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François Gény in Louisiana

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FRANÇOIS GÉNY IN LOUISIANA

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For the reviewer, Gény's analysis and suggested method was not just an X-ray showing the internal arrangement of the legal system; it was more a sort of stethoscope, catching the living beat of the law in action.[1]

Méthode d'interprétation et sources en droit privé positif,[2] a manifesto of the free objective search for a rule, has been genuinely received in Louisiana, both by doctrine and by

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1. Albert Tate Jr., *Method of Interpretation and Sources of Private Positive Law by François Gény*, 25 LA. L. REV. 577, 586 (1965) (book review).

2. Hereinafter MIS. Unless otherwise indicated, references are to Jaro Mayda's translation of Gény's book: MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (La. State L. Inst. 1963). The 1919 edition, as reprinted in 1954, was the object of the translation.

jurisprudence, to such an extent that an author wrote that in Louisiana, jurists "live and work with Gény."[3]

Before turning to Gény's success story in Louisiana, we think it not useless to sketch the main ideas of François Gény (1861-1959).[4] Often cited but rarely read nowadays, Gény's heritage has almost sunk into oblivion in the Anglophone world, despite accessible English material.[5] Gény's first and most important work is *Méthode d'interprétation et sources en droit privé positif*, whose first edition appeared in 1899. Not only was it a milestone in French legal scholarship but also for the entire Western world. Luminaries like Benjamin N. Cardozo and Roscoe Pound found great inspiration in his writings; generally, Gény exercised a notable influence on American scholarship.[6] For contemporary

3. Grover Joseph Rees III, *Albert Tate on the Judicial Function*, 61 TUL. L. REV. 721, 740, n.1 (1987): "In Louisiana, thanks in large part to the efforts of Judge Tate, lawyers also live and work with Gény . . . ."

4. Two excellent accounts should be mentioned*: Jaro Mayda, François Gény And Modern Jurisprudence 1-29 (Louisiana State University Press 1978) [hereinafter FGMJ]; Benoît Frydman, Le projet scientifique de François Gény* in CENTENAIRE DE MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 1899-1999: FRANÇOIS GÉNY, MYTHE ET RÉALITÉS 213 (Dalloz & Bruylant 2000). *See also infra* note 5.

5. F. Gény, *Judicial Freedom of Decision: Its Necessity and Method* in SCIENCE OF LEGAL METHOD—SELECT ESSAYS BY VARIOUS AUTHORS 2 (E. Bruncken and L.B. Register trans., Boston Book Company 1917); F. Gény, *The Legislative Technics of Modern Civil Codes*, in SCIENCE OF LEGAL METHOD—SELECT ESSAYS BY VARIOUS AUTHORS 498 (E. Bruncken and L.B. Register trans., Boston Book Company 1917); Julien Bonnecase, *The Problem of Legal Interpretation in France*, 12 J. COMP. LEGIS. & INT'L L. 79, 88 (1930); B. A. Wortley, *François Gény* in MODERN THEORIES OF LAW 139 (I. Jennings ed., Oxford University Press 1933); Mitchell Franklin, *Gény and Juristic Ideals and Method in the United States* in 2 RECUEIL D'ÉTUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY 30 (Recueil Sirey 1934); Thomas J. O'Toole, *The Jurisprudence of François Gény*, 3 VILL. L. REV. 455 (1958); Richard Groshut, *The Free Scientific Search of François Gény*, 17 AM. J. JURIS. 14 (1972); Nicholas Kasirer, *François Gény's* libre recherche scientifique *as a Guide for Legal Translation*, 61 LA L. REV. 331 (2001); Matthew Humphreys, *François Gény*, in ENCYCLOPEDIA OF MODERN FRENCH THOUGHT 251-54 (Christopher John Murray ed., Routledge 2004); Ward Alexander Penfold, *An Ineluctable Minimum of Natural Law: François Gény, Oliver Wendell Holmes, and the Limits of Legal Skepticism*, in 37 HISTORY OF EUROPEAN IDEAS 475 (2011); MAYDA, *supra* note 4.

6. *See* Duncan Kennedy & Marie-Claire Belleau, *François Gény aux États-Unis* in FRANÇOIS GÉNY, MYTHE ET RÉALITÉS 1899-1999—CENTENAIRE DE MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, ESSAI

legal scholars nurtured with legal realism or critical legal studies, Gény's ideas will seem commonplace. But one ought to remember that they were formulated at a time when legal formalism ruled supreme in France, in Europe and in the United States.[7] Gény was a sort of proto-legal realist: he asked us to lift the mask of formal logic which hid the reasoning of the courts. One of Gény's main theses[8] is that judges under the codes are not just automats applying legislated law with the use of syllogism and other tools of formal logic, but rather are active deciders who weigh interests, apply policies, etc. This reality ought to be admitted and its consequences carried out. The masks that Gény wanted to lift are numerous. First, he wanted his readers to recognize that positive law is more than legislation. Societal relations cannot be regulated by statutes that are often obsolete by the time they are promulgated. Here Gény appears as an heir to Portalis, the chief draftsman of the Civil Code, whom Gény abundantly quotes. Gény fought for the abandonment of the nineteenth-century exegetic positivism that was based on three well-established noxious fictions. The first one is the fiction of the logically necessary completeness of legislation.[9] But this fiction is corrected by another fiction that isolates the statute of the authority of its maker.[10] These fictions lead to the use and abuse of analogy reasoning as a technique of interpretation. Analogy reasoning is legitimated by a third fiction, that of the existence of a legislator's identifiable intent. This first deconstruction of the decisional process leads Gény to propose a realist method to decide cases.[11] It

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CRITIQUE 295 (C. Thomasset, J. Vanderlinden & Ph. Jestaz (dir.) eds., Yvon Blais 2000).

7. For the intellectual context, *see* Marie-Claire Belleau, *The "*Juristes Inquiets*": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379 (1997).

8. Gény offers an authoritative restatement of his *Méthode*: MIS, *supra* note 2, at nos. 183-187 & nos. 223-224.

9. MIS, *supra* note 2, at nos. 12-19.

10. MIS, *supra* note 2, at nos. 7-82.

11. MIS, *supra* note 2, at nos. 83-187.

can be summed up as follows: Modern constitutional principles imply that statutes be always fully implemented. Nevertheless, "justice and social utility" require that the one applying the law use all legitimate means when he decides a case. Customary law is the first of these legitimate resources. When no clear and applicable rule is available, the judge must draw from scholarship (*la doctrine*) and jurisprudence (*la jurisprudence*). According to Gény, jurisprudence bears only persuasive authority. His refusal to consider jurisprudence as a binding authority, i.e. as a real source of law, has been criticized by many authors. But if no appropriate source is available, the judge must freely search for a rule on which to ground his decision. This search is "free" in the sense that it is of discretionary nature. But it is in no way arbitrary. Gény rejects every path that could lead to the reign of the judge's subjectivity; hence the vehement attacks directed against the hunch cult of the German Free Law movement[12] or to the anarchic experiments of the "*bon juge Magnaud*."[13] In other words, this search must be objective, that is, grounded in social realities, needs, interests and in the nature of things. Thus, it is a scientific approach comparable to the approach a model legislator would use. But contrary to a legislator's rule, the rule created by the judge is limited to the case at hand.

At first glance, one could believe that the scope of the free scientific search is limited and that a praetorian rule will seldom

12. On this school of thought, *see* MIS, *supra* note 2, at nos. 205-222; *see* also James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987); more generally, *see* Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C.L. REV. 837 (1990).

13. MIS, *supra* note 2, at nos. 196-200; on the phénomène Magnaud, *see* also Max Radin, *The Good Judge of Château-Thierry and His American Counterpart*, 10 CAL. L. REV. 300 (1922); Roland Weyl & Monique Picard Weyl, *Socialisme et justice dans la France de 1895: le "bon juge Magnaud"* in 3-4 QUADERNI FIORENTINI 367 (Giuffrè 1974-1975); Marie-Anne Frison-Roche, *Le modèle du bon juge Magnaud*, in DE CODE EN CODE, MÉLANGES EN L'HONNEUR DU DOYEN GEORGES WIEDERKEHR 335 (Dalloz 2009); András Jakab, *What Makes a Good Lawyer? Was Magnaud Indeed Such a Good Judge?*, 62 ZEITSCHRIFT FÜR ÖFFENTLICHES RECH 275 (2007).

appear. To the contrary, Gény offers a definition of interpretation that opens a broad door to the judge's creativity. In effect, according to him, the only justified principle of interpretation is to determine the scope of the text with reference to the time of its enactment.[14] That means, as we saw before, that the judge must not try or pretend to guess "the" intent of "the" legislator.[15] That also means that analogy reasoning is taken for what it is: one form of the free search and not a technique of interpretation.[16]

After this brief account of Gény's method, we may turn to its reception in Louisiana.

This reception stems from the combination of various factors, in particular the remarkable translation by Jaro Mayda, a Czech comparatist, and the assimilation of François Gény's work by out-of-the-ordinary judges. Nevertheless, an excellent translation, enthusiastically received by outstanding judges, is not a sufficient explanation for the fertility of the *libre recherche scientifique*. An intellectual terrain within which the reception could flourish was also required. Louisiana was probably perfectly suited for this.

