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## Classifying and Clarifying Contracts

Ronald J. Scalise Jr.

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# Classifying and Clarifying Contracts

Ronald J. Scalise Jr.\*

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## INTRODUCTION

Although systems of classification and organization are popular in the natural sciences, it is not so in law. Ever since the age of legal realism, and probably long before, a jurisprudence of concepts or ideas has fallen out of fashion in favor of a system focused upon the interests involved in a case. Resolving legal disputes in a fair and equitable manner has taken precedence over rigid conceptualizations as to what rules are applicable to what classes or categories of contracts. Casuistry, although not popular in many dogmatic conceptions of civil codes, is popular today. As the late Tony Weir once wrote:

It is possible for us, like Hamlet, to tell a hawk from a handsaw, and to do so without a complete theory of aerial predators or an exhaustive inventory of the carpenter's toolbox; furthermore, we can effect such telling without having a theory of telling, though the current fad of epistemology might lead one to doubt that (given a theory of doubting).<sup>1</sup>

Certainly, the Romans would have agreed. In fact, this Article purports to follow the advice of Tony Weir and the example of Hamlet in distinguishing and explaining the various types of contracts that exist under the Louisiana Civil Code but without purporting to proffer a new theory of contracts that would necessarily harmonize them all. In fact, such a theory has eluded the drafters of the Louisiana Civil Code for the last 200 years and, before them, French scholars and Roman jurists. Any attempted system would likely be unsatisfactory and, consequently, none shall be offered.

The consequences of appropriate classification may not be obvious at first glance and, in fact, the usefulness of engaging in the exercise at all has varied throughout the ages. In Roman times, the matter of classification dictated the matter of enforceability.<sup>2</sup> Without finding an appropriate class or box for an interaction to reside, the relationship between the parties risked unenforceability. Over the course of time, the

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1. Tony Weir, *Contracts in Rome and England*, 66 TUL. L. REV. 1615, 1616 (1992) (footnote omitted) (quoting Shakespeare: "I am but mad north-north-west. When the wind is southerly, I know a hawk from a handsaw." WILLIAM SHAKESPEARE, *HAMLET* act. 2, sc. 2, ll. 388–89). Hamlet's reference to a "handsaw" may not be an allusion to the carpenter's tool, but to another bird, the hernshaw. 1 SHORTER OXFORD ENGLISH DICTIONARY 1224 (Lesley Brown ed., 1993).

2. JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 287–89 (2006) [hereinafter GORDLEY, *FOUNDATIONS*].

matter changed as contracts became enforceable based upon their adherence to a general theory, such as the “will” theory, be it a subjective internalization requirement or an objective manifestation of consent. Nonetheless, much of the classificatory system inherited from the Romans has persisted.

Although the civil law mind and civil law style eschew the types of definitions in the law that are necessary for classification,<sup>3</sup> both the Louisiana and the French Civil Codes specify definitions for various types of classifications of contracts.<sup>4</sup> The purpose behind classification of “legal concepts”—or in this case, contracts—has been persuasively discussed by the honoree of this Symposium, Professor Alain Levasseur, who has delineated three goals or purposes of classifying concepts. The first is “to be able to bring a given factual situation under a concept or another so that the factual situation will flow automatically from the proper classification under the appropriate concept.”<sup>5</sup> Of course, this rationale would be rejected by those who believe that law should be more pragmatic and less doctrinaire or by those who reject the impartiality and coherence of legal analysis altogether.<sup>6</sup> For others who prefer rigorous analysis and conceptual purity, however, knowing how to distinguish an immovable from a movable is necessary to determine the relevant law to apply in a given context, such as the requisite form of the contract needed for transfer.<sup>7</sup>

A second reason Professor Levasseur gives for having an accurate classification scheme is “to protect against the danger of polysemy or a

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3. E. Allan Farnsworth, *A Common Lawyer's View of His Civilian Colleagues*, 57 LA. L. REV. 227, 233 (1996).

4. CODE CIVIL [C. CIV.] arts. 1102–1107 (Fr.); LA. CIV. CODE arts. 1907–1916 (2016). It has been suggested that the civil law's resistance to the common law fetish of definitions as part of the law can be explained—along with lengthy and verbose legislative drafting—in part by the common law's distrust of judges to properly interpret the law. Farnsworth, *supra* note 3, at 233. Other civil codes, such as the German and Japanese Civil Codes, have resisted the temptation to contain definitions. *See, e.g.*, BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] (Ger.) (containing no classificatory definitions of contracts); Akira Kamo, *Crystallization, Unification, or Differentiation? The Japanese Civil Code (Law of Obligations) Reform Commission and Basic Reform Policy (Draft Proposals)*, 24 COLUM. J. ASIAN L. 171, 178 (2010).

5. ALAIN A. LEVASSEUR, *LOUISIANA LAW OF CONVENTIONAL OBLIGATIONS: A PRÉCIS* 3 (2010).

6. *See, e.g.*, JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 231–32 (1991) [hereinafter GORDLEY, *PHILOSOPHICAL ORIGINS*].

7. *Compare* LA. CIV. CODE art. 1839, *with id.* art. 1846.

possible plurality of meanings being given to the same word.”<sup>8</sup> Without an accurate or definite statement as to a term’s meaning, the risk of muddled understandings and loose interpretations is great. Professor Levasseur cites the multiple meanings that could be given to the word “act” as an example. If the law were not precise in its classification of and use of the term “act,” there could be great risk of confusion between “juridical acts,” “written acts,” “physical acts,” and even perhaps “acts of nature,” all of which may not demand the same or similar legal treatment. Another example could be the characterization of some obligations as “personal” or “strictly personal.”<sup>9</sup> Although these words distinguish obligations based on their heritability, courts and commentators have confused these terms with those that distinguish between obligations involving contractual rights generally and real ones involving property.<sup>10</sup>

A third and final reason is “for purposes of education and legal analysis.”<sup>11</sup> Indeed, the late Saúl Litvinoff, the Reporter for the 1984 revision of the law of obligations, has acknowledged the “didactic” nature of the revisions.<sup>12</sup> As has been remarked, “[a] civil code should contain doctrinal elements that explain the principles and rules and put them in context.”<sup>13</sup> As much as for the lawyer as for the student and the citizen, the civil code should elucidate and explain the meaning, context, and scope of the law.

With these three purposes in mind, this Article attempts to properly classify, consistently define, and accurately explain the Louisiana Civil Code’s approach to classifying contracts. The Civil Code articles on classification of contracts in Louisiana are generally known but little understood. Although many lawyers can recite the definitional difference between bilateral and onerous contracts, few could explain how the two differ and what difference, if any, their distinction makes in practice. Add to the confusion the concept of commutative contracts, whose definition

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8. LEVASSEUR, *supra* note 5, at 3.

9. LA. CIV. CODE art. 1766.

10. *Cf.* LA. CODE CIV. PROC. art. 422 (2016). For an example of the confusion, see *Succession of Ricks*, 893 So. 2d 98 (La. Ct. App. 2004).

11. LEVASSEUR, *supra* note 5, at 3.

12. Saúl Litvinoff, *Introduction: The 1984 Revision of the Louisiana Civil Code’s Articles on Obligations – A Student Symposium*, 45 LA. L. REV. 747, 748 (1985).

13. Michael McAuley, *The Pedagogical Code*, 63 LA. L. REV. 1293, 1302 (2003).

appears to have changed over time, and even the most erudite lawyers, scholars, and judges are left to speculate as to what the drafters intended.<sup>14</sup>

To compound this challenge, the revision process of the Louisiana Civil Code, although salutary in many ways, has at times magnified the confusion. The Louisiana Civil Code has been undergoing a comprehensive revision since 1976. The process for doing so has been caustically but accurately described as “piecemeal,”<sup>15</sup> often with the right hand not knowing what the left is doing. One subject matter committee is charged to revise the law of “contracts” and another to rewrite the law of “sales” and yet another to rewrite the law of “deposit.”<sup>16</sup> Indeed, in recent times, the granularity and specialization of committees has approached an almost microscopic level, with some committees designed to cover a single civil code article<sup>17</sup> or a single concept.<sup>18</sup> Although membership on committees is often overlapping, consistency in approach and concepts, if it exists, is not uniform.<sup>19</sup> This has, regrettably, led the Louisiana Civil Code to adopt rules in one section that do not always coordinate with the rules and principles in other sections. Thus, one area of the Civil Code may be revised, and a classificatory term may be discarded or changed without a full appreciation of its connection to or impact on other areas of the Civil Code.

Doctrine in many instances has filled the legislative gaps and helped explain some of the confusion. With respect to the rules on classification of contracts, however, virtually no doctrine exists since the recodification of 1984.<sup>20</sup> This Article hopes to fill that gap, beginning with a background of

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14. LEVASSEUR, *supra* note 5, at 8 (“What does ‘correlative’ mean and how can its meaning fit in the definition of both [Louisiana Civil Code articles] 1908 and 1911?”).

15. A.N. Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 TUL. L. REV. 379, 397 (2003); *see generally* Vernon V. Palmer, *The Death of a Code – The Birth of a Digest*, 63 TUL. L. REV. 221 (1988).

16. *See generally* *Committees*, LA. ST. L. INST., <http://www.lsl.org/committees> #18 (last visited Feb. 5, 2016).

