"Opening the Barbarians' Gate" or Watching the Barbarians from the Coliseum: A Requiem on the Nomos of the Louisiana Civil Law

Marc L. Roark
"Opening the Barbarians’ Gate" or Watching the Barbarians from the Coliseum: A Requiem on the Nomos of the Louisiana Civil Law

Marc L. Roark*

By the advice of their protectors (the Romans), they (the Britons) now built a wall across the island from one sea to the other, which being manned with a proper force, might be a terror to the foes whom it was intended to repel, and a protection to their friends whom it covered. But this wall, being made of turf instead of stone, was of no use to that foolish people, who had no head to guide them.¹

In their original form, they were watched by very few spectators who had to squeeze in against each other, pushing and jostling, straining and craning their necks to get a look at the bloody action being played out before them. These rough congregations, in which the spectators quickly planted themselves wherever they could find a place with a decent view, contained the seeds of the great spectacles of later years. They were primitive showcases for fighting and nothing more, and were certainly not prepared or stage managed in the manner that would later become commonplace . . . . It was not long, however, before seats were added and hired out to spectators who were thus afforded a little more comfort as they watched each pair of gladiators fight . . . .²

---

¹ Gildas, De Excidioet Conquestu Britanniae (J.A. Giles trans., 1841).

Copyright 2007, by Louisiana Law Review.

* J.D. Loyola (New Orleans) Law School; L.L.M. Duke University School of Law. The author would like to thank Kathy Lorio, Jeff Powell, and Giles Cunniberti for their review and insightful comments. The article is better for them, though any detractions are my own, not theirs.
Comparative law tends to focus on the differences and similarities present in different legal systems. Such analysis has led some to conclude that a third legal system has appeared in the West and in particular in Louisiana. The idea of a mixed jurisdiction, they claim, combines certain elements of civil law and common law into a hybrid system. This article challenges the supposition that a legal system’s core identity can be of a mixed nature. Rather, this article suggests that the proper way a legal system should be viewed is through its normative values as depicted in the narratives the system spawns—a nomos that directs the purveyors of the system towards the sources and identity that the system enchants. Focusing primarily on Louisiana, Part I of this article describes three normative elements that narratives tell about the Louisiana civil law: its Frenchness, its distinctiveness, and its dependency on a code. Part II then tells two narratives that demonstrate how these normative elements are revealed, even when they are not completely accurate. Part III challenges the readers to inhabit the nomos.

I. INSTITUTIONAL IDENTITY VERSUS NOMOS

There is a story in human history that the barbarians sitting on the verge of civilized society shaped human innovation. That, as uncivilized “tribes” threatened the parameters of the modern world, society had no choice but to innovate and repel the advances of chaos or themselves be infused with the chaos that the barbarians brought. The Mongols, the Huns, the Gauls, the Celts, the Turks, and the Germans each were the driving force requiring societies on the other side to develop or disorganize.

There is a similar story told in legal communities in two variations. In law (at least in the Western legal tradition) one is trained primarily as a civilian or as a common lawyer. The narrative is therefore told as either one of passive virtues (we stand at the gate and allow the other to influence our own legal tradition) or one of aggressive resistance (we stand aloof and reject the other as antiquated or barbaric given our predisposition). To be sure

there is no natural affinity between the two. But it is undeniable that systems do from time to time borrow from one another, despite the perception that each remains superior to its counterpart. Such is the premise behind comparative law. The more politically friendly version tends to suggest a developing third family of legal tradition known for the combination of civilian and common law themes—that jurisdictions are becoming multi-traditional, mixed, or "bijural."


5. “[T]here doesn’t exist in the modern world a pure judicial system formed without exterior influence.” Vernon Valentine Palmer, LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 4 n.6 (1999) (quoting Pierre Arminjon, Baron Boris Nolde & Martin Wolff, 1 TRAITÉ DE DROIT COMPARE 49 (1950)). The observation that one system of law derives essentially from the institutions that can be attributed to it (or in Palmer’s case a combination of certain institutions) ignores the truism that comparative law cannot be simply reduced to an evaluation of similarities and differences: such analysis ignores relevant social, political, moral, and economic values that more proximately determine the legal course of a jurisdiction. See Alan Watson, LEGAL TRANSPLANTS 4 (1974). In that sense, Merryman’s conclusion that legal “traditions” are more appropriately considered over “legal systems” reflects the well thought out conclusion that law tends to reflect “deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society,” about the institutions of the law, and about how law is to come about. See John Henry Merryman, THE CIVIL LAW TRADITION 2 (1969).

The danger in creating a "new legal tradition" from the relics of traditions is that it tends to devalue the traditions that supposedly have been combined. So, when Palmer writes that "because of their double genetic makeup mixed jurisdictions must appear anomalous (and unclassified) when compared to one of their two parents," he tells us that the two traditions cease to exist in the shadow of the third. Said another way, the "new legal system" becomes an orphan, unsure whether its institutions and enabling devices derive from one system or another. Thus in the same way that comparative law runs the risk of exaggerating the origins of differences, creating a new legal family where there really is none risks isolating legal systems to the point of losing tradition. To be sure, Louisiana has never thought of itself as alone in the sense that Palmer would suggest that it is; it has also never thought of itself as being aligned with the various other "mixed jurisdictions" that are opposed to being aligned by civilian values.

Instead, like other legal systems that share legal traits between multiple systems, Louisiana has continued to consider itself characterized by a dominant persuasion—Louisiana is a civilian jurisdiction. This is not surprising; legal systems continue to retain a dominant legal tradition that is unmitigated, though phenomena appear that do not derive from the dominant tradition. Said slightly differently, there is a nomos to legal traditions in much the same way that there is a nomos to specific legal cultures—an aura that transcends the institutions that make up the tradition. That

8. See Watson, supra note 5, at 4. Comparative law cannot be primarily a matter of drawing comparisons. Those who would disagree with this proposition proceed from one of two starting points. They may start from an individual legal problem they consider to be the same in more than one jurisdiction and examine the legal response to it. As one scholar has put it, "The fact that the problem is one and the same warrants the comparability." Id. Or they may take a branch of law, say contract, and investigate in detail the differences and similarities of the individual rules. But it is doubtful if the comparisons are justifiable in academic terms as comparative law, whether the starting point is the legal problem or the branch of law. Variations in the political, moral, social, and economic values that exist between any two societies make it hard to believe that many legal problems are the same for both, except on a technical level.
9. Palmer's family of "mixed jurisdictions" includes South Africa, Scotland, Louisiana, Quebec, Puerto Rico, the Philippines, and Israel. See generally Palmer, WORLDWIDE, supra note 6.
nomos includes the stories we tell about ourselves—the ways we perceive our institutions interacting with others—and the insulation of our traditions from those we deem contrary or destructive to our own.

It also includes hints that recognize the corpus of the dominant tradition as being superior to the secondary tradition; simply put, we prefer the legal institutions with which we grow familiar. I remember my first year torts professor reminding us civilian students that the barbarians in our class (the common law students) were indeed engaging in barbarism of the common law—fighting one another in courts to determine what the law was. We needed no contest of strength to know the law; we had the law and it was held in a central Civil Code—as sacred as the Bible and as wise as the ancients. Even now, as a scholar that engages more common lawyers than I do civilians, my mind oftentimes wonders and visualizes the superior legal training I received versus the vile combat these poor fellows must engage in on a regular basis. It is

10. See Legrand, supra note 4, at 58–59. Legrand ("PL") and Merryman ("JHM") had the following conversation:

PL: As you yourself observe, there is, despite the deficits you identify, a feeling among many civilians that the civil law tradition is "superior" to the common law. Why this sentiment? Would it suggest that there is less receptivity toward alterity in the civil law than in the common law?

JHM: I came to this conclusion by reading the work of civil law lawyers. There are passages making it very clear that they find a sophistication in the civil law that they do not see anywhere else. They regard the common law as relatively crude and undeveloped. If you accept their idea of what constitutes superiority—the emphasis on hard-edged concepts, system, abstraction, and all that—I see what they are saying.