However, at a 1991 conference in which he spoke for the last time of François Gény, Jaro Mayda could not hide his bitterness.[17] He regretted that in the United States no one was really interested in Gény, nor in his own works on the professor from Nancy. He had the feeling that his work was in vain: his translation of *Méthode d'interprétation et sources en droit privé positif*[18] was largely ignored, and his essay, *François Gény and Modern Jurisprudence*,[19] was not even reviewed in Louisiana, although

14. MIS, *supra* note 2, at no. 97.
15. In the same vein, *see* Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382 (1907).
16. MIS, *supra* note 2, at nos. 165-168.
17. Jaro Mayda, *Gény and the Common-Law World: Thirty Years Later* in FRANÇOIS GÉNY E LA SCIENZIA GIURIDICA DEL NOVECENTO, 20 QUADERNI FIORENTINI 189, 190 (Giuffrè 1991).
18. MIS, *supra* note 2.
19. MAYDA, *supra* note 4.

edited by Louisiana State University Press.[20] At first sight, this observation can be confirmed today: a recent article about the links between the thinking of François Gény and that of Oliver Wendell Holmes, Jr., does not mention Jaro Mayda's[21] translation or essays. It may also be noted that *François Gény and Modern Jurisprudence*, a work of incredible depth and richness, is rarely quoted, in France or in the rest of Europe.[22]

However, it is contended that the author's pessimism was unwarranted. An enthusiastic review of his translation has been made by one of the most influential judges of the 20th century in Louisiana, Albert Tate Jr., who became a driving force in spreading the application of the free objective search for a rule doctrine in Louisiana jurisprudence.[23] Within a few years, as Jaro Mayda had indicated,[24] it was genuinely received in the state, not only by doctrine, but also by jurisprudence. Jaro Mayda's brilliant translation[25] surely acted as a propellant. Until its publication, *Méthode d'interprétation et sources* was quoted by some authors, but its diffusion was limited because, by the end of the 19th century, in legal practice, the use of French had almost vanished.[26]

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20. Shael Herman, professor at Tulane Law School, had nevertheless dedicated a review to this excellent work. *See* Shael Herman, *François Gény and Modern Jurisprudence*, 27 AM. J. COMP. L. 730 (1979) (book review).

21. Penfold, *supra* note 5.

22. Henri Batiffol wrote a brief review of the book: Henri Batiffol, *Jaro Mayda—François Gény and Modern Jurisprudence*, 33 REVUE INTERNATIONALE DE DROIT COMPARÉ 224 (1981) (book review).

23. Albert Tate Jr., *Method of Interpretation and Sources of Private Positive Law by François Gény*, 25 LA. L. REV. 577 (1965) (book review).

24. FGMJ, *supra* note 4, at 68: "The important point . . . is that, despite the art represented by the current literature, the pragmatic temper of America and of its mixed jurisdictions, such as Louisiana, may well be the environment that will send Gény's themes toward their integration into a rational, modern jurisprudence."

25. *See* Olivier Moréteau, *La traduction de l'œuvre de Gény : méthode de traduction et sources doctrinales* in LA PENSÉE DE FRANÇOIS GÉNY 69 (O. Cachard, F.-X. Licari & F. Lormant eds., Dalloz 2012).

26. Roger K. Ward, *The French Language in Louisiana Law and Legal Education: A Requiem*, 57 LA. L. REV. 1283 (1997).

French doctrine was no longer cited in the original language.[27] Today, great civilians are only known through translations.[28]

Since then, it is common to read praises of François Gény's work in Louisiana scholarship. He has even been said to be "one of the civil law's crown jewels."[29] These tributes are not merely made out of propriety by a few nostalgists of the French Louisiana and the Napoleonic Code. The free objective search for a rule nourishes the Louisiana legal methodology and in particular the fundamental question of the connection between legislation and jurisprudence.

However, assessing the influence of an author on a country's jurisprudence is not an easy task. An attempt made on the occasion of Gény's centennial proved to be disappointing,[30] probably because French jurisprudence resists to such an assessment: it is formulated in a laconic or obscure style, with language free from doctrinal reference, therefore seldom permitting the identification of intellectual affiliation, leaving the interpretation open to speculation.[31]

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27. *See* Shelp v. Nat'l Surety Corp., 333 F.2d 431 (5th Cir. 1964).

28. About the immense work carried out under the patronage of the Louisiana State Law Institute, *see* Joseph Dainow, *Civil Law Translations and Treatises Sponsored in Louisiana*, 23 AM. J. COMP. L. 521 *(*1975). Translations of French doctrine from French into English were also made under the patronage of the Center of Civil Law Studies. For an overview of these translation projects, *see* Alexandru-Daniel On, *Making French Doctrine Accessible to the English-Speaking World: The Louisiana Translation Series*, 5 J. CIV. L. STUD. 81 (2012).

29. Paul R. Baier, *100 Years of LSU Law, 1906-2006: A Centennial Gloss*, 67 LA. L. REV. 289, 298 (2007).

30. Léon F. Julliot de la Morandière, *François Gény et la jurisprudence française* in LE CENTENAIRE DU DOYEN FRANÇOIS GÉNY 67 (Dalloz 1963).

31. French decisions are always a bit frustrating for foreign jurists, especially for those who are familiar with the American style of lengthy and policy-oriented opinions. For a comparison, *see* Jean Louis Goutal, *Characteristics of Judicial Style in France, Britain and U.S.A*, 24 AM. J. COMP. L. 43 (1976); Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 104 (1994).

Switzerland provided a more suitable environment,[32] but revealed judicial reluctance in resorting to the free objective search for a rule, even though the method can be found in essence in article 1 of the Swiss Civil Code.[33]

On the other hand, Louisiana provides an ideal context to conduct these investigations. The judicial style is discursive and gives arguments, following the model of the other U.S. states.[34] Majority, concurring, or dissenting opinions[35] do cite doctrinal sources, whether contemporary or not. This allowed Joseph Dainow to assess with precision the influence in Louisiana jurisprudence of the translation of Planiol's civil law treatise.[36]

More than thirty cases have been identified, where Louisiana courts cite *Méthode d'interprétation et sources*[37] to solve a delicate legal issue, whether in a majority,[38] concurring,[39] or dissenting

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32. Walter Yung, *François Gény et la jurisprudence en Suisse* in LE CENTENAIRE DU DOYEN FRANÇOIS GÉNY 85 (Dalloz 1963); FGMJ, *supra* note 4, at 31-64.

33. CODE CIVIL [CC] [CIVIL CODE] Dec. 10, 1907, RS 210, art. 1(Switz.):

> The law governs matters to which the wording or spirit of one of its provisions are related. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as a legislator. In doing so, it shall draw inspiration from established doctrine and jurisprudence.

34. Mack E. Barham, *La Cour suprême de Louisiane*, 30 REVUE INTERNATIONALE DE DROIT COMPARÉ 121, 135–137 (1978).

35. About this practice, its role and, in particular, its influence on the evolution of the law, *see* Katherine L. Brash, *Chief Justice O'Niell and the Louisiana Civil Code—The Influence of His Dissents*, 19 TUL. L. REV. 436 (1944-1945); Joe W. Sanders, *The Role of Dissenting Opinions in Louisiana*, 23 LA. L. REV. 673 (1962-1963); Mack E. Barham, *Methodology of the Civil Law in Louisiana*, 50 TUL. L. REV. 474 (1975-1976); C. A. Marvin, *Dissents in Louisiana: Civility Among Civilians*, 58 LA. L. REV. 975 (1997-1998).

36. Joseph Dainow, *Use of English Translation of Planiol by Louisiana Courts*, 14 AM. J. COMP. L. 68 (1965-1966); Joseph Dainow, *Planiol Citations by Louisiana Courts: 1959-1966*, 27 LA. L. REV. 231 (1966-1967).

37. There are only two federal court rulings which are based on Gény: Shelp v. Nat'l Surety Corp., 333 F.2d 431 (5th Cir. 1964), per Judge Wisdom; Hulin v. Fibreboard Corp., 178 F.3d 316 (5th Cir. 1999), per Judge Dennis (*see infra* Part II.B).

38. The first citation of Gény by the Louisiana Supreme Court is to be found in an opinion of Justice Tate: Chambers v. Chambers, 249 So. 2d 896 (La. 1971); Bell v. Jet Wheel Blast, 462 So. 2d 166, 170 (La. 1985); Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986); Entrevia v. Hood, 427 So. 2d 1146 (La.

opinion.[40] However, a purely statistical approach would be inadequate. It is more suitable to assess Gény's influence not solely by way of express references, but also through the implementation of the free objective search for a rule, in cases where the author is not cited. This requires the identification of cases where the method is applied.

