas* seems to be agreed upon for common law as well as for civil law.¹³ Here is a recent description of the Roman institution:

12. David Daube, *Societas as Consensual Contract*, CAMBRIDGE L.J. 381 (1936-1938).

13. On the shift from status to contract see HENRY MAINE, *THE ANCIENT LAW, ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* (John Murray, 1861).

Roman partnership was a contract based on the agreement of two or more parties who cooperated to reach a common aim. Partners contributed all their goods, money or labour to the company. They brought to the partnership single goods or specific activities and they sought a profit, in proportions which could vary from one partner to another. According to Gaius:

3.148: Societatem coire solemus aut totorum bonorum aut unius negotii, veluti mancipiorum emendorum aut vendendorum. Partnership usually covers either all the partners' worldly [sic] wealth or else a single business, for instance, buying and selling slaves.

The share of profits and losses among partners is “inside” the contract and it arises from the obligations among the partners themselves, regulated by the *actio pro socio*, a civil action based on *bona fides*. However the partnership was “personale,” that is among people. The personal nature of the partnership obligations are evidenced by the fact that a partner could not convey—either by a contract *inter vivos* (among living people) nor *mortis causa* (by hereditary succession)—his membership to other people without all the partners' consent. In that case a “new” partnership would arise, both substantially and legally. . . .¹⁴

The law of *societas*, as described here, organized the relations of the partners amongst themselves. The contract was *intuitu personae* and if a partner disappeared, the partnership collapsed.¹⁵ Partnership was a membership, a relationship, a way of being with one another regulated by a contract.

The common law today still understands partnership as a mere relationship: “Partnership is the relation that subsists between persons carrying on a business in common with a view to profit.”¹⁶

14. Salvo Randazzo, *The Nature of Partnership in Roman Law*, 9 *AUSTL. J. LEGAL. HIST.* 119, 120 (2005).

15. RAYMOND SALEILLES, *DE LA PERSONNALITÉ JURIDIQUE - HISTOIRE ET THÉORIES* 47 (2d ed., Rousseau 1922), available at http://droit.wester.ouisse.free.fr/pages/brocantes/saleilles_personnes/sal_pers_1_S.htm.

16. See s. 2, Partnerships Act, RSO 1990, c P.5. In Canada, statutory regulation of partnerships falls under provincial jurisdiction and the Partnership Acts in the common law provinces are essentially an adaptation of the United Kingdom's 1890 Partnership Act. Although reforms and law commissions have taken place in the United States and United Kingdom, Canada still understands partnership as an aggregate of persons.

What distinguishes *societas* from common law partnership today is mainly this idea of business. Presently, partnership is understood as a commercial enterprise and its first aim is profit. Yet, and this is where a big part of the confusion stems from, when we read, hear, and think of a partnership, we do not think of a relationship, a way of being with one another, we think of the firm, the actual business. Thus, when we talk about the partnership property, it seems as if the partnership is a distinct entity able to hold property. This is misleading. A partnership is not a distinct and autonomous entity as a corporation is. When we talk about a partnership, we must consider all the partners. They carry out the business. They own the partnership property, which is typically held in common. They are personally liable. We should not say “the partnership property” but always “the property held in partnership” or “the property appropriated to the firm,” “the business.” Partnership is a way of being, not a being. Partnership in the common law is an aggregate of partners;¹⁷ it is not a legal person.

In the civil law, in France more precisely, the distinctions between a *société* and a legal person, between a way of being and a being, have been blurred.¹⁸ The story of the French muddling is worth revealing. It pertains to the way civil law understands collective interests and the legal capacity conferred upon a group of persons. And, it has to do, yet again, with the power of metonymic language: the linguistic reification of the partnership—*société de personnes*—as an entity able to hold property and be liable on its own, has had an enormous influence on French, and thus Québec, legal minds throughout the years.

17. The debate in the common law over entity or aggregate status of partnership is not new. *See, e.g.*, Joseph H. Drake, *Partnership Entity and Tenancy in Partnership: The Struggle for Definition*, 15 MICH. L. REV. 609 (1917).

18. Not true for all civil law jurisdictions, *see* TRAVAUX DE L'ASSOCIATION HENRI CAPITANT, LES GROUPEMENTS ET LES ORGANISMES SANS PERSONNALITÉ JURIDIQUE (vol. 21, Dalloz 1974).

The distinction between a *société* and a legal person was relatively clear until the 19th century. The *société* resembled the common law partnership taking its roots, as the word itself denotes, in the *societas*. It was thus a relationship, an aggregation of persons, like the one previously mentioned. It had no legal personality, no patrimony, no legal capacity of its own. If one partner disappeared, the relationship disappeared. The individuals, together, were owners, debtors and beneficiaries. The life of their association depended upon them. It was a mere contractual agreement, a purely private matter, a way of being together for a particular purpose.

Legal persons were not so private. They required state intervention and they took shape around the roman idea of *universitas*. A *universitas*, a notion that developed slightly later in the Roman imagination, had, contrary to a *societas*, something akin to legal capacity. With *universitas*, the idea was to create an entity that could endure, an autonomous body—*corps*—independent from its actual members, who could change and even be reduced to one. Thus, a corporation, as opposed to a partnership, had legal personality, held property personally and thus was personally liable for its own debts.¹⁹ A corporation was a being.

Until the French revolution, the dichotomy in France between partnership and corporation was clear, as it was in other jurisdictions like England and Germany. General partnerships had no legal capacity and took the shape of a kind of collective ownership organized around a contractual private agreement

19. It was mainly around the idea of *universitas* that the notion of legal person—*personne morale*—started taking shape. Raymond Saleilles, the French specialist on the topic of legal personality, described *universitas* in the following way: “*L’Universitas . . . apparait comme un sujet de droit se détachant désormais de la personnalité des individus qui en sont les parties composites.*” See SALEILLES, *supra* note 15, at 78, 87, 89, 90.

between the partners.²⁰ Corporations, on the other hand, were legal persons and could only arise by royal assent.²¹

However, following the enactment of the French Civil Code, a bizarre phenomenon²² was observed in France: legal personality was granted to partnerships while other forms of aggregation, which had previously had legal personality, for example foundations, were deprived of it.²³ This shift occurred first for commercial partnerships in the Commercial Code, and was promptly followed by a decision by the *Cour de cassation* which declared that civil partnerships had legal personality and, consequently, their own patrimony.²⁴ One of the grounds for granting legal personality to partnerships is worth mentioning because it was primarily textual: according to the court, since the Code often referred to partnerships as debtors or creditors, this indicated that the legislature wanted implicitly to grant personality to partnerships. This is important, as a long debate concerning the source of legal personality had animated the law at the time. There were two schools of thought: the *fiction theory*, according to which legal personality was only granted expressly by law to entities; and the *realist theory*, according to which legal personality existed only under certain conditions, as if there was a natural right to legal personality. Here both schools of thought wanted to seize the ruling as an application of their understanding of what ought to be.

20. *Id.* at 297.

21. The state wanted to have a say or, more precisely, a hold on these fictional persons which, because of their capacity, accumulated wealth and became a threat. On the history of legal personality see Madeleine Cantin-Cumyn, *La personne morale dans le droit privé de la province de Québec*, in CONTEMPORARY LAW, DROIT CONTEMPORAIN 44-59 (Institute of Comparative Law, McGill University, Yvon Blais 1992).

22. These are the words of SALEILLES, *supra* note 15, at 300.

23. Maitland described the paradox: "Recent writers have noticed it as a paradox that the State saw no harm in the selfish people who wanted dividends, while it had an intense dread of the comparatively unselfish people who would combine with some religious, charitable, literary, scientific, artistic purpose in view." FREDERIC WILLIAM MAITLAND, STATE, TRUST AND CORPORATION 67 (Cambridge University Press 2003).

24. Cass. Req., 23 February 1891, D.P. 1891, I. 337.

Yet, it seems that what happened was more something in between: an implicit attribution of legal personality by the legislator. Partnership was understood to be a legal person simply because of the hesitant language of the Code.

Today the French law is clear: partnerships in France are, once registered, legal persons by law. The fiction theory prevailed.²⁵ French *sociétés* are beings.

II. PARTNERSHIPS IN QUÉBEC

The ambivalent nature of the Québec partnership stems from its ambiguous relationship with both the common law and French civil law as well as from its own particular history of codification and recodification.²⁶

The story is as follows: Under the Civil Code of Lower Canada, a general partnership was a contract,²⁷ but it was understood by the majority of Québec scholars²⁸ and judges²⁹ as a

25. It was only in 1978 that this was truly clarified in the French Civil Code, which states that a partnership has legal personality once it has been registered: *see* art. 1842 of the French Civil Code, amended by Law no. 78-9 of January 4, 1978.

26. For a good overview of the story of the new Québec code, *see* the well-documented, if a bit arrogant, text of Pierre Legrand, *Bureaucrats at Play: The New Québec Civil Code*, 10 BRIT. J. OF CAN. STUD. 52 (1995).

27. Article 1830 Civil Code of Lower Canada: "It is essential to the contract of partnership that it should be for the common profit of the partners, each of whom must contribute to it property, credit, skill, or industry." ("*Il est de l'essence du contrat de société qu'elle soit pour le bénéfice commun des associés et que chacun d'eux y contribue en y apportant des biens, son crédit, son habileté ou son industrie*").

28. PIERRE-BASILE MIGNAULT, 8 LE DROIT CIVIL CANADIEN 186 (Wilson & Lafleur 1909); ANTONIO PERRAULT, 2 TRAITÉ DE DROIT COMMERCIAL 433 (A. Lévesque ed., 1936); HERVÉ ROCH & RODOLPHE PARÉ, 13 TRAITÉ DE DROIT CIVIL DU QUÉBEC 339 (Wilson & Lafleur 1957); NICOLE L'HEUREUX, PRÉCIS DE DROIT COMMERCIAL DU QUÉBEC 162 (2d ed., PUL 1975); J. Smith, *La personnalité morale des groupements non constitués en corporation*, 81 R. DU N. 457, 462 (1979); ALBERT BOHÉMIER & PIERRE P. CÔTÉ, 2 DROIT COMMERCIAL GÉNÉRAL 20 (3d ed., Thémis 1986); Charlaïne Bouchard, *La réforme du droit des sociétés: l'exemple de la personnalité morale*, 34 C. DE D. 349, 374-75 (1993). *Contra*, *see* Yves Caron, *Les associations et les groupements dépourvus de personnalité juridique en droit civil et commercial québécois*, in TRAVAUX DE L'ASSOCIATION HENRI CAPITANT, *supra* note 18, at 181; J. Smith, *La personnalité morale des groupements*

legal person or an “imperfect legal person.”³⁰ It was only in 1996, two years after the coming into force of the new Civil Code of Québec, that the Québec Court of Appeal clarified the notion found in the Civil Code of Lower Canada, although it was already outdated by this time. In *Allard*, the Court, for the first time, stated clearly that a general partnership under the Civil Code of Lower Canada was not a legal person and, consequently, that it could not have a personal patrimony: “. . . *la société civile ne constitue pas une personne juridique distincte de ses membres, et . . . , même si la société peut paraître posséder certains des attributs de la personnalité juridique, elle ne jouit pas de la propriété d'un patrimoine distinct de celui de ses associés.*”³¹

What is paradoxical here is that this 1996 judgment came about after extensive debates on the nature of partnership had already been settled by the legislature in the new Civil Code of Québec. As mentioned in the introduction, the *Civil Code Revision Office* had at the time recommended giving legal personality to partnerships in Québec.³² Yet, the legislature rejected this proposal and kept the notion as a contract and a private matter regulated by the Civil Code. In the Civil Code of Québec, partnership is placed among the nominate contracts and is now defined along these lines: “Article 2186. A contract of partnership is a contract by which the

non constitués en corporation, 81 R. DU N. 457 (1978-79); J. Smith, *Le contrat de société en droit québécois*, 83 R. DU N. 123 (1979-80).

29. See, e.g., the following judgments: *Crépeau c. Boisvert* (1898), 13 C.S. 405 (C. de R.); *Wemyss c. Poulin* (1934), 57 B.R. 514; *Garneau c. Drapeau* (1939), 77 C.S. 350; *Gareau c. Laboissière*, [1949] C.S. 41; *Reindolph c. Harrison Bros. Ltd.*, [1949] R.L. 137 (C.S.); *Noël c. Petites soeurs franciscaines de Marie*, [1967] C.S. 1; *Sous-ministre du revenu du Québec c. Jobin*, [1971] C.S. 565; *Caisse populaire Pontmain c. Couture*, [1983] C.P. 149; *Somec Inc. c. P.G. du Québec* (4 juin 1987), Québec 200-09-000496-858, J.E. 87-667 (C.A.); *Lalumière c. Moquin* (24 avril 1995), Montréal 500-09-001726-934, J.E. 95-909 (C.A.); *Menuiserie Denla Inc. c. Condo Jonquière Inc.*, J.E. 96-225 (C.A.).

30. For a good example of this last idea, see G. Demers, *Considérations sur la société commerciale et sur la rédaction du contrat de société*, C.P. DU N. 75 (1971).

31. *Supra* note 4.

32. *Supra* note 5.

parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share any resulting pecuniary profits.”³³

This 1991 definition keeps the two essential characteristics established in article 1830 of the Civil Code of Lower Canada—common profit and common contribution—and simply adds the infamous *affectio societatis*. The new partnership is thus not so new.³⁴ In reality, if partnerships under the Civil Code of Lower Canada took on forms that are today forgotten—the distinction between civil and commercial partnerships or between universal and particular partnerships were not carried over—their very nature is the same: a contract between partners.

In fact, the legislature, to make sure that there was no confusion around this idea, specified this time around that only partnerships that were joint-stock companies were legal persons, implying that all the other types were evidently not: “Article 2188. Partnerships are either general partnerships, limited partnerships or undeclared partnerships. Partnerships may also be joint-stock companies, in which case they are legal persons.”³⁵

33. Article 2186 QCC: “*Le contrat de société est celui par lequel les parties conviennent, dans un esprit de collaboration, d'exercer une activité, incluant celle d'exploiter une entreprise, d'y contribuer par la mise en commun de biens, de connaissances ou d'activités et de partager entre elles les bénéfices pécuniaires qui en résultent.*”

34. See MINISTÈRE DE LA JUSTICE, 2 COMMENTAIRES DU MINISTRE DE LA JUSTICE—LE CODE CIVIL DU QUÉBEC, UN MOUVEMENT DE SOCIÉTÉ (Les Publications du Québec 1993), under art. 2186.

35. Article 2188 QCC (*La société est en nom collectif, en commandite ou en participation. Elle peut être aussi par actions; dans ce cas, elle est une personne morale*). The phrasing of the provision is worth emphasising, as it clearly states that in some cases partnerships may be corporations and thus have legal personality, and this is exactly why the distinction between the two has been blurred or is at least ambivalent in contemporary Québec civil law. According to the last sentence of this article, a partnership can—in some cases—be a legal person. Yet, the reasoning behind its calling a joint stock company a partnership may not be obvious to all. What is actually going on here is a bit strange and is mainly rooted in the French text and in successive civil law and common law translations over the years. As previously noted, in the French language and in civil law of the French tradition, the word “société” has multiple legal meanings

This was not an unmotivated provision. The commentaries of the Minister of Justice at the time are clear:

. . . having failed to establish the subtle and difficult distinction between “full-fledged” and “unfledged” juridical personalities, between complete and incomplete legal personality, the previous law was instead maintained. Furthermore, the assignment of juridical personality to partnerships would not provide any real benefits. Instead, it would risk creating a disparity in treatment for Québec partnerships when compared to partnerships founded elsewhere in North America, which do not possess juridical personality. This is in addition to the potential tax

and does not only mean “contract of partnership.” A *société* can have legal personality. So, in France, writing “une société peut être une personne morale” would not be wrong. In common law Canada, even if the distinction between partnership and corporation is still well established, the word *société* has been used in a very strange manner. For example, in the federal Business Corporation Act, the term “corporation” was translated by the French term “compagnie,” rather than by the French term “corporation,” and then, for reasons that seem to be purely linguistic, the term “sociétés commerciales” (to resemble the language of Québec law under the Civil Code of Lower Canada [hereinafter CCLC]). Yet, if we look at article 1864 CCLC, we can see that “société commerciale,” in English “commercial partnership,” had multiple meanings ranging from general partnership to “société par actions” (joint-stock companies). Under the CCLC, the word *société* thus embraced both entities encompassed by the terms “corporation” and “partnership,” as if they both meant the same thing in the eyes of the law. Translating “corporations” in Canada with “société commerciales” might have felt more French, but it was legally a bit amphigoric, if not perverse! A joint-stock company was a commercial partnership but not all commercial partnerships were corporations! The use of the same word in French in Québec and at the federal level introduced difficulty with respect to the distinctions between the nature of the two institutions. Today, in both Québec and at the federal level, the Business Corporations Acts are: Loi canadienne sur les sociétés par actions L.R. (1985), ch. C-44, art. 1; 1994, ch. 24, art. 1(F) and Loi sur les sociétés par action S.Q., ch. S-31.1. Even if we are clearly not talking in these cases about a *société de personnes* (a partnership), the use of the word *société* is misleading. Someone somewhere forgot the origins of the word and idea (*societas*) and incorporated (no pun intended) it bizarrely into the law. With this looseness in the use of language, it is no wonder that partnerships in Québec can be understood as having legal personality of some kind: lost in this translation is the distinction between partnerships and corporations, between a mere contractual agreement and legal personality. On the difficulties encountered with the word corporation and the story of its multiple translations (in French) in Canada, see Antoni Dandonneau, *La francisation à l’aveuglette du droit des ‘corporations,’* 13 R.J.T. 89 (1978), and André Lavérière, *Le droit des companies*, 49 R. DU B. 851 (1989).

consequences of such an assignment.³⁶

It was decided to keep partnership as a mere contractual agreement for two main reasons: first as a matter of continuity with the old law; second, partnership elsewhere in North America did not have legal personality.

Reading these provisions and commentary, the issue seems settled: a general partnership in Québec today is a mere contract and its regime can be found, like other nominate contracts, in Book V of the Code. Yet, instead of settling the controversy, the *Allard* judgment³⁷ only sparked a new discussion: since that judgment was argued under the Civil Code of Lower Canada, it did not resolve question under the Civil Code of Québec. A new debate followed, taking the text of the new Code, and pushing the question of the nature of partnerships a step further.

Between 1996 and today, the number of articles that have been written on this matter has been fascinating, each of them taking a different stance. In fact, in Québec scholarship, it seems that almost every issue concerning the nature of partnerships and the personal liability of the partners has been argued: some argued for legal personality,³⁸ others for mere *indivision*,³⁹ some for a new

36. (Translated by the author) COMMENTAIRE DU MINISTRE, *supra* note 34, under art. 2188:

... à défaut d'établir une difficile et subtile distinction entre la grande et la petite personnalité juridique, entre la personnalité morale complète et incomplète, a-t-on préféré maintenir ici le droit antérieur. D'ailleurs, l'attribution de la personnalité juridique aux sociétés ne comportait pas d'avantages réels particuliers, mais risquait, par contre, de créer une disparité de traitement par rapport aux sociétés constituées ailleurs en Amérique du Nord, qui ne sont pas dotées de la personnalité juridique, sans compter les incidences fiscales possibles d'une telle attribution.

37. *Supra* note 4.

38. Ruth Goldwater, *La société civile est-elle une personne morale?*, 34 THÉMIS 91 (1960), and also Charlaïne Bouchard, *La réforme du droit des sociétés : l'exemple de la personnalité morale*, 34 C. DE D., at. 349-394 (1993).

39. Charlaïne Bouchard & Lucie Laflamme, *La dérive de l'indivision vers la société: quand l'indivision se conjugue avec la société*, 30 R.D.U.S. 317, 333 (2000).

modality of ownership,⁴⁰ others for the long-forgotten collective ownership.⁴¹ The idea of distinct patrimony occupies a big share of the landscape,⁴² the new Code giving way to the new idea of patrimony by appropriation.⁴³ What is fascinating is that the judges seemed to be as indecisive as the scholars: some affirmed the obvious lack of legal personality of partnerships under the Civil Code of Québec,⁴⁴ while others hung on to the notion of *indivision*, which was at the heart of the issue in Allard.⁴⁵ Other judges clearly preferred the dissenting opinion in Allard⁴⁶ and reaffirmed the legal personality of some partnerships.⁴⁷ Others, feeling that something else was occurring, supported the idea that, in fact, a distinct patrimony had been created.⁴⁸ In *Laval (City of) v. Polyclinique médicale de Fabreville*, a 2007 case, the bench, which

40. Donald A. Riendeau, *La « société » en droit québécois*, R. DU B. 127 (2003).

41. Générosa Bras Miranda, *La propriété collective. Est-ce grave, docteur? – Réflexions à partir d'une relecture de l'arrêt Allard*, 63 R. DU B. 29 (2003).

42. Michael Wilhelmson, *The Nature of the Québec Partnership: Moral Person, Organized Indivision or Autonomous Patrimony?*, R.D. MCGILL 995 (1992).

43. Louise-Hélène Richard, *L'autonomie patrimoniale de la société : le patrimoine d'affectation, une avenue possible?*, in SERVICE DE LA FORMATION PERMANENTE DU BARREAU DU QUÉBEC, CONGRÈS ANNUEL DU BARREAU DU QUÉBEC 149 (Éditions Yvon Blais 2002).

44. *Lévesque c. Mutuelle-vie des fonctionnaires du Québec*, [1996] R.J.Q. 1701; *Caisse populaire Laurier c. 2959-6673 Québec Inc.*, C.S. Québec, no 200-05-004938-960, 28 novembre 1996; *Gingras c. Prud'homme*, [1997] R.J.Q. 664; *Charron c. Drolet*, J.E. 2005-916 (C.A.).

45. *Gingras c. Prud'homme*, [1997] R.J.Q. 664, 675; 9137-1096 *Québec Inc. c. Ville de Montréal*, C.Q. Montreal, 2006 Q.C.C.Q. 5136.

46. See Justice Biron's dissent in Allard, *supra* note 4:

Je ne puis me convaincre que dans les articles du Code civil du Bas-Canada où le législateur parle des biens de la société, des choses appartenant à la société, des immeubles de la société, 'the property of the partnership,' il ne donne pas aux mots et aux expressions leur sens habituel. Je suis donc d'avis qu'une société peut être propriétaire de biens.