PL: Have you encountered the same feeling of superiority in your common law colleagues vis-à-vis the civil law?

JHM: Of course, at least among American lawyers. But the values on which they hang their idea of superiority are completely different: there is the belief that the common law is more functional, more efficient, and so on. Having said this, I think that the feeling of superiority is stronger in the civil law. One of the things that bothers a lot of civil law lawyers about the common law is that they can not find it. They do not know where it is.

Id.
the vision of the noble savages battling for the law, as the civilized world sits smugly, watching their efforts, while holding the canon in its hands—the precious Civil Code.

But even by my description of the smugness that derives from certain preference judgments within the civilian and common law traditions, the nomos begins to be revealed. Some have suggested that the civil law suffers from a superiority belief.¹¹ In Louisiana, in recent years, that belief has come under siege. The perception that the Louisiana civil law has much to learn from its common law neighbors, at least within certain legal fields, seems to be growing in popularity. But much of this discussion has also become diluted. Instead of focusing on systems, the analysis has turned towards institutions within systems. We do not say the civil law system is superior. Rather, we now talk in terms of the superiority of civil law property systems, the sales code, or family law.¹² Let me give two examples from the recent past.

At the 2002 Tucker Lecture, my friend Kathy Lorio asked the question, "Is what remains in Louisiana of the civil law tradition, archaic or prophetic?"¹³ It seems that during the drastic changes to the Louisiana law of successions in the 1990s,¹⁴ the Reporter for

11. Id. See also Merryman, supra note 5, at 3.
12. Historic reasons could account for this distinction. Joseph Dainow noted the following:

The Civil Law in Louisiana is not the whole legal system but only those parts contained in the Civil Code, namely the law of persons and the family, property, successions and donations, obligations and the various private contracts (most important of which are sale and lease), the security devices of pledge and suretyship as well as privileges and mortgages, plus the acquisitive and liberative prescriptions. In a civil law country, the so-called civilian method of thinking and the civilian techniques are considered as characterizing also the nature and development and interpretation of other areas of that country's legal system . . . .


14. I call the move drastic, not as a negative connotation, but because of its breadth and scope. The changes to the laws of successions and donations in the 1990s were certainly dramatic, as seen by the amount of law review crescendo that the changes wrought. See, e.g., Katherine Connell-Thouez, The New Forced Heirship in Louisiana: Historical Perspectives, Comparative Law Analyses and Reflections upon the Integration of New Structures into a
the Louisiana State Law Institute ("Law Institute") developed the obnoxious habit of referring to certain institutions as "archaic," ultimately memorializing that commentary in the official comments to the Code.\textsuperscript{15} Comments such as these annoyed the persons who saw the civil law not as archaic, but as a timeless system that defined persons, their property, and their transactions. Lorio was one of those persons and wrote passionately about civil law institutions that could be deemed as more contemporary than ancient. During that same event, Professor Patrick Martin of Louisiana State University stood up and addressed the audience and proudly proclaimed in effect, "I believe that the rest of the nation could learn from the Louisiana civil law approach to property."

Lorio's approach (and Professor Martin's on a larger scale) focused on the institutions of the civil law to show that they have a place in the dialogue of law. Their comments were to this effect: "The civil law is superior because X manifestation is better than the common law Y." This rubric seems misplaced to me, though I sympathize with their reactions. Exchanging the corpus of the tradition for the institutional preference compromises the essence of the civilian tradition itself. It says, in effect, that the institutions of the civilian tradition—instead of its inherent characteristics (the


nomos)—define the tradition. Lorio (and others) are asking what it means to be a civilian jurisdiction in tension with its common law surroundings. One answer to that question is that being civilian means looking civilian. That is, we know we are a civilian jurisdiction because we have institutions like forced heirship and community property, among other things, that can be derived from our civilian heritage; our imagination has become confined to a rubric that says "we are what we look like.”

Taken as a simple statement, “we are what we look like” is a truism, correct and timeless. It forms the basis of what this article is about—we really are what we look like, or rather, we are what we imagine that we look like. I want to suggest that being civilian is less about institutional appearance and more about the nomos of the civil law. That is, the civil law is not definable by institutions, as institutions are temporary place-holders within the tradition. Rather, like so many other things, the Louisiana civil law is defined usually by the perceptions we draw regarding what we “should look like.” Mere institutional appearance, on the other hand, does not tell us what to do with legal innovations that have no root in either the civil or common law traditions. For this reason, an institutional appearance cannot be the basis for locating a tradition, though it can be an identifier.

Let me state this using the forced heirship example. One could argue from the forced heirship debate that the civilian tradition was well thought out, was designed to protect family, and was a built-in mechanism to limit dependency on the state for maintenance of individuals. Accordingly, its deep-rooted tradition in the Louisiana and French Civil Codes is justified by the policy reasons that support its continuance. One could also plausibly argue today that the transmogrification of forced heirship from a guarantee of family legacies to a protection for minor children and incapacitated adults is now the commodity of the civilian tradition on forced heirship because it serves the purpose of protecting vulnerable persons while preserving the individual autonomy of choice. Both are sound policy arguments that warrant deep and sober reflection. The former, though, carries an intrinsic quality of tradition that seems out of place when evaluating legal policy.

Moreover, the civil law tradition cannot be reduced simply to the distinction that we have statutes and codes. Let me provide
another example. In 1962, the Louisiana Supreme Court adopted a new methodology for deciding tort negligence cases called duty-risk analysis.16 The traditional civilian analysis requires a showing of "fault" before delict liability attaches.17 The duty-risk analysis therefore splits the elements required to prove fault into four distinct elements—cause, duty, breach, and damages—and engages in a policy analysis in evaluating their application.18 One might well conclude with Professor Vernon Palmer that this is merely a wolf in sheep’s clothing; though the conclusion may retain a civilian root—fault—its antecedent (the breach of duty) is purely an American common law innovation.19

16. The court began its duty-risk analysis trend in a case called Dixie Drive It Yourself System v. American Beverage Co., 137 So. 2d 298 (La. 1962). See also Pepper v. Triplet, 864 So. 2d 181 (La. 2004) (creating a doctrine of strict liability that is an amalgamation of civil law and American tort law). Duty-risk analysis was spawned by policy-oriented academics such as Leon Greene and Wex Malone. See Leon Green, RATIONALES OF PROXIMATE CAUSE 11–13 (1927); Wex Malone, Ruminations on Dixie Drive It Yourself Versus American Beverage Company, 30 LA. L. REV. 363 (1970).

17. See LA. CIV. CODE ANN. art. 2315 (2006) ("Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.").


The general consensus is that six identifiable socioeconomic considerations influence the decision of whether the defendant owed a legal duty to a particular plaintiff not to create this specific risk of harm by the precise conduct which the court has already concluded was a cause in fact of the plaintiff's injuries. Obviously, there is interplay among these factors as the judge ponders his decision. As a practitioner, the writer wishes that every judge would tape these six considerations to his wrist like a quarterback so that, when he has a visceral feeling as to who should win, he can at least check off each of these elements to determine exactly why he approves the position of one side or another and at the same time make sure he has not overlooked an important consideration. These six factors are: (1) ease of association, (2) administrative considerations, (3) economic considerations, (4) moral considerations, (5) type of activity, and (6) precedent or historical considerations.

Id.

What Palmer brushes by, however, is the type of analysis undertaken by judges applying this duty-risk analysis. Indeed, the analysis undertaken by judges is a policy analysis—the very analysis that renders legislation superior to decisions—and that undergirds the essence of a civilian approach to law. Duty-risk analysis begins with the civilian requirement for fault, interposes the questions of duty and cause, and invokes a policy analysis in its solution. Palmer’s assumption that institutions “compare” and therefore assimilate misses the truly civilian work being undertaken by the Louisiana Supreme Court.