Marc Desserteaux's criteria may be used to this end.[41] He focused on "situations in which the interpreter provided a genuine personal contribution, and in which, furthermore, his contribution was followed by a majority of judges, and favored a harmonious customary rule."[42] Desserteaux identifies two categories of cases; firstly, the resurrection of a historical tradition which was forgotten or erased by the legislature: "the mutilated legal institution tends to be wholly restored . . ." at the courts' instigation. At least two

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1983); Tannehill v. Tannehill, 261 So. 2d 619 (La. 1972); Bonnette v. Karst, 261 So. 2d 589 (La. 1972); Adoption of Meaux, 417 So. 2d 522 (La. Ct. App. 3d Cir. 1982); Hingle v. Hingle, 369 So. 2d 271 (La. Ct. App. 4th Cir. 1979); Burger v. Burger, 357 So. 2d 1178 (La. Ct. App. 4th Cir. 1978); Hill v. John L. Crosby, Inc., 353 So. 2d 421 (La. Ct. App. 4th Cir. 1977); Schiffman v. Service Truck Lines, Inc., 308 So. 2d 824 (La. Ct. App. 4th Cir. 1974); Levi v. Sw. Louisiana Elec. Membership Co-op. (SLEMCO), 542 So. 2d 1081 (La. 1989); Boyer v. Seal, 553 So. 2d 827 (La. 1989); Quinlan v. Liberty Bank & Trust Co., 575 So. 2d 336 (La. 1990); Tarver v. E.I. Du Pont De Nemours & Co., 634 So. 2d 356 (La. 1994); to the best of my knowledge, the first citation of Gény in an American court decision is by Judge Wisdom in Shelp, 333 F.2d 431, just a few months after the translation of MIS by Mayda.

39. Hill v. Crosby, 353 So. 2d 421, 424 (La. Ct. App. 4th Cir. 1977) (Redmann, J., concurring) (extinctive prescription—MIS, *supra* note 2, at no. 105); Butler v. Baber, 529 So. 2d 374, 382 (La. 1988) (Dennis, J., concurring) (liability without fault for the act of things—MIS, *supra* note 2, at no. 155-156); Schroeder v. Bd. of Sup'rs of Louisiana State Univ., 591 So. 2d 342, 345 (La. 1992) (Cole, J., concurring) (interpretation of an insurance contract—MIS, *supra* note 2, at no. 98).

40. Hibbert v. Mudd, 187 So. 2d 503, 510 (La. Ct. App. 3d Cir. 1966) (as the majority refused to reconsider the case, Judge Tate dissented); Sanders v. Gore, 676 So. 2d 866, 878 (La. Ct. App. 3d Cir. 1996) (Yelverton, J., concurring in part and dissenting in part) (compatibility with public policy of a promise to marry—*see* MIS, *supra* note 2, at no. 175).

41. Marc Desserteaux, *À quel critérium peut-on reconnaître le cas d'application de la libre recherche scientifique?* in 2 RECUEIL D'ÉTUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY 423 (Recueil Sirey 1934).

42. *Id*.

Louisiana jurisprudential landmarks meet this criterion: the maxim *contra non valentem agere non currit praescriptio*[43] and enrichment without cause.[44] Another use of the free objective search for a rule is the more typical case where "the interpreter opted for solutions not justified by precise legislative will, and not clearly based on the tradition preceding codification."[45] In this situation, the "lever" of the interpreter's creativity, is the new economic or political element "which disrupts the earlier conditions and makes former legal rules difficult to apply."[46] The jurisprudential construction of a regime of liability for the acts of things undoubtedly meets this criterion.[47] Other examples may also be found.[48]

I will first try to identify sociological, historical, and cultural factors that could have contributed to such a reception (part I). Subsequently, I will study expressions of such successful reception (part II).

I. FACTORS OF A SUCCESSFUL RECEPTION

The reception of the *libre recherche scientifique* in Louisiana stems from two different essential factors: a favorable scientific context developed from Portalis' ideas (A) and the erudition of

43. The renaissance of the well-known maxim is almost exclusively owed to French law and to former art. 21 of the Louisiana Civil Code (*see infra* Part I.A). Its extension and, in particular, the creation of a fourth application by Judge Tate is undoubtedly attributable to the free objective search for a rule: *see* Benjamin W. Janke & Françis-Xavier Licari, *Contra non valentem in France and Louisiana: Revealing the Parenthood, Breaking a Myth*, 71 LA. L. REV. 503, 511 (2011).

44. On the case *Myniard* (1967) and its aftermath as a pertinent situation for the application of the free objective search for a rule, *see* Albert Tate, Jr., *The Louisiana Action for Unjustified Enrichment: A Study in Judicial Process*, 51 TUL. L. REV. 446 (1976); FGMJ, *supra* note 4, at 76-77. French jurisprudence and doctrine have constantly been a model for Louisiana jurisprudence. Meanwhile, LA. CIV. CODE Art. 2298, introduced in 1998, codified what at that point was *jurisprudence constante*.

45. Desserteaux, *supra* note 41, at 429.

46. *Id*.

47. For an overview, *see* Wex S. Malone, *Ruminations on Liability for the Acts of Things*, 42 LA. L. REV. 979 (1982). *See also infra* note 106.

48. *See infra* Part II.

audacious judges who knew how to bring the civil law legacy to fruition (B).

A. Portalis in Louisiana

In Louisiana, Portalis literally prepared the landscape for François Gény. It is worth explaining how. Boulanger allegedly said that Gény was "Portalis one hundred years later."[49] These words were probably intended to deny Gény's originality, but still had the merit of emphasizing an intellectual affinity which seems to have been a catalyst for Gény's reception in Louisiana. François Gény restates Portalis' main ideas on the relationship between the legislature and the judiciary,[50] but elaborates them, by way of proposing his method. However, it is worth mentioning that Portalis' legal thinking was not as influential in France as in Louisiana. In France it has a mere doctrinal value, whereas in Louisiana it is part of positive legal precepts. This aspect of Louisiana civil law is not well known abroad.

If, indeed, everyone knows that the project of the year IX[51] has been the model for the first Civil Code of Louisiana (Digest of 1808), few people know that Portalis' project for the first book of

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49. FGMJ, *supra* note 4, at 136.

50. In MIS, Gény abundantly cites the preliminary discourse and the *exposé des motifs*: *see, e.g.*, nos. 45 & 57. In Justice Dennis writings, the two major authors are cited together in two Louisiana Supreme Court rulings. In the first one, regarding the custody of a child, the discussion bears on the relations between *jurisprudence constante* and the law that partly codifies it: Bergeron v. Bergeron, 492 So. 2d 1193, 1198-99 (La. 1986); in the second, the Court restated that judges are not bound to apply code provisions only to situations that were known at the time of their adoption: 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 233 (La. 1989).

51. *See, e.g.*, Joseph Dainow, *Codification et révision du droit privé en Louisiane*, 8 REVUE INTERNATIONALE DE DROIT COMPARÉ 376, 378 et seq. (1956); John H. Tucker, *Tradition et technique de la codification dans le monde moderne: l'expérience de la Louisiane*, in ÉTUDES JURIDIQUES OFFERTES À LÉON JULLIOT DE LA MORANDIÈRE 593 (Dalloz 1964); Alain A. Levasseur, *Les codifications en Louisiane*, REVUE DE LA RECHERCHE JURIDIQUE 171 (1986); ALAIN A. LEVASSEUR, MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808 (Claitor's Publishing 2008). More generally, regarding the influence of French law on Louisiana Law, *see* Vernon V. Palmer, *The French Connection and the Spanish Perception*, 64 La. L. Rev. 1067 (2003).

the code has been copied almost *verbatim* into the Louisiana Civil Code, and it can still be found in the code today with a few minor modifications.[52] This text, which appalled French judges[53] to such an extent that it was rejected and replaced with a crippled preliminary chapter in the *Code civil des Français*, restates in normative form the ideas expressed by Portalis in his famous discourse.[54] This introductory part was particularly needed in a code intended to be applied mainly by judges who were not familiar with the civil law tradition.[55]

The most remarkable norm in this preliminary title of the code, which simultaneously is an invitation to resort to the free objective search for a rule, could be found in former article 21: "In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law or reason, or received usages, where positive law is silent."[56] The immediate source of article 21,

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52. For a thorough study, *see* Thomas W. Tucker, *Interpretations of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title*, 19 TULANE EUROPEAN & CIVIL LAW FORUM 57 (2004).

53. *See* Marie-Claire Belleau, *Pouvoir judiciaire et codification: perspective historique*, 28 REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOKE [hereinafter R.D.U.S.] 67, 71 (1997- 1998).

54. Jean-Étienne-Marie Portalis, *Discours préliminaire sur le projet de Code civil présenté le 1er pluviôse an IX* in LE DISCOURS ET LE CODE. PORTALIS DEUX SIÈCLES APRÈS LE CODE NAPOLÉON, at XXI (LexisNexis 2004).

55. Ferdinand Fairfax Stone, *Les cas non prévus par le droit en vigueur* in MÉLANGES DÉDIÉS À GABRIEL MARTY 1077, 1078-79 (Université des sciences sociales de Toulouse 1978). On the first decade of the Louisiana Supreme Court and its judges, *see* Robert B. Fisher, Jr., *The Louisiana Supreme Court, 1812-1846: Strangers in a Strange Land*, 1 TUL. CIV. L.F. [vi] (1973).