47. 2964-7922 *Québec Inc. (Syndic de)*, J.E. 99-15 (C.S.); *Société en nom collectif Vausko c. Ameublement et décoration Côté-Sud (St-Denis) Inc.*, J.E. 99-2330 (C.S.); *Groupe Kotler et al c. L'inspecteur général des institutions financières*, J.E. 2002-1429 (C.Q.); *Dufour c. Savard*, [1995] R.L. 327 (C.Q.).

48. *Servomation International and Company Limited (Syndic de)*, J.E. 98-203 (C.S.) (société en commandite); voir aussi *Corporation des maîtres électriciens du Québec c. Jodoin Électrique Inc.* J.E. 2000-548 (C.S.); *Duval-Hesler c. Lalande*, J.E. 97-8 (C.Q.).

included Justice Brossard (who had written for the majority in *Allard*) went as far as to say: “A limited partnership, like any other partnership, has its own patrimony which, as long as it is sufficient, is distinct from the patrimony of the persons who founded it. Therefore, the limited partnership is its own entity, without being a legal person within the meaning of the Act.”⁴⁹

This is the approach that seems to have been taken in the latest judgment of interest, *Ferme CGR*.⁵⁰

III. THE JUDGMENT

The facts are quite simple. In July 2009, the Bank of Montreal gave notice to *Ferme CGR* that it intended to enforce its securities under the *Bankruptcy and Insolvency Act*.⁵¹ The trustee in bankruptcy presented the partnership’s documents but the Official Receiver refused to file the assignment on the ground that a partnership may not assign its property in bankruptcy if its partners do not do so as well. According to him, since partnerships were not granted legal personality under the Civil Code of Québec, all partners, as owners of the partnership’s property, were required to assign their own property for the assignment to take place. He grounded his position on the legal nature of partnerships in Québec as well as on common law commentary and case law.⁵² One must keep in mind that bankruptcy is a federal matter. In this

49. (Translated by the author) *Laval (Ville de) c. Polyclinique médicale Fabreville, sec.*, 2007 Q.C.C.A. 426 (CanLII) at para. 24: “*Une société en commandite, comme toute autre société, a un patrimoine propre qui, tant qu’il est suffisant, est distinct de celui des personnes dont elle est constituée; elle jouit alors d’une entité propre, sans pour autant être une personne morale au sens de la Loi.*”

50. *Supra* note 7.

51. Bankruptcy and Insolvency Act R.S.C. (1985), c. B-3 [hereinafter BIA].

52. *E.g.*: “An assignment executed by all the members of a partnership carries with it all the assets of the partnership as well as the separate assets of the partners.” *Taylor v. Leveys* (1922), 2 C.B.R. 390 (Ont. S.C.); *Cohen v. Mahlin*, 8 C.B.R. 23, [1927] 1 W.W.R. 162, 22 Alta. L.R. 487, [1927] 1 D.L.R. 577 (C.A.).” LLOYD W, HOULDEN, GEOFFREY B. MORAWETZ, & JANIS P. SARRA, THE 2010 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT 199 (Thomson Carswell 2010), D§51(5) and D§72(2)(b).

perspective, the officials administering the bankruptcy system naturally favour an approach that aligns the approach in Québec with that taken in the common law provinces.

The case appeared initially before a Superior Court judge. In a very brief judgment, the judge acknowledged the problem, first noting that the BIA did assimilate a general partnership to a person in its definitional provisions, then observing that the case law supported arguments on both sides. At that point, he concluded that the remedy was in the creditors' hands according to the BIA and the Civil Code of Québec, and thus that the Official Receiver had to respect their choice to pursue only the partnership.

The case was subsequently heard at the Québec Court of Appeal. There, the Superintendent of Bankruptcy took over the position first argued by his Official Receiver: a general partnership does not have legal personality or, he added, a distinct patrimony. Consequently, it cannot assign its property without assigning that of its partners, to pursue the partnership is to pursue its partners. The solvency test set out in the BIA is a collective one. Again, the Superintendent's position was largely based on common law commentary and case law as well as on the very nature of partnership under the Civil Code of Québec. The trustee in bankruptcy, for his part, dismissed the case law submitted by the Superintendent as long repealed and, more importantly for us, as inconsistent with the legal attributes given to general partnership in the Civil Code of Québec. He argued that the Superintendent is confusing "the notion of legal personality with the objectives of the BIA, that is, with the orderly liquidation of a patrimony for the benefit of the creditors."⁵³ What was at stake, according to him,

53. *Ferme CGR, supra* note 7, para. 15. (The translation of the judgment used in this article is based on an unofficial English translation prepared by the Société québécoise d'information juridique (SOQUIJ) which is an entity of the Department of Justice of Québec. It is available at <http://soquij.qc.ca/fr/services-aux-citoyens/english-translation>).

was the liquidation of an “organized patrimony”,⁵⁴ regardless of whether or not it possessed legal personality.

Thus, the debate at the level of the Court of Appeal shifted slightly: the idea of the liquidation of an “organized patrimony”, that is the liquidation of a personal patrimony or some other kind of patrimony, was introduced, leaving aside the idea of ownership and liability.

I will not perform an in-depth review of all the arguments analyzed by the Court, as I want to focus on on the “patrimony” issue.” To state the opinion briefly, Justice Rochon, writing for the Court, endorsed the trustee’s point of view: the case law and commentaries given by the Superintendent of Bankruptcy relied on old statutes and ignored recent legislation, the most important one for the case at bar being the Civil Code of Québec.⁵⁵ According to Justice Rochon, the legal nature of a general partnership has changed with the coming into force of the new Code.

Justice Rochon had no intention of reopening the Court’s holding in *Allard* under the old Code. He had no intention of dismissing the fact that the absence of legal personality has been codified in the Civil Code of Québec at article 2188. But, according to him, the stakes have now shifted: with the inclusion of the patrimony by appropriation, or what he calls the objective theory of patrimony,⁵⁶ in the Civil Code, the paradigm has changed: “While providing that every person has a patrimony, the CCQ acknowledges that a patrimony may be appropriated to a purpose (articles 2 and 915 CCQ).”⁵⁷

Hence, a partnership would be, in fact, a separate entity with a separate patrimony, albeit bereft of legal personality. According to Justice Rochon, because the language of article 2199 of the Civil Code acknowledges that the contribution of the partners to the

54. *Id.* para. 15.

55. *Id.* para. 41.

56. *Id.* para. 66.

57. *Id.* para. 66 (footnotes omitted).

partnership occurs through a property transfer from the partners to the partnership, there cannot be any doubt that partnerships have their own patrimonies: “It would be impossible,” he underlines, “not to acknowledge the clearly expressed legislative will to create, through that property transfer, a patrimony that is appropriated exclusively to the partnership.”⁵⁸ Recall the rhetorical argument given by the *Cour de cassation* when it turned the *société* into a legal person. Though not explicitly, the legislature must have wanted to implicitly give a distinct patrimony to partnerships.

But Justice Rochon went further. Since the patrimony created by the contribution will only be used in the interest of the partnership (article 2208 CCQ) and managed under its rules (article 2212 CCQ), he seems to see an analogy with trusts, although this is never explicitly stated.⁵⁹ This implicit analogy leads him to concluding something that, to orthodox civilians, seems almost impossible: “there does not seem to be anything to prevent a general partnership, which does not possess a legal personality, from taking on obligations or answering to them regarding its property.”⁶⁰ According to Justice Rochon, a partnership is not only a distinct entity; it can also be a debtor, although it does not have legal personality.

General partnerships are thus, according to him, rights-and-duties-bearing units,⁶¹ which have no legal personality. The question of the holder, or holders in the case of a partnership, of the rights and duties does not seem to perturb the judge. And he has an explanation: the new paradigm of the Code, this “objective theory of patrimony” newly inserted. The idea of a patrimony without a holder seems to be an integral part of his imagination.

58. (Translated by the author). *Id.* para. 68.

59. Rochon, J.A. cites Madeleine Cantin Cumyn, *La fiducie, un nouveau sujet de droit?*, in MÉLANGES ERNEST CAPARROS 129-143 (J. Beaulne ed., Wilson & Lafleur 2002). *Ferme CGR*, *supra* note 7, para. 70, n.40.

60. *Id.* (footnotes omitted).

61. To use an expression taken from Maitland in STATE, TRUST AND CORPORATION, *supra* note 23, at 68.

In fact, to anchor his reasoning, he uses the exact language used by the legislature when discussing patrimonies by appropriation: “The partnership's property thus forms an autonomous patrimony made up of each partner's contribution that is distinct from the patrimony of its partners.”⁶² A patrimony that is distinct and autonomous; those are the exact words that we find in article 1261 of the Civil Code of Québec concerning the nature of the trust, the archetype of the patrimony by appropriation in the Code. Yet again, the analogy with trusts is never explicitly made.

Justice Rochon, before concluding his reasoning on the autonomous nature of partnership, underlined that the legislature gave partnership in the new code the power to sue and be sued in a civil action under its own name (article 2225 CCQ), which expresses yet again its autonomous nature. He goes even further: to ground his conclusion, he reiterates that his conclusion finds its basis in the language of the Code itself: article 2221, which sets out the way property should be discussed by the creditors, blatantly uses the expression “the property of the partnership”—“*les biens de la société*.” The inference is therefore clear: the legislature wanted partnerships to have a patrimony of their own without having legal personality.

Justice Rochon concludes: All these provisions acknowledge that a general partnership has an autonomous, distinct and organized patrimony independent from its partners. Consequently, it can be liquidated on its own according to the BIA. He dismissed the appeal.

IV. *LE NON-DIT*: THE BASIC JURAL CONCEPTS AT PLAY

The power of this judgment lies in what it has left unsaid. The issue was one of bankruptcy, yet the very nature of a general partnership was at play and indeed the judge set aside a complete part of his judgment to discuss the problem, analyzing the legal

62. *Ferme CGR*, *supra* note 7, para. 68.

nature of partnership and giving it a new ground. But, by doing so, Justice Rochon performed a magnificent dance: never did he explicitly say what it means for a partnership to be a distinct and autonomous patrimony and thus be able to have rights and duties, even if it does not possess legal personality. Never did he truly invoke trusts and patrimonies by appropriation, even if we understand that that is where he finds his justification. He did mention the new paradigm, the idea that according to articles 2 and 915 of the Civil Code of Québec, the Code now recognizes an objective theory of patrimony; but what does that mean? He did mention, albeit in a footnote, a text about trusts—*La fiducie, nouveau sujet de droit*, as an analogy (those are his words) to understand how an autonomous patrimony could have rights and duties.⁶³ But where does that lead us? Are analogies sufficient to create a new kind of debtor? Are analogies sufficient to set aside how the liability of the partners and the ownership structure of partnership have been until now understood? To come back to the questions posed in the introduction, what really is a distinct and autonomous patrimony? Is it, in the case at bar, the same thing as a patrimony by appropriation? Are partnerships trusts? What is a partnership in Québec law? To answer these questions, not only must we look at the basic notions at play, but also the actual regimes set out by the legislature. Only after understanding what it might mean to call a partnership a distinct and autonomous patrimony can we understand the consequences of this nomenclature and assess its value.

As mentioned before, the only place where we find the words “distinct and autonomous patrimony” in the Code is in article 1260 CCQ concerning the trust. The story of the Québec trust is quite particular and has been the object of much scholarly work, its own juridical nature still being questioned.⁶⁴ In reality, trusts and

63. *Supra* note 59.

64. See Sylvio Normand & Jacques Gosselin, *La fiducie du Code civil : un sujet d'affrontement dans la communauté juridique québécoise*, 31 C. DE D. 681.

partnerships share many similarities with respect to their history, their relationship with the common law and their juridical attributes. The question is: do they share the same juridical mechanisms in the Civil Code of Québec today?

Fundamentally a common law institution, the trust has had a difficult relationship with the civil law. If we can find it today in many civilian jurisdictions, it is not without distorting both the law and the institution.⁶⁵ In Québec, the close relationship with the common law called for the trust's insertion quite early on, and it has been part of the civil code since 1889.⁶⁶ Yet under the Civil Code of Lower Canada, the law of trusts was not without pitfalls—the ownership structure of the trust was understood to be *sui generis*, as the trustee had ownership for someone else's benefit. With the recodification came a strong desire for modifications and this is where things become interesting: the committee in charge of studying how to reform the trust proposed giving it legal personality. According to some, this was the only way the trust could find its way into the civil law without disturbing the prevalent order of things, namely the dominant understanding of person, property and obligation, or the dominant understanding of subjective rights.⁶⁷ Yet, like partnership, this way of understanding trust was too much in opposition to its common law counterpart: calling a trust a corporation simply did not get the approval of the practice. Thus, at its final stage, a look toward the modern

(1990); see also Yaëll Emerich, *La fiducie civiliste : modalité ou intermédiaire de la propriété?*, in *THE WORLDS OF TRUST /LA FIDUCIE DANS TOUS SES ÉTATS* (Lionel Smith dir., Cambridge Univ. Press, forthcoming 2013).

65. For a good account see *RE-IMAGINING THE TRUST. TRUST IN THE CIVIL LAW* (Lionel Smith ed., Cambridge Univ. Press 2012).

66. On the origins of trust in Québec, see Madeleine Cantin Cumyn, *L'origine de la fiducie québécoise*, in *MÉLANGES OFFERTS PAR SES COLLÈGUES DE MCGILL À PAUL-ANDRÉ CRÉPEAU /MÉLANGES PRESENTED BY MCGILL COLLEAGUES TO PAUL-ANDRÉ CRÉPEAU 199* (Éditions Yvon Blais 1997).

67. See Yves Caron, *The Trust in Québec*, 25 R. D. MCGILL 421 (1979-1980).

understanding of patrimony prevailed and an all-new institution was created: trust as a patrimony by appropriation.

But what is a patrimony by appropriation? No definition is given in the code. Only a few clues are provided: “Article 1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, *autonomous and distinct* from that of the settlor, trustee or beneficiary and in which none of them has any real right (emphasis added).”⁶⁸ An autonomous and distinct patrimony; the words ring a bell. Yet here, the autonomy is inscribed in the law and circumscribed: in a Québec trust, no one owns the property held in trust, none of the people implicated in its *raison d’être*—the settlor, the trustee or the beneficiary—have any real, or for that matter, personal rights in the trust patrimony. The nature of the belonging and the longing lies elsewhere. The trust in Québec is neither a being nor a way of being with one another; it is a new mode of being. Patrimony by appropriation is a new modality of patrimony.

The notion of patrimony is at the very heart of the problem. The term, obviously part of the courts’ and legal actors’ imagination, and today part of the Civil Code of Québec,⁶⁹ does not, however, know any legal definition and no general consensus has been reached concerning its juridical nature.⁷⁰ In fact, according to the Minister’s comments on the Civil Code, the theoretical questions emanating from the notion were simply too grand to even try to express them in a mere definition.⁷¹

68. Article 1261 QCC (*Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d’affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d’entre eux n’a de droit réel*).

69. We now find the notion 67 times in the CCQ. More importantly, it is introduced at art. 2 which states that every person has a patrimony.

70. See Christopher B. Gray, *Patrimony*, 22 C. DE D. 81 (1981).

71. According to the minister:

It did not seem useful to define the notion of patrimony; in previous law, the absence of such a definition did not cause difficulties. Furthermore, the notion of patrimony constitutes a complex reality, which is difficult to express in a simple definition that would need to

The juridical notion of patrimony, which knows no equivalent in the common law, is, contrary to popular belief, a very recent doctrinal creation elaborated in the 19th century in Germany and France. Understood as a legal universality, that is an aggregate of property and debts understood as forming a whole,⁷² it knows two main schools of thoughts. The first one, called the classical or subjective theory was elaborated by Charles Aubry and Charles-Frédéric Rau, in their *Cours de droit civil français d'après la méthode de Zachariæ*.⁷³ Inspired by German doctrinal work, the authors developed the theory in order to explain certain matters in the French Civil Code at the time, mainly issues in succession and the common pledge of creditors. For Aubry and Rau, patrimony is intimately bound to the juridical notion of the person. It is a legal universality charged with the performance of a person's obligations. It is both container (the juridical capacity of a person to hold legal rights) and content (its rights and obligations, present and future). Essentially the term patrimony in the classical theory is used to describe the organization of subjective rights (personal, real and intellectual) and personal liability. This subjective organization has three fundamental outcomes: 1) every person, physical or legal, has a patrimony; 2) every person has only one indivisible patrimony; and 3) a patrimony cannot exist without a person, physical or legal, as its holder.

respond to all kinds of theoretical questions. (“*Il n'a pas semblé utile de définir la notion de patrimoine; l'absence d'une telle définition dans le droit antérieur n'a pas soulevé de difficultés, et, par ailleurs, cette notion constitue une réalité complexe, difficile à exprimer dans une définition simple qui répondrait à toutes les questions théoriques.*”)
(Translated by the author).

In COMMENTAIRES DU MINISTRE, *supra* note 34, under art. 2.

72. See F. ALLARD ET AL., PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS—PROPERTY (Éditions Yvon Blais 2012), under “legal universality.”

73. For an English translation and commentary, see N. Kasirer, *Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimoine*, 38 R.G.D. 453, 459 (2008).

In the civilian imagination, this understanding of patrimony has had an unexpected fate and some believe that it is impossible to think in a civilian manner without this classical notion,⁷⁴ the subjective theory of patrimony embodying the trinitarian architecture of civil codes: Persons-Property-Obligations.⁷⁵

The second school of thought, again understanding patrimony as a legal universality, is the objective or, what has been called in opposition to the classical theory, the modern theory of patrimony. Emanating from Germany at the same time as the classical theory while fundamental questions were being debated around the ideas of moral personality, and of giving a fictional person the same rights as a real person, this theory stems from the proposal that it is possible to imagine patrimonies, which are legal universalities, without personality or at least as not having personality as its main structuring feature.⁷⁶ According to this theory, that which assures the coherence of an aggregate of rights and duties is not a person but the purpose for which it was created.⁷⁷ The purpose, not the person, delimits the container.

There are two different ways of envisioning the creation and the nature of purpose patrimonies: division and appropriation. The distinction between the two modes of delimitating rights and duties

74. This doctrinal creation has been understood to be one of the most important theories of the civilian imagination. See on this matter F. Zenati, *Mise en perspective et perspectives de la théorie du patrimoine*, R.T.D.CIV. 667 (2003); F. Cohet-Cordey, *Valeur explicative de la théorie du patrimoine en droit positif français*, 95 R.T.D.CIV. 819 (1996); and R. Sève, *Détermination philosophique d'une théorie juridique : La théorie du patrimoine d'Aubry et Rau*, 24 ARCHIVES DE PHILOSOPHIE DU DROIT 247 (1979).

75. Eric Reiter, *Rethinking Civil-Law Taxonomy: Persons, Things and the Problem of Domat's Monster*, 1 J. CIV. L. STUD. 189 (2008).

76. For a good account of the theory, see L. MICHOU, 1 LA THÉORIE DE LA PERSONNALITÉ MORALE ET SON APPLICATION EN DROIT FRANÇAIS 38 et seq. (2d ed., L.G.D.J. 1924). See also F. Bellivier, *Brinz et la réception de sa théorie du patrimoine en France*, in OLIVIER BEAUD & PATRICK WACHSMANN (DIR.), LA SCIENCE JURIDIQUE FRANÇAISE ET LA SCIENCE JURIDIQUE ALLEMANDE DE 1870 À 1918, at 165 (Presses Universitaires de Strasbourg 1997).

77. Pierre Charbonneau, *Les patrimoines d'affectation : vers un nouveau paradigme en droit québécois du patrimoine*, 85 R. DU N. 491, 509 (1982-1983). See also DAVID HIEZ, *ÉTUDE CRITIQUE DE LA NOTION DE PATRIMOINE EN DROIT PRIVÉ ACTUEL* 22 et seq. (L.G.D.J. 2003).

is very important and frequently neglected, division and appropriation being too often understood as interchangeable, both being, to the eyes of some, simply purpose patrimonies emanating from the objective theory.⁷⁸ The distinction is, however, of high importance, and elaborating the differences between division and appropriation to a purpose might help us answer many questions left unresolved in the judgment and the Code.

Division of patrimony is a mode of organization that we find in many sites in the civil law: for example, property exempt from seizure,⁷⁹ property under estate administration,⁸⁰ substitutions,⁸¹ and the family patrimony⁸² are all types of divisions. When a patrimony is divided, the holder's legal rights are subject to a different regime of use, enjoyment and distribution. According to this understanding of purpose patrimonies, a person can hold many patrimonies, or what have been called small patrimonies or special patrimonies, and each patrimony is the common pledge of its own creditors.⁸³ Even if it questions the indivisible quality of patrimonies championed by Aubry and Rau in the classical theory—a person can have many patrimonies—this way of understanding purpose patrimonies has long been accepted in positive law as it does not question the vital link that exists between subjective rights and persons. With division, a person is still always the holder of rights and the debtor of obligations divided. The rights divided are only submitted to a different regime. It is simply as if the person held many containers, each having their own purpose and creditors within a big container.

78. This text of the French author Pierre Berlioz is a good example of the confusion: *L'affectation au cœur du patrimoine*, R.T.D. CIV. 635 (2011).

79. See Roderick A. Macdonald, *Reconceiving the Symbols of Property: Universalities, Interests and other Heresies*, 39 R.D. MCGILL 761, 778 et seq. (1994).

80. Article 625 CCQ and Art. 780 CCQ.

81. Article 1223 CCQ.

82. Article 414 CCQ et seq.

83. In Québec for instance, art. 2645 CCQ, which codifies the common pledge of creditors, clearly states that the performance of an obligation will not affect property that is the object of a division.

What is more, the line between the special patrimony and the personal patrimony is often permeable, the person holding the different sets of rights being ultimately responsible for all the debts he created.⁸⁴

At the other extreme of the objective theory, we find patrimonies without holders, what the Germans call the *Zweckvermögen*, literally “purpose patrimony,” what the Civil Code of Québec has called patrimonies by appropriation.⁸⁵ Here the patrimony is completely autonomous and distinct from one emanating from personality. The rights, appropriated to a purpose, do not have any titularies.⁸⁶ This way of understanding patrimonies is quite controversial,⁸⁷ as it breaks from the classical theory of patrimony and more fundamentally the classical understanding of subjective rights. Rights in this instance do not have titularies but mere administrators whose prerogatives have been stripped to mere powers⁸⁸ and who are never personally liable for the debts of the patrimony. With this way of understanding purpose patrimonies, “*un bien peut non seulement appartenir à quelqu'un, mais aussi appartenir à quelque chose, à un but.*”⁸⁹ Property cannot only belong to someone, it can belong to something. The patrimony continues to be a legal universality where property and debt respond to each other; yet, no one has title to it. Patrimonies by appropriation are rights-and-duties-bearing units with no legal personality, no titularies. Both the nature of the container and the content here have shifted.