The supreme court’s use of duty-risk analysis tracks several fundamental viewpoints by which Louisiana jurists view themselves. First, duty-risk analysis starts and ends in the Code. Professor Crawford’s comments, noting the scarcity of Code provisions in the area of delict, emphasize that the judicial role is one of interpretation, first, last, and throughout:

The codal texts governing delict are so spare and general that the court must as a practical matter write most of the tort law with its own pen, though it is done in the name of interpretation. The Civil Code requires the court to resort to justice, reason, and prevailing usages. Both Gény and Planiol support the theory that it is right and necessary for the court to resort to its own mind and conscience to write in detail the enormous superstructure of tort law that rests upon the codal texts.

20. See William E. Crawford, TORT LAW § 1.11, in 12 LOUISIANA CIVIL LAW TREATISE 21 (2000). Professor Crawford stated:

According to strict civil law theory, legislation is the law and judicial opinion is only an interpretation thereof. The functional result of the axiom of jurisprudence constante is not unlike the functional effect of the common law doctrine of stare decisis, which mandates the court to remain faithful to the earlier decisions that establish a rule of law. Under the Civilian notion, the interpretation of the legislation must also remain consistent.

Id. I might also remind Professor Palmer that Louisiana judges are elected; many times their function is as much legislative as it is judicial. Of course, he might also remind me that so too are many common law judges. Nevertheless, Louisiana judges certainly appear more willing to apply policy concerns to matters as Professor Palmer himself recognizes implicitly.

21. Id. (citations omitted).
Second, the decision to move towards duty-risk analysis and away from proximate cause as a theory of liability indicates the state's willingness to be distinct in its legal institutions. In short, the Louisiana Supreme Court demonstrated that the state's identity as unique amongst its forty-nine sister states empowers, not limits, its ability to interpret the state's law.

All of this goes to infer that "[w]e inhabit a nomos." As Robert Cover famously "uncovered" for us in the 1980s, law's nomos is tethered to the narratives that are told about it:

A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power and privilege and in the critiques that may be leveled in the justificatory enterprises of the law.

Our Louisiana nomos is distinct, it is French, and it has a Code. Our nomos is distinctive from other states. The supreme court's willingness to part with its sister states in the area of proximate cause was empowered by a consciousness that embraced the uniqueness of Louisiana law. Without such a perception, our legal system would be civilian in name only, having shed any and all likenesses of our civil law system.

Our nomos is French. The French connection in Louisiana has deep roots. Our first Civil Code was in French with an English

23. Id. at 9.
translation. 24 Even if the original Code contained a stronger Spanish influence, its French nature still transcended the document. 25 Moreover, the Louisiana State Law Institute undertook three major translation projects of notable French authors: in 1959, after nearly twenty-five years of planning, the Law Institute translated into English Marcel Planiol’s Traité Élémentaire de Droit Civil, titled simply as Planiol, Civil Law Treatise. 26 Six years later, the Law Institute unveiled its English translation of Charles Aubry’s Cours de Droit Civil Français. Four years after that, it produced François Gény’s Méthode d’interprétation et sources en droit privé positif.

The driving force behind these projects was a recognition that there was an intimate relation between Louisiana law and French law, even if not always exactly the same. The forward to the Planiol treatise states:

Louisiana, a civil law state, with a Civil Code based on the Code Napoleon, has relied heavily in the past upon the writings of the French legal scholars for the doctrinal interpretation and consistent development of a code of general law. Although one hundred fifty years have passed since the adoption of the Code of 1808, Louisiana has produced no commentary on its Civil Code as a whole, and only a few of the subjects covered thereby have been discussed in any work that properly might be called a treatise. Within the last generation of law reviews which were established at the Louisiana State, Loyola, and Tulane Universities have done much to answer the need for objective discussions of the provisions of the Code in the light of their underlying philosophy and historical development [sic]. Nevertheless, the great wealth of material of this nature can still be found only in the French Commentaries. In the early days under the Civil Code these commentaries were, in effect, Louisiana doctrine, for the French language was then used to a very considerable extent by the legal profession. But with the passing of the years its

24. See LOUISIANA CIVIL CODE (1808).
25. Dainow, supra note 12, at 177.
26. For a description of the process undertaken in approving the project and the obstacles, see id. at 178.
use has continued to decline, as has likewise the number of Louisianans sufficiently schooled in French to be able to avail themselves readily of French doctrinal materials. On the other hand, the succession of time has not lessened to any appreciable extent the importance of such discussions to the legal profession in Louisiana. Louisiana's law reports and other legal writings give ample positive evidence of how we can profit from the writings of the French, and there is no lack of evidence, of a negative sort, that a more complete knowledge of such materials might have been a source of great illumination to us in many cases. Of the 2281 articles in the Code Napoleon, approximately 1800 are contained in full or in part in the Louisiana Revised Civil Code of 1870. By far the greatest number appear in our Code without change in substance. 27

Finally, our nomos is identified by our Code. The very first value that we pass on to succeeding generations is the importance of the Code. The Code is important because it defines who we are, what we have, and how we use it. In the words of Colonel John Tucker, the Code is the:

[M]ost important book in your library, . . . because it ushers you into society as a member of your parent's family and regulates your life until you reach maturity. It then prescribes the rules for the establishment of your own family by marriage and having children, and for the disposition of your estate when you die, either by law or by testament, subject to law. It tells you how you can acquire, own, use and dispose of property onerously or gratuitously. It provides the rules for most of the special contracts necessary for the conduct of nearly all of your relations with your fellowmen: sales, loans (with or without security), leases, usufructs, and servitudes; and finally, all of the rights and obligations governing your relations with your neighbor and fellowman generally. 28

The Code prevented the Louisiana State Law Institute from adopting the Uniform Commercial Code ("U.C.C.") in 1967. It also required certain large scale revisions in 1870 following the most significant reclassification of persons and property in modern history: the mandated ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution changed more than the state of race relations, but completely reorganized social relations and property regimes. In Louisiana, that reorganization started in the Code. The Code captivates our attention in Louisiana, perhaps because it is so logical. It is also a part of what identifies us as Louisiana lawyers.

Principally, we know the \textit{nomos} and its features by the stories we tell. Law is as much about the stories that are told in the past—the formative narratives—as it is about the hungering for the future—"the messianic yearnings." In a certain sense then, Lorio's title mentioned above is exactly right: the arcane institutions of the past are bright predictors for the future.

The narratives that are told tend to shape communities as well as legal norms. We do not live in isolation from one another. Rather, a communal character inures to people who share the same stories. No person is an island in a normative story—even those who choose to withdraw from social standards do so within the context of a shared story—one they happen to reject but one of which they nevertheless are still a part. "The part that you or I choose to play may be singular, but the fact that we can locate it in a common 'script' renders it 'sane'—a warrant that we share a \textit{nomos}."29

One obvious inference then is that the Louisiana civil law tradition does not exist in isolation from either its past or its future. Indeed, a brief skimming of the latest \textit{Louisiana Law Review}, \textit{Tulane Law Review}, or \textit{Loyola Law Review}, will provide undoubtedly an article in which the central theme is that "X law" is faithful to the civilian tradition and should be continued; or that the same law is either unique to the point of embarrassment or to the point of supremacy and therefore should be changed to conform with the rest of the states or maintained as better than the common law alternatives. We are constantly in the market of comparing the

29. Cover, \textit{supra} note 22, at 8.
institutions we have against others dissimilar to us to decide whether the tradition is better served by change or by remaining the same.

An even more obvious point is that the nomos naturalizes its institutions. That is, the tradition can grow in ways that are different from its tradition but never without some symbolic glance towards it. So, the Louisiana State Law Institute's decisions to publish translations of the French treatises by Marcel Planiol, Charles Aubry and Charles Rau, and François Gény indicate, if nothing else, a passive reflection that at some deep point the Louisiana narrative begins in French law—the substance of which some Louisiana scholars have contested, but whose normative power they do not cross. Nevertheless, the culture tells us that French sources are important even if the main body of the law reflects other cultures. The language variance has the same effect: despite the fact that the Civil Code was amended in 1973 to anglicize the third party contract, courts and lawyers still refer to stipulations pour autrui, though I dare say not many speak French. 30 Similarly, in Louisiana we have projets that consider changes to the Louisiana Constitution, not projects or reports. Thus, the nomos takes variations that otherwise would feel awkward and unstable, and incorporates them as if they were a natural part of the institution.