17. *See, e.g., id.* at “Component Parts Committee” (constituted to revise article 466 of the Civil Code).

18. *See, e.g., id.* at “Counterletter Committee” (formed to respond to a specific legislative resolution proposing to abolish counterletters).

19. Although the Council of the Law Institute and the Coordinating and Semantics Committee are designed to achieve some form of uniformity, the Council membership is vast and changing from meeting to meeting, and the resources and time available to the Coordinating and Semantics Committee are very limited. For membership of both, *see generally id.*; *Council Members*, LA. ST. L. INST., <http://www.lsl.org/council-members> (last visited Feb. 5, 2016).

20. One notable exception is contained in Professor Levasseur’s *Louisiana Law of Conventional Obligations: A Précis*. *See* LEVASSEUR, *supra* note 5, at 3–

the Roman and French rules on classification of contracts to lay a foundation for understanding the rules specific in the Louisiana Civil Code. Although helpful, those Roman and French rules have not been well-understood and suffer from a number of defects or limitations. Subsequent revisions throughout the Louisiana Civil Code have proceeded without a firm foundation of this classification scheme, which has made harmonization and application of the existing scheme even more complex. Although the bulk of this Article is a critique of Louisiana law's current classification of contracts, it is not dogmatic in its approach. The hope and purpose is to elucidate and clarify the current classificatory scheme for contracts in Louisiana while also demonstrating the imperfect nature of any scheme and the need for flexibility.

#### I. A BRIEF OVERVIEW OF ROMAN CONTRACT CLASSIFICATIONS

The Romans had no general theory of contracts but, rather like the English, created enforceable contracts in certain situations when specific circumstances required.<sup>21</sup> Indeed, some have classified the eight specifically enforceable Roman contracts as “ris[ing] like islands in the sea, an archipelago not a single continent.”<sup>22</sup> These islands, however, were originally an unforgiving lot. Failure to moor one's boat on an island risked the death of a transaction. Stated more straightforwardly, failure to fall within one of the classes of contract did not, like modern law, mean that a different set of rules might apply. Rather, it meant that the transaction was not enforceable at all. These eight classes of contracts, which covered “the whole range of commercial and social life,” provided a definitive—even if later unsatisfactory—answer to the question of “[w]hat promises are binding at law.”<sup>23</sup> Because this terrain is so well-

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4. For older pre-revision works on this topic, see SAÚL LITVINOFF, OBLIGATIONS, in 6 LOUISIANA CIVIL LAW TREATISE 139–208 (1969); Andrew J.S. Jumonville, Comment, *Personal Services About the Home*, 23 LA. L. REV. 416 (1963); J. Denson Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2, 15–29 (1951); Leonard Oppenheim, Comment, *The Unilateral Contract in the Civil Law and in Louisiana*, 16 TUL. L. REV. 456 (1942).

21. THE ROMAN LAW READER 91–144 (F.H. Lawson ed., 1969); PETER BIRKS, THE ROMAN LAW OF OBLIGATIONS 30 (Eric Descheemaeker ed., 2014); Weir, *supra* note 1, at 1616; GORDLEY, FOUNDATIONS, *supra* note 2, at 290. For an overview of Roman contract law, see W.W. BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW 253–80 (1931); ALAN WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC (1965).

22. BIRKS, *supra* note 21, at 30.

23. *Id.* at 29–30; Alan Watson, *The Evolution of Law: The Roman System of Contracts*, 2 LAW & HIST. REV. 1, 8 (1984).

ploughed, there is no need to re-till the field here. A brief overview of the classification of Roman contracts, however, is helpful and perhaps essential background for understanding the system of classification that prevails today.

#### A. Consensual Contracts

There were four consensual contracts at Roman law—sale (*emptio-venditio*), hire (*locatio-conductio*), partnership (*societas*), and mandate (*mandatum*)—so called because they were enforceable by the mere consent of the parties without any other formality.<sup>24</sup> Although this feature alone does not strike the modern mind as noteworthy, the importance can be seen in comparison to contracts *re*, where consent was not key because no contract existed unless a thing (a *res*) was also actually delivered. Undoubtedly, the consensual contract classification was the most important in Roman law, both in terms of its commonality and in terms of its scope.<sup>25</sup> Lawson has noted that the modern concept of contract sprang from the Roman class of consensual contracts.<sup>26</sup> As no rigid formalities were required, consent was their foundation. Unlike a number of other contracts, the consensual ones gave rise to actions that allowed the judge to grant the plaintiff relief for whatever was due to him, not under the terms of the contract or the strict law, but under good faith (*ex fide bona*).<sup>27</sup>

#### B. Contracts Re

Like consensual contracts, there were four distinct contracts *re*. They were *mutuum* (loan for consumption), *commodatum* (loan for use), *depositum* (deposit), and *pignus* (pledge).<sup>28</sup> In contrast to consensual contracts, the commonality of these contracts was that no contract existed until delivery of the thing loaned, deposited, or pledged. Once delivery occurred, an enforceable contract arose. In fact, an agreement to make a deposit, confect a loan for use or consumption, or offer a pledge was unenforceable at Roman law as a *nudum pactum*. Barry Nicholas notes that “real contracts” were probably not as important to Roman law as their prominence in some Justinianic texts suggests.<sup>29</sup> After all, only *pignus* (pledge) was really a

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24. JUSTINIAN’S INSTITUTES §§ 3.13.22–26 (Peter Birks & Grant McLeod trans., 1987).

25. See THE ROMAN LAW READER, *supra* note 21, at 93–94.

26. *Id.* at 94.

27. *Id.* at 104.

28. JUSTINIAN’S INSTITUTES, *supra* note 24, § 3.3.14.

29. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 169 (1962).



commercial transaction.<sup>30</sup> The others—loan and deposit—were uncompensated and thus ordinarily took place between friends.<sup>31</sup>

### C. *Contracts Verbis*

A contract *verbis* is a contract “made by word of mouth.”<sup>32</sup> Although not the only type of contract *verbis*, the *stipulatio* was the most important.<sup>33</sup> The *stipulatio* was a simple method “in which any undertaking could be rendered binding, provided it were not substantially improper as involving a wrong or unacceptable as burdening a right.”<sup>34</sup> Many believed the *stipulatio* was a “very ancient contract” going “back to the time of the Twelve Tables.”<sup>35</sup> This contract was an oral exchange of promises that likely required the use of certain solemn or special words.<sup>36</sup> It was a *stricti iuris* contract, as opposed to one subject to good faith, meaning that it was not subject to “equitable defenses” or any “implied obligations” and “never offered much protection beyond its express terms.”<sup>37</sup> Although the *stipulatio* has no equivalent in modern law, it has been characterized as one of the devices that met the need for a general theory of contract because it “could be adapted to any content” and any circumstance.<sup>38</sup>

### D. *Contracts Litteris*

The contract *litteris* was a contract made by a writing.<sup>39</sup> This type of contract seems a bit obscure to the modern mind and, even in Roman times, its application seems to have been limited. Alan Watson provides a helpful explanation of this type of contract:

We have no real indications of how or when or to what end the literal contract arose, and hence no argument can be drawn from it for or against any theory of the growth of Roman contract law. It was in existence by around the beginning of the first century B.C. but may well be much older. In classical law it arose when a

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30. *Id.*

31. *Id.*

32. BIRKS, *supra* note 21, at 52.

33. *Id.*

34. Weir, *supra* note 1, at 1618.

35. BIRKS, *supra* note 21, at 53.

36. *Id.* at 53–57.

37. *Id.* at 58.

38. *Id.* at 30.

39. *Id.* at 38.

Roman head of family marked in his account books that a debt had been paid when it had not, then made an entry to the effect that a loan had been made when it had not. Thus it was not an originating contract but a method of transforming one kind of obligation into another. Whether that was also the case when the literal contract first came into being, and whether in the beginning the writing had to be in the formal account books is not clear. The action was the *actio certae pecuniae*, and therefore had to be for a fixed amount of money.<sup>40</sup>

Although the contract *litteris* flourished in the mid to late first century A.D., “when the eruption of Vesuvius destroyed Pompeii, . . . it had apparently disappeared from use by the end of the classical period.”<sup>41</sup> Its relevance in modern law is nonexistent.

#### *E. Innominate Contracts*

Despite the apparent completeness of the four-fold division of contracts identified above and delineated in Justinian’s Institutes, the classification was “imperfect” and thus another category was created—the so-called innominate contracts.<sup>42</sup> Innominate contracts were “agreements which did not fall under one of four accepted categories of contracts, but were thought worthy of enforceability by the praetor.”<sup>43</sup> Innominate contracts were not enforceable merely by virtue of consent, but became “enforceable only on part performance,”<sup>44</sup> that is, when one party performed his end of the agreement but the other party did not. Somewhat counterintuitively, the category of innominate contracts is populated by many contracts, most of which had names—specifically, the *transactio*, the *aestimatum*, the *permutatio*, and the *precarium*.<sup>45</sup> Although only the *transactio* and *permutatio* exist today as the compromise<sup>46</sup> and exchange<sup>47</sup> contracts, the *precarium* and the *aestimatum* were peculiarly Roman law institutions. They consisted of a grant of use of property for a period of

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40. Watson, *supra* note 23, at 14.