84. See, e.g., art. 1233 CCQ concerning substitution.

85. Article 1256 et seq.

86. For a defense of the possibility, see K. H. Neumayer, *Les droits sans sujet*, 12 REVUE INTERNATIONALE DE DROIT COMPARÉ 342 (1960).

87. Some defended it. See LÉON DUGUIT, *L'ÉTAT, LE DROIT OBJECTIF ET LA LOI POSITIVE* (1901, reedited by Dalloz in 2003); and G. PLASTARA, *LA NOTION JURIDIQUE DE PATRIMOINE* (A. Rousseau 1903).

88. On the notion of powers, see Madeleine Cantin Cumyn, *Le pouvoir juridique*, 52 R. D. MCGILL 215 (2007).

89. LÉON MICHOU, 1 *LA THÉORIE DE LA PERSONNALITÉ MORALE* 39 (2d ed., L.G.D.J. 1924).

If divisions can be found in most civilian jurisdictions as exceptions to the general rule calling for indivisibility, patrimonies without holders do not share the same fate. The implications of this understanding of purpose patrimonies are far-reaching, and most civilian jurisdictions do not even fathom its possibility. In fact, to this day, only the province of Québec and the Czech Republic⁹⁰ have included this vision of purpose patrimonies in their law. And, in the Civil Code of Québec, until the judgment at hand, it was thought that there was only one type of patrimony by appropriation, and that was the trust.⁹¹

To fully understand what is meant in the judgment by autonomous and distinct patrimony, we must turn to the title dedicated to trusts in the book on property, which the legislature paradoxically called “Certain patrimonies by appropriation.” Only after understanding which elements are fundamental to the constitution of a trust and how it is that property without titularies can still be the object of rights when in trust despite the fact that no one holds any rights in it, can we assess Justice Rochon’s new grounding for partnerships in Québec.

A trust is the result of multiple explicit juridical operations: first the appropriation of property to a purpose; second the transfer of that property from the patrimony of the settlor to a new patrimony that he creates for that purpose; third, the acceptance by a trustee of his administrative mission.⁹² The acceptance by the trustee of his mission is very important as it is his acceptance that divests the settlor from his property and secures the beneficiaries’ interest. The trust always has to have an independent and

90. The Czech Civil Code (Act 89/2012 Coll.), which will come into force on January 1st, 2014, introduces a new institution into Czech private law—the “trust fund” (in Czech, *svěřenský fond*). See sections 1448 to 1474 of the Czech Code.

91. Under the heading of “Certain patrimonies by appropriation” we find the trust and the foundation. However, foundation can either take the form of a legal person or a trust (article 1257 CCQ). As such, trust is the only actual patrimony by appropriation under this title in the Civil Code of Québec.

92. We find the constitutive element of trust set out in articles 1260, 1264 and 1265 CCQ.

disinterested third party as trustee holding the property.⁹³ Otherwise, the property is literally paralyzed.

In reality, the trustee's role in the legal scheme set up by the legislature is fundamental. It is because of him that the property in trust is not understood to be without owner and thus remains the object of rights throughout the duration of the trust.⁹⁴ According to article 1278 CCQ, the trustee has control and exclusive administration of the trust patrimony. Although holding the trust property, the trustee does not have any rights in it. He is vested with mere powers. Powers, contrary to subjective rights, can be understood as legal prerogatives exercised in a disinterested manner. It is through his disinterested powers that he exercises the rights pertaining to the trust patrimony. He is, according to the code, an administrator of the property of others charged with full administration, which means the regime and legal obligations set forth by the legislature in the title called "administration of the property of others" apply to him.⁹⁵ However, contrary to other administrators of the property of others,⁹⁶ the trustee is not an administrator of the property of another person. He has no "real" debtor, as no one owns the trust property and the trust is not a legal person. He is not an agent or a mandatary acting on behalf of or representing someone else. He has a function that gives him powers and imposes upon him some legal duties that he has to fulfill, namely to pursue the appropriation given to the trust property. Since no one is his creditor, measures of supervision and control over his administrative acts are set by the legislature: the settlor, his heirs, the beneficiaries or any other interested party can take action against the trustee to compel him to act according to the trust deed and the law.⁹⁷ But these supervisors are acting as

93. Article 1275 CCQ.

94. Article 911 CCQ.

95. See art. 1299 and seq. CCQ.

96. Think about tutors, curators, or mandataries.

97. Art 1287 et seq. and the title on "Administration of property of others," art. 1299 et seq.

outsiders, albeit interested outsiders, looking over the acts of the disinterested trustee. The trustee has legal obligations towards them imposed by the regime but no personal obligations. His personal patrimony is only engaged if he commits a fault that affects them personally in his administration.

The trustee thus holds two very distinct patrimonies, one personal and the other appropriated to a purpose, which carries on like a personal patrimony that has no owner, only a disinterested administrator. The trustee accordingly has two capacities in law, a personal capacity which gives him subjective rights and personal obligations; and an administrative capacity as a trustee which gives him powers and duties and only commits the purpose patrimony.

As Justice Rochon duly pointed out, this duplicity of holding rights is now inscribed in the law in articles 2 and 915 CCQ: in the Civil Code of Québec patrimonies can be appropriated to a purpose and rights can be either subjective rights, i.e. a legal prerogative that the holder exercises in his own interest, or a legal prerogative without a titular which is exercised by a disinterested administrator entrusted for that purpose.⁹⁸ The legislator did insert the objective theory of patrimony in the code.

V. BACK TO PARTNERSHIP

Now that we have a better idea of what is meant in the Civil Code of Québec by distinct and autonomous patrimony, a more profound analysis of the contract of partnership becomes possible. Are partnerships really distinct and autonomous patrimonies? Or to ask the question differently and in light of what was just explained: is it possible that the rights in a partnership are legal prerogatives without titularies exercised by disinterested administrators? Can we call partners of a general partnership disinterested administrators in the regime currently set forth in the Civil Code of

98. F. ALLARD ET AL., PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS - PROPERTY, *supra* note 72, under “right.”

Québec? Can combining property, knowledge or activities and sharing any resulting pecuniary profits be enough to constitute a patrimony by appropriation?

Well, the answer to all these questions is simply no. A partnership is not and cannot be a patrimony by appropriation. And the reason is simple: the partners, acting for the partnership, are interested actors and keep subjective rights in the property held in partnership from its constitution to its dissolution. If a patrimony is created, it cannot be one that is organized around the idea of rights without titularies administered by a disinterested third party. As such, it cannot be a distinct and autonomous patrimony. Yet this does not mean that partnership cannot be another kind of purpose patrimony.

A partnership in the Civil Code of Québec should be understood as a simple aggregate of partners. It is a contract; a set of obligations between the partners themselves and between the partners and third parties. To create the partnership, their collaboration, the partners combine some of their property creating a specific aggregate of property that is subject to a different regime of use, enjoyment and distribution. Each partner continues to be the owner of the property he contributed to the collaborative enterprise, yet this property is now charged with a destination and a specific purpose: the partnership.⁹⁹ As such, in each partner's personal patrimony, there is a special patrimony—a divided patrimony, which is devoted to the partnership. All these special patrimonies, combined, form the partnership's patrimony. Partnership is thus a universality of property appropriated to a purpose, but which has several owners, several titularies.¹⁰⁰

To make it work, each partner is understood to be the mandatary of the other when it comes to any act performed in the

99. Article 2208 CCQ.

100. Never is the partnership without titulary, though it can now be in the hand of only one partner (does that even make linguistic sense?!) for a specific amount of time. *See* art. 2332 CCQ.

course of the partnership's business.¹⁰¹ Here, there is no distinct supervisory scheme established by the legislature, because the supervision of each partner's actions is simply made by the other partners, the mandators or principals, whose patrimonies are engaged in the acts of the others partners. They are all personally implicated in their mutual enterprise. Being a partner does not entail acting in a disinterested manner. On the contrary, partners are acting in their own personal interest, their own interest now being linked to the interests of their partners. As such, they will together suffer the joys and the pains of their association: "participation to the profits entails obligations to share the losses."¹⁰²

All that being said, it is impossible to understand, or even compare partners with trustees; partnerships with patrimony by appropriation? Partners in this scheme are at the same time settlors, trustees, and beneficiaries. They are never disinterested, never independent, and never a third party. In law, there may not even be a stipulation excluding a partner from participating in collective decisions,¹⁰³ or excluding him from the profits made. There may not even be a stipulation that releases him from the obligation to share the losses.¹⁰⁴ Of course, the management of the partnership (i.e. the business the partners decided to pursue) can be given to a third party.¹⁰⁵ Yet the constitution of the partnership does not depend on this possibility, the partners being the only essential actors to this scheme.

Ultimately, partnerships are mere personal relationships between partners. It is a mere contract, as its place in the code and its definitional provision provide. If there is the creation of a special purpose patrimony, the nature of this patrimony is quite particular and should not be understood as a patrimony by

101. Article 2219 CCQ.

102. Article 2201 CCQ.

103. Article 2216 CCQ.

104. Article 2203 CCQ.

105. Article 2213 CCQ et seq.

appropriation, i.e. a distinct and autonomous patrimony that knows no titular and implies an independent administrator acting unselfishly through powers. Partners hold the rights they have appropriated to the partnership. As holders of the rights, partners are solidarily liable for obligations contracted for the purpose of the partnership. Yet, and this is what confounds the interpreters and judges: according to article 2221 CCQ, the creditors must first discuss the property that was duly destined to the partnership; then, they have access to the personal patrimony of each of the partners, but only after their own personal creditors are paid. The legislator here created a particular scheme of distribution of assets. The assets appropriated to the partnership make divided patrimonies in the personal patrimony of each partner. The combination of these divided patrimonies form the partnership patrimony. The partnership patrimony is an open aggregate of property and liability, which permits creditors to access, if needed and as a last recourse, the multiple owners' personal patrimonies.

As such, the partnership looks as if it has a distinct patrimony, but one that cannot be said to be without holders or autonomous. The partners are, as they should be, ultimately liable.

VI. THE QUIET REVOLUTION OF LEGAL IMAGINATION

In the judgment, Justice Rochon stated that partnerships are autonomous patrimonies distinct from that of the partners, taking on obligations and using the partnership's "personless" property to respond to them. According to him, this understanding was possible because the legislature introduced the objective theory of patrimony, which entails the creation of purpose patrimonies independent from legal subjects in the new Civil Code. Because the language of the Code was ambiguous when it came to understanding whether partnership meant an aggregate of persons or an aggregate of property, and because this property was appropriated to a specific purpose, he did not see any objection in

depersonalizing partnerships and making the partners ultimately not liable for the losses and debts they engendered. A partnership, as an aggregate of property appropriated to a purpose, albeit not having a legal personality, can, according to him, assign its property.

Yet, looking at the real nature of a patrimony by appropriation as inscribed in the Civil Code of Québec and how it is possible for rights without titularies to still be objects of rights during the duration of their appropriation, understanding partnership as a patrimony by appropriation distinct from that of the partners seems a bit strange. How can the partners not have rights in the partnership? How can they be disinterested? Is not the whole purpose of the enterprise to join with others and make an interested profit?

Depersonalizing partnership is indeed not obvious. If it worked for trusts, it is because the role of the trustee is quite specific and framed in a very particular manner. The trust is a patrimony by appropriation according to the Code. Partnership is nothing but a relationship. It is a contract. A contract cannot assign property. Relationships cannot go bankrupt. Persons can.

Introducing the objective theory of patrimony in the Civil Code is one thing. Seeing patrimonies without holders every time there is property appropriated to a purpose is another. If the idea is now part of the legal imagination of Québec's jurist, its nature and mechanisms are not yet assimilated. The idea of property without a holder is revolutionary and has the power of permitting the protection of anything valuable without personalizing it. However, for the idea to work, it is fundamental that we understand the apparatus behind it, which entails a disinterested actor holding the rights and the impossibility of that actor ever being personally liable for the obligations emanating from his mission. If his personal patrimony is solicited by law, then even if there is an appropriation to a purpose, what is at stake is not a patrimony by appropriation but a simple division of patrimony. Both are purpose

patrimonies, yet both reside on two fundamentally different regimes, subjective rights and rights appropriated to a purpose. Forgetting this distinction can engender complicated consequences, in this case permitting partners to ultimately not be fully liable for the losses stemming from their collaboration.

Codified civil law stands on the absolute precision of its language and concepts. When a new concept comes into force—a new concept that in this case is using a term that is so fundamental that it is taken for granted: patrimony—it is important to come back to the basics and understand what is really at play. Partnership in Québec was a good opportunity to revisit the three basic notions upon which our law is built: person, property and obligations. As I hope I have shown, one cannot be understood without the others. Changing or, in this case, adding a new concept of property in the Code, based on disinterested management and not personal benefit, is a major change in our understanding of what a right is, and most importantly in what law is supposed to protect. Appropriating rights to a purpose is nothing new, and in this sense the judge was right: a partnership is a special purpose. But depersonalizing rights is a whole other phenomenon that should not be taken lightly. Patrimony by appropriation changes the whole premise of what we understand as fundamental to our law and accounts for the distinctiveness of Québec civil law and society.

RUSSIAN SOCIETY AND ITS CIVIL CODES: A LONG WAY TO CIVILIAN CIVIL LAW

Asya Ostroukh*

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I. INTRODUCTION

This article is based on the presentation I gave at Paul M. Hebert Law Center, Louisiana State University, where I was a Fulbright Scholar at the Center of Civil Law Studies in the spring of 2010. Given the natural interest of Louisiana lawyers in

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comparative law, I was not surprised when my American colleagues asked me numerous questions about Russian law. However, the main question—to which legal family/system/tradition does Russia belong—is not an easy one to answer. The problem is that, even after the fall of the Soviet Union and substantial reforms to Russian law, comparativists (both Russian and Western) are indecisive about placing Russia within the legal tradition of civil law and continue to consider it as a legal tradition *sui generis*. In my opinion, this approach is the result of the power of historical tradition. The expulsion of the Soviet Union from civilian legal tradition was done in 1950-1960s by Pierre Arminjon, Boris Nolde and Martin Wolff in their *Traité de droit comparé*,¹ on one side, and by René David in his *Les grands systèmes de droit contemporains: (droit comparé)*,² on the other. I will not go into the details of why the scholars decided to classify Soviet law as a separate legal system, but the main points for distinction were divergent economic and political orientations, dissimilar social values, differences in property, labour, and contract law. Briefly, scholars were looking more for dissimilarities than similarities between Russian and Western law and, definitely, found enough of them to put Russia outside civilian legal tradition. This attitude of looking at how Russian law is different from civilian systems continues to persist today.

In this article, by presenting a survey of the history of civil law codification in Russia, with a special emphasis on property law as the most peculiar part of Russian law, I will try to show that, first, Russia (even in Soviet times) has always belonged to civilian legal tradition. It is obvious that the country was directed by divergent

1. PIERRE ARMINJON ET AL., 1 TRAITÉ DE DROIT COMPARÉ 47 (Pichon & Durand-Auzias, Paris 1951).

2. RENÉ DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS: (DROIT COMPARÉ) (Daloz, Paris 1964). In English translation RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (The Free Press, Collier-Macmillan, London 1968).

social and political values and had its own hierarchy of economic preferences. However, the techniques to promote these values and preferences by law were purely civilian. Throughout its history, Russian law has not created a single legal institution that would be incompatible with fundamental principles of the civil law tradition. Second, with the course of time, Russian civil law became more and more civilian and closer to other civil law countries, with the Civil Code of 1994-2006 being the culmination of the process. I hope that my examination of four Russian civil codes will provide persuasive arguments for both statements.

II. THE *CIVIL LAWS* OF 1835: THE BEGINNING OF MODERN CIVIL LAW IN RUSSIA

The formation of the modern Russian legal system can be attributed to an all-encompassing codification that was realized in the Russian Empire in the 1830s. Prior to the codification, the social life of the country was regulated by numerous legal sources that embodied local customary law as well as concepts and rules borrowed from Byzantium and Germanic law. The striking feature of the Russian legal system, which distinguishes it from those of most European countries, is that it has never known a direct reception of Roman law.³

The Russian codification of the 1830s fits into the European codification movement of the 18th and early 19th centuries, influenced by the Enlightenment. At that time, either a total codification of the whole scope of law or a codification of its separate branches was undertaken in Bavaria (the Criminal Code of 1751, the Code of Civil Procedure of 1753 and the Civil Code of 1756), Prussia (*Allgemeines Landrecht für die preussischen Staaten* of 1794, hereinafter ALR), Austria (*Allgemeines*

3. MIKHAIL M. SPERANSKY, PRÉCIS DES NOTIONS HISTORIQUES SUR LA FORMATION DU CORPS DES LOIS RUSSES TIRÉ DES ACTES AUTHENTIQUES DÉPOSÉS DANS LES ARCHIVES DE LA 2E SECTION DE LA CHANCELLERIE PARTICULIÈRE DE S. M. L'EMPEREUR (Imprimerie de Mme. veuve Pluchart et fils, Saint-Pétersbourg 1833).

bürgerliches Gesetzbuch für die gesamten deutschen Erbländer der Oesterreichischen Monarchie of 1811, hereinafter ABGB) and France (*Code civil des Français* of 1804).⁴ In Russia, the first codification projects were already started at the beginning of the 18th century, but were completed only in 1835, when the *Digest of the Laws of the Russian Empire*⁵—a set of fifteen volumes with 60,000 articles—entered into force.⁶ The civil law was codified in the tenth volume of the Digest of Laws, which was entitled *Civil Laws (Zakony Grazhdanskie)* and consisted of four books: 1) Family Rights and Obligations; 2) On the Procedure of Acquisition and Preservation of Real Rights in General; 3) On the Procedure of Acquisition and Preservation of Real Rights in Particular; 4) Contractual Obligations.

The terminology of the second and the third book is not consistent: they both regulate real rights and modes of their acquisition. The second book, “On the Procedure of Acquisition and Preservation of Real Rights in General,” covers classification of property, various real rights, legal capacity to acquire real rights and general provisions on acquisition of property. The third book, “On the Procedure of Acquisition and Preservation of Real Rights in Particular,” regulated the transfer of ownership by donation, succession, sale, and exchange.

The sources used by the drafters of the *Civil Laws*, along with Russian law, were Prussian (ALR 1794), Austrian (ABGB 1810), and French (*Code civil* 1804). Although scholars usually

4. OLIVIA F. ROBINSON ET AL, *EUROPEAN LEGAL HISTORY: SOURCES AND INSTITUTIONS*, 246-60 (2d ed., Butterworths, London 1994).

5. Or in other translations: *Corpus Juris of the Russian Empire* or the *Collection of Imperial Laws*.

6. For the history of the Digest of the Laws of the Russian Empire, see MIKHAIL M. SPERANSKY, *supra* note 3; Tatiana Borisova, *Russian National Legal Tradition: Svod versus Ulozhenie in Nineteenth-century Russia*, 33 REV. CENT. & E. EUR. L. 295-341 (2008); and Tatiana Borisova, *The Digest of Laws of the Russian Empire: The Phenomenon of Autocratic Legality*, 30 L. & HIST. REV. 901-25 (2012).

emphasize the influence of the French Code,⁷ the less numerous borrowings from the Prussian Code were also rather important. For example, the famous Russian definition of ownership as a triad of three faculties (to use, to possess and to dispose of property) that has survived Imperial and Soviet Russia, and which serves a fundamental notion of contemporary property law, first appeared in the *Civil Laws*, and was a calque from the Prussian definition. The Russian Code defines ownership in paragraph 1, article 430 of the *Civil Laws* as “the power exclusively and independently of another to possess, to use and to dispose of the property in a manner established by civil laws, in perpetuity and hereditarily.”⁸ The Prussian ALR stipulates that “full ownership includes the right to possess a thing, to use it and to dispose of it in a similar way (*Zum vollen Eigenthume gehört das Recht, die Sache zu besitzen, zu gebrauchen, und sich derselben zu begeben*).”⁹ The key feature that likens the Prussian and the Russian definition is the inclusion of possession as one of the rights inherent to ownership. Other European codes of the time do not include possession in the list of the faculties belonging to the owner.

Overall, the *Civil Laws* were a whimsical blend of modern and medieval legal principles and institutions. On the one hand, the Russian law adopted such progressive principles as an absolute, exclusive and perpetual right of ownership; protection of intellectual property; recognition of divorce, as well as freedom of contract and of testamentary disposition of property. Another merit of the Digest of Laws is that it established a system for Russian law and made it clear and accessible. Boris Nolde justly affirmed that “in no country the law was so substantially transformed as in

7. Maksim Vinaver, *K voprosu ob istochnikakh X toma Svoda zakonov*, 10 ZHURNAL MINISTERSTVA IUSTITSII 1-68 (1895).

8. Translation by VLADIMIR GSOVSKI in his 1 SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME 556 (Univ. of Michigan Law School, Ann Arbor 1949). I will also use this author’s translation of the *Civil Code of the Russian Federation* of 1922 in this article.

9. Section 9, tit. VII ALR, <http://www.koeblergerhard.de/Fontes/ALR1 fuerdiepreussischenStaaten1794teil1.htm> (last visited Mar. 4, 2013).

Russia in 1835: all legal life in all its smallest details, was suddenly regulated by a unified legislation that replaced innumerable statutes, decrees, and judgments which had been governing the country before then.”¹⁰ On the other hand, the *Civil Laws* preserved such institutions as: a limitation of certain social groups’ legal capacity (e.g., Jews, married women, and natural children); limited commerce of some property (such as entailed estates); a system of *majorat* for some property, preservation of serfdom and, as a result of this, a distinction between populated and unpopulated lands, as well as interpretation of peasants as things accessory to lands;¹¹ and other obsolete rules and institutions.