All of these factors tend to be worked out by the narratives that help shape the nomos. I offer two narratives that reveal the nomos; there are certainly others. I chose these two because they represent the collision of institutions and ideals. The first is the narrative of the Code Noir and Louisiana slave law. The second narrative is the adoption of Article 9 of the Uniform Commercial Code in Louisiana. Both demonstrate elements of the nomos and how we begin to formulate an identity as a civilian state.

30. See, e.g., Alexander v. Gary, 924 So. 2d 428 (La. App. 3d Cir. 2006); Barnhill v. Remington Oil & Gas Corp., 918 So. 2d 52 (La. App. 4th Cir. 2005); Joseph Hosp. Serv. Dist. No. 2 of Parish of St. Mary, 923 So. 2d 27 (La. App. 1st Cir. 2005). Indeed, since 1990, fifty-four cases have used the term stipulation pour autrui in the place of the anglicized "third party beneficiary contract." See, e.g., cases cited supra this note.
II. LOUISIANA NARRATIVES

A. Narrative 1—Louisiana Slavery and the Code Noir

Slavery came to Louisiana in the early eighteenth century, relatively later than the rest of North America. Louisiana was colonized by the French in the early seventeenth century. Reasons for the delay include: the French preference for mining over agriculture; the preference for using slavery for building infrastructure; and the fact that the driving motivation for obtaining Louisiana was not economic but political: the French did not want the British to have it. In fact, it was not until the Spanish gained the territory in 1763 that agricultural slavery began to flourish in the colony.

Despite the fact that the French were not committed to agricultural development of the territory, slavery was still an institution desired by the French colonials. In 1704, the colonists in Louisiana began petitioning the government for the introduction of slave labor to clear the land. With the introduction of large numbers of slaves into the territory, new laws had to be shaped to control the slavery system. Thus, in 1724, the Code Noir was introduced into the vast French colony. The Code Noir regulated

32. Id. at 5–13.
33. France claimed the Louisiana territory in the late seventeenth century, and held the territory until the end of the Seven Years' War. François-Xavier Martin, HISTORY OF LOUISIANA 92–93 (3d ed. Pelican Publishing Co. 1975) (1882). Then, in 1763, France ceded to Spain the vast territory—first by secretive agreement, and then officially in the Treaty of Paris. Id. King Louis XV informed the Superior Council by letter dated April 21, 1764, of the ceding of the Louisiana Territory to Spain. Id.
34. Id.
everything touching the institution of slavery, including religion, nourishment and care, control, prosecution, status, seizure, and emancipation of African slaves. The Code Noir remained the central piece of slavery legislation even after the French lost control of the territory. It is this code—the Code Noir—that became the lasting legal force behind the slavery laws. In contrast to the Civil Code's "ushering" of persons into society, the Code Noir specifically exempted a certain class of persons from society, but it directed their affairs in much the same pattern as the Civil Code.

The Code Noir was introduced into the Louisiana territory in 1725. Over the course of one hundred fifty years it was altered and

36. See Code Noir arts. 2–5, 11 (1724). The author, in a previous piece, described the relation of the Code Noir to the revolutionary atmosphere surrounding the territory. In that piece, notable cases applying the articles of the Code Noir are cited. See Marc L. Roark, Louisiana Colonial Slavery Law—Revolution, Property and Race (copy on file with author).

37. See Code Noir arts. 18–21 (1724).


39. Id.

40. See, e.g., Re Indian, 4 LA. Hist. Q. 355 (1729) ("Petition for emancipation: 'Duplesis, settler at Natchitoches, holds a "kind of will" . . . by late Frangois Viard, who freed an osage woman slave and reserved 100 pistoles in behalf of her catholic instruction . . . . Attorney General approves emancipation . . . but the black code forbids cash legacies to a slave.'").


42. While the Civil Code told persons how to own property, the Code Noir specifically exempted slaves from property ownership. In the Code Noir, the slaves were the property. See, e.g., Dupuy v. Veillon, 8 LA. Hist. Q. 154 (1770), reported in Helen Tunnicliff Catterall, III JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 423 (2d ed. 1998) ("[I]f he has not paid . . . apprehend one of his slaves or his person."); Morico v. Beller, 7 LA. Hist. Q. 539 (1770), reported in Catterall, supra, at 422 (seizing a slave and placing in public prison until the debt of the master was paid). See also Code Noir § X (1806) ("And be it further enacted that Slaves shall always be reputed and considered Real estates . . . ."). Thus its regulations were not empowering but rather inapplicable. Both codes regulated marriage and children. Compare generally La. Civ. Code Ann. arts. 87–154 (1825), with Code Noir § 9 (1724).
amended regularly but continued to maintain the corpus of its organization. For example, the initial Code Noir was divided into seven parts: Religion; Clothing and Nourishment; Police; Crimes and Punishments; Witnesses, Donations, Successions, and Actions; Legal Seizures, Slaves as Movable Property; and Grants of Liberty. When a new "black code" was desired, the drafters turned to the former Code Noir as a model. While retaining many of the substantive provisions of the previous Code Noir, the new code was divided into two primary sections: (1) general provisions; and (2) crime and punishment.

Both versions of the Code Noir were designed to provide owners of slaves with direction regarding every aspect of a slave's life. The code's purpose was holistic; that is, it meant to treat every aspect of slavery by reference to a single compendium of laws. But the stories we tell about the Code Noir demonstrate that it was as much a civil code of slavery as it was a collection of laws.

While the fact that the compendium of laws regulating one area were encompassed in one complete code certainly suggests a similarity to the Civil Code, the use of the Code Noir as a source for the later Civil Code of 1806 serves as more compelling evidence of its civilian character, regardless of how modest that role was. Amongst other sources, the Code Noir served to create a source of instruction for the territorial reorganization of its laws and structure. Previously, the Code Noir served as a source for the infamous O'Reilly's Code under Spanish provincial rule.

43. See Vernon Valentine Palmer, The Authors and Sources of the Original Code Noir, in The Louisiana Civilian Experience: Critiques of Codification in a Mixed Jurisdiction 121 n.54 (2005).
47. Vernon Valentine Palmer, The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law, 63 LA. L. REV. 1067, 1073 n.13 (2003). In addition to the Code Noir, other sources included were "Las Siete Partidas,
The decision to incorporate provisions into a code is a matter of contemporary judgment, reflecting the currents of the time. But the decision regarding whether such inclusions reveal faithful decisions are issues of reflection that appear most contestable from afar. Notably, no one contends or contended that the Code Noir was anything but a civilian extension to the law of slavery. From its structure to its sources, the civilian character transcends the Code Noir.

What we do debate, however, is whether the Code Noir’s sources are purely French or reflect other traditions. As discussed above, this transcends through language and institutions that have long since left the ordinary usage of social construction, but which retain significance in the legal identity of the state. Nowhere is this story more contested than with regard to the nature of slave laws in Louisiana. That is, no one contests that the laws were civilian; rather, the issue that has been debated is a question of which civilian character: French, Spanish, or Roman.

The crux of the story requires a brief description of the historical facts relating to the transfer of the territory from France to Spain and then back to France again. France claimed the Louisiana territory in the late seventeenth century, and held the territory until the end of the Seven Years’ War. Then, in 1763, France ceded to Spain the vast territory—first by secretive agreement, and then officially in the Treaty of Paris. Scholars have offered several viable reasons for French cession of Louisiana to Spain, including: the unloading of an economic drain from the French economy, the compensation for Spanish loss of Florida in the Seven Years’ War, and even a pre-orchestrated bargained for exchange for Spain’s alliance against Britain in the same war. See, e.g., Author S. Aiton, The

Febrero, the Institutes, Blackstone, Justinian’s Digest, Curia Philipica, Gaius, the Fuero Real, the Ordinances of Bilbao, and local Louisiana statutes.” Id.