41. *Id.*

42. THE ROMAN LAW READER, *supra* note 21, at 96.

43. A COMPANION TO JUSTINIAN’S INSTITUTES 168 (Ernest Metzger ed., 1998).

44. *Id.*

45. *Id.* at 169.

46. LA. CIV. CODE art. 3071 (2016) (“A compromise is a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship.”).

47. *Id.* art. 2660 (“Exchange is a contract whereby each party transfers to the other the ownership of a thing other than money.”).

time<sup>48</sup> and an agreement to give property to another under the obligation to pay an estimated price or return the goods,<sup>49</sup> respectively.

*F. The Relevance of the Roman System for Louisiana Law*

In many ways, the Roman system of contract classification is an interesting historical vestige that seems only slightly relevant to Louisiana law. Surely, there are no contracts *litteris* in Louisiana law. The *stipulatio* may perhaps be an ancestor of many Louisiana contracts, but no longer exists in any recognizable form today. Contracts *re* and consensual contracts, however, still have some saliency, not in terms of their enforceability but in terms of their classification. Consensual contracts, such as sale, are enforceable as a sale even before the price is paid or the thing delivered, which are subsequent obligations imposed on the buyer and seller, respectively.<sup>50</sup> Contracts *re*, such as deposit, however, still require both “delivery of the thing” and consent to be enforceable as a deposit.<sup>51</sup> Before the thing is delivered, Louisiana law notes that “there is no contract of deposit, but there may be a variety of legal relations between the parties,” such as “offers to enter into a contract of deposit,” a contract to deposit, or “unilateral promises to deliver or to accept a thing in deposit.”<sup>52</sup>

Modern Louisiana law, like Roman law, also recognizes the existence of consensual contracts. In fact, all of Louisiana contract law in general—unlike Roman contract law—is founded upon consent. Article 1927 makes clear that “[a] contract is formed by the consent of the parties.”<sup>53</sup> Although unnecessary now, the nominate contracts of sale and lease still contain the definitional vestige of consent. A sale contract is formed upon agreement of price and thing, even before the price is paid or the thing delivered.<sup>54</sup> Moreover, “[t]he consent of the parties as to the thing and the rent is

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48. 4 THE DIGEST OF JUSTINIAN bk. 43, ch. 26, para. 1 (Alan Watson trans. & ed., 1998) [hereinafter DIGEST].

49. For discussion of this innominate contract, as well as extensive discussion of other Roman contracts and their development, see REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 535–36 (1992).

50. LA. CIV. CODE arts. 2475, 2549.

51. *Id.* art. 2929.

52. *Id.* art. 2929 cmt. b.

53. *Id.* art. 1927.

54. *Id.* art. 2456; INSTITUTES OF ROMAN LAW BY GAIUS § 3.139 (Edward Poste trans., E.A. Whittuck ed., 4th ed. 1904); DIGEST, *supra* note 48, bk. 18, ch. 1, para. 2.

essential . . . for a contract of lease.”<sup>55</sup> Although the foundational article on mandate no longer specifies the consent element,<sup>56</sup> the comments to the articles on partnership still make clear that “[t]he consensual element underlying the creation of a partnership distinguishes it.”<sup>57</sup>

Just as in Roman law, *mutuum*, *commodatum*, *depositum*, and *pignus* in Louisiana law still require delivery of the thing for the existence of the transaction. A loan for consumption under Louisiana law is “a contract by which a person, the lender, delivers consumable things to another, the borrower, who binds himself to return to the lender an equal amount of things of the same kind and quality.”<sup>58</sup> Similarly, a loan for use “is a gratuitous contract by which a person, the lender, delivers a nonconsumable thing to another, the borrower, for him to use and return.”<sup>59</sup> Likewise, a deposit is “a contract by which a person, the depositor, delivers a movable thing to another person, the depositary, for safekeeping under the obligation of returning it to the depositor upon demand.”<sup>60</sup> Similarly, the contract of pledge requires delivery of the thing pledged, unless the object is not a corporeal moveable.<sup>61</sup> Prior law also made clear that “[t]he pledge is a contract by which one debtor gives something to his creditor as security for his debt.”<sup>62</sup>

Although innominate contracts exist under Louisiana law, they are not the innominate contracts of Roman law. Innominate contracts under Louisiana law are truly contracts “with no special designation,”<sup>63</sup> such as an agreement to provide a home and burial for a relative in exchange for the transfer of property.<sup>64</sup> In Roman law, the term “innominate” contracts refers not to the contracts themselves, which were quite nominate, but to

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55. LA. CIV. CODE art. 2668.

56. *Id.* arts. 2998–3032; *see also* LA. CIV. CODE art. 2988 (1870) (“The contract of mandate is completed only by the acceptance of the mandatary.”).

57. LA. CIV. CODE art. 2801 cmt. a (2016); *see also* LA. CIV. CODE art. 2805 (1870) (“Partnerships must be created by consent of the parties.”).

58. LA. CIV. CODE art. 2904 (2016).

59. *Id.* art. 2891.

60. *Id.* art. 2926.

61. *Id.* art. 3149.

62. LA. CIV. CODE art. 3133 (1870).

63. LA. CIV. CODE art. 1914 (2016).

64. *Thielman v. Gahlman*, 44 So. 123 (La. 1907). At the time of Domat, the consignment contract also appears to have been innominate. “There are likewise some covenants which have no proper name; as if one person gives to another a thing to sell at a certain price, on condition that he shall keep to himself whatever he gets over and above the price that is fixed.” 1 JEAN DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* 162 (William Strahan trans., Luther S. Cushing ed., 1850).

the category of contracts that had no name but were subsumed together in a rather rag-tag group.<sup>65</sup>

All of these classificatory systems, however, operate today in the background. Although Louisiana law does not distinguish contracts based upon these terms, an understanding of their origins is helpful in assessing consequences and evaluating definitions. A more general theory of contract formation has displaced these categories, but new categories have arisen to take the place of the old ones.

## II. MEDIEVAL LAW AND THE ABANDONMENT OF THE ROMAN SYSTEM

Given the disappearance of the Roman system in the void of the dark ages, little development occurred on the Roman classification system after Justinian. With the re-engagement of Roman law and the rediscovery of the Digest in the thirteenth century, hope for further refinement began anew. Medieval jurists and even early modern ones tried for some time to retain the Roman system of classification,<sup>66</sup> even though the Roman system of classification was unquestionably lacking and had been roundly criticized.<sup>67</sup> The eventual disappearance, some have suggested, was not due to the impracticability of the Roman system but to the reconceptualization and reorganization of contract law by the late scholastics.<sup>68</sup>

It is true that the absence of a general theory of contract likely put pressure on the Roman system to evolve, but recall that the *stipulatio* was flexible enough to adapt to any situation.<sup>69</sup> Additionally, the Roman reluctance to enforce innominate contracts probably was not a significant obstacle for the medieval jurists because such contracts were routinely made enforceable by blessing them with the notarial seal.<sup>70</sup> But as flexible as the *stipulatio* may have been, it still involved what many would likely

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65. Although even in Roman times, it was recognized that “it is implicit in the nature of reality that there are more types of transactions than names for them.” DIGEST, *supra* note 48, bk. 19, ch. 5, para. 4, at 217.

66. GORDLEY, FOUNDATIONS, *supra* note 2, at 290.

67. Weir, *supra* note 1, at 1615 (“If we were to imagine all possible defects—in [the Roman] division, in their nomenclature—it would be difficult to exaggerate them.” (quoting 3 JEREMY BENTHAM, *General View of a Complete Code of Laws*, in THE WORKS OF JEREMY BENTHAM 155, 191 (Russel & Russel, Inc. 1962) (1843))).

68. GORDLEY, FOUNDATIONS, *supra* note 2, at 287.

69. BIRKS, *supra* note 21, at 30.

70. GORDLEY, FOUNDATIONS, *supra* note 2, at 291; BIRKS, *supra* note 21, at 30–31.

have regarded as an “irksome” formality, “however slight and simple.”<sup>71</sup> Moreover, the *stipulatio* was *stricti iuris*, meaning that the contract was “judged according to strict law” and did not have the benefit of more equitable remedies that would become important and that might be available to contracts governed by *bona fides* (good faith).<sup>72</sup>

Scholars have noted that the late scholastic philosophers rejected the Roman scheme of distinguishing between consensual contracts and real contracts and between nominate and innominate ones as a classificatory system not relevant to modern law and useful only in explaining Roman law.<sup>73</sup> Rather, they “explained the binding force of promises in terms of the Aristotelian virtues of promise-keeping, liberality, and commutative justice.”<sup>74</sup> The important consideration became not so much finding the right classification or fact scenario for enforcing a contract, but rather whether the parties had made promises to be bound.<sup>75</sup> This, of course, was not news to the medieval canon lawyers who had long believed that breaking a promise was wrong, but the Roman law had historically denied a legal remedy for promise-breaking, unless it otherwise fell within one of the recognized and allowable forms for contracting.<sup>76</sup> As Jim Gordley has aptly observed,

The Roman rules about which contracts were binding when were dismissed as matters of Roman private law, and eventually, by legislation or judicial decision, most of them vanished. The late scholastics developed a theory based on Aristotelian ideas of voluntary action . . . The distinguished two basic types of contracts: contracts to make a gift, which were intended to enrich the other party, and were acts of the Aristotelian virtue of liberality; and contracts to exchange, which were voluntary acts of commutative justice requiring equality so that at the moment of the transaction, neither party was enriched at the other’s expense.<sup>77</sup>

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71. BIRKS, *supra* note 21, at 57.