In general, the *Civil Laws* were not a real codification in the sense of a substantial legal reform but a mere consolidation of existing law. They were criticized by the leading legal scholars for desuetude, gaps, and contradictions.¹²

Moreover, before the second half of the 19th century not all the population of the Empire could enjoy the provisions of the Digest of Laws. Due to the existence of serfdom, about 35% of the population (who were serfs),¹³ were excluded from the application of the official Russian law. The country had to wait until the accession of the emperor Alexander II (“the liberator”) who was able to fulfill the difficult task of the emancipation of compatriots from serfdom.¹⁴ However, the peasants were emancipated without

10. PIERRE ARMINJON ET AL., 3 TRAITÉ DE DROIT COMPARÉ 235 (Pichon & Durand-Auzias, Paris 1951).

11. Similar to the Civil Code of the State of Louisiana of 1825, which considered slaves as immovables by the operation of law (art. 462).

12. KONSTANTIN D. KAVELIN, RUSSKOE GRAZHDANSKOE ULOZHENIE, 1-2 (St. Petersburg 1882); EVGUENY V. VAS'KOVSKY, UCHEBNIK GRAZHDANSKOGO PRAVA. VYP. I. VVEDENIE I OBSHAYA CHAST' 38 (St. Petersburg 1894); PYOTR P. TZITOVICH P.P. KURS RUSSKOGO GRAZHDANSKOGO PRAVA. TOM I. UCHEBIE OB ISTOCHNIKAH PRAVA. VYPUSK 1, 22-23 (Odessa 1878).

13. ALEXANDER G. TROINITZKY, KREPOSTNOYE NASELENIE ROSSII PO 10-Y NARODNOI PEREPISI 26-27 (V typografii Karla Wulfa, St. Petersburg 1861).

14. For more details on the reforms, see ROSSIISKOE ZAKONODATEL'STVO X - XX VEKOV: V 9-TI TOMAKH. T. 7. DOKUMENTY KREST'YANSKOI REFORMY. (Oleg I. Chistyakov ed., Yuridicheskaya literature, Moscow 1989) and

land. The price for redemption was too high; the majority of peasants could not afford to become landowners. Such a palliative solution of the agrarian question was one of the most important factors that led to the Socialist Revolution of 1917. However, in the years 1861-1864, as a result of liberal reforms, former serfs were granted full legal capacity and became subjects of law, including civil law. Although the legal status of different social groups was still different and it was too early to talk about full legal equality of all the subjects of the Russian monarch (the principle of the equality of all citizens was introduced by the 1917 bourgeois revolution), at least they became free and legally capable (with the exception of the already-mentioned limitations of the legal capacity of certain groups of the population).

The time that followed the Great Reforms could be justly described as the golden age of Russian legal science, including civil law studies. Russian scholars were highly-educated (typically not only in Russia, but in Europe as well), multilingual, and integrated into the European community of legal scholars. Such Russian legal scholars as Leon Petrażycki, Maxim Kovalevsky, Paul Vinogradoff, Georges Gurvitch, Fyodor Martens, Nicholas Timashev, and Pitirim Sorokin have substantially enriched international legal science.

Changes in the social life of the country, as well as the development of legal studies, necessitated legal reforms, including revision of the *Civil Laws*. A new Civil Code (*Grazhdanskoye Ulozhenie*) was drafted by 1905. At that time, the law reform was inseparably connected to the necessity of reception of foreign laws. The Codification Commission relied on the German and the French codifications as models (especially in the law of property, obligations, and succession) and doctrinal sources, both Russian

and European.¹⁵ The new Civil Code would have introduced new orientations for economic and social development if the Bolshevik revolution had not interrupted the social development of the state.

III. THE CIVIL CODE OF 1923: A CODE FOR TRANSITION FROM CAPITALIST TO SOCIALIST SOCIETY

A. Drafting the Civil Code

The Socialist Revolution of 1917 opened a new period in the history of Russian civil law. Initially the Bolsheviks kept the legal principle introduced by the bourgeois revolution of February 1917: the equality of political and civil rights of all the people, regardless of their sex, class, race or religion.

One of the first decrees of the Soviet state, *On Land* (1917), abrogated the private ownership of land, subsoil, waters, and forests.¹⁶ The title of another decree, *On Abrogation of Successions* (1918), speaks for itself. It was aimed at complete extermination of one of the sources of private ownership. For the same reason donations were abrogated, too.¹⁷

Revolutionary law (if it could be called law) engendered a new mode of acquisition of ownership: nationalization. This mode of acquisition exists in capitalist countries, too, but the socialist nationalization has two fundamental distinctions. First, it is realized without any indemnification. Second, the new owner is free from all the obligations of the former: from all the charges, all the debts, and all the dismemberments.¹⁸

In general, the civil law during the first years of Soviet power remained faithful to Lenin's slogan, "We recognize nothing

15. For more details on the drafting of the Civil Code, see VLADIMIR A. SLYSHYENKOV, *PROEKT GRAZHDANSKOGO ULOZHENIYA 1905 G. I EGO MESTO V ISTORII RUSSKOGO PRAVA* (Moskva 2003).

16. Decret "O zemle", 1 SOBRANIE UZAKONENIY RSFSR 3 (1917).

17. Decret "Ob otmene nasledovaniya", 34 SOBRANIE UZAKONENIY RSFSR 456 (1918).

18. For more details on the stages of nationalization in Soviet Russia, see PIERRE ARMINJON ET AL., 3 *TRAITÉ DE DROIT COMPARÉ*, *supra* note 10, at 246-50.

private, for us in the economy everything is public, but not private.”¹⁹ That is why some Soviet jurists proposed to adopt a Code of Economic Laws or a Code of Social Legislation instead of a Civil Code. However, the profound economic crisis of the time showed the necessity of private investments, including foreign capital. The policy of reconstruction of the social economy, known as the New Economic Policy introduced by Lenin in 1921, would never have been successful if it had not been supported by the restoration of the security of juridical acts: that is to say, the restoration of civil law.

That is why and how the first Soviet Civil Code was adopted in December 1922 and entered into force on January 1, 1923.²⁰ It was the first time in Russian history that the expression “Civil Code” (“*Grazhdansky codex*”) had been used.²¹ The 1905 project of civil law codification bore a title of “*Ulozheniye*”, which is an original Russian term for “code” and had been used in Russia since 1649, the year when the famous *Sobornoye Ulozheniye* was enacted. It was exactly this term that was chosen for the translation of Prussian, Austrian, German and Swiss codes in Imperial Russia, although the term “code” (“*codex*” in Russian) had always been used for the French codification. Thus, the Bolshevik codification established a new tradition to name collections of laws with a Latin word, “*codex*.”

19. Vladimir I. Lenin, *O zadachakh Narkomyusta v usloviyakh novoi ekonomicheskoi politiki: Pis'mo D. I. Kurskomu*, in VLADIMIR I. LENIN, POLNOE SOBRANIE SOCHINENIY 389 (Moscow 1964).

20. For the history of the creation of the 1922 Code, see TATYANA E. NOVITZKAYA, *GRAZHDANSKY KODEKS RSFSR 1922 GODA. ISTORIYA SOZDAINYA. OBSHAYA KHARAKTERISTIKA. TEXT. PRILOZHENIYA* (Zertalo-V, Moscow, 2002). In the Russian legal tradition, codes are dated by the year of their adoption and not by the date of their entrance into force, as in Western European countries. Thus, Russian and some European scholars talk about the 1922 Civil Code. However, I will follow the Western tradition and call it the 1923 Civil Code.

21. However, the very first Soviet Code (“codex”) was the *Code of Laws on the Acts of Civil Status, Marital, and Family and Tutorship* law adopted in October 1918. The Civil Code of 1923 was the first *civil* code.

The sources of the 1923 Civil Code are the Draft of the Civil Code (“*Ulozhenie*”) of the Russian Empire as revised by 1913, the German, the Swiss and the French civil codes (however, the Germanic codes were more popular than the French).

Although European scholars criticized the Code for its technical imperfections,²² we should not forget that the Code was hastily drafted in just three months—an amount of time unprecedented for the codifications of the 19th and 20th centuries. Moreover, it was a Civil Code created for an unprecedented political, economic, social, and cultural setting. Finally, in the first years of the new regime, Soviet jurists adhered to the Marxist idea of the state and of the law’s inherently temporary character, and their inevitable withering away in the Communist future. The legal profession was perceived as archaic and transient, and law in general, as a means of social regulation, did not enjoy great importance in this period.²³ The Civil Code was initially drafted as an interim Code, but was fated to regulate the life of the Russian people more than forty years. However, given the lack of time and the novelty of the tasks confronting the Soviet codifiers, the first Code of the Soviet State was not all that imperfect, and contained the potential to become a basis for the Civil Code of 1964. The Code was replicated in the Civil Codes of the Ukrainian (1923), Byelorussian (1923), Georgian (1923), Azerbaijan (1923), and Armenian (1924) Republics. It was also applied directly in Uzbek (1924) and Turkmen (1926) Republics, as well as in Lithuania,

22. Édouard Lambert, *La place des codes russes dans la jurisprudence comparative*, in LES CODES DE LA RUSSIE SOVIÉTIQUE 1-46 (Marcel Giard Libraire-Éditeur, Paris 1925); Heinrich Freund, *L’avenir du droit civil dans l’Union Soviétique*, in 3 INTRODUCTION À L’ÉTUDE DU DROIT COMPARÉ 363, 365 (Recueil Sirey, Paris 1938).

23. On the development of the Soviet legal theory in the first years of Soviet power, see SERGEY S. ALEKSEEV, FILOSOFIYA PRAVA 148–182 (Izdatelskaya grupa Infra M. Norma, Moskva 1998), and VLADIK S. NERSESIANTS FILOSOFIYA PRAVA 163–311 (Izdatelskaya grupa Infra M. Norma, Moskva 1997).

Latvia and Estonia from 1940 until the adoption of the Republics' civil codes in the 1960s.²⁴

B. Main Features of the 1923 Civil Code

First, the Soviet legislature completely broke with the pre-revolutionary legal system, prohibiting an interpretation of the Code according to the “laws of overthrown governments and the decisions of pre-revolutionary courts” (article 6 of the Decree of the Russian Central Executive Committee, *On Enactment of the Civil Code of the Russian Soviet Socialist Republic* of October 31st, 1922).²⁵ Article 2 of the same decree prohibits bringing actions concerning civil law issues that occurred before the 7th of November, 1917.

Second, the Civil Code does not cover family relations and relations between an employer and employees, since the Soviet law established a new legal trend. It proclaimed that henceforth these relations would be regulated by separate codes: the Code of Laws on the Acts of Civil Status, Marital, Family and Tutorship law (1918) and the Labour Code (1918). From that time, the legal regimes of land and forests were regulated by the Land Code (1922) and the Forestry Code (1923). This tradition of distributing the legal material belonging to private law (totally or partially) among various codes has been preserved in Russia to this day.

Third, the Code of 1923 was permeated with the idea of the supremacy of the State in civil law relations. This principle can be perceived from the following examples: 1) The creation of a private legal person requires state authorization, not just registration (art. 15); 2) Also, the Code does not recognize general legal capacity of legal persons; they have only special capacity, meaning that they have to act in conformity with the goals, fixed in

24. VLADIMIR GSOVSKI, 2 SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME 4-5 (Univ. of Michigan Law School, Ann Arbor 1949).

25. *Id.* at 10.

their founding documents; otherwise, the state would liquidate such a legal person (art.18); 3) A natural or a legal person may participate in international trade only with permission from the State (art. 17); 4) Pledged property first covers the debts of a debtor to the State (such as taxes, fees, and salary of the debtor's employees) in preference to the claims of the pledgee (art. 101); 5) The Civil Code recognizes a possibility to rescind a contract for lesion if the aggrieved party is the State, and it was the only case of lesion admitted by the Code. The Soviet judicial protection of the interests of the State went even further than that. For instance, in contractual obligations, the jurisprudence insisted on the specific performance of the contract, if one of the parties was the State. It means that the obligor could not just indemnify the obligee; he had to perform the obligation even if he suffered a loss himself (for example, if his creditor had failed to perform his obligation).

From these rules one general trend can be perceived: a substantial "publicization" of the Soviet private law, a trend which was preserved in the Civil Code of 1964. Thus, the prioritized legal status of the Soviet State in private relations prevents me from agreeing with the statement of a German scholar, Heinrich Freund, that "the Civil Code was a code of economic liberalism and not a code of a Socialist economy."²⁶ Although in many points the Code of 1923 was similar to a classical liberal civil code, it nonetheless incorporated substantial deviations from the principles of equality of all persons and types of property, of free circulation of property and the freedom of contract—all of which is incompatible with economic liberalism.

However, the Civil Code of 1923 was more liberal than the revolutionary law since it restored successions and donations, which were abrogated by the revolutionary decrees. However, both institutions were rather limited. The Code specified the maximum amount of property that could be inherited or donated. Property

26. Heinrich Freund, *supra* note 22, at 367.

could be inherited by the surviving spouse and descendants to the second degree. A typically-socialist innovation is that the legislature recognized as heirs persons who were dependent on the deceased person. The two subsequent Russian civil codes kept this rule.

C. Property Law

As for property law, the Code of 1923 abrogates the distinction between movables and immovables, justifying this step by the fact that the private ownership on land is abrogated (art. 21). The Code of 1923 recognizes only three real rights: ownership, pledge (this is, probably, the influence of Germanic legal tradition which recognizes pledge as a real right) and a right of construction (which is a kind of superficies as a special mode of ownership). The right of construction was not an invention of the Soviet legislature; it was introduced into Russian law in 1912,²⁷ and was probably drafted on the basis of the BGB's *Erbbaurecht* (hereditary right of construction).

In spite of the fact that it is a socialist code, it recognizes private ownership even on enterprises. The Code provides the following definition of ownership: "Within the limits laid down by law, the owner has the right to possess, to use and to dispose of ownership" (art. 58). As Vladimir Gsovski justly pointed out, general provisions of the Soviet Code on ownership "might have been included in a civil code of any capitalist country"²⁸ and that "a non-Soviet jurist would look in vain for a new concept of ownership in the Soviet Civil Code."²⁹ However, the commerce of housing under the 1923 Code is limited. No one may have more

27. See MIKHAIL I. MITILINO, *PRAVO ZASTROIKI. OPYT CIVILISTICHESKOGO ISSLEDOVANIYA INSTITUTA* (Kiev 1914).

28. VLADIMIR GSOVSKI in *1 SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME* 556 (1948).

29. *Id.* at 558.

than one accommodation; a family may alienate only one accommodation every three years.

While keeping private ownership, the legislature, however, pays more attention to the socialist ownership—namely, State property. Property in abeyance is presumed to be State property (art. 68) as well as discovered treasure (the finder receives only recompense equal to one fourth of the treasure's value). According to Boris Nolde, attribution of the ownership of the found treasure is a restoration of the feudal legal tradition.³⁰

The Soviet Code follows the Roman law rule that distinguishes between a good and a bad faith possessor. As a general rule, according to the Code of 1923, the owner may revendicate his property from a good faith possessor only if the property was lost or stolen.³¹ However, a state enterprise may revendicate its property from a good faith possessor under any circumstance (art. 60). The State is able to make restitution of its property from any possessor. The Supreme Court of the RSFSR, in its ruling of 1925, even outstripped this rule, creating a presumption of State ownership. In case of litigation, the property was presumed to be owned by the State and it was the other party who had to prove the contrary, regardless of who was plaintiff or defendant.³²

Thus, the Soviet legislature deliberately proclaimed inequality of property and owners and priority of the socialist ownership.

30. PIERRE ARMINJON ET AL., 3 TRAITÉ DE DROIT COMPARÉ, *supra* note 10, at 315.

31. At the same time, the possession of a non-owner was not protected from infringement, probably due to the fact that the number of real rights in the Soviet Code was very restricted. Similarly, the Soviet civil law does not contain special provisions on possession as factual relationship, probably because the Civil Code did not recognize *usucapion* (acquisitive prescription or adverse possession) as a mode of acquisition of ownership (PIERRE ARMINJON ET AL., 3 TRAITÉ DE DROIT COMPARÉ, *supra* note 10, at 320).

32. VLADIMIR GSOVSKI, *supra* note 24, at 76.

D. Further Developments

The main trend of the development of the Soviet civil law in the years 1930-1950s, which culminated in the Civil Code of 1964, is the reinforcement of State ownership and the weakening of private ownership.

It should be pointed out that there was no special law that would have abrogated private ownership. However, with the advent of Stalin, a forced collectivization of agriculture, industrialization of the country, and reinforcement of the state economy naturally resulted in the weakening of the private initiative and gradual disappearance of private enterprises. As Professor Ioffe puts it, “. . . [P]rivate ownership was eradicated without reference to any legal provision. On the contrary, legal provisions addressed to private activity became dead letter formally, not abolished but actually eliminated from application in practice as a result of the liquidation of private ownership.”³³ The Constitution of the USSR of 1936 knows only two forms of ownership: socialist and personal. Private ownership had disappeared in the thirteen years following the enactment of the first Soviet Civil Code.

Moreover, “Stalin’s Constitution” demonstrated a trend to centralization of the civil law, depriving Soviet socialist Republics of their rights to adopt civil codes and transferring this right to the all-union legislature (representing all of the republics). Between 1946 and 1952, three drafts of the Civil Code of the USSR were elaborated; however the all-union Civil Code remained a stillborn project.

Between the two codifications—that of 1923 and the Civil Code of 1964—there were numerous doctrinal attempts to split civil law (the set of provisions which regulated proprietary relations and connected to them personal relations) into two

33. OLIMPIAD S. IOFFE, *DEVELOPMENT OF CIVIL LAW THINKING IN THE USSR* 45 (Giuffrè, Milano 1989).

branches: civil law and economic law. The latter was considered as a branch of law that would regulate the patrimonial rights and obligations of Socialist enterprises in their relations with other Socialist enterprises or with the Soviet State, while the civil law would exclusively regulate private relations of physical persons with other physical persons or of physical persons with Soviet legal entities. Once again, this was far from being a Soviet invention. According to Heinrich Freund, the concept of economic law was borrowed from interwar Germany, where it was called *Wirtschaftsverwaltungsrecht* (economic-administrative law) and at that time consisted of set of provisions applicable to an enterprise when it was subject to the regulatory intervention of the State.³⁴ However, the attempt to split the civil law into two branches was unsuccessful, which clearly demonstrates that Soviet legal scholars and politicians preferred to develop Russian civil law as a classical united civil law.

IV. THE CIVIL CODE OF 1964: A CODE OF A SOCIALIST SOCIETY

A. General Features

The development of the country after World War II was marked by a substantial economic upswing, and by significant social reforms which required new civil legislation. Although, under Khrushchev's rule, the 1936 Constitution was changed to restore the prerogative to adopt civil codes to the Soviet Republics, it also entitled the Supreme Soviet of the USSR to adopt the *Fundamental Principles of Civil Legislation*, which had to serve as a framework for the Republics' civil codes.³⁵ These Fundamental Principles were adopted in 1961. They also served as the basis for the new Civil Code of RSFSR of 1964.

34. Heinrich Freund, *supra* note 22, at 367.

35. OLIMPIAD S. IOFFE, *supra* note 33, at 67.

What differentiated this Code from all the other Russian Civil Codes is that it was not influenced by European civil codes. The major sources of the 1964 Code are the Civil Code of 1923 and Soviet legal doctrine.

This Code follows the tradition of confusion of private and public law. It opens with a preamble that resembles more a political declaration or constitutional provision. The preamble proclaims that the Soviet Union “has achieved a total and definite victory of socialism and has entered into the period of extensive construction of the communist society.” Creating such quasi-constitutional provisions, the preamble describes the objectives of this phase of communism, the socialist economy, and its future. According to the preamble, “the purpose of Soviet civil laws is to contribute to solving problems of the construction of communism.” It is worth noting that the Civil Code of 1923 was not as impregnated with ideology. Two explanations for this phenomenon are possible. First, the Code of 1964 was adopted between two USSR Constitutions, that of 1936 and of 1977. The Stalin Constitution was already outdated, while “Brezhnev’s Constitution” (of 1977) had not yet been drafted. In such a situation, the legislature introduced some constitutional legal provisions into the Civil Code. Second, such provisions show a substantial evolution in the understanding of the social function of the civil law. If in the 1920s, the civil law was perceived as a “narrow horizon of bourgeois law,”³⁶ which would disappear in a communist society, then in the 1960s, the civil law was already considered as a means that contributed to construction of the communist society.

In comparison to the Civil Code of 1923, the Code of 1964 is better structured, demonstrates better legislative technique, contains books on intellectual property and international private law, and recognizes a more complicated system of obligations. In

36. VLADIMIR GSOVSKI, *supra* note 28, at 576.

general, the Code of 1964 regulates almost the same relations and by the same means as “capitalist” codes.

B. Property Law

The demarcation line between the Soviet Code and civil codes of Western countries lies in property law. The Civil Code of 1964 recognizes only one real right: the right of ownership. It distinguishes only two types of ownership: socialist ownership and personal ownership. Apart from the rights of socialist enterprises over their property, the Code of 1964, unlike the Code of 1922, does not recognize limited real rights.³⁷ According to E. Sukhanov, “this category was omitted because the State’s right to land was effectively exclusive and did not allow for the existence of other real rights, including servitudes.”³⁸

The first paragraph of article 94, which is devoted to state property, contains an obvious tautology: “The Soviet State is the only owner of all property of the State.” However, in my opinion, this phrase was coined deliberately: such a wording suppresses all the attempts to qualify rights of the socialist enterprises on their property as a right of ownership. The second paragraph of the article defines precisely the real right of Socialist enterprises over their property: “The property of the State assigned to state enterprises is under the operational administration of these enterprises. They exercise the right of possession, enjoyment and disposition over this property in the limits fixed by law, as well as

37. In various legal traditions real rights lesser than the right of ownership bear different names. In Roman law they were called *jura in re aliena*. In modern French law and legal systems of French origin they are considered as dismemberments of ownership; in Scotland they are called subordinate real rights. I have chosen the Germanic title “limited real rights” because in property law the Russian legal tradition is closer to Germanic law than to any other western legal tradition.

38. Yevgeny Sukhanov, *The Concept of Ownership in Current Russian Law*, VI JURIDICA INTERNATIONAL. UNIVERISTY OF TARTU LAW REVIEW 104 (2001).

in accordance with objectives of their activities, with the tasks fixed by plans and with the destination of the property.”