56. For a commentary on this text, *see* Mitchell Franklin, *Equity in Louisiana: The Role of the Article 21*, 9 TUL. L. REV. 485 (1935); *see also* Joseph Dainow, *The Method of Legal Development Through Judicial Interpretation in Louisiana and Puerto Rico*, 22 REV. JUR. U.P.R. 108, 110-11 (1953); Ferdinand Fairfax Stone, *The So-Called Unprovided-For Case*, 53 TUL. L. REV. 93 (1978); MAYDA, *supra* note 4, at 168. On the importance of equity in general in Louisiana law, *see* Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 Tul. L. Rev. 7 (1994). Talking about this article, Stone (*see supra* note 55, at 1082) points out that it was feared that article 21 would have become a vehicle for the importation of the *common law* into Louisiana under the cover of natural law and reason on the pretext that there is no applicable express law. As seen in the following discussion, this threat did not come to fruition.

the gist of which can be found today in article 4,[57] but without reference to natural law,[58] is article 11 from the project of the preliminary book of the French Civil Code.[59]

Several essential points regarding the relation between legislation and the judge emerge from Portalis' and Gény's ideas. The legislature cannot foresee everything and, as time passes, the necessity for creative jurisprudence grows. Judges must decide a case as fairly as possible and without any reference to positive law, thus acting as praetors: they recognize a particular interest and provide a remedy. To this end, they have to resort to a number of sources such as analogy, equity or natural law.

It is worth discussing these sources further. What Portalis had in mind was equity. The term is certainly one of the most polysemous in existence, but, for the father of the Civil Code, it was synonymous with justice based on natural law in concrete cases.[60] As to Gény, he sometimes referred to equity,[61] but preferred the concept of natural law. Through an allusion to natural law, "the legislature reintroduces roman law, which was renounced during the revolution because it was lumped together with the

57. The preliminary title was revised in 1987. Louisiana Civil Code article 4 provides: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." LA. CIV. CODE art. 4).

58. *See* the surprising comment (b) under article 4 (Louisiana Civil Code, A. N. Yiannopoulos ed., West 2009): "The term "natural law" in article 21 of the 1870 Code has no defined meaning in Louisiana jurisprudence and is not reproduced in this revision."

59. "In civil law matters, where there is no express legislation, the judge decides in equity. Equity is the return to natural law, or received usages where positive law is silent."

60. *See* Portalis' Preliminary Discourse Adressed to the national Assembly in 1800, translated by Shael Herman, in Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 771 (1969): "When the legislation is clear, it must be followed; when it is obscure, we must carefully analyze its provisions. If there is no particular enactment, custom or equity must be consulted. Equity is the return to natural law, when positive laws are silent, contradictory or obscure."

61. MIS, *supra* note 2, at 100.

jurisprudence of the *ancien régime* . . . ."[62] Gény's concept of natural law was certainly ambivalent,[63] but it seems close to that of Portalis: an uncompromising justice based on the nature of things. It does not really matter that both authors' conceptions are not exactly the same. The suggestive power of the notion was enough to create a link between the two thinkers. The approach of Louisiana courts actually seems closer to Raymond Saleilles' and Édouard Lambert's views,[64] for whom comparative law was quasi-synonymous with natural law.[65] This affinity clearly reveals the main applications of the free objective search for a rule in Louisiana courts: by resurrecting the *contra non valentem agere*

62. Belleau, *supra* note 53, at 85; for Portalis' idea of natural law, *see* Bernard Beigner, *Portalis et le droit naturel dans le Code civil*, 6 REVUE D'HISTOIRE DES FACULTÉS DE DROIT ET DE LA SCIENCE JURIDIQUE 77 (1988); Simone Goyard-Fabre, *Montesquieu entre Domat et Portalis*, 35 MCGILL L. J. 715 (1990); Michel Ganzin, *Portalis et le droit naturel: de la souveraineté pour le législateur au recours supplétif pour le juge* in 20 COLLECTION D'HISTOIRE DES IDÉES ET DES INSTITUTIONS POLITIQUES. UN DIALOGUE JURIDICO-POLITIQUE: LE DROIT NATUREL, LE LÉGISLATEUR ET LE JUGE 227 (Presses Universitaires d'Aix-Marseille, 2010). *See*, more generally, on Portalis' conception of law: Eric Gasparini, *Regards de Portalis sur le droit révolutionnaire: la quête du juste milieu*, 328 ANNALES HISTORIQUES DE LA REVOLUTION FRANÇAISE 121 (2002).

63. *See* Eugenio di Carlo, *Le droit naturel dans le système d'interprétation de Gény* in 1 RECUEIL D'ÉTUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY 234 (Recueil Sirey 1934); MAYDA, *supra* note 4, at 14, 130 et seq.; Michel Villey, *François Gény et la renaissance du droit naturel* in LE CENTENAIRE DU DOYEN FRANÇOIS GÉNY 39 (Dalloz 1963); Olivier Cayla, *L'indicible droit naturel de François Gény*, 6 REVUE D'HISTOIRE DES FACULTÉS DE DROIT ET DE LA SCIENCE JURIDIQUE 103 (1988); Bruno Oppetit, *François Gény et le droit naturel* in FRANÇOIS GÉNY E LA SCIENZIA GIURIDICA DEL NOVECENTO, 20 QUADERNI FIORENTINI 89 (Giuffrè 1991); Penfold, *supra* note 5.

64. On these views, which are rather complementary than conflicting, *see* Christophe Jamin, *Saleilles' and Lambert's Old Dream Revisited*, 50 AM. J. COMP. L. 701 (2002). *See also*, regarding the various aspects of the latter work: Stephane Caporal, *Édouard Lambert. Théoricien de la jurisprudence sociologique*, 5 ACTA U. DANUBIUS JUR. 182 (2009).

65. Raymond Saleilles, *École historique et droit naturel*, REV. TRIM. DR. CIV. 80, 131 (1902); Raymond Saleilles, *La fonction juridique du droit comparé*, in RECHTSWISSENSCHAFTLICHE BEITRÄGE: JURISTISCHE FESTGABE DES AUSLANDES ZU JOSEF KOHLERS 60. GEBURTSTAG 164, 168-171 (F. Enke 1909). In one of the chapters added to the second edition, Gény mentioned Saleilles' and Lambert's thoughts. He recognized that comparative law can constitute a useful aid for the renewal of French law. However, he does not go as far as to consider it as a source of natural law: MIS, *supra* note 2, at no. 193.

maxim or the *in rem verso* action, and by establishing a system of liability without fault, Louisiana judges have renewed the law of their state, while wearing both the praetor's toga and the *Lord Chief Justice*'s wig. They found an objective foundation in French doctrine and jurisprudence, which enabled them to go beyond the Louisiana Civil Code, but through the Louisiana Civil Code. All in all, the civil law renaissance has been a re-assimilation of the Civil Code and a rejuvenation of the same, thanks to an authentic civil law method.

The reception of Gény's work was probably made easier by the reluctance that Louisiana courts have always shown towards positivism.[66] This is demonstrated by the interpretation they made of the provisions of the 1808 and 1825 codes which aimed at repealing all laws predating codification, a jungle of customary law, French law and Spanish law. Thus, in the *Reynolds v. Swain* case, Chief Justice François-Xavier Martin stated, without beating around the bush, that the legislature did not repeal unwritten law such as natural law or the law of nations, or even *jurisprudence constante*.[67] That is why applying a rule of roman "corporation law" was confirmed in that case and why, in another case, natural law was presented as the foundation for the *contra non valentem*

66. Olivier Moréteau, *De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe* in LE DROIT CIVIL ET SES CODES: PARCOURS À TRAVERS LES AMÉRIQUES 1, 11 (Jimena Andino Dorato, Jean-Frédérick Ménard & Lionel Smith eds., Thémis 2011), *republished in* 5 J. CIV. L. STUD. 31 (2012); Robert Anthony Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301 (1998), *republished in* ROBERT ANTHONY PASCAL: A PRIEST OF RIGHT ORDER 129 (Olivier Moréteau ed., Center of Civil Law Studies, LSU Law Center 2010).

67. Reynolds v. Swain, 13 La. 193, 198 (1839):

> The repeal spoken of in the code, and the act of 1828, cannot extend beyond the laws which the legislature itself had enacted. . . . It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the laws of peace and war, and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept.

Reynolds v. Swain has been referred to as François-Xavier Martin's "most influential contribution." MARK F. FERNANDEZ, FROM CHAOS TO CONTINUITY: THE EVOLUTION OF LOUISIANA'S JUDICIAL SYSTEM, 1712-1862 84 (Louisiana State University Press 2001).

agere non currit praescriptio maxim.[68] This sound resistance to positivism certainly was another expression of the influence Portalis had in Louisiana.

Thus, Louisiana had rules of interpretation incorporated in its code and a suitable method of implementation. Great judges found a way to make the best out of it: the *libre recherche scientifique* was fully promoted, and Louisiana law was overtly modernized.

B. A Trinity of Learned Judges: Justices Barham, Tate and Dennis

The fruitfulness of the method has been noticed by some learned and audacious judges who made the *Méthode d'interprétation et sources* a preferred tool for completing the rebirth of civil law in Louisiana.[69] Mack Elwin Barham (1924-2006), made the community of jurists realize that in order to strengthen the Louisiana civil law resurgence movement, the implementation of a civil law methodology was necessary: that of François Gény.[70] He set an example by applying it in many of his

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68. The first time a position was taken on the historical origins of *contra non valentem* by a Louisiana court is to be found in Justice Mathews' opinion in *Morgan v. Robinson*, 12 Mart. (o.s.) 76, 77 (La. 1822), affirming his Spanish and natural law origins:

> [The plaintiff] relies principally on the maxim, *contra non valentem agere, non currit prescriptio* as adopted and recognized by the Spanish law, and being an axiom, or first principle of natural law and justice, and therefore applicable to every system of jurisprudence, wherein the contrary is not expressly established by legislative power. In this view of the subject we agree with the counsel of the plaintiff, and, notwithstanding the express terms of limitation in our code, it is thought, that they ought not to be interpreted as to conflict with this universal maxim of justice.