72. *Id.*

73. JAMES GORDLEY, *THE JURISTS: A CRITICAL HISTORY* 96 (2013) [hereinafter GORDLEY, *JURISTS*].

74. GORDLEY, *PHILOSOPHICAL ORIGINS*, *supra* note 6, at 82.

75. GORDLEY, *FOUNDATIONS*, *supra* note 2, at 291.

76. *Id.*

77. *Id.* at 287.

This distinction between acts of liberality and acts of exchange or commutative justice were used to “restructure the law of particular contracts.”<sup>78</sup> For transactions involving an exchange:

[T]he parties had to exchange at a just price—a price that enriched neither party at the other’s expense. . . . If one of the parties had wanted to enrich the other at his own expense, he would have made a gift. The very nature of a contract of exchange is that the parties exchange equivalents. . . . According to Aquinas, relief was given only for large deviations from the just price, because human law could not command all acts of virtue.<sup>79</sup>

Grotius, and later Puffendorf, continued the debate and discussions on this topic that had animated the late scholastics.<sup>80</sup> Grotius sets his work in opposition to François de Connan, who maintained that “no obligation is created by those agreements which do not contain an exchange of considerations.”<sup>81</sup> Grotius rejected this view and instead emphasized the role of the internal will or desire in serving as the primary forces behind agreements.<sup>82</sup> Puffendorf noted the debate between Grotius and “*Connanus* the Civilian,”<sup>83</sup> and endorsed the position of Grotius. Puffendorf agreed that “consent” was the hallmark principle for the binding effect of promises and pacts. He noted that:

Since the regular effect of pacts and promises is to abridge and refrain our liberty, . . . there can be no better argument to hinder a man from complaining of this burden, than to alledge, [sic] that he took it upon him by his own free will and consent, when he had full power to refute it.<sup>84</sup>

In short, the medieval period was important in reorienting contract law. Contract law slowly but unquestionably moved from the Roman casuistic system of specific types of classes of contracts to a philosophically oriented system based upon promise keeping, justice, and the importance of the will. The Roman concepts, however, were not completely abandoned. Rather,

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78. GORDLEY, *JURISTS*, *supra* note 73, at 97.

79. *Id.* at 97.

80. GORDLEY, *PHILOSOPHICAL ORIGINS*, *supra* note 6, at 75.

81. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 328 (Francis W. Kelsey trans., 1925) (1625).

82. *Id.* at 329.

83. 1 SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 51 (Basil Kennett trans., 1719).

84. *Id.* at 54.

“[a] synthesis between Roman law and Aristotelian and Thomistic moral philosophy was finally achieved in the sixteenth and early seventeenth centuries.”<sup>85</sup>

### III. THE FRENCH SYSTEM OF CLASSIFICATION

Given the philosophical reorientation that occurred in medieval times, by the time the French Code Civil was drafted, the treatise writers who were heavily relied upon by the French all conclusively stated that “consent” was the hallmark of a contract. Domat makes clear that “[c]ovenants are perfected by the mutual consent of the parties, which they give to one another reciprocally.”<sup>86</sup> Similarly, Pothier unequivocally states that a contract is a kind of an agreement, and “[a]n agreement is the consent of two or more persons.”<sup>87</sup> Other scholars have long observed the influence of Domat and Pothier in orienting the Code Civil around a concept of “voluntarism” but noted that the true binding force of a contract for them both appears not to be the autonomy of the human will, but to be something external to man—such as an obligation of conscience to uphold one’s word.<sup>88</sup> Indeed, this mindset is evident in the Code Civil, which notes that contractual freedom is subordinated not only to law but to public order and good morals.<sup>89</sup> Pothier, like the scholastic philosophers before him, rejects the Roman classification of contracts. Still, however, he sees the need to classify contracts, even in the face of a general theory of contracts. Pothier explains that in France, contracts can be divided into five classes: (1) synallagmatic and unilateral; (2) consensual and real; (3) contracts of mutual interest, beneficence, or mixed contracts; (4) principal and accessory; and (5) those regulated by the civil law and those regulated by “mere natural justice.”<sup>90</sup>

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85. GORDLEY, PHILOSOPHICAL ORIGINS, *supra* note 6, at 69.

86. 1 DOMAT, *supra* note 64, at 163.

87. 1 ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS 3 (William David Evans trans., 1826).

88. JACQUES GHESTIN, TRAITE DE DROIT CIVIL: LA FORMATION DU CONTRAT 40 (3d ed. 1993).

89. *Id.* at 39–40.

90. POTHIER, *supra* note 87, at 7–10. For an excellent discussion of the history of unilateral and bilateral contracts, see MICHEL SÉJEAN, LA BILATÉRALISATION DU CAUTIONNEMENT? LE CARACTÈRE UNILATÉRAL DU CAUTIONNEMENT À L’ÉPREUVE DES NOUVELLES CONTRAINTES DU CRÉANCIER 389 (2011) (arguing that the distinction between unilateral and bilateral contracts originates not in Roman Law, but in Byzantine law).



Despite the importance of Pothier's influence, not all of his classification scheme was actually adopted by the drafters of the French Code Civil. Articles 1102 through 1106 present three separate classes of contracts: (1) bilateral and unilateral, which is distinguished based upon whether the parties assume reciprocal obligations;<sup>91</sup> (2) commutative and aleatory, based upon what is given—either the equivalent in the case of a commutative contract or the chance of gain or loss in the context of an aleatory one;<sup>92</sup> and (3) contracts of beneficence and onerous contracts, distinguished upon what each party gives.<sup>93</sup> The classification system adopted by the French Code Civil begins the title on contracts, which “comprises all types of contracts” and is necessary to show which types of Roman contracts the French Code Civil accepted and which ones it rejected as not useful.<sup>94</sup>

A contract is synallagmatic or bilateral when the parties assume reciprocal obligations, such as in a sale, lease, or partnership.<sup>95</sup> It is unilateral when only one party takes on an obligation, such as in a loan for use, mandate, or deposit.<sup>96</sup> Toullier, however, is critical of this distinction, labeling it “imperfect” and suggesting that some unilateral contracts impose reciprocal obligations as well.<sup>97</sup> Those cases, however, involve obligations that are not principal obligations of the contract and do not arise immediately at the time of contract formation.<sup>98</sup> Other scholars have observed that this intermediate classification of imperfect synallagmatic contracts has been recognized by the courts and results from a contract that was “originally unilateral . . . [but] becomes synallagmatic when the other party became liable during the life of the contracts.” This occurs when a gratuitous depositary expends money to preserve the property for which reimbursement will be due.<sup>99</sup> In these obligations, the obligation on the part of one party is only “eventual or accidental” and often does not exist at all.<sup>100</sup>

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91. C. CIV. arts. 1102, 1103 (Fr.).

92. *Id.* art. 1104.

93. *Id.* arts. 1105, 1106.

94. 3 P.A. FENET, RECUEIL COMPLET DES TRAVAUX PREPARATOIRES DU CODE CIVIL 222 (1856).

95. 3 C.B.M. TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 256 (1823).

96. *Id.* at 256.

97. *Id.*

98. *Id.*

99. Denis Tallon, *Contract Law*, in INTRODUCTION TO FRENCH LAW 208 (George Bermann & Etienne Picard eds., 2012).

100. 3 TOULLIER, *supra* note 95, at 256.

Commutative and aleatory contracts, on the other hand, have a different distinction. Commutative contracts are those in which what is given or done is regarded as the equivalent of what is given or done by the reciprocal party, such as in a sale or exchange.<sup>101</sup> In aleatory contracts, however, “the equivalent consists in the chance of gain or of loss for each of the parties, after an eventual uncertainty.”<sup>102</sup> Contracts of insurance are a classic example of an aleatory contract.<sup>103</sup> Toullier is also critical of this distinction, noting that it is of little utility but explaining that in commutative contracts equivalent things can be exchanged, equivalent acts can be performed, or equivalent things can be given in exchange for acts. In this sense, he notes that an aleatory contract can be commutative because one party exchanges a thing, such as money, in return for a hope.<sup>104</sup>

Finally, contracts can be onerous or gratuitous. Gratuitous contracts are those in which one of the parties procures from the other a purely gratuitous advantage, such as in a deposit, mandate, or donation.<sup>105</sup> Onerous contracts are those in which each of the parties gives or does something, such as in a sale, lease, or loan for interest.<sup>106</sup> Toullier also suggests a blend of these categories is possible and notes that some contracts are mixed, such as when the motives could be partly onerous and partly gratuitous, as when a donation is subject to a charge.<sup>107</sup>

Writing in the mid-nineteenth century, Demolombe also follows the French Code Civil but adds two extra categories: (1) nominate and innominate; and (2) principal and accessory.<sup>108</sup> The former category is hinted at by article 1107 of the French Code Civil, which discusses those contracts that “have a proper denomination” and “those that have not.” The latter category of principal and accessory is a doctrinal innovation.