The legal nature of this operational administration engendered heated discussions among the Soviet civilians. Perhaps the creation of such a real right is the most remarkable contribution of Soviet jurists to legal science. This right was not an invention of the 1964 Civil Code. As a matter of fact, this right already existed from the introduction of the New Economic Policy (1921) and was recognized by Soviet legal doctrine; however, it was not included into the Civil Code. Because of that, the character of proprietary rights of Soviet enterprises was already a subject matter for scholarly debates in the 1920s.

According to the theory suggested by B.S. Martynov, the relations between the State and enterprises are similar to both Roman law *fiducia* and to common law trust. The same scholar also used the medieval theory of divided ownership to explain the distribution of proprietary rights between the State and enterprises, and attributed *dominium directum* to the State and *dominium utile* to enterprises.³⁹ However, this scholar’s theory ignores substantial differences between such legal constructions as *fiducia*, divided ownership, and trust. The fiduciary is not the owner, while trust and divided ownership imply that several persons are owners and the ownership is split between them (although the division of ownership is realized differently in feudally-divided ownership and the common law trust).

Later, in order to avoid any possible references to the theory of divided ownership, Soviet scholars started to insist that the true civil law owner of the property was the State, while the right of enterprises over their property was not a civil law right and could not be classified by using traditional concepts of property. That is how a new real right—the right of operative administration—that

39. OLIMPIAD S. IOFFE, *supra* note 33, at 211-12.

combined administrative and civil law components appeared.⁴⁰ However, by the mid-1960s, the doctrine of the Soviet civil law already considered the right of operative administration as a civil law real right, a kind of limited real right. Although an enterprise exercises all the rights of an owner (possession, enjoyment, and disposition), the State reserves the right of juridical accession (or what is called in the French doctrine *l'arrière-droit* or in Québec doctrine *vis attractiva*) of the property and this characteristic is decisive for the determination of a real owner, which is the State.

The Civil Code of 1964 proclaims that personal ownership is derived from socialist ownership and constitutes a means to satisfy the needs of the citizens. Unlike the 1923 Civil Code, the Code of 1964 does not contain provisions on private ownership. It knows only two types of ownership: socialist and personal, the latter being a substitute for private ownership. Only a natural person can own it and the property may not be used for producing income which does not stem from labour (art. 105). The law specifies that the personal property of a citizen may not consist of more than one house with maximum dimension of sixty square meters (art. 106). If, by means of donation or succession, a citizen gets another house, he may, at his own choice, keep one and sell the other within one year. If he does not sell it, the local administration would organize a forced sale. And if there is no buyer, the State acquires ownership of the house in question (art. 107). The ownership of a citizen therefore depends on a fortuity: if there is a buyer, the owner enjoys his right; if there is no buyer, the State deprives the person of his property.

To make things short, by its legal nature the personal ownership of the Soviets is nothing but a private ownership, a limited private ownership, an amputated private ownership. It is limited by its holders: only natural persons are entitled to it. It is confined to certain objects with definite dimensions. Finally, it is

40. OLIMPIAD S. IOFFE, *supra* note 33, at 215-21.

appropriated to a particular purpose: to satisfy material and spiritual needs of the owner (thinking about this, I cannot help seeing a parallel with Québec's patrimony by appropriation/*patrimoine d'affectation*). Nonetheless, in spite of all these restrictions, it is a private property that gives to its owner all the rights of possession, enjoyment, and disposition of property. This right is also protected by all of the means of private ownership known to civilian legal systems (a true revendicatory action/*actio rei vindicatio* and negatory action/*actio negatoria*). Vladimir Gsovski is correct in his statement that, "the Soviet law of property shows also how inescapable private ownership, although in a small dose, is, even in a socialist State."⁴¹

V. THE CIVIL CODE OF 1994-2006: A CODE FOR A MARKET ECONOMY AND A LIBERAL SOCIETY

A. Drafting the 1994-2006 Civil Code

The predominance of socialist ownership and the degeneration of private ownership engendered negative trends in the Russian economy and society, and by the end of the 1980s, the inefficiency of the socialist economy was indisputable. The Gorbachev government implemented *perestroika*: an unprecedented series of political and economic reforms.

The Laws *On Ownership in the USSR*⁴² and *On Ownership in the RSFSR*⁴³ of 1990 opened a new age in the history of Russian civil law. These laws re-established private ownership (although only the second one openly uses the expression "private ownership") and proclaimed the equality of all forms of ownership and all owners.

41. VLADIMIR GSOVSKI, *supra* note 24, at 576.

42. Zakon SSSR "O sobstvennosti v SSSR," 11 VEDOMOSTI SOVETA NARODNYKH DEPUTATOV SSSR I VERKHOVNOGO SOVETA SSSR 164 (1990).

43. Zakon RSFSR "O sobstvennosti v RSFSR," 30 VEDOMOSTI SOVETA NARODNYKH DEPUTATOV RSFSR I VERKHOVNOGO SOVETA RSFSR 416 (1990).

Another document that gives a new direction to Russian civil law is the Constitution of the Russian Federation (1993), the first constitution that has a direct application. It proclaims that the right of private ownership is an inalienable right belonging to everyone from the day of birth and protected by the law (art. 35). The third part of article 35 repeats almost verbatim article 545 of the French Civil Code: “No one may be deprived of his property otherwise than by a court decision. Expropriation of property for public utility may be carried out only and in consideration of a just and prior indemnity.” This is the first time that such a provision was introduced into Russian legislation. The following constitutional rule sounds as a repercussion of the revolutionary legislation: “The right of succession is guaranteed.”

Profound and rapid social reforms that were undertaken in Russia in the early 1990s required the adoption of a new Civil Code as soon as possible. That is why the new Russian Civil Code was adopted in several installments: the first part in 1994, the second in 1995, the third in 2001, and the fourth in 2006. Thus, now the Russian civil law is fully codified, and has even entered a stage of decodification.

The sources of the new Code are the Civil Code of the RSFSR of 1964, the Fundamental Principles of Civil Legislation of the USSR of 1991,⁴⁴ classical civil codes (German, Swiss, French, and Italian), two of the newer codes (of Québec and of the Netherlands), the Draft of the Civil Code of the Russian Empire of 1913, and international private law (e.g., Vienna Convention on International Sale of Goods).

B. Main Features

The new Russian Code is founded on liberal values: free enterprise, sanctity of private property, freedom and sanctity of

44. This legislation never entered into force in the USSR itself, but became a source of Russian civil law in 1992.

contract, recognition of five degrees of heirs (compared to only two degrees in the Code of 1964), and equality of the State and other persons in private relations.⁴⁵ Briefly, the philosophy of the Civil Code is the 19th century principle of *laissez faire, laissez passer*. The Code does not feature any noticeable socialization of property or contract law that departs from the civil law of Western countries in the 20th century.

One may also notice that the new Civil Code demonstrates very good legislative technique. It contains an impressive theoretical part. Everywhere in the Code there are general provisions. The book on the law of intellectual property reflects the latest results of scientific and technological progress.

One of the hallmarks of the new Code is that it proclaims its own supremacy over all the other civil legislation, which distinguishes it from contemporary European Civil Codes and makes it kindred to the Civil Code of Québec of 1994.⁴⁶ Article 3 of the Russian Code stipulates that civil legislation consists of the Civil Code and other federal laws adopted in accordance with it, of presidential decrees, and of governmental regulations. However, presidential decrees and governmental regulations must be in compliance with the Civil Code and other federal laws, and may not contradict them. Thus, article 3 creates a hierarchy of legislative sources of civil law, the Civil Code being the vertex of the pyramid. The aim of the third article is to prevent the executive power (mainly the President) from legislating arbitrarily in the field of civil law, i.e., to establish a separation of powers. The authors of the Civil Code had a good reason for introduction of such a provision.

45. For the history of the Civil Code and its fundamental principles, see Alexandre Scaggion, *La Codification du droit russe* (2002) (Doctoral thesis, Paris I) (on file with Atelier national de reproduction des thèses).

46. The preliminary disposition of Québec Civil Code reads: “The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.”

In the early 1990s, the decrees of President Yeltzin drastically changed Russian civil law. On the one hand, the executive power can change law faster than the legislature, and this was what the country needed at that time for efficient, speedy economic and political reforms. On the other hand, the executive power could sign a decree that would never be passed by the parliament.

Thus, on December 24, 1993, President Yeltzin signed a decree “On Fiduciary Property (the Trust)” that was an instance of direct intrusion of the common law into the Russian legal system.⁴⁷ Article 3 of the decree stipulated that “while establishing the trust, the settlor transfers for a certain time property and real rights that belong to him on the right of ownership to the trustee, who is obliged to exercise his right of ownership exclusively in the interest of the beneficiary and in accordance with this decree, with the contract establishing the trust, and with the legislation of the Russian Federation.”⁴⁸ What is also unusual is that this decree entered into force at the moment of its signing. Although the decree created a general institution of trust, allowing any physical or legal person to become a settlor, a beneficiary or a trustee, the provisions of the decree applied only to state-owned shares of stock-companies created as a result of privatization of state enterprises before the entrance into force of a new Civil Code (art. 21).

That decree outraged the Russian legal community, which thought it to be a specimen of juridical ignorance, disrespectful of national legal tradition, and introducing “absolutely alien Anglo-American approaches.”⁴⁹ Struggling against common law trust, Russian civilians insisted on the fact that Russia belonged to the continental legal tradition, which does not know trust, and for this

47. On the history of the law of trusts in Russia, see Elspeth Christie Reid, *The Law of Trusts in Russia*, 24 REVIEW OF CENTRAL AND EAST EUROPEAN LAW 43-56 (1998).

48. Decree “On Fiduciary Property (the Trust),” 1 SOBRANIE AKTOV PREZIDENTA I PRAVITEL'STVA ROSSIISKOI FEDERATZII 6 (1994).

49. Yevgeny Sukhanov, *supra* note 38, at 106.

reason the institution was absolutely foreign to Russian legal system. This construction was also criticized as a way to misappropriate State property at the time of privatization.⁵⁰ On November 30th, 1994, the same president signed into law the first part of the Civil Code of the Russian Federation. Paragraph four of article 209 of the Code clearly eliminated trust from the Russian legal system and moved the fiduciary administration of property (as the institution is now called) into the law of obligations (i.e., among personal rights). Article 209 paragraph 4 of the Code reads “An owner may transfer his property for fiduciary administration to another person (fiduciary administrator). The transfer of property for fiduciary administration *does not entail the transfer of the right of ownership to the fiduciary administrator* who is obliged to administer the property in the interests of the owner or a third person designated by the owner” (emphasis added). Finally, on December 22nd, 1995, the president signed into law the second book of the Civil Code, which categorizes the fiduciary administration of property as a contractual obligation (chapter 53) and reproduces the provision of article 209 that “the transfer of property in fiduciary administration does not entail the transfer of the right of ownership to the fiduciary administrator” (article 1012 paragraph 1). The story of Russian trust law, thus, explains why the drafters of the Civil Code wanted to securely establish the priority of the Code over other sources of civil legislation and prevent excessive legislative action from the executive power.

50. Viktor A. Dozortsev, *Doveritel'noe upravlenie imushchestvom*, in GRAZHDANSKY CODEX ROSSIISKOI FEDERATZII. CHAST' VTORAYA. TEKST, KOMMENTARII, ALFAVITNO-PREDMETNYI UKAZATEL' 527-49, 531 (Oksana V. Kozyr et al. eds., Mezhdunarodny centr finansovo-ekonomicheskogo razvitiya, Moscow 1996).

C. Property law

During the recent recodification, the most profound and most important changes were made in the field of property law.⁵¹ The new Code has almost 200 (197) articles on property law, compared to just 66 articles on the same subject in the Civil Code of 1964. Besides this quantitative change, the new Code proclaims a new approach to property law. Unlike previous socialist codes, the new Russian Code follows a new system of exposition of provisions on property law. In the past, the legislature organized the articles on property law according to the types of ownership; now the emphasis is made on the acquisition, extinction and protection of ownership.

The gist of the reform of property law in Russia, as well as in other post-socialist countries, was to reject the idea of state ownership as the principal and dominating type of ownership, and to rehabilitate private ownership in its fullness.⁵²

Unlike the Code of 1964, the new Code recognizes not only ownership, but limited real rights as well, revitalizing property law in Russia. Apart from the right of ownership, article 216 of the Code recognizes such real rights as: the right of lifetime inheritable possession of a land plot; the right of permanent (in perpetuity) use of a land plot; predial servitudes; the right of economic management, and the right of economic administration (the two last rights originate in the Soviet right of operational administration). Such real rights as pledge and the right of

51. For more details on property law in the new Civil Code, see David Lametti, *Rights of Private Property in the Civil Code of the Russian Federation and in the Civil Code of Québec*, 30 REV. CENT. & E. EUR. L. 29-47 (2005); Oksana M. Kozyr, *The Legal Treatment of Immovables Under the Civil Code of the Russian Federation*, 44 MCGILL L. J. 327-56 (1998-1999); Evgueny A. Sukhanov, *The Right of Ownership in the Contemporary Civil Law of Russia*, 44 MCGILL L. J. 301-26 (1998-1999).

52. Vladimir A. Toumanov, *Évolution du droit de propriété dans les anciens pays socialistes*, in ACTUALITÉS DE LA PROPRIÉTÉ DANS LES PAYS D'EUROPE CENTRALE ET ORIENTALE ET EN CHINE : [ACTES DU] COLLOQUE, 6 DÉCEMBRE 1996, CONSEIL CONSTITUTIONNEL DE PARIS 15 (Société de législation comparée, Paris 1997).

retention are also sometimes recognized by Russian doctrine as limited real rights, although in the Code they are placed in the book on obligations. The striking feature of Russian property law is that, apart from pledge and the right of retention (if they could be recognized as real rights), the objects of all limited real rights are exclusively immovables.⁵³

This enumeration is not exhaustive; these are only examples of limited real rights, and the wording of the article presupposes that one may create innominate real rights. Theoretically, Russia does not have a *numerus clausus* of real rights, although most scholars insist that it exists in Russian property law.

Although the new Civil Code recognizes *usucapion* (acquisitive prescription or adverse possession) as a mode of acquisition of both movable and immovable property, it definitely lacks a developed set of provisions concerning possession as a protected factual relationship that could ripen into ownership.⁵⁴

Another part of Russian civil law with a lot of innovation after recodification is intellectual property law. In this field, we have a code with more than 300 articles (even more than on property law), and all possible objects of intellectual activities are protected by the fourth part of the Civil Code.

VI. CONCLUSION

The history of codification of the civil law in Russia demonstrates that all Russian civil codes were based on the civilian legal tradition and quite often borrowed provisions from other European civil codes. It goes without saying that Russian civil law has always had its peculiarities resulting from differences in economy, politics and lifestyle. However, the unique features of

53. Yevgeny Sukhanov, *supra* note 38, at 104.

54. For the critique of the absence of provisions on possession, see Denis Tallon, *Le point de vue d'un expert étranger pour la codification du Code civil en Russie*, in ACTUALITÉS DE LA PROPRIÉTÉ DANS LES PAYS D'EUROPE CENTRALE ET ORIENTALE ET EN CHINE 24 (Société de législation comparée, Paris 1997).

Russian civil law are not deviations from the civilian tradition, and could be compared to local variations in many countries belonging to the civil law or Romano-Germanic tradition. The new Civil Code of 1994-2006 makes a particular and substantial effort to make Russian civil law compatible with the civil law of its European counterparts.

In summary, in the field of civil law, Russian society now has a very good and promising regulator. The lawyers and legal scholars have already intelligently commented upon, interpreted and annotated the Civil Code, and it contains a good regulative potential. However, the implementation of the Code into the everyday life of society is still a problem to be solved. The legislative power has fulfilled its task perfectly. Now it is the turn of the judiciary, the bar, and the notaries public to make the Civil Code a civil law in action.

**SPANISH LAW IN 2010-2012:
THE INFLUENCE OF EUROPEAN UNION LAW AND THE
IMPACT OF THE ECONOMIC CRISIS**

Juana Marco Molina^{*†}

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This Chronicle covers recent legislative developments in Spain for the period 2010-2012.

I. APPLICATION OF LAWS: MUTUAL LEGAL ASSISTANCE BETWEEN SPAIN AND THE UNITED STATES OF AMERICA

Because it also concerns the law of the United States of America, reference should be made to the entry into force on February 1, 2010¹ of the Agreement² related to the application of the Mutual Legal Assistance Treaty in Criminal Matters between the United States of America and the Kingdom of Spain.³

This new agreement increases the possibilities to exchange financial information between the two States in the context of a criminal investigation.

Also, article 16 bis 1(a) of the Treaty sets forth the obligation of the Requested State to ascertain if the banks located in its territory possess information about the existence of bank accounts whose holder is a natural or juridical person⁴ suspected or charged with a criminal offense. The Requested State shall not deny the request for assistance on the grounds of bank secrecy.

The Agreement also includes a provision that joint investigative teams may be established between the two States (article 16 ter) for the purpose of taking testimony, expert opinion or any other investigative activities. The measures taken by the

1. Published in B.O.E. n. 22, Jan. 26, 2010.

2. In fact, it is an instrument that executes particularly for each of the Member States of the European Union, a broader agreement concluded between the European Union and the United States (*see* Art. 3.2(a) of the Agreement on Mutual Legal Assistance between the European Union and the United States of America, signed on June 25, 2003); 2003 O.J. (L181) 27, 34.

3. The treaty was signed on November 20, 1990.

4. The Treaty uses the term “legal person.”

members of the joint investigative team may be executed directly in any of the States without the other State having to submit a request for mutual legal assistance (article 16 ter, 4).

II. LAW OF PERSONS

In the area of the Law of Persons, three new developments took place. The first two exemplify the legislators' effort to adapt to the changes resulting from the new options—often driven by medical and scientific progress—promoting the individual freedom to decide one's own sexual orientation (and even gender designation), and consequently, in deciding the composition of one's own family.

A. Ratification by Spain of the International Convention on the Recognition of Decisions Recording a Sex Reassignment

Regarding sexual orientation, on July 16, 2011,⁵ Spain ratified the Convention⁶ on the recognition of decisions recording a sex reassignment. This Convention, drafted by a European Intergovernmental Agency,⁷ is a multilateral agreement that sets forth the mutual recognition between the signatory States of judicial or administrative decisions recording a person's sex reassignment that have occurred in a Contracting State. The sex reassignment affecting the citizen or resident in a Contracting State shall be recognized in the other Contracting States if two conditions are met:

1. A physical alteration (i.e., by means of surgery) of the person concerned has been made; and

5. B.O.E. n. 36, Feb. 11, 2011.

6. Convention of September 12, 2000.

7. The International Commission on Civil Status is based in Strasbourg, France. It was founded on September 29-30, 1948 in the post-war context of the time. It is intended to facilitate the cooperation between States for the mutual recognition of vital records (including, among others, birth, marriage, divorce or death certificates) or any other official documents indicating the civil status of persons.

2. That the physical alteration shall be officially recognized in the Contracting State through the recordation of the judicial or administrative decision recognizing a person's sex reassignment in the Civil Status Registry.

B. The New Provisions Concerning Registration in the Civil Registry of the Filiation of Children Born Abroad by Means of Surrogate or Substitute Motherhood

The second legal development includes the question of the so-called "surrogate" or "substitute motherhood".⁸ In Spain, surrogate motherhood agreements are still legally prohibited (Article 10.1, Law on Assisted Human Reproduction Techniques).⁹ Thus, when the birth of a human being results from this form of pregnancy, only the gestating woman will be recognized as the mother, never the woman who, alone or coupled with her partner, agrees to the surrogacy.¹⁰ Even if the contracting party is a male, the legislation does not allow the possibility of considering him the father.

Notwithstanding, neither courts nor administrative authorities in Spain have been able to turn their backs to the situation of children born abroad by surrogacy, in cases where a Spanish citizen has entered into a surrogate motherhood contract in a State where legislation permits this kind of contract. The problem might arise when, once the child is born in the State where the contract was entered into, the Spanish person or couple who executed the contract intend to register the child as his or theirs¹¹ in the Civil Registry of Spain (Civil Registry).

8. The common colloquialism used is "rent-a-mother" or "rent-a-womb".

9. Law 14/2006 of May 26, related to assisted human reproduction techniques. Art. 10.1 prescribes: "The contract wherein it is agreed that the pregnancy, with or without payment, will be carried by a woman who gives up the maternal filiation in favor of the other party or a third party shall be null and void." B.O.E. n. 126, May 27, 2006.

10. Art. 10.2, Law 14/2006, *supra* note 9: "The filiation of children born by surrogacy shall be determined by birth."

11. In many cases, the child born by surrogacy is, indeed, a biological child of the contracting parties because the gestating mother has been fertilized with

This practice has increased notably since the Spanish Civil Code was amended in 2005 to allow and recognize same-sex marriage.¹² Since then, many male same-sex couples who can only achieve paternity by contracting with a surrogate mother and fertilizing her with sperm or by any human reproductive material of either of them, have been denied—by both the Civil Registry and the courts—their attempts to establish the paternity of the child born by surrogate motherhood.¹³

An administrative provision recently enacted has attempted to remedy this situation. It is a provision made by the General Directorate for Registries and Notaries on October 5, 2010 concerning “the registration regime of the filiation of children born by surrogacy.” The Directorate General of Registers is a branch of the Ministry of Justice, serving as the hierarchical superior of the Spanish notaries and registers. Because it is a non-judicial administrative body, its decisions on the validity of the acts recorded in the Spanish registers¹⁴ have no judicial or normative value; they simply contain expert or doctrinal value and consequently are merely advisory.

These provisions, otherwise, are binding for the Spanish Registers because they are public officers of this agency. Therefore, in the exercise of this function, the Directorate General, with the purpose to preserve the best interest of children born abroad by means of surrogate motherhood, has recognized that, in

gametes or reproductive cells of the man or the woman, or of the male or female same-sex couple who contracted the surrogacy.

12. The recognition of same sex marriage in Spain is established in Law 13/2005 of July 1, which amended the Civil Code with respect to the right to marry; B.O.E. n. 157, Jul. 2, 2005.

13. An example of judicial decision rejecting such registration is the judgment of the Court of First Instance No. 15 of Valencia, September 15, 2010; Juz. Prim. n. 15 de Valencia, s. n. 193/2010.