49. Martin, supra note 33, at 77–78. The Seven Years’ War, also called the French and Indian War, pitted France against Britain primarily, but also involved Spain, the American colonies, and the Native Americans. See id. at 88–95.

50. See Clive Perry, Editor’s Note to Preliminary Act of Cession between France and Spain (“Treaty of Fontainebleau”) (Nov. 3, 1762), 42 CONSOL. T.S. 239. Scholars have offered several viable reasons for French cession of Louisiana to Spain, including: the unloading of an economic drain from the French economy, the compensation for Spanish loss of Florida in the Seven Years’ War, and even a pre-orchestrated bargained for exchange for Spain’s alliance against Britain in the same war. See, e.g., Author S. Aiton, The
Louis XV informed the Superior Council by letter dated April 21, 1764, of the ceding of the Louisiana Territory to Spain.\textsuperscript{52}

On March 5, 1766, the first Spanish Governor, Don Antonio de Ulloa, arrived in New Orleans and established Spanish provincial rule.\textsuperscript{53} Ulloa maintained French political structures, even issuing his orders through the French Commandant Phillip Aubrey. Those that resided in the territory, particularly those of Creole descent,\textsuperscript{54} feared that the new Spanish Administration would bring a complete denial of their rights as colonists.\textsuperscript{55} Additionally, the French colonists felt betrayed by their king as mere pawns of politics. The French colonists envisioned not only the present loss of country but the potential loss of property.\textsuperscript{56}

Gayarré, a


54. At the time, Louisiana was composed of persons from Creole, English, and Spanish decent. Indeed, the territory identified itself as French, though its people were from varying nationalities. \textit{See} Gayarré, \textit{supra} note 52, at 185.

55. Note that King Louis XV somewhat presumes this inference in his letter to Mr. D'Abbadie and reassures the colonists that their property rights are secure, stating:

\begin{quote}
I hope . . . that the titles of the inhabitants to their property shall be confirmed in accordance with the concessions made by the Governors and ordaining commissaries of said colony . . . hoping moreover that his Catholic Majesty will be pleased to give his subjects of Louisiana the marks of protection and good will which they have been made more effectual, if not counteracted by the calamities of war.
\end{quote}

\textit{Id.} at 111–12.

56. \textit{See id.} at 113.
Louisiana historian, summarizes succinctly the French colonial apprehensions of this transfer:

As Frenchmen, they felt that a deep wound had been inflicted on their pride by the severing in twain of Louisiana, and the distribution of its mutilated parts between England and Spain. As men, they felt the degradation of being bartered away as marketable objects; they felt the loss of their national character and rights, and the humiliation of their sudden transformation into Spaniards or Englishmen without their consent. As colonists, as property owners, as members of a civilized society, they were agitated by all the apprehensions consequent upon a change of laws, manners, customs, habits and government.\footnote{57}

Thus, in 1768, six hundred plantation owners and merchants sent a petition to the Superior Council asking that Governor Ulloa be expelled from the territory, and that certain rights and liberties be restored.\footnote{58} Governor Ulloa was removed, and, at least temporarily, the colonists believed that repatriation was in their future. Those hopes were short-lived. Spain responded by replacing the removed Governor Ulloa with Governor Alejandro O'Reilly. O'Reilly acted swiftly to punish insurgents and restore Spanish rule. One of Governor O'Reilly's first acts was to replace the French legal structures with a visibly Spanish presence.\footnote{59} Specifically, O'Reilly dissolved the Superior Council, believing it to be a tool of the colonists towards insurrection.

From the start, the Spanish were viewed with disdain by French settlers who continued to identify more with the \textit{mère patrie} than they did with their colonial governors.\footnote{60} O'Reilly's

\footnotesize
\begin{itemize}
  \item \textit{57.} Id.
  \item \textit{58.} Id. at 192.
  \item \textit{59.} See \textit{Ordinances and Instructions of Don Alexander O'Reilly}, 2 LA. L.J. 1, 1 (1841) (translating three orders of Governor O'Reilly relating to the substitution of Spanish Law for French Law and structure, enacted and published in French November 25, 1769). See also Kate Wallach, \textit{BIBLIOGRAPHICAL HISTORY OF LOUISIANA CIVIL LAW SOURCES ROMAN, FRENCH, AND SPANISH} 67 (1955).
\end{itemize}
punishment of the insurrectionists of 1768 did not ease the tension as French-Louisianans referred to him as “Bloody O’Reilly,” a practice that continued long after his rule as governor ceased. Though French citizens did indeed prefer the mother country to Spanish provincial rule, those feelings were clearly simple nationalism. Indeed, the Spanish did more to assist colonists in creating a viable Louisiana economy. And Spain was sensitive to the French people’s desire for their mother country as long as that sensitivity did not spread to insurrection. A 1779 and 1782 trade cédula, which permitted direct commerce between France and Louisiana, seemed to placate French citizens and temper reactions against the Spanish.

Relating to slavery, O’Reilly continued the enforcement of the Code Noir, expressing “admiration for the Code’s ‘wisdom and piety.’” The question that has been debated most recently is whether the Code Noir continued a French version of rule or whether it was supplanted by a Spanish version. A follow-up question seeks to uncover the normative value of the Code Noir.

To the first, Hans Baade has pointed to several provisions of Alfonso el Sabio’s Siete Partidas that, although sharing a common Roman heritage, did not enter the French Code Noir of 1724. For example, the Siete Partidas included a provision that declared slavery as contrary to “natural reason.” Similarly, under

61. Id.
62. Id.
63. Baade, supra note 41, at 371 (citing AGI, Santo Domingo, Leg. 2594 f. 58 (available on microfilm at Loyola University, New Orleans)).
64. Literally translated the “Seven Departures,” the Siete Partidas was compiled in 1265 by King Alfonso X, and governed peninsular Spain. See Dylan O. Drummond et al., The Rule of Capture in Texas—Still So Misunderstood After All These Years, 37 TEX. TECH L. REV. 1, 31 (2004). See also David Gruning, Mapping Society Through Law: Louisiana Civil Law Recodified, 19 TUL. EUR. & CIV. L.F. 1, 5 (2004) (discussing the role of the Siete Partidas in the Louisiana civil law tradition).
65. See Baade, supra note 41, at 368.
66. See THE LAWS OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA 581 (L. Moreau Lislet & Henry Carleton trans., 1820) [hereinafter SIETE PARTIDAS] (“Slavery is a condition and state of things established anciently by nations, by which men who were naturally free, are made slaves, and put under the dominion of others, contrary to natural reason.”). See also Baade, supra note 41, at 368.
traditional Spanish law, “slaves were entitled to file complaints of cruelty against their masters,” and were entitled to judicial sale when cruelty was established. Baade points to these early provisions as a source of more favorable treatment towards slaves by Spanish law than French; indeed, citing to the Informe, Baade notes that the Spanish perceived that in “modern times, slaves received ‘incomparably milder’ treatment in Spanish overseas possessions than in the American colonies of France, England or the Netherlands,” built around a “more favorable ratio of freedman to slaves in Spanish possessions.” As Spain gained control of the territory, some of these incidents became incorporated into the Louisiana slave laws. Baade argues that the Spanish laws of Castile soon replaced all law in Louisiana, including the Code Noir. Baade’s contention is supported by Raphael Rabalais, who concludes, among other things, that the early Louisiana courts cited Spanish codes more than they did French codes, cited French treatises only slightly more than they did Spanish treatises, and cited Spanish statutes more than they did French statutes. This

67. See SIETE PARTIDAS, supra note 66, at 584–85:

We likewise say that if a man be so cruel to his slaves, as to cause them to die of hunger, or strike or chastise them so severely with the whip, that they cannot bear it; they may then complain to the judge, who ought, in virtue of his office, to enquire into the truth of the facts, and if he finds them to be so, he ought to sell the slaves, and give the price to their master. And this ought to be done in such a manner, that the slaves shall never again come under the power or dominion of the person, by whose fault they were sold.