About the parallel development of the maxim in France and in Louisiana, *see* Janke & Licari, *supra* note 43.

69. Kenneth M. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 LA. L. REV. 1 (1988).

70. Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 LA. L. REV. 357 (1973), *republished in* THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 38 (Joseph Dainow dir., Louisiana State University Press 1974).

opinions.[71] Judge Albert Tate, Jr. (1920-1986) certainly was one of the greatest Louisiana judges; relying on Gény, but also on his unmatched knowledge of French law, he has developed, in a series of articles, an important reflection on the role of judges in a mixed legal system[72] and gave Louisiana jurisprudence real pieces of anthology.[73] James L. Dennis, another judge of great erudition, followed the footsteps of his illustrious predecessors and has consolidated the position of both doctrine[74] and jurisprudence.

One might wonder why Gény became *the* cardinal reference in Louisiana, even though American doctrine already had brilliant critics of formalism,[75] amongst the most famous of them being Oliver Wendell Holmes, Jr. (1841- 1935),[76] Benjamin N. Cardozo

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71. *See, e.g.*, his remarkable dissenting opinion in the case *Tannehill v. Tannehill*, 261 So. 2d 619, 624-29 (La. 1972).

72. ALBERT TATE, JR., REFLECTIONS ON LAW, LAWYERING, & JUDGING. THE ESSAYS AND ARTICLES OF JUSTICE ALBERT TATE, JR. (Pugh Institute for Justice, LSU Law Center 2006) (with a foreword by Judge Dennis). It is an excellent book, compiling all his writings, with the exception of his judicial opinions. On Albert Tate's doctrine, *see* Rees, *supra* note 3.

73. Mack E. Barham, *A Civilian of Our Times: Justice Albert Tate, Jr.*, 47 LA. L. REV. 929 (1987); Athanassios N. Yiannopoulos, *Civil Law in Judge Tate's Court: Three Decades of Challenge*, 61 TUL. L. REV. 743 (1987); Paul R. Baier, *Of Judicial Freedom and Judicial Constraint: The Voice of Louisiana's Judge Albert Tate, Jr.*, 35 S.U. L. REV. 443 (2008).

74. James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1 (1993). In this remarkable article, Judge Dennis was inspired not only by writings of Portalis and Gény, but also by those of Philipp Heck, founder of *Interressenjurisprudenz*. In his work, he elaborated upon the significance of weighing conflicting interests as a method for the court to fill the gaps in the law. This method was merely sketched by Gény (regarding this topic, *see* Guillaume Lazzarin, *Le juge administratif et la doctrine de François Gény. Réflexions sur la méthode de la "balance des intérêts"*, JCP Adm. 2011. 2222 (Fr.). *See also*, James L. Dennis, *Capitant Lecture*, 63 LA. L. REV. 1003 (2003)).

75. *See* G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972); Françoise Michaut, *Le rôle créateur du juge selon l'école de la "sociological jurisprudence" et le mouvement réaliste américain. Le juge et la règle de droit*, 39 REVUE INTERNATIONALE DE DROIT COMPARÉ 343 (1987); Marie-Claire Belleau, *Le classicisme et le progressisme dans la pensée juridique aux États-Unis selon l'analyse historique de Morton J. Horwitz*, 34 LES CAHIERS DE DROIT 1235 (1993).

76. Holmes is generally referred to as a forerunner of the legal realism movement (*see, e.g.*, WILLIAM W. FISHER III, MORTON J. HORWITZ & THOMAS A. REED, AMERICAN LEGAL REALISM 3 (Oxford University Press 1993)). His

(1870-1938),[77] Dean Roscoe Pound (1870-1964),[78] Jerome Frank (1889-1957),[79] Karl N. Llewelyn (1893-1962)[80] and Fred Rodell (1907-1980),[81] the *enfant terrible* of *Legal Realism*.

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most important work is THE COMMON LAW (Little, Brown, and Co. 1881; *reprinted by* The Belknap Press of Harvard University Press 2009, with an introduction and annotations by G. Edward White); *see also* another work of his, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), which is, likewise, a canonical text of American realism. The latter has recently been translated by Françoise Michaut. The translation is entitled "*La passe étroite du droit*" (*Clio@Themis, Revue électronique d'histoire du droit*, no. 2). The thinking of Judge Holmes continuously inspires American doctrine and jurisprudence. An article of major reference would be G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971). *See also*, Ruth Gavison, *Holmes's Heritage: Living Greatly in the Law*, 78 B. U. L. REV. 844 (1998).

77. In the United States Judge Cardozo was one of the main authors spreading Gény's thinking. He cites the latter no less than twenty six times in his book THE NATURE OF THE JUDICIAL PROCESS (Yale University Press 1921).

78. Roscoe Pound, whose influence on American legal science is still considerable, shares various common traits with François Gény, whom he cites in numerous writings of his. The first series of citations can be found in an article criticizing conceptualism, which was the prevailing view at that time: *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). The work of the then future Dean of the Harvard Law School from 1916 to 1936, founder of the *Sociological Jurisprudence* and spiritual father of *Legal Realism*, is impressively prolific and deep. It is enriched with history, philosophy and comparative law, and fully reached maturity in a collection of conferences published towards the end of his life and which remained undisclosed for a long time: THE IDEAL ELEMENT IN LAW (University of Calcutta Press 1958, *reprinted by* Liberty Fund, Inc. 2002). Gény and Pound have different views on natural law: *see* Karl Kreilkamp, *Dean Pound and the Immutable Natural Law*, 18 FORDHAM L. REV. 173 (1949).

79. JEROME FRANK, LAW AND THE MODERN MIND (Brentano's 1930); COURTS ON TRIAL. MYTH AND REALITY IN AMERICAN JUSTICE (Princeton University Press 1949). On the personality and the influence of Jerome Frank, founder of legal realism, *see* ROBERT J. GLENNON, THE ICONOCLAST AS REFORMER. JEROME FRANK'S IMPACT ON AMERICAN LAW (Cornell University Press 1985).

80. K. N. Llewelyn is one of the great characters of American legal scholarship and one of the pioneers of American legal realism. He taught at the University of Columbia and at the University of Chicago. THE BRAMBLE BUSH (Oceana Publications 1930, *reprinted by* Oxford University Press 2008) became "classic" literature. Another major work of his, which until recently was only a manuscript, has been published: THE THEORY OF RULES (University of Chicago Press 2011) (with an introduction by Frederick Schauer). It proves a relative return to legal classicism.

81. Fred Rodell and Jerome Frank were probably the most radical advocates of legal realism. Rodell's sharp criticism of academism in law reviews constitutes a piece of anthology: Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

The reason for this is probably the fact that Judge Holmes, while brilliantly attacking formalism, by way of formulating general ideas, disseminated in his judicial and extrajudicial works,[82] never proposed an alternative method. Judge Cardozo, in his landmark work, while methodically identifying the flaws of formalism, left "unresolved the basic question of how the judge is to decide cases that fall in the open area (and indeed how to demarcate that area)."[83]

As to Jerome Frank, his fundamental skepticism, his radical criticism of the law and its methods, stimulating as they are, may have been deemed to be of limited utility for a judge confronted with a concrete case.[84] As for Llewelyn and Pound, their influence is present in certain judgments although they are not explicitly cited.[85]

When the translation of Jaro Mayda was published, Gény was already known in America. *Méthode d'interprétation et sources* had already left a significant mark over American legal science.[86] This changed its perception, the work now being understood the way it was initially designed: as a methodology for judges.

Gény, who was at the same time catholic, conservative and reformer, proposed a compromise[87] which was able to seduce

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82. *See* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. (Richard A. Posner dir., University of Chicago Press 1992).

83. RICHARD A. POSNER, CARDOZO. A STUDY IN REPUTATION 30 (University of Chicago Press 1993).

84. Regarding the attitude of Jerome Frank when he was judge, *see* GLENNON, *supra* note 79, at 129-63.

85. Rees, *supra* note 3.

86. Mitchell Franklin, *L'influence de M. Gény sur les conceptions et les méthodes juridiques aux États-Unis* in 2 RECUEIL D'ÉTUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY 30 (Recueil Sirey 1934); Kennedy & Belleau, *supra* note 6, at 295; Carlos Petit, *A Contributor to the Method of Investigation. Sobre la fortuna de Gény en America* in FRANÇOIS GÉNY E LA SCIENZIA GIURIDICA DEL NOVECENTO, 29 QUADERNI FIORENTINI 201 (Giuffrè 1991).