14. The Directorate General of Registers safeguards the legality of issues relating to civil status, which are recorded in the Civil Registry, as well as the validity of the acts of disposition or agreements over immovable property, which are recorded in the Land Registry.

certain circumstances, those children can be entered in the Civil Registry as children of male applicants.¹⁵ Two conditions must be met:

The first condition is formal. It requires that the filiation of the child born be accredited by a foreign judgment following exequatur proceedings¹⁶ in Spain. In any case, an administrative decision or medical certificate produced abroad will not be sufficient to obtain recognition in Spain.

The second condition is substantive. It requires the verification by the Spanish Register, by way of the examination of the documentation submitted by the applicants, that the rights of both the child and the surrogate mother have been sufficiently guaranteed. In particular, it should be verified that the surrogate mother has the ability and natural capacity to understand and voluntarily renounce her maternity, and that the renunciation is made in the absence of any vice of consent (error, fraud or duress).

C. The New Civil Registry Act

Finally, the third development in the area of the Law of Persons is the enactment of the new Civil Registry Law in July 21, 2011.¹⁷ Its entry into force will be delayed until 2014 due to the importance of the changes introduced by the law.¹⁸ The Civil Registry is the public record of acts affecting the civil status and, accordingly, the legal capacity of a person to exercise rights. The reform, undertaken for the reasons indicated below, includes a

15. Or persons, irrespective of their sex, who contracted surrogacy abroad.

16. The European Commission of Justice provides this definition of exequatur: a concept specific to private international law referring to the decision by a court authorizing the enforcement in that country of a judgment, arbitral award, authentic instrument or court settlement given abroad. Available at: http://ec.europa.eu/justice/glossary/exequatur_en.htm (last visited on June 13, 2013).

17. Civil Registry Act, Law 20/2011, B.O.E. n. 175, Jul. 22, 2011.

18. This law replaces the prior Civil Registry Law [hereinafter CRL] of June 8, 1957 (B.O.E. n. 15, Jun. 10, 1957). However, most likely because it introduces significant changes, its entry into force is postponed until July 22, 2014 (so ordered by the 10th Final Disposition of the new law, *supra* note 17).

modification of the Spanish Civil Code concerning the acquisition of legal personality.¹⁹

This important legislative reform is justified for several reasons, which primarily have to do with the internal organization of the Registry and the system of information management contained therein.

Prior to this revision, the Civil Registry was a unitary body with several Registry offices distributed throughout the Spanish territories. Each office had custody of the books containing the records of the essential facts affecting the life of a person. The criterion for classification of the registry information was not by individuals or persons, but rather by the legally relevant fact: there was a registry for birth, another for marriage, a third registry for death, and another for tutorship and legal representation. In addition, the registrar or person responsible for each office of the Civil Registry was a member of the judiciary (the “Civil Registry Judge”).

1. The first reason for this reform was the conversion of the former Registry maintained in books into a data retrieval system or electronic record, which will act as a database. In turn, this system allows administrative decentralization: citizens may apply for recordation of registerable facts affecting them at any Registry office and not only, as it was until the reform, at the office in the location where the fact occurred (e.g., place of birth). Despite this new decentralized organization, the unity of performance is guaranteed in all the offices, both by decisions and instructions issued by the aforementioned Directorate General of Registers²⁰ and by the possibility to appeal decisions made by the officials of the Registry offices to the Directorate General.²¹

19. Art. 30, Spanish Civil Code [*Código Civil*, hereinafter C.C.].

20. As mentioned in the previous paragraph B, the Directorate General of Registers operates under the Ministry of Justice, which is responsible for the most important legal records of Spain (The Civil Registry and the Land Registry).

21. Art. 85 CRL, *supra* note 17.

2. The second change affects the very officials who are in charge of the Registry offices. Previously, the official in charge of each Registry office was a judge. In order to clearly separate the judicial function and the purely administrative function of the Registry, this task is now assigned to officials of the Civil Service, although they must have a law degree.²² Notwithstanding, registration activity ultimately remains under judicial control because the decisions of the Directorate General of the Registers may be challenged by any interested party in civil court.²³

3. The main change introduced by the 2011 legislative reform affects systematic management, or the systematization, of Registry information. Fundamentally, it is intended that the Registry will become a historical or personal record for each Spanish citizen. To do this, the hitherto existing classification system based upon the fact (consisting of all births, marriages, deaths, tutorships or other forms of legal representation that were grouped in the same book) is replaced by a classification of persons or individuals, so that all the facts affecting their civil status²⁴ will be grouped in the section or individual Registry²⁵ that is assigned to each person within the General Registry.

4. Finally, the greater importance ascribed by the new Civil Registry Law to the person or individual has resulted in two changes of material or substantive law:

a. The first change is the reform of article 30, Civil Code of Spain, concerning the commencement of legal personality, or recognition of the natural person, as a subject of law.²⁶ Until now, our Civil Code maintained the Romanist rule that birth alone does not determine the legal personality or juridical recognition of being

22. Second Additional Disposition CRL, *supra* note 17.

23. Art. 87 CRL, *supra* note 17.

24. Starting with the first registration, which is the act of birth.

25. Articles 6 & 44.3 CRL, *supra* note 17.

26. The amendment of the Civil Code is provided by the 3rd Final Disposition CRL, *supra* note 17. Despite the fact that this law will not enter into force until 2014, the amendment of Art. 30 of the Spanish Civil Code has immediate effect.

born as a person. In addition to the act of birth, one additional requirement was that the newborn would be recognized as having legal capacity and, accordingly, the capacity to have rights and duties, if the child survived at least twenty-four hours after separation from the mother's womb.

From now on, the recognition of the juridical personality of the individual is simultaneous to his birth, since the new article 30 of the Civil Code states that "legal personality is acquired from the moment the child is born alive, after complete separation from the mother's womb."²⁷

b. In the second place, and with the same purpose of strengthening the rights of the newborn child, the new Civil Registry Law of 2011 has abolished the right, previously recognized to the mother, of "disavowal" or denial of her maternity by a unilateral declaration recorded in the Registry, without contesting the filiation in court.²⁸ The only requirement for extrajudicial action to deny maternity was for the mother to make the declaration at a time very close to the birth and registration.²⁹

As mentioned above, such unilateral right has been repealed in the new Registry Law of 2011, which thereby recognizes a

27. This is because it was necessary for the newborn to survive at least twenty-four hours from the time that the umbilical cord was cut. This requirement was intended to prevent important juridical effects, such as the devolution of succession rights from one family line in favor of another, caused by the birth of children with little chance of survival.

28. Such a unilateral right of the mother was the counterpart of the possibility that the birth registration could take place without her participation since anyone who has certain knowledge of the birth is urged to report it to the Registry (art. 42 CRL, 1957, *supra* note 18). Moreover, it is mandatory for the doctor and other healthcare personnel attending the birth to report it to the Registry (art. 44 CRL, 1957).

29. The alleged mother shall make the declaration of disavowal or denial of maternity within 15 days following the notification from the Registrar informing her of the registration of maternity. *See* art. 47.3 CRL, 1957, *supra* note 18:

[t]he reference of this filiation can be suppressed by a judicial decision or by disavowal of the person who appears as the mother formalized before the Registrar, which shall be entered in the margin of the birth certificate. This disavowal cannot be made beyond 15 days of that notification. . . .

As above-mentioned, the prior act, which shall be in effect until 2014 (*see supra* note 18), was enacted on June 8, 1957.

previous jurisprudential rule.³⁰ Under this previous judicial interpretation, article 47.3 of the 1957 Civil Registry Law was unconstitutional, and therefore unenforceable, because the registration (and thus official recognition) of filiation depended exclusively on the will of the mother, to the detriment of the newborn child. Conversely, upon the entry into force of the new 2011 Civil Registry Law, the only way to cancel the registration of maternity will be by way of court judgment, which the alleged mother can only get by demonstrating to the courts (with proof and with guarantees for the rights of the newborn child inherent to the judicial process) that maternity was falsely attributed to her.

III. FAMILY LAW

In the area of Family law, the main legislative development has been the entry into force on January 1, 2011 of Law 25/2010 of July 29, 2010, promulgating Book II of the Catalonia Civil Code (*Codi Civil de Catalunya*),³¹ related to Persons and the Family.

A. Spain as a Multi-legislative State, with Coexisting Territorial Civil Law Systems

Catalonia, like the Basque country, Aragon, Navarre, the Balearic Islands and Galicia, is one of the regions or autonomous communities of Spain that has its own civil law, embodied in a civil code, which applies to the exclusion of the Spanish Civil Code within the Catalan territory.³² Spain is, therefore, a multi-

30. This line of case law originates from the Supreme Court Judgment of Sept. 21, 1999, T.S., s. n. 776/1999.

31. The Civil Code of Catalonia is being promulgated in stages. The first Act or Preliminary Act was enacted in 2002 (Law 29/2002 C.C. CAT., Dec. 30, 2002). At this time, the code is almost complete. Only Book VI, related to Obligations and Contracts, is missing and still in progress. The full text of the Civil Code of Catalonia is available in Spanish at <http://civil.udg.es/normacivil/cat/CCC/ES/Index.htm> (last visited May 5, 2013).

32. Art. 111-3.1 & 111-5 C.C. CAT. These provisions of the Civil Code of Catalonia show that, with respect to those civil matters over which the Catalan legislature has authority and which have been regulated by it, the law applicable in the territory of Catalonia is Catalan civil law. The Spanish Civil Code (1889)

legislative State in which a plurality of territorial civil laws exists. However, there are certain civil matters which are governed by a uniform civil law, since they are reserved to the legislative authority of the State and, accordingly, forbidden to the territorial legislative powers. Relevant provisions are found in article 149.1, rule 8, of the Spanish Constitution (*Constitución Española*).³³

B. The New Book II, Of Persons and Family, the Civil Code of Catalonia: Its Regulation of Matrimonial Regimes

With regards to family law, the Constitution grants to the State of Spain the exclusive power to legislate on the form of the marriage celebration and the capacity to marry. Therefore, although it aims at the complete regulation of family law,³⁴ Book

is, in turn, applicable to those territories of the State which do not have their own civil law. In addition, in certain civil matters (referred to in art. 13.1 C.C.), it is the common or uniform code that is applicable in of all the territories of the State, including those who have a special civil law.

33. Art. 149.1 of the *Constitución Española* [hereinafter C.E.] establishes those matters which can only be regulated by the State of Spain, and accordingly, those which are forbidden to the legislative authority of the autonomous communities or regions of Spain. Thus, matters not included in this list may be regulated by an autonomous or regional legislature. Although art. 149.1, rule 8, C.E. also reserves to the State “civil legislation”, that same rule recognizes the legislative power of certain Spanish regions for the “conservation, modification, and development” of their own civil law. Even so, art. 149.1, rule 8, C.E. provides that certain matters are also exclusively reserved to the legislative authority of the State and may not, therefore, be included in the territorial or regional civil laws. Among those civil matters reserved to the State, art. 149.1, rule 8, C.E. includes the “grounds of contractual obligations,” a limitation that has been much discussed by the State as well as by the regional powers before the Spanish Constitutional Court. The Constitutional Court (for instance, in judgment 71/1982, Nov. 30, 1982) stated that with this limit the intent is to preserve the unity of the market within Spanish territory. This limit would play, therefore, a similar role as the commerce clause (U.S. CONST. art. I, § 8) which, in the United States Constitution, limits the competence of States in matters of private law.

34. In addition, the Civil Code of Catalonia strives toward regulation adapted to new models of family (for example, single-parent families), as established by art. 231-1, which, significantly, bears the heading “the heterogeneity in the family.” According to this provision, “The family enjoys legal protection provided by law, protecting without discrimination family relationships arising from marriage or stable cohabitation in couples, and families formed by a single parent with his/her descendants.”

II of the Civil Code of Catalonia must be enacted without those matters upon which the Catalan Legislature is forbidden to take legislative action.

One of the issues that, in Catalonia, has its own regulation distinct from the Spanish Civil Law relates to “matrimonial agreements”, which are contracts between spouses or between persons who will contract a future marriage in order to regulate the economic regime of the marriage.

Although there were obstacles to grant matrimonial agreements in Spanish law until 1975 (until that date the Spanish Civil Code prevented the execution of post-nuptial agreements, because of possible psychological influence of the husband over the wife),³⁵ in Catalonia, vast autonomy has always existed to grant matrimonial agreements, allowing them both prior to and after the celebration of the marriage. Moreover, the content of the agreements has been and continues to be very broad. In Catalonia, beyond the choice of the economic regime, these agreements have been intended to articulate everything related to the whole regime applicable to the community of family life. Thus, as detailed below, matrimonial agreements are not unitary transactions, but rather a group of transactions (i.e., a set of multiple transactions and statements).

The primary, but not the only, purpose of the matrimonial agreement is to determine the “matrimonial economic regime,” which can either be of separate property or of community property; only the latter creates the existence of common marital property. In Catalonia, in the absence of a consensus between the contracting parties or spouses in the agreement, the matrimonial economic regime is that of separate property, as provided by law.³⁶ However,

35. As reflected in the Statement of Purpose (§ IV) of Law 14/1975 of May 2, which amended the Spanish Civil Code to eliminate restrictions on a married woman’s legal capacity; B.O.E. n. 107, May 5, 1975.

36. Art. 231-10.2 C.C. CAT. On the contrary, in Spanish law, in the absence of a regime chosen by the parties themselves in the matrimonial agreement, the

the agreement on the economic regime is not the only content of the matrimonial agreement. On the contrary, it is common that the contracting parties (the persons who intend to contract marriage, if the agreement is pre-nuptial), or the spouses (in a post-nuptial agreement or an agreement concluded after the marriage ceremony), may waive that part of the agreement and maintain the regime of separate property already provided by law, since that is the one best in keeping with the current social reality (the full integration of women into the labor market and, accordingly, of their economic autonomy).

Thus, in Catalonia, the agreements tend to be designed to mitigate the effects of the separation of property, permitting a certain connection between the personal patrimonies of both spouses. The principal means for achieving this has been by mutual donations which, for reason of marriage or future marriage, the contracting parties or spouses make, either between themselves or in favor of their—usually—future descendants. For the same nuptial reasons, donations may also be made by third parties (usually, the relatives of one or either of the contracting parties or spouses) to the contracting couple or their future descendants. Indeed, at times the object of these donations is not only specific property, but is, rather, a universality: applied to all or part of the patrimony of the donor, who, at the time of the donation, irrevocably institutes as heir the son or daughter who marries and/or his or her future descendants. In the latter case, we are dealing with the *heretament* or successoral contract³⁷ which up to

matrimonial property regime shall be one of community property, which involves the creation of a common patrimony of the spouses (art. 1316 C.C.).

37. Indeed, the *heretament* or typical successoral contract in Catalan civil law requires kinship between the contracting parties (art. 431-2, C.C. CAT.).

this point was necessary to include in the instrument of the matrimonial agreement.³⁸

Aside from that specific type of *heretament* or successoral contract, the remarkable thing is that, by the fact they are included in the instrument of matrimonial agreement, donations for reason of marriage are more binding than ordinary donations. They are non-revocable on a variety of causes that ordinarily³⁹ make it permissible for the donor to revoke them unilaterally (e.g., by the subsequent birth of a child) after donation. Rather, donations contained in the matrimonial agreement are revocable only on a single ground: the failure by the donor to perform a charge stipulated in the act of donation to the benefit of the donee-spouse.⁴⁰ The reason for this provision is the legal assumption that these kinds of donations are not strictly gratuitous or exclusively intended to benefit the donee. On the contrary, the law assumes that all donations contained in the instrument of matrimonial agreement have been made correspondingly or in recognition of the attributions made in turn by one contracting party or their family to the benefit of the other contracting party or their relatives. They are, therefore, mutual and reciprocal attributions. It is precisely that *quasi-onerous* or reciprocal character peculiar to donations in the marital agreement that determines the restriction of the unilateral power to revoke or leave them without effect.

Another provision related to this rule is article 231-23, concerning the modifications of the marital agreement. When, in addition to the contracting parties, third parties (i.e., relatives who make donations on behalf of the spouses or their descendants) have participated in the marital agreement, the agreement may only be amended with the participation of all persons involved in its initial formation. The only declaration in the agreement which does not

38. Currently, the Catalan Civil Code allows the *heretament* to be recorded in a deed or notarized document that is not a matrimonial agreement (art. 431-7 C.C. CAT.).

39. Art. 531-15 C.C. CAT.

40. Art. 231-25 C.C. CAT.

require unanimous modification is the agreement on the choice of the economic regime: the spouses are free during the marriage to modify the economic regime established at the time of the marriage contract. However, since the amendment can be used to defraud the rights of creditors of either spouse,⁴¹ such modification shall be enforced against them only from the date of its publication in the Civil Registry.⁴²

As mentioned above, the content of the matrimonial agreement is not limited to setting up the economic regime of marriage, but, because it may be comprehensive, it may be used to regulate various issues raised by the community of marital life. Although, traditionally, the content of the agreement has been eminently patrimonial or economic, current regulation does not preclude the inclusion of strictly personal marital or family issues.⁴³ Furthermore, it seems that the current Catalan Civil Law is even favorable to such a possibility, given its purpose to provide non-judicial means to solve family conflicts, attempting to resolve them within the family's own sphere by the agreement of the parties themselves.⁴⁴ Therefore, there could also be a place in the agreement for stipulations of a personal nature, such as marital agreements relating to the exercise of parental authority,⁴⁵ the

41. For instance, matrimonial creditors might be disappointed in a reduced guarantee (the patrimony of the debtor), if the original matrimonial regime of community property is replaced by a separate property regime.

42. Art. 231-23.2 C.C. CAT. In addition, modification of the matrimonial agreement must be recorded in the Registry of Commerce if either of the spouses is a merchant or employer, as well as in the Land Registry, if one or both are the owner of immovable property.

43. Note that art. 231-19.1 C.C. CAT. allows including in the matrimonial agreement all lawful pacts that the contracting parties consider pertinent.

44. As established by art. 233-6 C.C. CAT., which includes family mediation in the case of marital crisis and, therefore, invites spouses at any stage of the proceedings to try to resolve their differences through consensus guided and managed by a professional mediator.

45. Art.236-9 C.C. CAT. allows, during cohabitation, the parents, whether married or not, to agree on different approaches to the exercise of parental authority, such as the exercise by only one of them with the consent of the other.

recognition of a non-marital child of either spouse,⁴⁶ or the husband's consent that, during his life, and even after his death, his wife can receive assistive (or *in vitro*) insemination using his reproductive material.

Despite the potential scope of the content of the agreements, an impassable restriction is imposed on them legally, which is the respect for the equal rights and duties between the spouses. The application of such a restriction raises two issues:

First, it is necessary to provide the restriction with a new meaning. Originally, this restriction intended to prevent discrimination on grounds of sex (particularly, discrimination against women) within the marriage. However, since in 2005,⁴⁷ when same-sex marriage became legal in Spain, the goal of equality between spouses must apply to both heterosexual and homosexual marital unions. Therefore, it is no longer intended to prevent only discrimination due to sex, but also on any other grounds of discrimination that, in a same-sex marriage, might arise from a certain diversification of roles.

Second, it is questionable whether the indicated restriction permits the contracting parties or spouses to make an unequal distribution of marital rights and duties. Despite the above-mentioned restriction, a myriad of specific rules of family law in Catalonia give rise to the possibility that an asymmetrical or unequal distribution of rights and duties agreed upon by the spouses themselves is legally supported.⁴⁸

46. In fact, art. 231-26(a) already includes that kind of recognition as possible content of the matrimonial agreement.

47. Pursuant to Law 13/2005 of July 1, related to the right to marry, *supra* note 12.

48. Thus, for instance, reference should be made to art. 236-9 C.C. CAT., empowering parents to unevenly distribute between them functions inherent to parental authority, which may even include an agreement that such power will be exercised by one of the parents. In addition, spouses are allowed to confer on only one of them the management and disposition of common property (art. 569-30). Also, in the case of dissolution of the matrimonial regime, the unequal distribution of earnings or common property is allowed in the agreement (art. 232-15 – 232-38.1). Finally, without intending to be exhaustive, it should be

Now, given the strict requirement of reciprocity prevailing in the content of marital agreements,⁴⁹ in order for that kind of agreement to be considered valid and effective, it should be verified that every disadvantage or individual renunciation has in return some other advantage or gained superiority for the spouse who assumes the disadvantage. Thus, this strict requirement of reciprocity shall be understood as synonymous with balance, and not as rigorously symmetrical or quantitatively equal. Furthermore, any kind of confusion or communication between the personal and patrimonial spheres should be prevented. For instance, a renunciation to exercise paternal authority made in exchange for a price or a patrimonial right should not be accepted.

Under the terms and within the above-mentioned limits, nuptial or matrimonial agreements bearing unequal content should then be accepted. Because, since 1975,⁵⁰ marriage no longer affects the legal capacity of the spouses, legislation, at the present stage of legal development, should have abandoned excessively protective attitudes, and should be limited to ensure that those entering into nuptial agreements do so under conditions of free will and informed consent. To this effect, according to Catalan jurisprudence, the ordinary rules to eradicate the vices of consent are sufficient.⁵¹

noted that even those rules which in the event of matrimonial crisis aim to protect the most disadvantaged spouse, a waiver or agreement to the contrary is permitted. For a more detailed analysis, please see Juana Marco Molina, *Los capítulos matrimoniales* in 4 TRATADO DE DERECHO DE LA FAMILIA 181-212 (M. Yzquierdo & M. Cuena eds., Aranzadi, Cizur Menor (Navarra) 2011).

49. Art. 231-20.3 C.C. CAT.: "The agreements [in anticipation of marital rupture] of exclusion or limitation of rights should have a reciprocal basis and clearly define the rights that are limited or waived."

50. Since Law 14/1975, *supra* note 35, which reformed the Spanish Civil Code to remove previous restrictions on a married woman's legal capacity.