Modern French scholarship<sup>109</sup> recognizes a general category of consensual contracts and exceptional ones in which delivery of object is

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101. *Id.*

102. *Id.* at 257.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. 12 C. DEMOLOMBE, COURS DE CODE CIVIL 6 (1868).

109. In the *projet* for the reform of French obligations law, many of the above doctrinal categories, in addition to the ones in the current French Code Civil, are proposed—for example, consensual, solemn, and real; mutual and adhesionary; and contracts of successive and instantaneous execution. See PROJET DE REFORME

also required—such as real contracts—and those in which consent is subordinated to some solemnity—such as solemn contracts.<sup>110</sup> Still other divisions include contracts of mutual agreement (*gré a gré*) and contracts of adhesion;<sup>111</sup> individual and collective contracts;<sup>112</sup> contracts of instantaneous execution and those of successive execution;<sup>113</sup> civil contracts and commercial ones;<sup>114</sup> and professional ones and consumer contracts.<sup>115</sup>

The practical significance of these many classifications is not obvious, and the importance of each division varies. Planiol suggests that the difference between bilateral and unilateral contracts is “very important”;<sup>116</sup> that the distinction between onerous and gratuitous ones is “somewhat delicate”;<sup>117</sup> and that the distinction between commutative and aleatory ones is “hardly of any importance.”<sup>118</sup>

The sheer number of categories seems to have expanded to such an extent that one may long for the old Roman system. That being said, some commentators have attempted to explain the function of this categorization, which, given the advent of the will theory, now no longer has anything to do with the enforceability *vel non* of the contract. Bilateral contracts differ from unilateral ones as to the benefit from the laws pertaining to interdependence of obligations, such as the defense of non-performance.<sup>119</sup> Gratuitous contracts differ from onerous ones in that they generally impose a lesser degree of care and often require a higher degree of form in formation.<sup>120</sup> Gratuitous contracts also are more easily challenged through the Paulienne action and more easily rescindable due to mistake as to identity of the other party.<sup>121</sup> Commutative contracts are distinguishable from aleatory ones insofar as commutative contracts are

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DU DROIT DES CONTRATS, DU REGIME GENERAL ET DE LA PREUVE DES OBLIGATIONS arts. 1104–1110 (2015).

110. 8 ROBERT BEUDANT & PAUL LEREBOURS-PICEONNIÈRE, COURS DE DROIT CIVIL FRANÇAIS 35–37 (2d ed. 1936).

111. *Id.* at 38–39.

112. *Id.* at 39.

113. *Id.*

114. ALAIN BÉNABENT, DROIT CIVIL: LES OBLIGATIONS 6 (9th ed. 2003).

115. *Id.* at 7.

116. MARCEL PLANIOL & GEORGE RIPERT, OBLIGATIONS, *in* 6 TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS (2d ed. 1952) (Author’s translation).

117. *Id.* at 41.

118. *Id.* at 554 (with respect to lesion).

119. Tallon, *supra* note 99, at 208–10; BÉNABENT, *supra* note 114, at 1–7; BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 38–47 (2d ed. 1992).

120. Tallon, *supra* note 99, at 208.

121. NICHOLAS, *supra* note 119, at 45; 2 GEORGE RIPERT & JEAN BOULANGER, TRAITÉ DE DROIT CIVIL 34 (1957).

subject to rescission on the basis of lesion.<sup>122</sup> Nominate contracts differ from innominate ones insofar as special rules, in addition to the general rules of contract, govern their operation.<sup>123</sup> Consensual, real, and solemn contracts can be distinguished from one another because consent alone is sufficient to form a consensual contract whereas real or solemn contracts require either delivery or an extra formality for enforceability.<sup>124</sup> “Consensual contracts are the rule whereas real and solemn contracts are the exception.”<sup>125</sup> Adhesionary contracts, unlike those of mutual agreement, may be subject to special rules under the Consumer Code, Insurance Code, and Labor Code.<sup>126</sup> Individual and collective contracts differ from each other in terms of whose consent is necessary for its formation. Individual consent is required for ordinary individual contracts, but collective ones can be formed even without the consent of each party affected.<sup>127</sup> Instantaneous contracts are different from successive ones because the latter contains special rules on termination.<sup>128</sup> Professional contracts are different from consumer ones because consumer ones are subject to special protective consumer law.<sup>129</sup> Finally, commercial contracts, unlike civil ones, are subject to special rules, among which is a relaxation of the evidence rules for proof of contracts.<sup>130</sup> In the end, the French system of classification is complex but does appear to have some relevance in the modern day. It does not, like the Roman system, dictate enforceability, but it may, in some instances, dictate outcome.

#### IV. THE LOUISIANA CIVIL CODE’S CLASSIFICATION OF CONTRACTS

Relying heavily on French law, the Louisiana Civil Code sets up a number of dichotomies for classification of contracts. The juxtaposition of various types of contracts, such as unilateral and bilateral, often provides insight into understanding the opposite sides of the juridical terrain. In other instances, however, the dichotomy is less clear, such as the distinction between commutative and aleatory contracts. The provisions in

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122. Tallon, *supra* note 99, at 208–09.

123. *Id.* at 209.

124. *Id.*

125. BEUDANT & LEREBOURS-PIGEONNIERE, *supra* note 110, at 35 (Author’s translation).

126. Tallon, *supra* note 99, at 209.

127. F.H. LAWSON ET AL., AMOS & WALTON’S INTRODUCTION TO FRENCH LAW 153 (2d ed. 1963).

128. Tallon, *supra* note 99, at 209.

129. YVAINE BUFFELAN-LANORE & VIRGINE LARRIBAU-TERNEYRE, DROIT CIVIL: LES OBLIGATIONS 254–57 (13th ed. 2012).

130. Tallon, *supra* note 99, at 209.

Louisiana law have arrived by way of France but do contain “some curious anomalies.”<sup>131</sup> In the Digest of 1808, the provisions on classifying contracts appear to be almost verbatim copies of the provisions of the Code Napoleon,<sup>132</sup> although the de La Vergne manuscript cites the influence of Pothier, which seems obvious at least in later revisions.<sup>133</sup>

A dramatic expansion from the French system of five articles to one that included thirteen articles and new categories of “certain” and “independent” contracts occurred in 1825 and was perpetuated under the 1870 Code.<sup>134</sup> From whence came the new categories added in 1825 is still a mystery. The redactors mention in the *projet* to the revision that the goal was to correct inaccuracies and to provide “a better plan of distribution.”<sup>135</sup> Although Batiza references Pothier as the source for the new articles and categories,<sup>136</sup> Pothier’s influence is not evident.<sup>137</sup> Neither Domat nor Toullier, two other French scholars from whom the redactors freely borrowed, seem fruitful either.<sup>138</sup> Whatever their source, the classificatory schemes in 1825 were paired in terms of their “parties,” their “substance,” their “motive,” and their “effects.”<sup>139</sup> When considering the parties in the contract, one party “does, or engages to do or not to do,” while the other receives the performance.<sup>140</sup> When the “latter party make[s] no express agreement on his part,” the contract is unilateral.<sup>141</sup> “[W]hen the parties expressly enter into mutual engagements,” the contract is bilateral.<sup>142</sup>

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131. Smith, *supra* note 20, at 15.

132. Compare LA. CIV. CODE arts. 3–7 (1808), with C. CIV. arts. 1102–1107 (1804) (Fr.).

133. A REPRINT OF MOREAU LISLET’S COPY OF THE DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808): THE DE LA VERGNE VOLUME (Claitor’s Publ’g Div. 1971).

134. *A Republication of the Projet of the Civil Code of Louisiana of 1825*, 1 LA. LEGAL ARCHIVES 228–29 (1937).

135. *Id.* at 227; LITVINOFF, *supra* note 20, § 91, at 143.

136. See Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 71 (1971).

137. See, e.g., POTHIER, *supra* note 87 (containing no mention of independent or certain contracts).

138. Rodolfo Batiza, *The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey*, 47 TUL. L. REV. 1, 70–71 (1972); see also A.N. Yiannopoulos, *The Civil Codes of Louisiana*, 1 CIV. L. COMMENTS. 1, 12 (2008).

139. LA. CIV. CODE arts. 1765, 1767, 1772, 1775 (1870).

140. *Id.* art. 1765.

141. *Id.*

142. *Id.*

When the “substance” of a contract is considered, contracts are “either commutative or independent, principal or accessory.”<sup>143</sup>

The motive of the parties serves as the basis for distinguishing gratuitous contracts from onerous ones.<sup>144</sup> When the cause of a contract is to “benefit the person with whom it is made, without any profit or advantage, received or promised as a consideration for it,” it is gratuitous.<sup>145</sup> The contract is onerous when something is “given or promised as a consideration for” the performance, even if what is given or promised is of “unequal” value.<sup>146</sup>

Finally, considering “effects,” contracts are either certain or aleatory.<sup>147</sup> A contract is aleatory when it “depends on an uncertain event,” and it is certain “when the thing to be done is supposed to depend on the will of the party, or when in the usual course of events it must happen in the manner stipulated.”<sup>148</sup>

The modern Louisiana Civil Code, as amended in the 1984 Obligations revision, abandoned the expansion created by the 1825 revision and returned to an approach more similar to the French Code Civil. The reason for the compression, just as the reason for the expansion, remains unclear. What is clear is that Louisiana law now contains a series of five sets or types of contracts: unilateral and bilateral; onerous and gratuitous; commutative and aleatory; principal and accessory; and nominate and innominate. Most obviously, the distinctions between commutative and independent contracts, as well as the contrast between aleatory and certain contracts, have disappeared. Rather, commutative and aleatory seem to have returned to their historical place as counterparts. Regardless of the origin of the change, each of these distinctions will be considered below, but each is not of equal importance. Some of the distinctions are necessary for certain contractual defenses, such as dissolution or nonperformance. Others are important for assessing standards of care, degrees of form, and norms of capacity. Still others are subject to entire legal regimes by virtue of their special nomination. Finally, some cannot even exist without supporting contracts or legal relations to reinforce their existence.