87. *Compare* to Belleau, *supra* note 7, at 382-83: "By offering sufficient change, they sought to salvage a rapidly deteriorating situation and to keep social peace."

elected judges, and therefore in line with a Louisianan society which, although conservative, was also in transition.[88] Gény was a French civilian, by contrast with most of his American peers, who were inevitably *common law* jurists, focused on, if not obsessed with, the system of binding precedent or *stare decisis*, as well as on the power of the Supreme Court. He proposed a modern and balanced method, able to favor the rebirth of the civil law in Louisiana. Lastly, or perhaps above all, Louisiana judges saw their creative activity justified for the past and encouraged for the future, by an undisputed master of the civil law. This diminished the risk of giving new arguments to those who saw Louisiana and its system as an unacknowledged *common law system*.[89]

What now remains to be seen is the expression of this reception of the work of Gény by the Louisiana jurisprudence.

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88. For a portrait of the typical Louisiana judge as a magistrate, statesman and politician, *see* Symeon C. Symeonides, *The Louisiana Judge: Judge, Statesman, Politician* in LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 89 (Vernon V. Palmer dir., Carolina Academic Press 1999).

89. Since the incendiary article of Gordon Ireland, *Bench and Bar: Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937), the question of the adherence of Louisiana to the civil law family is of major importance, binding both doctrine and jurisprudence to take positions consistent with the *civil law*. This attitude is sometimes borderline to ultra-orthodoxy. Thus, the courts regularly and vigorously assert that they are not applying the principle of *stare decisis*, but that of *jurisprudence constante*; the corollary is the adhesion to the questionable fiction of non-retroactivity of court decisions (*infra* Part II). Also, this probably explains why Louisiana jurisprudence is deeply attached to the principle *pacta sunt servanda* to the point of rejecting the theory of imprevision (revision of contracts in case of hardship) and refusing any idea of judicial control of unreasonable contractual provisions—*see* Jean-Louis Baudouin, *Theory of Imprevision and Judicial Intervention to Change a Contract* in ESSAYS ON THE CIVIL LAW OF OBLIGATIONS 151, 160 (Joseph Dainow ed., Louisiana State University Press 1969); Jonathan Riley, *Embracing the Principle of Growth: A Call for An Expansion of the Doctrine of Fortuitous Event in Louisiana Law*, 35 S.U. L. REV. 413 (2008). Regarding abusive clauses, the jurisprudence seems to lean towards a moderate reception of *unconscionability*: R. Fritz Niswanger, *An Unconscionability Formula for Louisiana Civilians?*, 81 TUL. L. REV. 509 (2006).

II. THE MANIFESTATIONS OF THE RECEPTION OF *MÉTHODE D'INTERPRÉTATION ET SOURCES* IN LOUISIANA

Most of the judgments citing *Méthode d'interprétation et sources* would deserve a commentary. The most significant reveal the influence of Gény's doctrine on the methods of interpretation applied by Louisiana courts (A) and on the issue of the retroactive effect of court decisions (B).

A. The Influence of Gény on the Methods of Interpretation Applied by Louisiana Courts

Writing about the Swiss Civil Code, Gény said that ". . . the formula given in article 1 of the Swiss Civil Code of 1907 could be seen as the most accurate summary of my developments."[90] The provision capturing the essence of Gény's method is certainly paragraph 2 of the same article according to which: "In the absence of a provision, the court shall decide . . . in accordance with the rule that it would make as legislator." It is no wonder that its spirit became a real leitmotiv of the Louisiana jurisprudence.

This is how it was implemented: In the context of a very ordinary case, like a divorce where alimony was also sought, the Louisiana Supreme Court had to decide on an issue of principle related both to the constitutionalization of private law,[91] and to legal methodology, in particular to courts filling gaps in the law. The Louisiana Civil Code contained an article 160 as follows: "When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income."

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90. MIS, *supra* note 2, at no. 204; Oscar Gauye, *François Gény est-il le père de l'article 1er, 2e alinéa, du Code civil suisse?*, 92 REVUE DE DROIT SUISSE 271 (1973).

91. Loyacano v. Loyacano, 358 So. 2d 304 (La. 1978). Regarding the constitutionalization of Louisiana private law, *see* Moréteau, *supra* note 66, at 25, 27.

There was no provision expressly authorizing a court to grant alimony after divorce to the husband. The husband, who was also the defendant, argued that article 160 was unconstitutional because it violated both the Fourteenth Amendment of the United States Constitution[92] and article 1 § 3 of the Louisiana Constitution of 1973, written in similar language. The reasoning which led Justice Dennis not to annul this provision, while reaching a solution adapted to the evolution of Louisianan society, constitutes a topical application of the free objective search for a rule.

Justice Dennis began by noticing that the arguments based on constitutional law are relevant, because the contested provision established a difference between man and woman which was unreasonable and arbitrary. Then he explained that this provision was justified by the socio-economic context of the time of its adoption:

> Although not based solely on sex, such classifications for purposes of entitlement to alimony after divorce probably were founded on the assumption that all former husbands have sufficient means for their support, or that few divorced women have property and earnings out of which alimony could be paid, or upon both. If these propositions were ever true, common experience tells us that the deviations from them are now too numerous for the classifications to withstand equal protection challenge.[93]

Interestingly, Justice Dennis asserts that:

> The failure of the legislature to expressly authorize the allowance of alimony after divorce for male citizens, however, does not necessarily invalidate Civil Code article 160. Because Louisiana is a civil law jurisdiction, the

92. U.S. CONST. amend. XIV, § 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

93. Loyacano v. Loyacano, 358 So. 2d at 307.

> absence of express law does not imply a lack of authority for courts to provide relief. In all civil matters, where positive law is silent, the judge is bound by the Civil Code to proceed and decide according to equity, i.e., according to natural law and reason, or to received usages. This Court has recognized its duty to proceed and decide important issues under these circumstances on many occasions.[94]

Taking his reasoning further, Justice Dennis presented the method employed so as not to annul article 160 of the Louisiana Civil Code, nevertheless deciding that divorced husbands should be granted alimony, even in the absence of an express legal provision. He invoked not only articles 13 to 30 of the Louisiana Civil Code, which offer guidance for interpretation, but also, and above all, legal doctrine:

> We are also mindful of the doctrine of reputable scholars, which teaches that civilian judges are not required to depend merely upon a logical analysis of the existing statutes, but may employ other recognized methods of interpretation. They may perform extensive exegesis to discover the original legislative intent; legislative texts may be interpreted so as to give them an application that is consistent with the contemporary conditions they are called upon to regulate; and a particular conflict of interests before the court may be resolved in accordance with the general policy considerations which induced legislative action rather than by reliance on logical deductions from the language of the text.[95]

The last sentence carries beyond all doubt the mark of François Gény's thinking. And if Justice Dennis did not explicitly cite him in support of his methodological developments, he relies on a series of doctrinal contributions obviously inspired by the free search for a rule.[96] Also influenced by the central idea of Gény's work is the following assertion:

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94. *Id*. at 307-08 (citations omitted).
95. *Id*. at 308.
96. *Id*. at 308, citing A. N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM 89-93 (Claitor's Pub. Division 1977); Barham, *supra* note 70, at 371; Albert Tate, Jr., *Law Making Function of a Judge*, 28 LA. L. REV. 211 (1968); Albert Tate, Jr., *Louisiana and the Civil Law*, 22 LA. L. REV. 727 (1962).

> Consequently, when we attribute to Article 160 the meaning that a present day legislator would have attributed to it, we must assume that he would have taken cognizance of the increasing and expanding nature of women's activities and responsibilities, as well as our constitution's prohibition of arbitrary or unreasonable gender based legal classifications, and that he would not have intended by the legislation to discriminate against husbands who have not sufficient means for their maintenance by declaring them ineligible for alimony after a divorce.[97]

In his conclusion, Justice Dennis wrote for the majority that "Equity and our constitution demand that the husband be awarded alimony under the same circumstances in which it can be claimed by the wife."[98] Thus, the *libre recherche scientifique* applied by Justice Dennis led him to the conclusion that article 160 did not breach the Constitution, while giving it a sphere of applicability compatible with the Louisiana legal system.