51. In this regard, the judgment of the Superior Court of Justice of Catalonia of July 19, 2004, is particularly significant. The mentioned judgment recognized the validity of certain agreements in anticipation of marital rupture in which the wife renounced the use of marital home in favor of her husband. Pursuant to this decision (see the judgment's 4th legal basis) such matrimonial agreement should be complied with because "it is an agreement between adults with full capacity

Finally, it should be noted that one of the most innovative features found in the matrimonial agreements are those agreements between the contracting parties or spouses in anticipation of a marital rupture.⁵² The Catalan Civil Code not only supports these agreements, which in Catalonia are binding on the contracting parties without court approval or endorsement,⁵³ but also deals with the rules related to their formation and effectiveness, having been greatly influenced by American law; in particular, by the principles formulated by the American Law Institute relating to marital rupture.⁵⁴

For instance, a rule such as article 231-20.1 is derived from American law, which provides that the agreements in anticipation of marital rupture are only valid if they have been agreed upon at least 30 days prior to the celebration of the marriage. This rule, based on American jurisprudence,⁵⁵ is an expression of legal protection of the contracting parties when matrimonial agreements are entered into too close to the date of the wedding, since it may

. . . [wherein] the parties cannot be detached . . . since that agreement binds them, as it is the case with any contract.” It was sufficient to use the rules on vices of consent to verify that the spouse at a patrimonial disadvantage signed the agreement of their own free will and with informed consent; T.S.J. Cataluña, s. n. 23/2004.

52. According to art. 231-20.1 C.C. CAT., it can be included either in the notarized instrument of matrimonial agreement or in a notarized document independent and disassociated from the matrimonial agreement.

53. In contrast, the Spanish Civil Code only confers efficacy to matrimonial agreements regulating the effects of separation, divorce, and annulment of marriage after they have been reviewed and signed by the judge, before whom these cases of matrimonial crisis are presented (art. 90.2 C.C.).

The difference between the Catalan and the Spanish regulation is certainly due to the above-mentioned purpose of the Catalan Civil Code to provide non-judicial solutions for family conflicts and promote as much as possible a resolution by agreement between the parties concerned. Even so, there are certain matters for which the Civil Code of Catalonia maintains judicial control. Therefore, art. 233-5.3 C.C. CAT., subjects to judicial review the agreement on the custody of and relationship with the child, as well as regarding the child support that should be provided to them after the marital rupture, in order to verify if these agreements are in accordance with the best interest of the child.

54. AMER. LAW INST. (ALI), PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

55. *See id.* at 966.

increase the risk of intimidation where one of the parties threatens not to marry the other party if the latter does not endorse the proposed prenuptial agreement.

Unlike the remaining provisions of the agreements, which, if prenuptial, enter into force on the date of the marriage,⁵⁶ the agreements in anticipation of rupture only become binding when and if the regulated situation occurs—that being the rupture of the marriage. It may be that, when the rupture occurs, such agreements are no longer suitable to adequately address an unforeseen subsequent event and circumstances very different from those that surrounded the agreement. For that reason, the Civil Code of Catalonia permits the injured spouse to challenge it by showing that an unforeseeable and unpredictable change occurred regarding circumstances relevant at the time the agreement was made.⁵⁷

Even without naming it as such, article 231-20.5 brings into family matters an institution as strictly patrimonial as the *rebus sic stantibus*, typical of synallagmatic or bilateral contracts, which impose reciprocal benefits to the contracting parties. This is because, like in the donations discussed previously, the marital agreements, and in particular those in anticipation of rupture⁵⁸ contained in the marital agreements, tend to be linked by strong ties of interdependence or reciprocity thus justifying the application of that clause. Accordingly, the promise, renunciation, or attribution that is carried out by one of the parties in favor of the other can be maintained only if the circumstances at the time of the execution of the agreement continue to support the continuous justification of the reciprocal promise or concession made by the other party.

Despite the aforementioned influence of the passage of time and the consequent change of circumstances to the effectiveness of the agreements in anticipation of rupture, it is necessary to

56. Art. 231-19.2 C.C. CAT.

57. Art. 231-20.5 C.C. CAT.

58. Art. 231-20.3 C.C. CAT.

emphasize that the agreements that were formed after the marital rupture has occurred are weaker than those formed before the marital rupture, despite the fact that they are more recent; thus, it is recognized that each one of the spouses has the right to unilaterally withdraw from them.⁵⁹ Indeed, underlying the rule is the legal recognition that post-rupture agreements are usually made in a moment of particular emotional distress.

IV. CONTRACT AND PROPERTY RIGHTS: THE LEGISLATIVE RESPONSE TO THE ECONOMIC CRISIS

Regarding the law of contract and the law of property rights, the main legislative developments have been directly related to the financial crisis that Spain has faced since 2008, particularly by the most economically vulnerable strata of society. During this period, hundreds of thousands of people,⁶⁰ most of them unemployed,⁶¹ have been evicted from their homes because they found it impossible to fulfill the contracted obligations assumed in order to finance the acquisition of immovable property.

The financial crisis created an urgent imperative for public intervention,⁶² which was necessarily translated into the adoption

59. Precisely, such unilateral right to withdraw exists when the spouse who wants to exercise it signed the agreement without independent legal counsel (Art. 233-5.2 C.C. CAT.).

60. According to Reuters, an estimated 400,000 properties have been repossessed between 2008 and 2012; www.reuters.com/article/2012/11/15/us-spain-evictions-idUSBRE8AE10A20121115 (last visited Aug. 8, 2013).

61. According to estimates made by the government itself, the number of unemployed people in Spain for the first quarter of 2012 hovers around 23% of the labor force, reaching almost 50% for those age 25 and younger. Moreover, such as is recognized in one of the legal provisions that I discuss later, this situation of unemployment very often affects all members of the family, as thus recognized by art. 3.1(a) of Royal Decree-Law 6/2012 of March 9, concerning urgent measures for the protection of mortgagors without resources; B.O.E. n. 60, Mar. 10, 2012).

62. The regulation itself is motivated by this state of affairs, recognizing without reservation the seriousness of the situation. Thus, for instance, the penultimate paragraph of Royal Decree-Law 6/2012, *supra* note 61, states that:

The adoption of the measures referred to in this Royal Decree-Law is essential in order to protect a social group in a situation of special vulnerability in the economic context generated by the crisis. The

of laws. In Spain, unlike in common law countries, the legal system does not allow courts to create a law without statutory support.⁶³ Judicial attempts to remedy this situation by interpretation, even forcibly, have been ultimately proven to be insufficient in the current legal framework, as well as dangerous to the legal security and the necessary social confidence that contractual obligations will be performed: *pacta sunt servanda* (“agreements must be kept”).

When analyzing the legal measures taken, it is therefore essential to take into account the socio-economic context mentioned above. The same context of urgency and necessity also justifies the fact that the main measures have been taken, not by Spanish Parliament (*Las Cortes Generales*), but directly by the Executive Branch, which for reasons of extraordinary urgency and necessity, may issue regulatory provisions which have the force of law: the decree-law.⁶⁴ After its promulgation by the Executive Branch, it must be ratified by the Parliament,⁶⁵ which has to determine whether the actual circumstances existing at that time justified such extraordinary provisions.

A. Contract Law: Labor Reform

In the area of contract law, the most significant measure was the “labor reform”, undertaken by Royal Decree-Law 3/2012 of

effects of unemployment on Spanish families and their social situation have produced damage for which government intervention cannot be further delayed. . . .

63. In Spain, the judges are not bound by precedent (our system does not recognize the principle of *stare decisis*), but, as stated in art. 117.1 C.E., judges are bound solely by legislation (*imperio de la ley*). The jurisprudence of the Supreme Court is not, therefore, a source of law or legal norm under Spanish law, but only has persuasive interpretative value (art. 1.6 C.C.) and is a guide for probable future determination, but is neither certain nor immutable for future litigation.

64. Art. 86 C.E.

65. The ratification, which must be made within 30 days of the promulgation of the decree-law, falls within the authority of the *Congreso de los Diputados*, which is the lower House in the Spanish Parliament.

February 10,⁶⁶ containing urgent measures for the reform of the labor market. This provision, which first and foremost seeks to combat unemployment, introduces flexible modifications aimed at regulating the employment contract in order to encourage small and medium-sized companies to hire workers.

This flexibility was undoubtedly necessary, since the rigidity of the labor law framework has been identified as one of the main reasons for the high rate of unemployment in Spain. This is because Spanish labor law (primarily contained in “The Workers’ Statute”)⁶⁷ is still very attached to the achievements of the labor movement in the beginning of the 20th century and is, therefore, extremely protective of the rights of workers, often to the detriment of the employer, who desires the ability to adapt in order to serve the financial needs of the company.

Hence, the above-mentioned legislative reform provides flexibility and acceleration of the possible renegotiation of individual employment contracts, especially concerning the causes and consequences of dismissal, even to the detriment of collective agreements (i.e., contracts between a trade union and the group of companies in a certain sector of economic activity), which so far have predetermined the conditions that could be agreed upon individually between workers and companies in that sector.

The most notable changes caused by the Royal Decree-Law 3/2012 with regard to the previous legal framework are as follows:

1. First, as a main instrument for flexibility in hiring, and at the same time for the promotion of employment, it creates a new form of employment contract of indefinite duration that can only be used by companies with fewer than fifty workers.⁶⁸ This category of

66. Royal Decree-Law 3/2012, B.O.E. n. 36, Feb. 11, 2012.

67. Royal Decree-Law 1/1995 of March 24, approving the consolidated Workers’ Statute [*Estatuto de los Trabajadores*, hereinafter E.T.], B.O.E. n. 75, Mar. 29, 1995.

68. It is taken into account that small and medium-sized enterprises (called “PYMES”—*pequeñas y medianas empresas*), which represent the majority of Spanish production, suffer the consequences of the economic crisis with greater intensity.

companies is allowed to hire workers for an indefinite time by subjecting them to a trial period longer than the ordinary trial period. While the ordinary trial period is six months,⁶⁹ in this new type of contract, in the favor of small enterprises, the probationary period is extended to one year.⁷⁰ Within that period, both the employee and the company may unilaterally terminate the contract without justification or cause, or payment of additional compensation for termination. Additionally, the companies are entitled to tax incentives when workers are under the age of thirty or unemployed persons registered at the Employment Office.

2. Second, the new legislation brings two new substantial changes with regards to dismissal:

a. The first change consists of a broader consideration of the possible causes of dismissal, especially the “objective dismissal”, which is founded on “economic, technical, organizational or production causes.” At the same time, this also applies to collective dismissals, which must impact at least 10% of the workers in the company.⁷¹

Particularly significant is the dismissal on economic causes or based on the performance of the company. It is deemed that those “economic causes”⁷² are present where the performance of the company shows a negative economic situation, in cases such as current losses and anticipated losses or a persistent decrease in their level of income or sales. In this regard, two aspects should be stressed: First, based on the intention to facilitate the ability of the company to act in such circumstances, even though there is still *ex post* judicial review to determine the veracity of such circumstances, the company is exempt from obtaining approval from the administrative authority, which, until now, had to

69. Art. 14 R.D.-L. 3/2012, *supra* note 66.

70. Art. 4 R.D.-L. 3/2012, *supra* note 66.

71. Art. 18, para. 2 & 3, R.D.-L. 3/2012, *supra* note 66, amending Arts. 51 & 52 E.T., *supra* note 67.

72. Art. 51 E.T., *supra* note 67.

authorize this type of dismissal.⁷³ Second, although the formulation of the reasons for dismissal does not vary substantially from the previous legislation, the previous references to the reasonableness and the prospects for success of the measure are eliminated from the provision⁷⁴ in order to ensure that the courts will look at only the existence of the cause and refrain from making judgments relating to the management of the business, as they had done on previous occasions.

Another modification related to those mentioned above—whose effectiveness has yet to be proven is that in counterpart to the broad and flexible causes for dismissal, the provision at the same time prevents dismissal by granting greater freedom to the companies to unilaterally modify the conditions of work.⁷⁵ Thus, for instance, they are allowed to modify essential contractual terms such as the wage amount, distribution of working hours, geographic relocation and even functional reallocation of workers.⁷⁶ Moreover, such unilateral modifications are also allowed without prior administrative authorization. Above all, the company may also make changes contrary to conditions previously set in the collective agreement applicable to the sector to which the company belongs.⁷⁷

b. The second change consists in trying to reduce the economic cost of dismissal for companies, also known as “low-cost dismissal.”⁷⁸ Thus, for contracts concluded after the Royal Decree-Law entered into force, in the case of individual dismissal (when it

73. Art. 13 R.D.-L. 3/2012, *supra* note 66, amending Art. 47 E.T., *supra* note 67.

74. Art. 51.1 E.T., *supra* note 67.

75. Arts. 8 & 12 R.D.-L. 3/2012, *supra* note 66, which reorganized arts. 22, 39 & 41 E.T., *supra* note 67.

76. That functional reallocation or unilateral power exercised by the company to change the functions or tasks of the worker includes even the possibility to assign to him or her lower-skilled functions than those corresponding to the professional group to which the worker belongs.

77. Art. 14, para.1, R.D.-L. 3/2012, *supra* note 66, amending art. 82.3 E.T., *supra* note 67.

78. In Spanish, “*abarataamiento*”, a term used in social media.

is unfair or unjustified), the current severance payment of forty-five days' salary per year of service is replaced by a severance payment of thirty-three days' salary per year of service, to be paid in installments over a maximum period of twenty-four months.⁷⁹ In contrast, with collective dismissal on economic or any other objective cause, the severance payment will be, as a general rule, of twenty days' salary per year of service, and may be paid in a maximum of twelve monthly installments.⁸⁰

3. Lastly, the labor reform emphasizes the importance, as mentioned above, to ensure that individual employment contracts, as well as specific collective agreements of each company, prevail over sectorial or professional agreements between Trade Unions and employers of a particular sector. The legislature presents this measure as an attempt to further "conventional decentralization in order to facilitate the negotiation of working conditions at the closest, most appropriate level to the actual circumstances of the company and its employees."⁸¹ Naturally, from the unions' point of view, these kinds of measures are seen as an attack on the bargaining power of the labor representatives, to the detriment of the requisite bargaining power of the workers themselves.

In any case, the main changes in this area have basically been as follows:

a. It is possible to modify or revise a sectorial collective agreement during its period of performance, thus changing the agreement's previous stability until the next negotiation. Now, however, article 86.1 E.T.⁸² allows either party (employees' representatives or employers' representatives) to push for its renegotiation.

79. Art. 18, para.7, R.D.-L. 3/2012, *supra* note 66, modifying art. 56.1 E.T., *supra* note 67.

80. Art. 53.1(b) E.T., *supra* note 67.

81. As per the Statement of Purpose, para. IV, R.D.-L. 3/2012, *supra* note 66.

82. Modified by art. 14, para. 5, R.D.-L. 3/2012, *supra* note 66.

b. Second, the survival of the collective agreement is abolished; until now the law provided that, after the maximum time allowed to negotiate has expired without reaching an agreement, the collective agreement remains in force indefinitely. Now, however, two years after the denunciation of the collective agreement by either party, without having reached a new agreement or being issued an arbitral award, the denounced agreement would no longer be valid.⁸³

c. Finally, in order to facilitate the decentralization of collective bargaining already mentioned above,⁸⁴ it is established, for the first time, that the company agreement takes precedence over the sectorial collective agreement,⁸⁵ providing the company the flexibility to adapt working conditions to economic and organizational needs, as well as to the changing market situation.

B. Property Rights Law: “Giving in Payment” or Allowance for Alternative Satisfaction⁸⁶ Granted to the Debtor Who Loses His House in a Foreclosure Proceeding

One of the most-debated issues of 2011 is the so-called “giving in payment,”⁸⁷ meaning that the debtor who gave his immovable property (usually his own house) to the creditor as a mortgage can be released from the obligation (or obligations resulting from the mortgage loan contracted for the acquisition of that property) if the mortgage property is adjudicated to the mortgage creditor. Such an adjudication takes place when, in the course of the foreclosure proceeding, the sale by public auction of the object of the guarantee is not completed due to a lack of bidders or interested

83. Art. 14, para. 6, R.D.-L. 3/2012, *supra* note 66, modifying art. 86.3 E.T., *supra* note 67.

84. As mentioned both in the previous paragraph 2 and at the beginning of this paragraph 3.

85. Art. 14, para. 3, R.D.-L. 3/2012, *supra* note 66, modifying art. 84.2 E.T., *supra* note 67.

86. In Spanish, “*la facultad solutoria alternativa*.”

87. As we shall see, the use of the term “giving in payment” (*dación en pago*) in the context of this reform is technically inaccurate.

persons.⁸⁸ In this event, according to Spanish Procedural Law,⁸⁹ the creditor may request the court to adjudicate the mortgaged property to him.

Such adjudication does not extinguish the obligation or obligations secured by the mortgage. Instead, according to Spanish law, the creditor may continue to claim from the debtor the portion of the debt that is not satisfied (i.e., remains unpaid) after the sale of the adjudicated immovable property. This means that since the foreclosure does not alter the unlimited personal liability of the debtor,⁹⁰ the creditor may continue to try to collect the amount due (the unsatisfied debt) from the debtor's remaining assets.⁹¹

Thus, it has become a widespread and socially criticized practice that, after the adjudication of the property at a price that may be well-below the appraised value of the mortgaged property assigned by the creditor and stated in the mortgage contract,⁹² the creditor (usually a bank) then gets an additional benefit by transferring the property to a third party while still claiming the amount of the outstanding debt from the debtor, who is typically an unemployed person who has lost his house precisely because of the lack of income needed to satisfy the obligations arising from the mortgage loan taken in order to purchase the property.

88. Very often, auctions of immovables are deserted due to rampant falling prices in the Spanish real estate market, which, on the one hand, has been overwhelmed by the excessive construction activity of the previous two decades, and, on the other hand, by a lack of liquidity because of the general situation of indebtedness of individuals and companies.

89. Law 1/2000 of January 7, the Law of Civil Procedure (*Ley de Enjuiciamiento Civil*), referred to as L.E.C., B.O.E. n. 7, Jan. 8, 2000.

90. The Mortgage Law [*Ley Hipotecaria*, hereinafter L.H.], consolidated pursuant to the Decree of February 8, 1946. Art. 105 L.H. states that "The mortgage . . . will not alter the unlimited personal liability of the debtor provided in art. 1911 of the Civil Code." B.O.E. n. 58, Feb. 27, 1946.

91. According to art. 1911 C.C., "the debtor is liable for the performance of his obligations with all his property, present and future."

92. The mortgage contract has to be formalized in an authentic act or instrument before a notary in order for this right to be created or exist (art. 1875 C.C.).

This situation, although protected by the law in force,⁹³ has not only raised widespread social criticism for being incomprehensible to common citizens, but has also led to attempts to put an end to the problem by way of certain judicial decisions from lower courts. Thus, decisions such as those of the Court of First Instance of Lleida, December 29, 2011; of the Provincial Court of Girona, September 16, 2011; and above all, of the Provincial Court of Navarra, December 17, 2010 (which has had the greatest social impact), describe the conduct of the banks as “abuse of rights,” “an anti-social exercise,” or “an excess of authority”⁹⁴ regarding the rights derived from the mortgage.⁹⁵ Consequently, the courts deny the right of the creditor bank to pursue the collection of the outstanding amount of the mortgage on the remaining assets of the mortgagor.⁹⁶ These cited decisions reinforce the line of argument

93. In the already-cited art. 105 L.H. and art. 1911 C.C.

94. Article 7.2 C.C.

95. Indeed, art. 7.2. C.C. prohibits abuse of rights, antisocial exercise or excess of authority as follows:

The law does not support abuse of rights or antisocial exercise thereof. Any act or omission which, as a result of the author’s intention, its purpose or the circumstances in which it is performed manifestly exceeds the normal limits to exercise a right, with damage to a third party, shall give rise to the corresponding compensation and the adoption of judicial or administrative measures preventing persistence in such abuse.

96. As stated in the resolution of the Court of First Instance No. 5 of Lleida, December 29, 2011, ejecución hipotecaria 1895/2009 (which corresponds with other judicial decisions referred to in the text):

. . . [W]e must not forget that when the Bank granted the loan, it valued the property or estate at €19,242.55, and now intends to incorporate it into their assets for a value of €109,621.28, and to continue the enforcement process on the other assets of the debtors . . . *la doctrina de los actos propios* (compare with the doctrine of estoppel) applies here. If the bank, the dominant party in the contract of adhesion with the borrower, appraised the mortgaged property at a certain amount, it cannot then, if it does not want to contravene the above-mentioned doctrine, which has been repeatedly applied by jurisprudence, incorporate as its own the auctioned property without giving it the value that [the creditor bank] itself set. One of the foundations of this jurisprudential trend is the application of art. 7 of the Civil Code . . . because it is understood that the incorporation of this patrimonial asset at a lower value to which the party has acknowledged, and intends to continue the enforcement process, presumes an abuse of rights by the creditor . . . and allows an unjust enrichment of the Bank. Because the

that judgments should reflect the current economic and social reality, since, in effect, pursuant to article 3.1 of the Spanish Civil Code, “The law will be interpreted . . . according to the social reality at the time they should be applied. . . .”

Indeed, in view of the current economic situation of the country, judgments such as that the aforementioned Court of Lleida state that:

[T]he 2011 economic outlook has nothing to do with the economic outlook of 2006, 2007 and 2008 when the crisis was still emerging. Nowadays, the Spanish economy, as well as the world economy, suffers a deep economic crisis and for this reason, surely, the property adjudicated to the bank . . . now has a market value below the price agreed in the mortgage loan, but is it fair that the debtor suffers all the consequences of this fall? Would it not be fairer that the financial institutions also bear part of this decline? Economists are unanimous in considering that the real estate value losses have been caused by the financial institutions themselves with their mismanagement of the financial system. Hence, if the laws should be interpreted according to the reality at the time when they are applied (article 3 of the Spanish Civil Code) . . . [it] is not acceptable that the stronger party in the mortgage loan contract obtains an unjustified benefit with the further execution at the expense of the debtor as a consequence of applying the legal rules which aim to obtain reimbursement, not enrichment, of the creditor. . . .⁹⁷

However, the jurisprudence of the Supreme Court⁹⁸ rejects that judicial approach because it holds that if the foreclosure proceeding has been followed according to the legal procedure,⁹⁹ it

purpose of foreclosure is to obtain for the creditor, with the auction of the property, the collection of the outstanding debt, but not to obtain an unjust benefit such as that when the mortgaged property is acquired at a lower price than the value fixed by the parties . . . and continue the enforcement process on the other assets of the debtors.