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143. *Id.* art. 1767.

144. *Id.* art. 1772.

145. *Id.* art. 1773.

146. *Id.* art. 1774.

147. *Id.* art. 1775.

148. *Id.* art. 1776.

*A. Unilateral and Bilateral*

One important distinction between contracts under the Louisiana Civil Code is that between unilateral and bilateral contracts, a distinction under the 1870 Code based upon the parties. Like the French classification, a contract is unilateral when only one party accepts an obligation and the other party does not assume a reciprocal one.<sup>149</sup> On the other hand, a bilateral or synallagmatic contract<sup>150</sup> gives rise to reciprocal obligations on behalf of both parties to the contract.<sup>151</sup> This dichotomy in Louisiana does not admit of gradations, as neither Louisiana law nor Louisiana doctrine recognizes the French concept of imperfectly bilateral contracts. Rather, a contract is unilateral or bilateral based upon the essence or nature of the obligations entailed in the contract. Donations, mandates, and loans, are classic cases of unilateral contracts, whereas sales, leases, and exchanges are classic instances of bilateral contracts.

Donations are unilateral because the donor is obligated to deliver the thing to the donee, but the donee has no reciprocal obligation.<sup>152</sup> Mandates are unilateral for a similar reason: because the mandatary must “transact one or more affairs for the principal,” who does not assume a reciprocal obligation toward the mandatary.<sup>153</sup> Loans for use are also unilateral because the borrower must “use and return” the thing lent, but the lender is not reciprocally obligated.<sup>154</sup> At this point, the Anglo-American lawyer

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149. A unilateral contract in Louisiana is not to be confused with a unilateral juridical act. Juridical act has been defined as “a licit act intended to have legal consequences.” See LA. CIV. CODE art. 3483 cmt. b (2016); see also SAÚL LITVINOFF & W. THOMAS TÊTE, LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS 133–90 (1969).

150. Bilateral contracts are sometimes known by their Greek name, synallagmatic contracts, from the Greek word *synallagama*, meaning “exchange.” Although the Louisiana Civil Code uses the term bilateral in its classificatory scheme, it also employs the term synallagmatic in certain specific contexts. There is no distinction, however, between the two terms, bilateral and synallagmatic.

151. LA. CIV. CODE art. 1908 (2016); see also *Kaplan v. Whitworth*, 40 So. 723, 724 (La. 1906) (“The language of the instrument imposes no obligation upon the plaintiff but seems carefully to avoid doing so. The contract, if any there be, is therefore, not bilateral.”).

152. See, e.g., LA. CIV. CODE art. 1544; see also *id.* art. 1551 cmt. b (stating that delivery is not required “if the acceptance is made by means other than corporeal possession,” presumably because the transfer of ownership via the acceptance takes the place of delivery, as in the case of sales); see, e.g., *id.* art. 2477.

153. *Id.* art. 2989.

154. *Id.* art. 2891.

is almost hardwired to resist with the reasonable criticism that loans under the above dichotomy seem unilateral only if they are executed rather than executory. In other words, if one considers a loan transaction at a point in time before the money or thing is lent, then each party does indeed appear to have reciprocal obligations—the lender to lend the money and the borrower to repay it (either with or without interest). Although such a criticism is plausible, it misunderstands the conceptual basis of the contract of loan. Both under Roman law and Louisiana law, a loan contract is not a consensual contract like a sale or lease. Rather a loan contract is a real contract or a contract *re* and thus not a contract of loan at all until a thing is lent. Barry Nicholas reminds us that:

In the Roman view the real contracts came into existence when the thing (*res*) was delivered to the borrower, who then came under an obligation to return it (or, in a loan for consumption, its equivalent) at the appointed time. In terms of the distinction which we are discussing this is a unilateral contract, the borrower having a duty (to return the money) and the lender a correlative right, but not vice versa. Until delivery of the thing there is no contract . . . .<sup>155</sup>

Similarly, in Louisiana, the very definition of a loan requires delivery of the thing lent.<sup>156</sup> Parties are, of course, free to enter into the consensual contract of a “contract to lend,” whereby each party by virtue of the manifestations of their consent agrees to accept mutual or reciprocal obligations.<sup>157</sup> At Roman law, however, such an agreement would not “be a contract because it is not one of the four ‘consensual’ contracts (and is not clothed in the form of the *stipulatio*).”<sup>158</sup> Thus, an executory loan is not a bilateral loan because it is not a loan at all, although it may be a contract to lend.

Although the distinction between unilateral and bilateral contracts in Louisiana law is not as significant as in French law, distinctions do exist, primarily in the areas of default and consent. With respect to putting an obligor in default for failure to perform, an obligor in a bilateral contract may not be put in default unless the obligor of the other has performed or is ready to perform his own obligation.<sup>159</sup> For example, in *Retail*

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155. NICHOLAS, *supra* note 119, at 41.

156. See LA. CIV. CODE arts. 2891, 2904.

157. Cf. *id.* art. 2891 cmt. b.

158. NICHOLAS, *supra* note 119, at 41.

159. LA. CIV. CODE art. 1993 (limiting application of this article to the “case of reciprocal obligations”); see also *id.* cmt. b (“Reciprocal obligations are those



*Merchants Ass'n v. Forrester*, the court appropriately held that a hospital could not put a patient in default and seek full payment from him for medical services when it failed to perform its obligation under the contract of timely notifying the patient's health insurer.<sup>160</sup> Similarly, nonperformance by one party to a bilateral contract, unlike a unilateral one, gives the other a right to seek dissolution of the contract. For example, if a lessee "fails to pay the rent when due, the lessor may . . . dissolve the lease."<sup>161</sup> Similarly, "[i]f the buyer fails to pay the price, the seller may sue for dissolution of the sale."<sup>162</sup> In *Madere v. Cole*, the seller of dogs was "entitled to sue" the purchaser of a puppy "to dissolve the sale" when the sale was perfected through agreement and the buyer failed to pay the price.<sup>163</sup> In the context of a unilateral contract, such as a donation, however, dissolution is not the appropriate remedy for failure to deliver the thing donated, as confection of the contract through acceptance transfers "the ownership or other real right in the thing given."<sup>164</sup> Rather, the donee could sue to compel discovery, but dissolution of the donation hardly seems to achieve the donee's goal if the donor fails to perform.

#### *B. Onerous and Gratuitous (and Mixed)*

Perhaps the most important distinction between types of contracts exists between gratuitous and onerous contracts. Unlike unilateral and bilateral contracts, gratuitous and onerous ones are distinguished based upon their cause.<sup>165</sup> Gratuitous contracts are those in which one party obligates himself without doing so to obtain any advantage in return.<sup>166</sup> By contrast, an onerous contract exists when each party assumes an obligation to obtain an advantage in exchange for his obligations.<sup>167</sup> A donation, the purpose of which is to enrich another with no expectation of return, is a classic case of a gratuitous contract, whereas a sale, in which a thing is given in exchange for a price in money, is the typical onerous one. Unlike the characterization of bilateral and unilateral, "[w]hether a contract is an onerous contract or gratuitous depends in the final analysis on its cause,"<sup>168</sup>

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that arise from bilateral or synallagmatic contracts."); LITVINOFF, *supra* note 20, § 95, at 150.

160. Retail Merchs. Ass'n v. Forrester, 114 So. 3d 1175, 1180 (La. Ct. App. 2013).

161. LA. CIV. CODE art. 2704.

162. *Id.* art. 2561.

163. *Madere v. Cole*, 424 So. 2d 1125, 1127 (La. Ct. App. 1982).

164. LA. CIV. CODE art. 1551.

165. See LA. CIV. CODE art. 1772 (1870).

166. LA. CIV. CODE art. 1910 (2016).

167. *Id.* art. 1909.