Other developments followed. During a petition for rehearing, the Court reversed its position and, according to a doubtful analysis, concluded that article 160 of the Louisiana Civil Code was not unconstitutional and that the plaintiff could not demand alimony.[99] Then, Mr. Loyacano took the case to the United States Supreme Court which annulled the decision of the Supreme Court of Louisiana and sent the case back to the latter to be retried in the light of the precedent established in *Orr v. Orr*.[100] However, the Supreme Court of Louisiana did not have to reverse its judgment, because, on rehearing, Mr. Loyacano declared his consent to the judgment of the Court.[101] Therefore, according to the Court, there was no longer any reason to rule on the constitutionality of article 160. It was possible to reinstate the judgment previously annulled

97. Loyacano v. Loyacano, 358 So. 2d at 309.
98. *Id*.
99. *Id*. at 314.
100. Loyacano v. LeBlanc, 440 U.S. 952 (1979).
101. Loyacano v. Loyacano, 375 So. 2d 1314, 1315 (La. 1979). One of the reasons invoked by Mr. Loyacano was that in the meantime article 160 was amended in a way that made no distinction according to the gender of the one requesting alimony.

by the Supreme Court. Article 160 was eventually reformed, in order to eliminate any reference to gender and to restore equality between spouses, but the *Loyacano* case continued to have significant repercussions.[102]

In *Loyacano v. Loyacano*, Justice Dennis also talks about interpretation and seems reluctant to openly acknowledge the necessary consequence of applying the free objective search for a

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102. In *Clausen v. Clausen*, 375 So. 2d 1315 (La. 1979), the Supreme Court of Louisiana decided that the husband was not entitled to require alimony on the basis of article 160 given that it is granted solely to the wife. Justice Calogero, writing for the majority, emphasized the importance of the *Loyacano* case, but felt that it would be futile for the Court to rule on the constitutionality of article 160. *Id.* at 1318 n.4. The Court noted that declaring the article unconstitutional would not benefit the ex-husband because "[s]triking Louisiana's provisions affording wives the right to alimony would not thereby create a corollary right for husbands." *Id.* Nonetheless, the Court held that the lower court had to retry the case and apply the revised article 160 for the period subsequent to its entry into force. *Id.* at 1318. Justice Tate and Justice Dennis wrote concurring opinions on this last point, but dissented as to the applicable law for the period prior to the revision. *Id.* at 1318-19. They reaffirmed their attachment to the solution reached by the majority in the original *Loyacano v. Loyacano* case, *see* 358 So. 2d at 309, i.e., that it was possible to say, on the basis of article 21 of the Louisiana Civil Code, that the husband was also entitled to alimony. Clausen, 375 So. 2d at 1318-19. The issue of constitutionality of article 160 seems to have been eluded in order to avoid deciding the more delicate issue of the validity of judgments which previously granted alimony on the basis of the above-mentioned article. In Lovell v. Lovell, 378 So. 2d 418 (La. 1979), the Supreme Court accepted to confront this problem and end the *Loyacano* saga. Justice Marcus, writing for the majority, recognized the unconstitutionality of the criticized provision, but also held that the judgment would only produce effects for the future. *Id.* at 422. In order to reach this decision, he relied on the "test" developed in the leading case decided by the United States Supreme Court, Chevron Oil Company v. Huson, 404 U.S. 97 (1971). *See* Clausen, 375 So. 2d at 421-22. He wrote:

> Upon consideration of each of these factors, we conclude that our decision should not be applied retroactively. Our decision establishes a new principle of law by overruling clear past precedent on which litigants have relied. Innumerable divorced persons, both those paying and receiving alimony, have relied on the constitutionality of art. 160. *Loyacano v. Loyacano*, upholding the constitutionality of this statute, was decided by this court as recently as last year. Moreover, retrospective application would undermine the objectives of art. 160. Finally, substantial inequity would result if prior judgments awarding alimony were declared invalid. . . . [i]t would subject divorced wives to suits by their former husbands seeking repayment of alimony paid by husbands under art. 160 prior to its amendment. *Id.* at 422.

On the possible repercussions of *Loyacano v. Loyacano* in the law of matrimonial regimes, *see* Burger v. Burger, *supra* note 38.

rule: the creation of a rule. Several years later, in *Bell v. Jet Wheel Blast*,[103] in a case concerning the issue of whether the fault of the victim can reduce liability (regarding strict liability for defective products), the idea was expressed without ambiguity:

> The court's purpose in an objective search is to discover a rule which will satisfy, as well as possible, justice and social usefulness in the case at hand and in similar cases. Even if the legislature has tacitly authorized the courts to update the statute by including as one of its elements a dynamic concept, such as "fault" or "public policy", the search for a subsidiary rule more specifically defining the dynamic concept must be objective. The court must eliminate any personal influence or influence related to the specific case and base its decision on objective elements; it should take into account all of the social, moral, economic and other considerations that an objective rule-maker would consider in forming a rule to govern the case.[104]

The idea that "it is necessary for the judge . . . to consider the particular situation from the same standpoint as would a legislator regulating the matter," has been expressed this way many times by Justice Dennis.[105] As seen above, this idea expresses the

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103. Bell v. Jet Wheel Blast, 462 So. 2d 166, 170 (La. 1985).

104. The translation of MIS, nos. 155-56, is cited. *See* Bell v. Jet Wheel Blast, 462 So. 2d at 170. The well-known book of Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS (Yale University Press 1921), is also cited alongside Gény's. A third reference is made to JULIO C. CUETO-RUA, JUDICIAL METHODS OF INTERPRETATION OF THE LAW 80-81 (The Publications Institute, LSU Law Center 1981).

105. *See*, *e.g.*, in another "great judgment" concerning the law of liability for the act of things, Entrevia v. Hood, 427 So. 2d 1146, 1148-49 (La. 1983). MIS is cited many times: nos. 173, 174, and 183. *See* Entrevia v. Hood, 427 So. 2d. at 1149. In the paragraph last cited (no. 183), Gény wrote:

> In the absence of any formal directive—a clear statutory or customary rule—the lawyer must scrutinize the essence of the matter and directly investigate the social elements for which he is to find the rule. In the complex of the resulting data . . . [a]s the legislator himself would do, he must [assess the elements according to their own nature and] determine the laws of their harmony, aiming his sight at the ideal of justice and social usefulness . . . .

MIS, *supra* note 2, at no. 183 (trans. note: added text was not included in Mayda's translation). The *Entrevia* case and its reference to Gény had a great influence, as attested by the multiple citations in subsequent cases: Celestine v. Union Oil Company of California, 636 So. 2d 1138, 1142-43 (La. Ct. App. 1994); Billiot v. State, 654 So. 2d 753, 759 (La. Ct. App. 1995). On the *Entrevia*

quintessence of Gény's thinking. Its appearance in the field of the purely jurisprudential construction of liability for the act of things is not a surprise.[106]

In this field, the boundary between *common law* and *civil law* is abolished.[107] The opinion of Judge Dennis was welcomed by

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case, *see* Elizabeth Baucum, Entrevia v. Hood: Back to Loescher v. Parr, 44 LA. L. REV. 1485 (1984).

106. The law of liability for the act of things developed similarly to French law, which was openly used as a model. The founding judgment was *Loescher v. Parr*, 324 So. 2d 441 (La. 1975), in which the Supreme Court of Louisiana (A. Tate, Jr., for the majority) decided for the first time that the plaintiff, whose defense was based on Louisiana Civil Code article 2317, did not have to prove the fault of the person who caused the injury. Article 2317 at that point reproduced *verbatim* article 1384, paragraph 1, of the French Civil Code and has been considered until then a mere transition article, without normative effect. After comparing provisions from the French Civil Code and the Louisiana Civil Code, the owner of a tree which was 90% rotten was held liable by the Supreme Court for the damage inflicted on a Cadillac, though the tree was apparently healthy. The thing being in the defendant's custody, he was held liable because the vice or defect of the tree constituted an unreasonable hazard and because this vice or defect was the cause of the damage. The *Entrevia* case marked a return to the standards laid down in *Loescher* and which had been in the meantime modified by *Kent v. Gulf State Utilities Co.*, 418 So. 2d 493 (La. 1982); for more detail, *see* Baucum, *supra* note 105. Even though an author convincingly advocates the abandonment of liability for the act of things in French law (Jean-Sébastien Borghetti, *La responsabilité du fait des choses, un régime qui a fait son temps*, REV. TRIM. DR. CIV. 1 (2010)), one may note that the system stemming from *Loescher v. Parr* and subsequent cases has been abolished by the Louisiana legislature who has reintegrated the liability for the act of things into fault-based liability (LA. CIV. CODE art. 2315). In 1996, Louisiana Civil Code article 2317.1 was inserted:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of *res ipsa loquitur* in an appropriate case. LA. CIV. CODE art. 2317.1.

For a commentary, *see* Joseph S. Piacun, *The Abolition of Strict Liability in Louisiana: A Return to a Fairer Standard or an Impossible Burden for Plaintiffs*, 43 LOY. L. REV. 215 (1997); concerning the central question of knowledge of the defect, *see* Joseph E. Lee III, *A Return to Negligence or Something More? Proving Knowledge in "Strict Liability" Cases in Louisiana Under Civil Code Article 2317.1*, 59 LA. L. REV. 1225 (1999).

107. *Compare* to André Tunc, *La méthode du droit civil : analyse des conceptions françaises*, 27 REVUE INTERNATIONALE DE DROIT COMPARÉ 817, 824 (1975):

Judge Doucet's dissent in *Adoption of Meaux*.[108] The natural parents of Jason Michael Meaux wished to adopt him. This adoption was denied at trial because the Louisiana Civil Code did not provide for the adoption of a child by single persons when none of them is a legitimate parent. Since there was no legal way to adopt, the judgment was affirmed. In his dissenting opinion, Judge Doucet noted that the judgment disregarded the interest of the child and discriminated against an innocent child. The following paragraph from his opinion constitutes an additional illustration of the free objective search for a rule:

> This is an un-provided-for case. Because ours is a free society and Louisiana is a civil law jurisdiction, the absence of express law does not imply a prohibition upon the petitioners or this court. Inasmuch as our adoption laws are designed to protect, not destroy, the natural rights of parents, I do not believe R.S. 9:422 can be construed as providing an exclusive list of remedies. Such an interpretation is consonant with constitutional prohibitions against discrimination based on birth. Thus, the silence of positive law requires we proceed according to equity as we are bound to do under C.C. Art. 21. . . . See also Justice Dennis' concurrence in *Lovell v. Lovell* and his original opinion in *Loyacano v. Loyacano* and Geny (sic), *Method of Interpretation*, § 105. Applying equity I believe that the best interest of the child and due regard for natural rights of the parents dictates that we allow the relief sought.[109]

> [T]he jurisprudence that developed on the basis of art. 1384, par. 1 of our Code . . . is not typical of the relations of the law and the judge in a jurisdiction where the law is codified. We are facing a pure judge-made law, detached from the Code to such an extent that it has been compared to a pyramid constructed on the head of a pin. It evolves in a free, sometimes surprising or contradictory, manner reminiscent of the common law rather than of the jurisprudence in a codified jurisdiction.