See also Baade, supra note 41, at 368.

68. Baade, supra note 41, at 368 (citing Informe del Consejo de Indias Acerca de la Observancia de la Real Cedula de 31 de Mayo de 1789 Sobre la Educacion, Trato y Ocupaciones de los Escalvos, reprinted in J.A. Saco, 3 HISTORIA DE LA ESCLAVITUD DE LA RAZA AFRICANA EN EL NUEVO MUNDO Y EN ESPECIAL EN LOS PAISES AMERI CO-HISPANOS 247–78 (1938)).

69. But see Beard v. Poydras, 4 Mart. (O.S.) 348, 366–67 (La. 1916) (referencing the proclamation issued by Governor O'Reilly continuing the Code Noir's effect in the territory: “the French Law, called the Code Noir . . . was in force in this country. To establish this, a proclamation is produced, issued by Don Alessandro de O'Reilly, of the 27th of August, 1769, whereby it is continued in force.”).

approach was described fully by Professor Rodolfo Batiza in the early 1970s.  

The Baade/Rabalais/Batiza position is countered by A.N. Yiannopoulos, who argues that the Spanish laws were less than enforceable against a resilient French population:

Nevertheless, there are indications of a strong attachment by the French population to its own laws and customs. Rather than adhering to the official Spanish legal system, the French population frequently settled affairs extrajudicially under French laws, customs, and usages. This state of affairs continued until the retrocession of the Louisiana territory to France on October 1, 1800, by the Treaty of San Idelfonso. France did not assume sovereignty until November 20, 1803. During the twenty-day period of French control, Pierre de Laussat, as colonial prefect for Napoleon, abolished the Spanish authorities and established a municipal government in Louisiana. There was not sufficient time to organize a new legal system; Laussat's only change in the law was the reintroduction of the French code noir and the repeal of the Spanish slave legislation. When the United States took possession of the Louisiana territory on December 20, 1803, the bulk of the preexisting laws were in force.

Louisiana was a French colony with a French history. Of course, what the citizens did and what the government enforced are oftentimes different questions. Whether the courts applied French law or Spanish law in the territory would seem to answer this debate. Surprisingly, this did not seem to present the difficulty that one might expect. Palmer notes:

O'Reilly had issued a proclamation that all proceedings in civil and in criminal matters would be according to the laws of Castille and of the Indies. By all accounts, this change of substantive law did not have a great impact because of

the common origin, hence, the similarity of laws between Spain and France. As a consequence, no noticeable disruption occurred when the courts began applying the new body of laws. Nevertheless, O'Reilly issued a decree in 1769 abolishing French law. It provided that thereafter the laws in effect would be a compilation referred to as the "Code O'Reilly." It was a combination which borrowed from the Laws of the Indies, the Siete Partidas, and the code noir. Although there were occasional adjustments of the judicial structure and of the substantive laws of Louisiana over the period of Spanish rule which lasted some forty years, the basic form of the judicial system remained unchanged. 73

The sources of the laws may have been Spanish, but the colonial nomos was French.

There are principally two ways to address this narrative. One is purely historical. That is, the legal scholar can engage the texts, identify the provisions that seem most French, Spanish, or Roman, and argue vigorously that those texts create some institutional identity for the territory. This has been the primary means of debate to this point. 74 The second way is to consider what that

73. Fontenot, supra note 48, at 1155.
74. Indeed, both French and Spanish legal heritages derive from the Roman civil law system. See Baade, supra note 41, at 371. Much ink has been spilled (on many, many law review pages) regarding the debate over whether the 1724 Code Noir reflected a Romanist tradition or a French Caribbean innovation. I take the position that the Code Noir was a distinctly French scheme, but with distinct Romanist influences. Compare Palmer, supra note 47 (distinguishing several points of Roman law from the Code Noir), with Hans W. Baade, The Bifurcated Romanist Tradition of Slavery in Louisiana, 70 TUL. L. REV. 1481, 1482–85 (1996) (maintaining a Romanist influence on the Code Noir sources). See also Alan Watson, The Origins of the Code Noir Revisited, 71 TUL. L. REV. 1041, 1051 (1997) (conceding sources as non-Roman, but also reasserting certain Romanist influences). Nevertheless, the sources of the laws as French colonial or Roman make little difference to the ultimate disposition of this article.

Both the French and Spanish laws regulating slavery were influenced substantially by the Roman system of law, which also legislated rules for slavery. See, e.g., W.W. Buckland, The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian (2000); Alan Watson, Roman Slave Law (1987). Both Watson's and
debate and the accompanying historical facts have to say about the nature of Louisiana law. That is, can there be a *nomos* inside this debate?

This comment has suggested that the *nomos* is identified by three factors. First is the prevalence of a code-centric debate. For example, the fact that the Code Noir is in a structured code certainly aids our argument, but even if it were not, other phenomena warrant the same conclusion. So, for example, one could draw the conclusion that the Code Noir’s past, the confusion regarding what legal institution was dominant, and the need for order contributed to a Civil Code being adopted. Consider Roger Ward’s argument:

Louisiana’s decision to adopt a civil code was based on necessity. Because of its motley colonial past, Louisiana’s legal system was actually an interesting amalgamation of Spanish and French law. The Spanish law in effect at the time of the transfer of the territory to the United States was composed of eleven different codes, containing more than 20,000 laws, with many conflicting provisions. Relatively few Spanish legal treatises were available to help Louisianans understand and interpret these laws. Likewise, remnants of French law such as the Customs of Paris,

Buckland’s treatments of Roman law slavery provide detailed analysis of the Roman laws regulating the institution. For example, Judith Schafer draws the obvious connection between the Roman law of redhibition and redhibition allowed under the Code Noir. Judith Kelleher Schafer, *Roman Roots of the Louisiana Law of Slavery: Emancipation in American Louisiana, 1803–1857*, 56 *LA. L. REV.* 409, 409 (1995) (“The most important survival of Roman law in the law of slavery in antebellum Louisiana was the concept of redhibition.”). Another aspect of Roman slave law transmogrified to the new world context was the notion of “obsequium,” or respect for one’s former patron. See *Dig.* 37:15.1–11 (Paulus, Ad Edictum 9). Though the tradition of showing respect to one’s former master is traceable to Roman ancestry, the practice was mutated to include respect for all white persons in the Code Noir of 1806. See CODE NOIR § XXXX (1806) (“And it be further enacted that Free People of Color ought never to strike white people nor presume to conceive themselves equal to the white; but on the contrary that they ought to yield to them in every occasion and never speak nor answer to them but with respect under the penalty of imprisonment according to the nature of the offense.”).
Ordinance of 1667, Royal Edicts, and the Code Noir were interspersed in the Spanish law governing the territory.\textsuperscript{75}

The Code Noir was certainly a part of this background—for better or worse.