168. Smith, *supra* note 20, at 5.

not upon the parties to the contract. In the words of the late obligations scholar J. Denson Smith:

If a contractant desires to confer a benefit by way of gratuity the resulting contract is gratuitous. Where he is not so moved the contract is onerous. Certain special contracts such as the loan of money without interest, the non-remunerative suretyship, mandate and deposit, and the loan for use are therefore characterized as gratuitous. In all these cases a benefit is conferred without anything being asked for or received in return.<sup>169</sup>

The importance of cause as a basis for classifying contracts as gratuitous or onerous is readily apparent in the jurisprudence. Nowhere perhaps is the importance of cause more evident than in *Larose v. Morgan*, where the court concluded that the transfer of a house from one party to his son-in-law due to prior services rendered and money advanced, rather than for reasons of beneficence, created an onerous contract rather than a gratuitous one.<sup>170</sup> Finally, in *Townsend v. Urie*, the court found that the plaintiff's letter to the defendant constituted acceptance of his gratuitous offer of a bonus and thus confected an enforceable unilateral and gratuitous contract.<sup>171</sup> Although the acceptance letter did contain "something in the nature of a compromise not to pursue legal action in lieu of enforcing the existing unilateral gratuitous contract," the letter did not constitute a counter offer, as "the cause of the contract was [the defendant's] generosity and desire to reward [the plaintiff]."<sup>172</sup>

Although the concept of cause is well known in Louisiana law as the "reason"<sup>173</sup> or, historically, the "motive" for entering into a contract,<sup>174</sup> ascertaining a party's cause often poses problems for courts. The subjective will, although important and often essential in ascertaining contract formation, issues of error, and contract interpretation, must yield in some instances to objective declarations. "A will that is purely subjective, meaning that it was never expressed, is irrelevant in the eyes of the law."<sup>175</sup> On the other hand, sometimes an external manifestation does not match the subjective or internal intent. Consequently, a holistic view of the will is necessary and important for purposes of our law. In other words, "a

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169. *Id.*

170. *Larose v. Morgan*, 252 So. 2d 766, 769 (La. Ct. App. 1971).

171. *Townsend v. Urie*, 800 So. 2d 11, 17 (La. Ct. App. 2001).

172. *Id.* at 18.

173. LA. CIV. CODE art. 1967 (2016).

174. LA. CIV. CODE art. 1896 (1870).

175. LITVINOFF & TÊTE, *supra* note 149, at 113.

judge[] will have to take the act as one single phenomenon wherein a certain intention—a subjective element—is thoroughly blended with a certain utterance—an objective element.”<sup>176</sup>

The consequences of this classification in Louisiana law are multifold. First, the requirement of consent is often relaxed in the context of gratuitous contracts.<sup>177</sup> In a remission, a gratuitous extinction of an obligation,<sup>178</sup> acceptance by the obligor is “always presumed unless the obligor rejects the remission within a reasonable time.”<sup>179</sup> Similarly, although an authentic act is required for a donation *inter vivos*,<sup>180</sup> an acceptance can be made “subsequently in writing.”<sup>181</sup> This conclusion was bolstered by a recent holding that a “donee’s signature on the act of donation is a sufficient writing to perfect the acceptance,” even though not itself done in an authentic act.<sup>182</sup>

Second, gratuitous contracts usually impose a lower standard of care than onerous ones.<sup>183</sup> In the context of an onerous deposit—such as a deposit contract in which the depositary receives compensation for his services—the standard of care is an objective one of “diligence and prudence.”<sup>184</sup> If the deposit is gratuitous—such as a deposit contract in which a depositary receives no compensation for his services—however, the law imposes a lesser standard of care of the “same diligence and prudence” as a person “uses for his own property.”<sup>185</sup> The law on mandate similarly imposes a general standard of diligence and prudence but then allows a court to “reduce the amount of loss for which the mandatory is liable” if the mandate is uncompensated or gratuitous.<sup>186</sup> Ordinary suretyships, or those that are not compensated, also benefit from being “strictly construed in favor of the surety,”<sup>187</sup> whereas the same is not the case for commercial suretyships.

Third, the individual parties to the contract are presumed to be the principal reason for entering into a gratuitous contract such as a donation.

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176. *Id.* at 113.

177. LITVINOFF, *supra* note 20, § 95, at 151.

178. LA. CIV. CODE art. 1888 & cmt. b (2016) (noting that a remission is “an act gratuitous in principle”).

179. *Id.* art. 1890.

180. *Id.* art. 1541.

181. *Id.* art. 1544.

182. *Wiedermann v. Wiedermann*, 30 So. 3d 972 (La. Ct. App. 2009).

183. LITVINOFF, *supra* note 20, § 100, at 169.

184. LA. CIV. CODE art. 2930.

185. *Id.*

186. *Id.* art. 3002.

187. *Id.* art. 3044.

This presumption is important because errors as to “the person or the qualities of the other party” may constitute an error as to cause,<sup>188</sup> and thus vitiate the consent necessary for a contract.<sup>189</sup> If the contract is a gratuitous one, such as a donation, “the presumption obtains that the person of the intended obligee was the reason why the obligor bound himself.”<sup>190</sup> French law is the same on this matter. Scholars have noted that gratuitous contracts are generally concluded “as a function of the person of the beneficiary” and are thus annulable for error as to the person.<sup>191</sup> Although rescission of error as to the person is certainly possible in onerous contracts,<sup>192</sup> no such presumption exists in the context of an onerous contract, such as a sale.

Fourth, gratuitous contracts are more easily annulable when made by persons deprived of reason than are onerous contracts.<sup>193</sup> The Louisiana Civil Code provides that “[a] contract made by a noninterdicted person deprived of reason at the time of contracting may be attacked after his death, on the ground of incapacity, only when the contract is gratuitous.”<sup>194</sup> An onerous contract made by such persons may be annulled only when “it evidences lack of understanding, or was made within thirty days of his death, or when application for interdiction was filed before his death.”<sup>195</sup>

Fifth, gratuitous contracts are easier for creditors to annul under the revocatory action.<sup>196</sup> That is, “[a]n obligee may attack a gratuitous contract” made by an obligor that causes or increases his insolvency “whether or not the other party knew that the contract would cause or increase the obligor’s insolvency.”<sup>197</sup> With respect to an onerous contract, however, an obligee

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188. *Id.* art. 1950.

189. *Id.* art. 1949.

190. *Id.* art. 1950 cmt. d. *But see id.* art. 1479 cmt. e (“There is no intent to create a right to challenge donations based on mistake alone.”).

191. BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 129, at 246.

192. *See, e.g.,* Bischoff v. Bros. of the Sacred Heart, 416 So. 2d 348, 351 (La. Ct. App. 1982).

193. LA. CIV. CODE art. 1926.

194. *Id.*

195. *Id.*

196. *Compare id.* art. 2039, with *id.* art. 2038. Of course, donations, as a subset of gratuitous contracts, are even more specifically regulated from other unilateral contracts. *See id.* art. 1541 (requiring the heightened form of an authentic act); *id.* art. 1477 (imposing special capacity rules); *id.* art. 1519 (imposing special rules on illicit conditions).

197. *Id.* art. 2039.

can annul the contract only if the other party “knew or should have known that the contract would cause or increase the obligor’s insolvency.”<sup>198</sup>

To aid in the classification of contracts, the Louisiana Civil Code, unlike the French Code Civil, recognizes a sort of halfway house between onerous and gratuitous contracts—those characterized by some scholars as “mixed.” These “mixed” contracts are those “by which one of the parties confers a benefit on the other, receiving something of inferior value in return, . . . such as a donation subject to a charge.”<sup>199</sup> Relying on Toullier, the drafters of the 1825 Louisiana Civil Code enacted a mathematical test for deciding when mixed motive transactions were sufficiently onerous to be treated as onerous contracts or not onerous enough, such that they should be treated as donations, despite some element of onerosity.<sup>200</sup> Thus, articles 1526 and 1527 provide that the rules for donations do not apply when the donation is burdened with an obligation or in recompense for a service, unless at the time of donation the obligation or the service is less than two-thirds the value of the thing given.<sup>201</sup> For instance, a \$10,000 donation that imposes a charge or obligation valued at \$7,000 is subject to the rules of onerous contracts, not donations, because the value of the obligation exceeds two-thirds (i.e., \$6,667) of the value of the \$10,000 gift. This objective mathematical test serves as a surrogate for cause, making the ascertaining of a person’s subjective reason, motive, or cause unnecessary. As the late comparative scholar John Dawson has noted, “[p]sychological probes are entirely dispensed with where appraisal in economic terms is feasible and the appraisal reveals that the outlay required by the charge is substantial as compared with the value of the asset ‘given.’”<sup>202</sup>

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198. *Id.* art. 2038. Exceptionally, an obligee can annul a contract of an obligor that causes or increases his insolvency “with a person who did not know” that the contract would do so, “but in that case that person is entitled to recover as much as he gave to the obligor.” *Id.*

199. 2 MARCEL PLANIOL, *TRAITE ELEMENTAIRE DE DROIT CIVIL* 9 (La. Law Inst. trans., 1938). Stated succinctly, Professor Kathryn Lorio has explained that there are “three types of *inter vivos* donations: gratuitous, onerous or remunerative.” KATHRYN LORIO, *SUCCESSION AND DONATIONS* § 8.13, in 10 *LOUISIANA CIVIL LAW TREATISE* 257 (2d ed. 2009). A “gratuitous donation is made purely from liberality; the onerous donation is burdened with charges upon the donee; and the remunerative donation is given to recompense the donee for services rendered in the past.” *Id.*

200. LITVINOFF, *supra* note 20, § 102, at 173–75.

201. LA. CIV. CODE arts. 1526, 1527.

202. JOHN DAWSON, *GIFTS AND PROMISES* 105 (1980).

This dichotomy—or perhaps trichotomy if “mixed” contracts are included—is a comprehensive one. That is, a contract must be either gratuitous, onerous, or mixed. It cannot then fall in the interstices of the classification, as has sometimes been mistakenly held by courts.<sup>203</sup> If mixed, the predominate element must be ascertained under the above standard, and the contract must then be subjected to the rules of either the gratuitous regime or the onerous one.