See also René Savatier, *Le gouvernement des juges en matière de responsabilité civile* in 1 RECUEIL D'ÉTUDES EN L'HONNEUR D'ÉDOUARD LAMBERT 453 (L.G.D.J. 1938).

108. Adoption of Meaux, 417 So. 2d 522, 523-24 (La. Ct. App. 1982).

109. *Id*. at 523-24.

B. The Ambiguous Status of Jurisprudence: The Issue of the Retroactive Effect of Overruling

The case *Hulin v. Fibreboard Corporation*[110] is certainly one of the most remarkable, as it deals with a highly controversial issue among both civilians and common law lawyers: the retroactivity of overrulings.[111] Mrs. Hulin and other plaintiffs sued the *American Tobacco Company* and various manufacturers of products containing asbestos, alleging that the defendants' products contributed to the development of lung cancer and subsequent death of Mr. Hulin, husband and father of the plaintiffs. They sought recovery under strict liability, ultra-hazardous activities, and negligence. Six weeks after the complaint was filed, in the *Halphen*[112] case, the Louisiana Supreme Court decided that if the plaintiff proves that the product was unreasonably dangerous *per se*, i.e. "if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product,"[113] whether because of defective design or another kind of defect, or unreasonably dangerous in construction or composition, "a manufacturer may be held liable for injuries caused by [the] product even though [the] manufacturer did not know and reasonably could not have known of the danger."[114] The plaintiffs amended their complaint, alleging that tobacco is unreasonably dangerous *per se*, because a reasonable person would conclude that the danger-in-fact of tobacco outweighs its utility.

Then, the case focused on the applicability of the *Halphen* jurisprudence. The plaintiffs argued that this jurisprudence could not apply retroactively to the facts of the case. The district court agreed with the defendant on this issue and, in a separate

110. Hulin v. Fibreboard Corp., 178 F.3d 316 (5th Cir. 1999).
111. LES REVIREMENTS DE JURISPRUDENCE. RAPPORT REMIS À M. LE PREMIER PRÉSIDENT GUY CANIVET (Nicolas Molfessis dir., Litec 2005).
112. Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 116-117 (La. 1986).
113. *Id*. at 114.
114. *Id*. at 116.

judgment, the same court noted that the plaintiffs relied only on the *Halphen* jurisprudence and that such jurisprudence could not be applied retroactively; therefore, the case was to be dismissed. The plaintiffs appealed from this judgment before the United States Court of Appeals, Fifth Circuit. The Court reversed the judgment and remanded the case to the district court. In essence, Justice Dennis—the author of the opinion—noted that the Louisiana Supreme Court has always firmly applied the principle that "[u]nder the State's constitution and Civil Code, Louisiana courts cannot make law but are bound to decide cases according to their best understanding of the law established by legislation and custom."[115] Thus, the Louisiana Supreme Court considers that such an interpretation should lead to full retroactivity unless the court specifies otherwise or unless such an application would be impossible due to prescription.

Citing an abundant *jurisprudence constante*, Justice Dennis reminds that "[t]he law as construed in an overruled case is considered as though it had never existed, and the law as construed in the last case is considered as though it has always been the law."[116] Thus, "the law as construed in the last decision operates both prospectively and retrospectively, except that it will not be permitted to disturb vested rights."[117] This opinion is based on both the Louisania Constitution, which declares that, without exception, the legislative power is vested solely in the Legislature, and the Louisiana Civil Code,[118] whereby legislation and custom are the only sources of law. Justice Dennis also pointed out that "[i]n Louisiana and other civil law jurisdictions, the judicial method of applying Civil Code principles by analogy to facts

115. Hulin v. Fibreboard Corp., 178 F.3d at 319.
116. *Id*. at 320 (citing Norton v. Crescent City Ice Mfg. Co., 178 La. 135 (La. 1933)).
117. *Id*.
118. Louisiana Civil Code article 1 provides: "The sources of law are legislation and custom." LA. CIV. CODE ANN. art. 1 (2014). These sources are respectively defined in Louisiana Civil Code articles 3 and 4.

unforeseen by the Code always has been used and considered as judicial interpretation of law and not law making."[119] Some precedents and Louisianan distinguished authors were cited. Philipp Heck and François Gény were also cited.[120] Among contemporary authors, Justice Dennis also cites François Terré who maintains that court decisions, besides being retroactive, are also declarative. Justice Dennis relied also on article 5 of the French Civil Code and on the spirit of the Louisiana Civil Code.

Subsequently, there is an overview in the case of "the relatively small number of cases in which the Louisiana Supreme Court has limited the retroactive effect of its own decisions."[121] They mostly concern family matters and matters related to the interpretation of the Constitution. Then, the case considers the situations where some "overriding legal principles" can limit the retroactive effect of court decisions, such as *res judicata*, prescription, or the theory of vested rights. Afterwards, Justice Dennis mentions how, based on identical provisions to those of the Napoleonic Code, liability for the acts of things and liability for defective products (the *Halphen* case being the most recent example when Justice Dennis was writing) were developed by jurisprudence. To further consolidate his argument, he also notes that all Louisiana courts applied *Halphen* retroactively. Finally, Justice Dennis completed his argument by appealing to the *common law*.[122] He meticulously offered an overview of the jurisprudence of the United States Supreme Court to show that even though the Supreme Court was also tempted for a while by the idea of *prospective overruling*,[123] this "experience" has been abandoned. Though it has great

119. Hulin v. Fibreboard Corp., 178 F.3d at 320.
120. MIS, *supra* note 2, at nos. 107, 165, 166.
121. Hulin v. Fibreboard Corp., 178 F.3d at 322.
122. It is interesting to note how Justice Dennis justified his analysis based on the *common law*.
123. In addition to the discussion contained in the judgment, *see* Horatia Muir Watt, *La gestion de la rétroactivité des revirements de jurisprudence: systèmes de common law* in LES REVIREMENTS DE JURISPRUDENCE. RAPPORT REMIS À M. LE PREMIER PRÉSIDENT GUY CANIVET 53 (N. Molfessis ed., Litec 2005).

doctrinal value, this opinion can leave the reader bemused. While not qualified to assert whether the relation made between the position of the Louisiana Supreme Court and the United States Supreme Court regarding the retroactivity of overrulings is valid, this author is of opinion that it may not be the case. Its faithfulness to François Gény in general and to civilian doctrine in particular may be doubted. It is true that Gény always adopted an ambivalent position and never succeeded in offering a theory that would adequately reflect the significance of jurisprudence in French law.[124] That being said, contrary to what Justice Dennis wrote, Gény always said, quite clearly, that analogical reasoning did not stem from interpretation, but from free objective search for a rule, and is therefore an act of creation.[125] Arguing that judges only declare the law and do not create it, so that jurisprudence is not a source of law, is a position that practically no one takes seriously, neither in Louisiana nor in France.[126] Interestingly, this assertion is to be found in a case related to one of the most sophisticated jurisprudential constructions Louisiana law has ever known: that of strict liability. It can be noted that in order to illustrate the place of reasoning by analogy, Justice Dennis mentions the jurisprudence on mineral servitudes, which constitutes one of the most brilliant manifestations of the free objective search for a rule in Louisiana.[127]

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124. *See* the remarkable developments of Mayda, FGMJ, *supra* note 4, at 16 et seq.

125. MIS, *supra* note 2, at no. 165: "Let us first discuss analogy. We have already met it as a proposed procedure of interpretation in the proper sense of the statute law. I could not admit it on that level."

126. It can be concluded, as a commentator of the judgment previously has, that a lawyer taking Louisiana Civil Code article 1 literally would need to substantially invest in liability insurance: William Reed Huguet, *Hulin v. Fibreboard Corp.—In Pursuit of a Workable Framework for Adjudicative Retroactivity Analysis in Louisiana*, 60 LA. L. REV. 1003, 1016 n.84 (2000).

127. It comes as no coincidence that a learned lawyer who presided the Louisiana Law Institute chose, in order to summarize the creative work of the Louisianan jurisprudence, to borrow Raymond Saleilles' famous expression in his foreword to the first edition of MIS: *see* John H. Tucker, Jr., *Au-delà du Code civil, mais par le Code civil*, 34 LA. L. REV. 957 (1974).

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Had François Gény been aware of article 21 of the Louisiana Civil Code, he would probably have looked at it in the light of article 1 of the Swiss Civil Code.[128] Had he been exposed to subsequent Louisiana jurisprudence, he would have discovered the fertility of his method. It is hard to imagine a better reward for his work.

128. *See supra* note 33 and *supra* p. 495.