97. The resolution of the Court of First Instance No. 5 of Lleida, December 29, 2011, ejecución hipotecaria 1895/2009.

98. In particular, the judgment of the Supreme Court of February 16, 2006, in its 5th legal basis; T.S., s. n. 128/2006.

99. Art. 131 L.H.

does not constitute an abuse of rights by the mortgagee to exercise the rights conferred by law in order to obtain admissible economic benefits in those transactions. In addition, the Court holds that preventing the mortgagee from exercising those rights would undermine the general confidence in the performance of contractual obligations.

Moreover, even the Constitutional Court, in its Decision 113/2011 of August 17, 2011, censured such a judicial approach, holding that those judges, critical of the use of the rules for foreclosure proceedings, exceed their interpretative role and force the existing legal framework, which, in a system of law such as that of Spain, can only be modified by the legislature, as the Constitutional Court also noted.

Perhaps that is the reason why the legislature itself¹⁰⁰ eventually decided to intervene in order to try to remedy, or at least alleviate, the severity of the above-mentioned social-economic situation. The measures taken are twofold:

1. First, the Royal Decree-Law 8/2011 of July 1,¹⁰¹ concerning measures in support of mortgagors, which introduces two provisions:

a. The aforementioned Law of Civil Procedure (L.E.C.) is modified to ensure that in foreclosure proceedings for default of payment, the debtor receives an adequate price for the immovable property that allows him to minimize the remaining debt. This way, in modifying article 671 L.E.C., it is anticipated that the adjudication to the creditor of a mortgaged property as a result of a foreclosure proceeding will never be at a price of less than 60% of its appraised value.

b. The threshold or legal limit of that which is exempt from seizure is raised. Usually, the general minimum value of what is

100. In fact, the executive branch itself uses its exceptional power to proclaim Decree-Laws, which, as mentioned in the previous paragraph, have the rank of law even though these decrees are issued by the executive power.

101. B.O.E. n. 161, Jul. 7, 2011.

unseizable for any debtor coincides with the minimum wage.¹⁰² Then, for mortgagors who have lost their habitual place of residence, this Royal Decree-Law raises the legal limit up to 150% of the minimum wage, and an additional 30% for each member of their family who does not receive income exceeding this minimum wage.¹⁰³

2. Subsequently, the Royal Decree-Law 6/2012 of March 9, concerning urgent measures for the protection of mortgagors without resources, seeks to curtail the social problem of evictions of people who have lost their housing in a foreclosure proceeding by means of establishing a voluntary system of mortgage debt renegotiation. This system consists in the introduction of a “Code of Good Practice,”¹⁰⁴ which can be voluntarily adopted¹⁰⁵ by financial institutions (banks and other savings institutions). It is not, therefore, an imperative measure, but merely a voluntary measure or *soft law*. Even so, the executive branch is confident that the majority of banks will adhere to the “Code,” both for reasons of professional prestige (the government would publish a list of participating institutions),¹⁰⁶ and, above all, to gain a competitive position in the market.

The measure is not created for the benefit of any mortgagor, but rather to favor those who, in accordance with the guidelines established by the Royal Decree-Law, can be considered particularly vulnerable, due to the suffering of extraordinary difficulty, to satisfy the payment of their mortgage obligations.¹⁰⁷ Article 3.1 of the Royal Decree-Law considers the debtor of a loan secured with a mortgage on his habitual place of residence to be in

102. In May 2013, the minimum wage was €645 per month; http://elpais.com/elpais/2013/05/31/inenglish/1370013481_405760.html.

103. Art. 1, R.D.-L. 8/2001, *supra* note 101.

104. The content of the Code of Good Practice is established in the Annex of R.D.-L. 6/2012; B.O.E. n. 60, Mar. 10, 2012.

105. Art. 5, R.D.-L. 6/2012, *supra* note 104.

106. Art. 5.3, R.D.-L. 6/2012, *supra* note 104.

107. Art. 1, R.D.-L. 6/2012, *supra* note 104.

such a vulnerable situation when all the following circumstances are met:

- a. That all members of the family unit¹⁰⁸ lack income derived from work or economic activities.
- b. That the mortgage payment¹⁰⁹ is greater than 60% of the net income received by all the members of the family unit.
- c. That all the members of the family unit lack sufficient property rights or any other property to satisfy the debt.
- d. That the credit or loan is secured with a mortgage on the only house owned by the debtor, and has been granted for its acquisition.

Hence, mortgagors who establish (by means of the documentation indicated in article 3.1) that they are in such a situation may request the following from the lending bank:

1. First, a novation or modification of the contract¹¹⁰ leading to a restructuring of the mortgage debt that makes its performance viable by the debtor in the medium and long term. It is necessary that the restructuring plan include¹¹¹ a four-year grace period on the repayment of the capital, an extension of the loan repayment term of up to 40 years, and a reduction in the rate of interest applicable, which, during the grace period, will be determined according to the Euribor index + 0.25%.
2. After applying these conditions, even if the mortgagor is able to pay, he may ask the lending institution for a remission or reduction of the capital to be repaid, which, at the choice of the

108. Persons considered as belonging to the family, in addition to the debtor, are his or her spouse or partner registered as such in a public register, and the children who reside in the house, regardless of their age (art. 3.1(a), R.D.-L. 6/2012, *supra* note 104).

109. This is the debt resulting from the mortgage loan, which requires periodic payments (e.g., monthly payments).

110. In fact, it is not a single contract, but two connected or related contracts: a contract of loan whose repayment is guaranteed with a mortgage on immovable property, and the contract establishing the mortgage, which is a real right. Typically, both contracts are formalized in the same instrument (a deed before a notary public); thus, it would include both the loan contract and the contract that establishes or creates the mortgage.

111. See para. 1(b) Code of Good Practice, *supra* note 104.

institution, can be 25% of the outstanding capital, or the amount paid in interest to that point, or a part of the value of the adjudication of the house.

3. Finally, if the mortgagor does not accept these new conditions, he may unilaterally impose on the creditor bank the “giving in payment,” whereby the mortgagor demands that the bank accept the transfer of the mortgaged property in payment of the outstanding debt, which will then totally and definitely extinguish the obligation.¹¹² Despite the fact that both the media as well as the general public call this option “giving in payment,” technically it is only giving in payment if the debt is extinguished by transferring an object that is different from the one which is owed,¹¹³ and occurs by agreement between the creditor and the debtor, simultaneously upon payment or performance.¹¹⁴ Since in this case, where no agreement exists, it is the debtor who unilaterally imposes the asset offered as satisfaction or payment to a performance (the transfer of the dwelling) different from the one which is due (the repayment of the loaned capital and interest), it is technically more accurate to refer to “unilateral allowance for satisfaction” provided by law to the debtor.

Despite this kind of “giving” or transfer of ownership of the dwelling to the creditor bank, the debtor can request to remain therein as a tenant for a period of two years, paying as annual rental 3% of the total debt at the moment the giving in payment occurs.¹¹⁵ An additional protective measure to the mortgagor who loses ownership of his house is that he may unilaterally impose a rental relationship upon his former creditor and new owner of the dwelling.

In a recent judgment of March 14, 2013, the European Court of Justice declared that Spanish legislation does not conform to

112. Paragraph 3, Code of Good Practice, *supra* note 104.

113. Or, more generally, through the completion of an act or performance different from that which was initially due.

114. Art. 1153 C.C.

115. Paragraph 3(c), Code of Good Practice, *supra* note 104.

European Union consumer protection law.¹¹⁶ It violates Directive 93/13/EC of April 5, 1993, to the extent that it does not allow the debtor, in the course of mortgage enforcement proceedings, to argue that some clauses of the mortgage loan are unfair contract terms and have this question judicially determined before enforcement proceedings are concluded. The debtor may later on obtain compensation if the terms are found unfair by the court having jurisdiction to do so, but this court cannot stay the enforcement proceedings. To comply with the aforementioned European judgment, the Kingdom of Spain has enacted the Law 1/2013, of May 14, 2013, amending both the Mortgage Law and the Law of Civil Procedure.

V. EUROPEAN UNION LAW: THE RECENT JURISPRUDENCE ON INTELLECTUAL PROPERTY

Because Spain has been one of the Member States of the European Union since 1985, it is necessary to include in this assessment the major developments related to the implementation of European private law. As the Spanish Constitutional Court has consistently stated,¹¹⁷ European Union (EU) law does not constitute international law for the Member States of the EU, but, at least in certain aspects, the EU legal system can be considered part of the domestic law of the Member States. In particular, EU directives make the integration of the EU legal system into domestic law possible. The directives are provisions that only acquire normative or binding value when a Member State of the Union implements or transposes them into its domestic law, usually through the promulgation of legislation that incorporates the content of the directive.¹¹⁸

116. Case C-415/11, Mohamed Aziz v. Catalunyacaixa, 2013 O. J. (C141) 5.

117. Since the judgment of the Constitutional Court (*Tribunal Constitucional*) 165/1994, May 26, 1994.

118. Art. 288 of the Treaty on the Functioning of the European Union (the consolidated version, consequent to the Treaty of Lisbon of December 13, 2007) leaves to the Member States the choice of the means of incorporating the

One of the subjects of private law that the European legislature has attempted to harmonize or provide a uniform regulation within the European Common Market is intellectual property, which raises several conflicts between holders of protected rights (particularly, authors or creators) and the users who are, substantially, those who exploit protected works by making them available to the public, but also private users. There are, indeed, certain private uses of protected works, such as private copying, which, because of their volume, also cause significant damage or loss of benefit to the authors.

The European legislature has changed its approach to dealing with these kinds of conflicts, as reflected by the first set of directives adopted in the 1990s.¹¹⁹ At first, the European Union opted to reinforce the rights of users against the creators, and even went so far as to impose on the authors specific uses of their works, such as the transmission by cable, in a system of agreements very close to that of the common law system of mandatory licensing.¹²⁰ However, since the beginning of the last decade, a change of legislative policy is taking place because the authorities of the EU have realized that the European market of cultural production can achieve competitiveness only by strengthening the rights of the creator against those of a distributor or exploiter.

directive into their own domestic law. The Spanish legislature opted to incorporate the main directives on matters of private law (e.g., relating to consumer contracts) through provisions with the rank of law and not through mere administrative provisions.

119. Concerning EU policy in the area of intellectual property law at that time and the directives reflecting it, see Juana Marco Molina, J., *El derecho de autor frente a la sociedad de la información*, 2 REVISTA JUR. DE CAT. 367 (1997).

120. See art. 9, Directive 93/83/EC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993 O.J. (L248) 20-21.

That change of legislative policy in the area of intellectual property, in part due to the “Bangemann Report,”¹²¹ resulted in directive 2001/29/EC, May 22, 2001, on the harmonization of certain aspects of copyright and related rights in the information society. Despite the conflicts arising from its application, its firm and definite position to strengthen the rights of the creator against the users of the works facilitates the task of the courts. Some recent judgments of the European Court of Justice (ECJ), as well as some Spanish judicial decisions, reflect this position.

A. The Question of Fair Compensation for Private Copying; ECJ Judgment of June 16, 2011: Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH

The aforementioned judgment resolves the dispute raised by a Dutch copyright management organization for a collective of authors (Stichting de Thuiskopie) brought against a German company (Opus Supplies) which sold, via the internet, blank media that targeted consumers in the Netherlands. Opus Supplies did not pay the private copying levy in either Holland or Germany, as provided for in article 5.2(b), directive 2001/29. The judgment ordered Opus Supplies to pay Stichting de Thuiskopie for the loss of earnings due to the Dutch authors, for reason of non-payment of that levy.

The recognition of the right to receive fair compensation needs to be justified because the copying or reproduction of protected works by a person for private (and non-profit) use is “free use” or does not require authorization from the right-holder of the work.¹²²

121. It was a study conducted by a group of experts led by Martin Bangemann, who was EU Commissioner for Industrial Affairs, Information and Telecommunications Technologies during the 1990s. This report was submitted to the European Council on May 26, 1994.

122. Art. 5.2(b) Directive 2001/29/EC (2001 O.J. (L167) 16) authorizes Member States to exempt from the authorization of the author the “reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial.” Making use of that authority recognized by European Union law to the Member States, Art. 31.2, Spanish Intellectual Property Law (R.D.-L. 1/1996 of April 12) excludes the

This is because, from the inception of intellectual property protection, it has been considered that the protection of the author's rights should stop at the doorstep of those who use the work.¹²³ Nevertheless, because modern audio, visual, and above all, digital reproduction media enable these kinds of copies to be easily made, private copying has acquired over time an uncontrolled and massive nature which, as the judgment recognizes, causes serious economic damage to the authors.

In response to this situation, European legislation recognizes that the right of the author (and also of some other holders of intellectual property, such as interpreters) to fair compensation is based on the estimated damage caused. From the viewpoint of both creditor and debtor, the author's economic right to the work has certain special characteristics:

1. From the creditor's point of view, despite the right to which the author is entitled, he cannot claim it or receive it individually; rather, he may only act through one of the copyright management organizations (or "collecting societies"),¹²⁴ such as that appearing in the above-mentioned judgment. After the fair compensation is paid, the organization distributes it among its members according to its own rules. This is because those revenues are not considered the fee paid or compensation for the individually authorized use of the work, but rather as global compensation for free use or unauthorized use ("fair use") and, accordingly, for the loss of earnings due to the collective authors who are members of the organization.

2. But, from the point of view of the person bound to perform an obligation (the debtor), there are greater particularities

reproductions of works made for private use which are already available to the public from the need to obtain the authorization of the author; B.O.E. n. 97, Apr. 22, 1996.

123. Josef Kohler explains this limitation in these terms (JOSEF KOHLER, URHEBERRECHT AN SCHRIFTWERKEN UND VERLAGSRECHT 181 (1981).

124. In Spanish, "*entidades de gestión*."

regarding these rights. As recognized in the judgment, given the practical difficulty to identify the plurality of anonymous private users (who make copies for personal or private use) of protected works, the laws have selected—within the long chain of intermediaries between the creator and the final user of the work—certain persons who directly or indirectly facilitate access to the work. In this case, both the Dutch legislature and, until very recently,¹²⁵ the Spanish legislature determined that manufacturers and importers of equipment, media and devices which enable digital, visual or audio reproduction of protected works are liable to pay fair compensation.

Considering that Opus Supplies possessed such equipment and media (in addition to making them available to private persons¹²⁶ or providing them a reproduction service), the ECJ declared it liable to pay fair compensation for private copying to the Dutch authors associated with Stichting de ThuisKopie, despite the fact that Opus Supplies is not established in Netherlands.

B. Delimitation of the Concept of “Communication to the Public” of the Work; ECJ Judgment of 21 October 2010: Padawan S.L. v. Sociedad General de Autores y Editores de España

This second judgment, also raised in a lawsuit brought by a copyright management organization (in this case, the *Sociedad General de Autores y Editores de España*, or SGAE) addressed the

125. Until now, art. 25 of the Spanish Intellectual Property Law imposed a copyright levy for private copying on the manufacturers of the reproduction equipment above-mentioned in the text. However, the 10th Additional Disposition, R.D.-L. 20/2011 of Dec. 30, on urgent budget, tax, and financial deficit correction measures, abolished this system and provides that the beneficiaries of fair compensation would be compensated from the Spanish national budget; B.O.E. n. 315, Dec. 31, 2011.

126. Without needing such copies to actually be made, since, as pointed out by another ECJ judgment (that of October 21, 2010, in case C-467/08, Padawan S.L. v. SGAE), “the fact that that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users.”

question of fair compensation for private copying and was resolved in the same manner as in the precedent judgment.

Another issue (widely discussed both before and after the Directive 2001/29/EC) that was addressed collaterally by this decision¹²⁷ is related to whether the “on-demand”¹²⁸ or “peer-to-peer” (“p2p”) communication (i.e., one that only takes place upon individual request by each private user, and accordingly makes the work available at the place and time requested by the individual user) should be considered as public or private communication or use of the work. The typical intermediary in this form of access to works protected by intellectual property law is either a audiovisual media company (e.g., cable television channel), or a hospitality establishment, such as a hotel or restaurant, that, in connection with the main service or accommodation provided to its customers, facilitates as an additional service potential access to protected musical or audiovisual works for their enjoyment.

However, a difficulty arose regarding this form of dissemination of the work with regard to the concept of “public communication” (which includes all the forms of intangible dissemination, e.g., those who make the work accessible to the public without prior distribution of copies of the same) during the preparation of Directive 2001/29/EC. The difficulty was in maintaining the public nature of the communication with respect to interactive or “on-demand” communication: first, because this

127. Indeed, such a debate took place prior to Directive 2001/29/EC and was resolved, for instance, in France. There, it resulted in a judgment contrary to the approach adopted later by the directive and the above-mentioned jurisprudence of the ECJ. In two lawsuits brought by S.A.C.E.M. (*Société des auteurs, compositeurs et éditeurs de musique*, a copyright management organization in France) against two hotel companies (Hôtel Lutetia and Hôtel Le printemps), the *Cour de Cassation* held that the defendant hotel companies had not committed an act of public communication subject to copyright, for having made available to the public works protected by intellectual property law in a private place, such as the hotel rooms. Cass., 1re Civ., Nov. 23, 1971, no. 70-12523.

128. Art. 1.2, Directive 98/48/EC of July 20, 1998, amending Directive 98/34/EC, which establishes the rules relating to the information society services, defines the notion of interactive communication or “à la carte” in similar terms; 1998 O.J. (L217) 21.

form of dissemination involves an individualized access to the work, which makes it difficult for the law to include it within the acts of exploitation contained in the exclusive power of the author;¹²⁹ and second, because such access may occur in places, such as a hotel room, that are supposedly private.

Nevertheless, article 3 of Directive 2001/29/EC opted to include individualized or “on-demand” communication within the broader notion of “public communication”, thereby of allowing for the purpose of collective enjoyment, and not just private enjoyment, of the work. This makes the activity another one of the operating activities that should be authorized by the author, and one for which he should receive remuneration.

Hence, the 2010 judgment mentioned above correctly applied the directive when, according to a 2006 judgment of the ECJ, it stated that “the right of communication to the public covers making the works available to the public in such a way that they may access them from a place and at a time individually chosen by them.”¹³⁰

Several reasons justify this decision:

First, we should take into account that a room in a hotel is not strictly private, since a number of people who are not related by personal ties may separately access it in a consecutive manner. Therefore, even though it is not a public place, it is a place accessible to the public.¹³¹

129. Indeed, only activities of collective use of the work, or making the work available to the public constitute acts of exploitation covered by intellectual property law. See JUANA MARCO MOLINA, *LA PROPIEDAD INTELECTUAL EN LA LEGISLACIÓN ESPAÑOLA* 215 (Marcial Pons 1995).

130. The ECJ judgment of October 21, 2010 explicitly adopted the approach established in legal basis no. 58 of the ECJ judgment of July 13, 2006 in case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles, S.A.* The dispute originated from a claim for compensation for the exploitation of rights brought by SGAE, a copyright management organization, against a hotel company that offered to its customers additional cable television and music services, which allowed them the enjoyment of works protected by intellectual property law.

131. So it is also considered in the ECJ judgment of 2006, *supra* note 130, in their legal basis nos. 48, 49, 53 and 54.

Second, it is not inherent to the activity of public communication that the disseminated work is received or enjoyed simultaneously by a plurality of persons to whom access is facilitated. Such simultaneity is exclusive to the traditional forms of communication such as stage productions. However, with technological advances allowing the work to be recorded or captured and be disseminated at a different time or place, the simultaneity of reception is no longer a necessary characteristic of the activities of communication. Consequently, the legal definition of this form of exploitation does not require simultaneous reception.¹³² As recognized by the above-mentioned jurisprudence, what is crucial is the potentiality, not the effectiveness, of the communication or making of the work available to the public.¹³³

Those who perform such collecting activities through intermediate devices (i.e., cable, speakers or similar devices, as well as individual receivers that are made available to third parties) are not mere receivers of the work, but are instead making an autonomous act of communication to the public, which requires new authorization from the author, since, through their intervention, they expanded the originally-intended scope of the communication previously authorized.¹³⁴

132. It is referred to in Spanish Intellectual Property Law (R.D.-L. 1/1996, *supra* note 122), in which Art. 20.1 provides:

Communication to the public means any act whereby a number of persons can have access to the work without prior distribution of copies to each of those persons.

Communication shall not be considered public when it takes place in a strictly domestic environment that is not integrated or connected to a distribution network of any kind.

133. So declares the ECJ judgment of 2006, *supra* note 130, in which legal basis no. 43 states: “[I]t is not decisive . . . that customers who have not switched on the television have not actually had access to the works.”

134. Indeed, the ECJ judgment of 2006, *supra* note 130, considers it so (see its legal basis numbers 41 and 42):

. . . [I]f reception is for a larger audience . . . a new section of the receiving public hears or sees the work and the communication of the program . . . no longer constitutes simple reception of the program itself but is an independent act through which the broadcast work is communicated to a new public. . . . [S]uch public reception falls within the scope of the author's exclusive authorization right;” and, “The

Finally, it should be taken into account that this new act of communication of protected works provides its agents with a profit or benefit at the expense of the author. Indeed, despite the fact that such activities frequently do not involve direct income, since, as in the case of hospitality establishments, they do not receive from the public an initial compensation (such as an entry fee), the public communication of the work constitutes an indirect source of income. This is because such activities either allow the communicator to apply a surcharge to the price of the main service performed (e.g., a surcharge for the hotel room equipped with devices permitting such individualized or “on-demand” communication) or, at least, because it provides the communicator with a patrimonial benefit derived from the potential increase in the number of his customers due to the fact that this form of communication is facilitated.¹³⁵

Thus, given that the very existence of intellectual property rights is justified by the objective of giving a share to the author from all of the earnings that his work or creation is able to produce, it seems necessary that this type of use might also be remunerated, in the same way that the acts of direct and simultaneous communication to the public are remunerated. This is, ultimately,

clientele of a hotel forms such a new public [since the] transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast. . . . On the contrary, the hotel is the organization which intervenes . . . to give access to the protected work to its customers.

135. As recognized in the ECJ judgment of 2006, *supra* note 130, in its legal basis no. 44:

. . . [T]he action by the hotel by which it gives access to the broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit. It cannot be disputed that the provision of that service has an influence on the hotel’s standing and, therefore, on the price of rooms. Therefore, even taking the view, as does the Commission of the European Communities, that the pursuit of profit is not a necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature

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what the judgments of the ECJ herein commented intend to recognize to the creators.