Second, we have also argued that there is a perception of distinctiveness that exists in Louisiana. In the area of slave law, that norm has manifested itself towards making value-weighted judgments of which system was more humane. For example, consider Vernon Palmer’s argument:

>The one constant of barbaric laws is that they did not seem harsh to the barbarians. The Roman law of the talion—an eye for an eye, tooth for tooth, etc.—originally seemed equitable compared to the unlimited right of revenge that it superseded. The talion introduced for the first time the requirement of limited and proportionate response. The Code Noir, which the French monarch introduced into Louisiana in 1724, was apparently a well-intentioned attempt to ameliorate the condition of slaves. As there were previously no controls governing how a master might treat a slave, certain elements of enlightened society regarded the Code Noir as humane and reformatory. Both the lex talionis and the Code Noir, however, are victims of moral and historical relativism. These “improvements” will always be scorned for the inequity they presupposed rather than the incidental evils they suppressed.\textsuperscript{76}

At times, our \textit{nomos} of distinctiveness has caused those on the outside to also laud our attempt to be human, in the face of owning humans. Consider Jonathan Bush’s reading of the historical account:

>There were also no systematic slave codes in the English colonies, in contrast to such other New World texts as the French Code Noir or the Codigo negro caroleno of Santo


Domingo. In short, whatever the timing and extent of slavery in each English colony, at every step English colonial law seemed to take slavery more or less for granted.\footnote{77}

However, ultimately, we simply were not distinct enough:

The Louisiana code noir of Colonial times and the Black Codes of the eighteen sixties; the pre-Civil War denial of the vote to Negroes, even to wealthy and educated free men of color; the ebb and flow of Negro rights in the Constitutions of 1864 and 1868; the 1879 transfer of political power from police juries and the legislature to the Governor; the close election of 1892 and the 1896 victory for white supremacy; the grandfather clause and the complicated registration application form in the Constitution of 1898; the invalidity of the grandfather clause and the consequent resort to Mississippi's understanding and interpretation clause; the effectiveness of the white primary as a means of disfranchising Negroes; the invalidity of the white primary and the consequent need to revive enforcement of the interpretation test; the White League and the Citizens' Councils; the Black League and the N.A.A.C.P.; the Battle of Liberty Place in 1874 and the Ouachita voting purge of 1956—these are all related members of a series, all reactions to the same dynamics that produced the interpretation test and speak eloquently of its purpose.\footnote{78}

As one commentator of Judge Wisdom noted:

\[\text{[I]}\text{t was necessary to view the interpretation test as part of \text{"the State's historic policy and the dominant white citizens' firm determination to maintain white supremacy in state and local government by denying to Negroes the right to vote[;\]}\text{" it was necessary to begin at the beginning. In the beginning, as Judge Wisdom aptly noted, \text{"there was, of}\]

course, no problem.” There was “no problem” because “the Codes Noir, from the 1724 Code to Act 33 of the Territorial Legislature of 1806, disfranchised Negroes.” Surveying the constitutional developments embodied in the Louisiana Constitutions of 1812, 1845, and 1852, Judge Wisdom noted, with obvious pride in the history of his state, that the latter two were “progressive and broadly democratic documents.” The Constitution of 1845 “did away with the tax-paying qualification for voters and established universal suffrage for free white males, regardless of wealth and literacy.” The Constitution of 1852 “introduced registration of voters, a progressive step many years in advance of most states.” Despite the presence in Louisiana of many free blacks, however, the franchise continued to be limited to white males:

Thus, from the Code Noir of 1724 until 1864, the organic law of the state ordained that only free white males could vote or hold office. This was in a state where there were thousands of free men of color. Many of these were well educated and owned slaves. Except for suffrage, they possessed the civil and legal rights of white citizens.79

And then there are the times that our distinctiveness and its purposes became brutally honest with one another—when our nomos became the source of our disappointment. Gayarré reflects on the nature of the Code Noir in the sparsely inhabited territory of early colonial Louisiana:

This law is hard, but it is both wise and necessary in a land of fifteen slaves to one white. Between the races we cannot dig too deep a gulf. Upon the Negro, we cannot impress too much respect for those he serves. This distinction rigorously upheld even after enfranchisement, is the surest way to maintain subordination; for the slave must thus see that his color is ordained to servanthood, and that nothing can make him his master’s equal.80

80. Gayarré, supra note 52, at 215.
Third and finally, the debate of sources demonstrates the importance of identity in Louisiana. We are not just civilian. We are French civilian even when the sources of laws indicate otherwise.

B. Narrative 2—Revision of Security Rights

In 1990, Louisiana joined the other forty-nine states by adopting the Article 9 Secured Transactions provisions into its commercial law (Louisiana has since referred to the provisions as "Chapter 9" instead of Article 9 to "avoid confusion with the articles of the Louisiana Civil Code"). This section, like the previous, is not a normative dialogue of the virtues of Article 9 or their counterweights. Instead, it is a narrative, like the first, that exposes the norms of civilian culture in Louisiana law.

In 1967, the Louisiana State Law Institute first considered what an adoption of Article 9 into the Louisiana civil law would look like. The report started like this:

In considering changes in Louisiana law the question constantly arises whether the change is consistent with the civil law. Yet there is little agreement as to what the term "civil law" means. Civil law was once defined written law, but this definition is not helpful today because the common law probably contains more written words than the civil law. The volumes of reports and statutes that any common-law lawyer must use indicate that it too is written law. The essence of civil law then may be not that it is written but that it is written in codes, that is, that large areas of the law are regulated, at least in their broad outlines, by systematic statutes rather than by judicial opinions or fragmentary statutes. This in turn leads to a methodology or way of handling law which emphasizes the creativity of the legislatures and the interpretive or interstices-filling function of courts.

In accord with this analysis, it is tempting to say that the Uniform Commercial Code is a civilian document and the

lack of system in the present Louisiana law of secured transactions involving movables is uncivilian. Louisiana may keep its uniqueness by being the only common-law state in the area of commercial transactions. However, another element should be introduced, namely that by civil law is often meant a system, the substance or at least the categories of which are descendents of Roman law. German law before the code of 1900, Roman law itself, and present South African law would be classified as civil-law systems though not meeting modern standards of codification. But even in the area of legal categories and substance it is often hard to say that one idea is civilian and another is not. The difference in substance between Roman law and French law today probably exceeds the difference between French and English law. There are also substantial differences between modern German law and modern French law. Further common law itself is permeated with civilian concepts that have either been arrived at independently or have been imported from continental law through the courts of equity and canon law. Thus to ask whether a legal reform is consistent with civil law is at best a vague question. 82

The report went on to describe the civilian roots of the then-current Louisiana security devices, 83 to hypothesize what an Article 9 transition might look like, 84 and to recommend its

83. Id. at 506–07 (discussing Roman and French Law security devices in terms of the chattel mortgage); id. at 508–10 (discussing privileges and Louisiana codification); id. at 511–12 (describing Louisiana secured transaction patterns).
84. Id. at 514–18 (describing the U.C.C. provisions—mortgage, chattel mortgage, pledge, conditional sale, bulk mortgage, and liens); id. at 527 ("A one sentence description of the coverage of article 9 in Louisiana terminology would be the following: article 9 provides the basic rules for the creation, ranking, and enforcement of all conventional security devices in movables and regulates the sale of certain incorporeal movables such as accounts receivable. It does not purport to regulate non-contractual security rights, except as to ranking with conventional devices, or security rights in immovable property, except as to
adoption, the reasons being the structure of the Uniform Commercial Code, the fact that the devices do not differ greatly from traditional Louisiana law, and the commercial benefit of uniformity. In other words, the Law Institute attempted to cast Article 9 as a civilian text, or at least one that could be civilian with the right surroundings.

Ultimately, Article 9 was rejected for more than twenty years as "incompatible with the Louisiana Civil Code." Then, in 1988, on the urging of Louisiana’s commercial community, the governor proposed the adoption of Article 9 and appointed William Hawkland to chair a committee for the preparation of appropriate legislation. Hawkland’s committee found that four reasons justified adopting Article 9 into Louisiana law: (1) the need for uniformity; (2) the need to reduce transaction costs relating to obtaining security; (3) the benefit of an expansion of property types that would be classified as security; and (4) the benefit of greater certainty between state and federal regulation. Indeed, Hawkland has received much praise for "finally bringing to [Louisiana] Article 9 of the UCC."

Consider the strong emphasis on the Uniform Commercial Code as a "code" in the civilian sense. "[The UCC] seems to be an embodiment of the civil law principle of the code as a source of law rather than the traditional common-law method in which a statute is considered an abrogation of an already existing law." Consider the strong emphasis on the Uniform Commercial Code as a "code" in the civilian sense. Id. at 523.

85. Id. at 554 ("In other words, from a practical standpoint, the ten part division of personal property under the UCC is not far different from the fragmentation of movable property under the Louisiana Civil Code and statutes. The terms represent concepts that people dealing in property will designate in one way or another.").

86. Id. at 521. Consider the strong emphasis on the Uniform Commercial Code as a "code" in the civilian sense. Id. "[The UCC] seems to be an embodiment of the civil law principle of the code as a source of law rather than the traditional common-law method in which a statute is considered an abrogation of an already existing law." Id. at 523.

87. COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS IN LOUISIANA: THE COMMERCIAL LAWS iii (Herzberger ed., 1974). See also David S. Willenzik, Hawkland’s Handbook on Chapter 9 Louisiana Commercial Laws, 51 LA. L. REV. 1143, 1143 (1991) ("[T]he first time Louisiana seriously considered adopting Article 9 of the Uniform Commercial Code was in 1967–68 when the Louisiana Law Institute summarily rejected the UCC in its entirety as being contrary to Louisiana Civil Law tradition.").

88. Gabriel, supra note 81, at 312.

89. Id.

90. See Willenzik, supra note 87, at 1143. Ironically, in the same year that Louisiana finally adopted U.C.C. Article 9, a comprehensive revision of Article 9 commenced in the American Law Institute and the National Conference of
Just as the civil law served as an analogue to justify Article 9's adoption by the Law Institute in 1967 (despite rejecting the whole), the civil law would retain an influence over the version that Hawkland would introduce. For example, several provisions were changed from the "Uniform" Commercial Code version that either reflected civilian traditions or that did not offend the Civil Code provisions already in place. Notably, the types of collateral were expanded while use of fixtures as collateral was significantly restricted. These restrictions reflect a long-held tradition in Louisiana law that a security interest cannot be attached to something that is already a fixture. The change was necessary to honor not only notions of chattel mortgages present in the state, but also the very distinction between movable and immovable property that undergird the civil law property system in Louisiana. The alteration thus honored tradition while adopting a provision that mostly brings Louisiana into conformity with its sister states.

The civilian story transcended the adoption of U.C.C. Article 9. First, the Law Institute's initial report cast Article 9 not as a common law vestige, but rather as a provision that could be seen in civil law terms. The fact that it was contained in a code and contained a systematic approach certainly aided that distinction. The ease of transition from traditional civilian tenets (with French and Roman roots) was also a strong factor. When Hawkland proposed his Article 9, the legislature accepted its provisions because it was not offensive to certain tenets of the civil law tradition.

This is the essential narrative that could be told. It embraces the civilian approach to law. However, there is also a counter narrative. For example, consider one commentator who, reviewing the Louisiana adoption of Article 9, concedes the improvement but also notes that a part of the civilian character is lost:

Louisiana has adopted article 9 of the U.C.C. That article is among the best-known pieces of private law legislation in the world, and needs no discussion here. I will confine myself to

91. Stuckey, supra note 90, at 796.
92. Id. at 830.
three observations. One is that it does not extend to immovables. The second is that it honours the publicity principle, in the sense that nonpossessory security rights cannot in general be "perfected" without registration (filing). To that extent it is superior, I would suggest, to the current Scots and South African law. The third observation concerns the attachment/perfection contrast which is embedded in article 9. Is a "perfected security interest" a "real right?" Presumably it is. Is an "attached," but "unperfected" security interest a real right? That is more difficult. Either answer is a problem, for if it is a real right, how does it differ from a perfected security interest, and if it is not a real right, how does it differ from a personal right? The whole point of a security right lies in its third party effect. Its effect "as between the parties" is really no effect, for all the debtor's assets are in any case available to the creditor. As the Louisiana Civil Code provides "[w]hoever has bound himself personally, is obliged to fulfill his engagements out of all his property, movable and immovable, present and future." The U.C.C.'s idea that there is something called "attachment" whereby a security interest takes effect as between the parties, as distinct from "perfection," which involves third-party effect, seems dubious from a civilian standpoint. An outsider may wonder whether Louisiana considered this issue before it decided to adopt article 9 of the U.C.C. No doubt the pressures on Louisiana to adopt the U.C.C. were comparable with the pressures on Scotland to adopt the floating charge.\footnote{93. George L. Gretton, Reception Without Integration? Floating Charges and Mixed Systems, 78 Tul. L. Rev. 307, 331–32 (2003).}

The vision of the civil law's interaction with the proposed Article 9 is mediated, in this commentator's view, by a failure to deal consistently with terms of attachment and perfection in the Civil Code's notion of a property system. The narrative is thus construed as a tale that creates more of a problem than a solution.
Shael Herman narrates the story in a more positive tone:

To promote harmony with its sister states, Louisiana has sometimes adopted, and then adapted, legislation from mainstream American law . . . [E]ven when Louisiana lawmakers have consciously preferred national uniformity over the state's historical traditions, they have reached compromises between the two. Embedded in the working habits of lawyers and Courts, the Civil Code has assured that the mainstream American law at issue would bear a Civilian stamp. In the regulation of movable security, the Civil Code has remained a repository of solutions not expressly articulated in Article 9 of the U.C.C. As a gapfiller and a source of analogies for unanticipated cases, the Civil Code fulfills for Louisiana lawyers a role played by the general common law jurisprudence in the other states.94

This vision of the civil law in Louisiana then, according to Herman, is the preservation of a Civil Code that both "mediates the common law influence" as well as translates the common law rubric into a civilian language. Thus, Herman notes:

Following the nomenclature of the civil code, for example, Louisiana's initial version of U.C.C. article 9 defined real estate as "immovable property and real rights therein," personal property as "movable property," tangibles as "corporeal" property, and intangibles as "incorporeal property." Particularly important for the reformers' case in favor of Article 9, its enactment did not require short-circuiting or abandoning the Civil Code, even for security devices regulated by the article. For example, the term possession in section 9-109 incorporated the phrase "civil possession" as defined in Civil Code articles 3421 and 3431.95

95. Id. at 466.
Article 9 was compatible with the civilian system, not just because it did not offend the Code, but because in key places it incorporated the Code.

Both narratives demonstrate that being civilian means to a certain extent looking civilian, sounding civilian, and acting civilian. The slavery narrative demonstrates the pervasive respect and admiration we have for a code. The Article 9 narrative, in turn, demonstrates how the respect influences and defines the ways we approach legal innovation.

III. WHY A NOMOS

Inhabiting a nomos is not an option. Recognizing our nomos, its effects on the way we think about legal problems, and the consequences that come from such recognitions is a different story. My concern with creating new “legal families” is that this tends to ignore the valuable lessons we learn from self-recognition. Principally, the debate of French versus Spanish influence on the laws of Louisiana is not possible without a nomos. Next, our court would be constrained against being unique amongst its judicial fellows. Finally, our Code would be just another lengthy statute, with very little normative material, but only policy decisions by elected officials.

Instead, a nomos empowers a community to understand what it is, what it is becoming, and what it imagines it can be. As Robert Cover elegantly stated:

The great legal civilizations have, therefore, been marked by more than technical virtuosity in their treatment of practical affairs, by more than elegance or rhetorical power in the composition of their texts, by more, even, than genius in the invention of new forms for new problems. A great legal civilization is marked by the richness of the nomos in which it is located and which it helps to constitute. The varied and complex materials of that nomos establish paradigms for dedication, acquiescence, contradiction, and resistance. These materials present not only bodies of rules or doctrine
to be understood, but also worlds to be inhabited. To inhabit a nomos is to know how to live in it. 96

And so I return to the analogy I offered at the beginning of this comment and ask: Are we civilians standing on the walls, guarding our institutions from the encroaching barbarians? I say that if we inhabit a nomos, we need not worry about their vulgar institutions adulterating our legal system. Our nomos defines itself so that the innovation brought by the "commoners" need not threaten our own institutional perception.

Likewise we need not sit in the coliseum either, waiting to see which gladiator will win our praise. I say that if we inhabit a nomos, the contests that we view as being so imperative towards defining who we are actually do not define us at all. Our nomos defines us. *La Fin!*

---