### *1. Onerous v. Bilateral and Gratuitous v. Unilateral*

The classificatory dichotomy of onerous and gratuitous, although overlapping, is not the same as the dichotomy between bilateral and unilateral contracts. In truth, all bilateral contracts are onerous.<sup>204</sup> The very nature of the reciprocal obligations of a bilateral contract is at the same time evidence of the advantage each party obtains and thus the contract’s onerosity.<sup>205</sup> A contract, however, may be onerous without, at the same time, being bilateral.<sup>206</sup> A loan at interest serves as a good example of an onerous, unilateral contract.<sup>207</sup> In such a case, both parties have obtained advantages—the borrower, the use of the thing loaned, and the lender, the interest. The obligations of the parties once the loan has been extended, however, are not reciprocal. Rather, the obligations are engendered solely by the borrower and thus the contract is unilateral.<sup>208</sup>

Moreover, despite an apparent similarity in meaning, gratuitous contracts are not the same as unilateral contracts. Although all gratuitous contracts are unilateral, not all unilateral contracts are gratuitous. Loan for use, loan for consumption, deposit, and pledge are all unilateral contracts but may in fact be onerous as well as gratuitous. In all of these instances, the contracts are unilateral and onerous when compensation is given to the obligee. Because, however, no reciprocal obligation is assumed by the lender, depositor, or pledgor once the thing has been loaned, deposited, or

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203. In *Moore v. Wilson*, the court correctly held that the transfer of an interest in immovable property for \$10.00 was not a sale because the price was “out of all proportion with the value of the thing sold” under article 2464. 772 So. 2d 373, 376 (La. Ct. App. 2000). The court continued, however, to invalidate the transaction in its entirety and mistakenly held that the transfer was neither a sale nor a donation because of the lack of donative or gratuitous intent. *Id.*

204. BEUDANT & LEREBOURS-PIGEONNIÈRE, *supra* note 110, at 32; DEMOLOMBE, *supra* note 108, at 9; LITVINOFF, *supra* note 20, § 95, at 152.

205. BEUDANT & LEREBOURS-PIGEONNIÈRE, *supra* note 110, at 32.

206. *Id.*

207. *Id.*; PLANIOL & RIPERT, *supra* note 116, at 39; *but see* LITVINOFF, *supra* note 20, § 95, at 152 (describing pre-revision law).

208. BEUDANT & LEREBOURS-PIGEONNIÈRE, *supra* note 110, at 32.

pledged, the contracts are still unilateral.<sup>209</sup> Loans without interest and deposit and pledges for no compensation are both unilateral and gratuitous because the service is rendered with no benefit in exchange.<sup>210</sup>

Although the Roman concept of mandate was always gratuitous,<sup>211</sup> it is not so in current law. French law departed from the Roman idea as far back as 1804 and allowed a contract of mandate to be either onerous or gratuitous.<sup>212</sup> The Louisiana Civil Code recognizes the same: “The contract of mandate may be either onerous or gratuitous.”<sup>213</sup> The presumption, however, is that mandate is gratuitous, unless the parties agreed otherwise.<sup>214</sup> In fact, the nearly universal position in the civil law world today is that mandate can be either onerous or gratuitous.<sup>215</sup> This approach has been praised as the “wiser choice” to help keep the contract of mandate useful and realistic in the modern day.<sup>216</sup> In either case, however, a mandate is a unilateral contract, even when compensation is paid.

## 2. *The Scope of Gratuitous Contracts*

Donations are the classic case of gratuitous contracts, but the contract of donation does not exhaust the category of gratuitous contracts. Loan for use, deposit, remission, and mandate can be gratuitous when they are done for no compensation. As gratuitous contracts, they are subject to the rules

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209. *Id.*

210. *Id.*

211. DIGEST, *supra* note 48, bk. 17, ch. 1, para. 1 (“*Mandatum nisi gratuitum nullem est.*”). The Romans thought it important to distinguish the gratuitous contract of mandate from a similar arrangement in which compensation was paid, which would be classified as *locatio-conductio*. Nevertheless, it was not uncommon for an honorarium to be given in exchange for the exercise of the mandate and in later law even a *salarium*. See generally ALAN WATSON, CONTRACT OF MANDATE IN ROMAN LAW (1961); ZIMMERMANN, *supra* note 49, at 413–32.

212. C. CIV. art. 1986 (1804) (Fr.).

213. LA. CIV. CODE art. 2992 (2016).

214. *Id.* (“It is gratuitous in the absence of contrary agreement.”).

215. See, e.g., PRINCIPLES OF EUROPEAN LAW: MANDATE CONTRACTS art. 1:101(2)–(3), at 3 (Marco B.M. Loos & Odavia Bueno Díaz eds., 2013) (stating that the principles “apply where the agent is to be paid a price, and with appropriate adaptations, where the agent is not to be paid a price”); see also *id.* at 143–46 listing various countries.

216. Wendell H. Holmes & Symeon C. Symeonides, *Representation, Mandate, and Agency: A Kommentar on Louisiana’s New Law*, 73 TUL. L. REV. 1087, 1121 (1999).

for donations, such as revocation, with the exception of form.<sup>217</sup> Donations, of course, by their nature are always gratuitous.<sup>218</sup> The Louisiana Civil Code defines a donation *inter vivos* as “a contract by which a person, called the donor, gratuitously divests himself, at present and irrevocably, of the thing given in favor of another, called the donee, who accepts it.”<sup>219</sup> In addition to other particular rules for donations, the form required is an “authentic act under the penalty of absolute nullity.”<sup>220</sup>

Charitable subscriptions, or charitable pledges, present difficult practical problems, even though there is no theoretical reason to treat this type of donation as different from other types of donations *inter vivos*. After all, a charitable subscription is a gratuitous disposition of a thing—here a promise or pledge<sup>221</sup>—in favor of a donee, who happens to be a charity rather than a private person. Many systems, as a matter of policy, desire to enforce charitable subscriptions even in the absence of a coherent theory as to why. Louisiana is no exception.

Obviously, to be enforceable as a donation *inter vivos*, a charitable pledge would need to be made via an authentic act. Unfortunately, charities rarely employ notaries for these purposes, which rather obviously would dissuade those inclined from making gifts. Nonetheless, charitable subscriptions, despite the lack of necessary form, have long been held to be enforceable in Louisiana. For example, in *Baptist Hospital v. Cappel*, the court found enforceable a pledge card that read: “For a valuable consideration, receipt of which is hereby acknowledged, and in consideration of the subscription of others, I hereby subscribe.”<sup>222</sup> Similarly, in *Louisiana College v. Keller*,<sup>223</sup> the language of the pledge card stated simply:

We, the subscribers, agree and bind ourselves to pay the sums severally annexed to our names, to any person or persons who may be appointed by the legislature of the State of Louisiana to receive the same, in behalf of a college, which may be established in the town of Jackson, East Feliciana. It is, however, expressly

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217. See, e.g., LA. CIV. CODE art. 1890 cmt. b.

218. *Id.* art. 1468 (“A donation *inter vivos* is a contract by which a person, called the donor, *gratuitously* divests himself, at present and irrevocably, of the thing, given in favor of another, called the donee, who accepts it.” (emphasis added)).

219. *Id.* art. 1468.

220. *Id.* art. 1541.

221. See *id.* art. 1468 cmt. c (noting that a thing can be an incorporeal, such as a real right or obligation).

222. *Baptist Hosp. v. Cappel*, 129 So. 425, 426 (La. Ct. App. 1930).

223. *La. Coll. v. Keller*, 10 La. 164 (1836).



understood, that no obligation is hereby created against the subscribers, unless the said legislature do establish a college with an endowment, in the said town, at their next session. And, if a college be established, as aforesaid, we waive all informality in this obligation; those who subscribe two hundred dollars or under to pay in equal instalments [sic] of one and two years; those who subscribe over two hundred dollars, to pay the amount of their subscriptions in annual instalments [sic] of one hundred dollars, subsequent to the passage of a bill relative to said institution.<sup>224</sup>

In both cases, the charitable subscriptions were found to be enforceable, despite their failure to comply with the form prescribed for donations *inter vivos*.

A charitable subscription or pledge undoubtedly could “induce the other party to rely on it to his detriment.”<sup>225</sup> But article 1967, which defines detrimental reliance, rules out the possibility of enforcing a gratuitous promise, such as a charitable pledge, made in the wrong form. That article clearly states that “[r]eliance on a gratuitous promise made without required formalities is not reasonable.”<sup>226</sup> Unsurprisingly, the courts have never used a detrimental reliance rationale for enforcing charitable subscriptions.

Instead, Louisiana courts have engaged in a rationale that suggests that charitable pledges are enforceable either because they are really onerous contracts or because they are exempt from traditional form rules for donations. The courts’ rationales are admittedly unclear. For example, in *Louisiana College*, the Court suggested that a charitable subscription was in fact an onerous contract. The Court stated that the donor of money for the erection of a hospital may have done so under the expectation that he would derive an “advantage . . . from the establishment of a college at his own door, by which he would save great expense in the education of his children.”<sup>227</sup> On the other hand, the Court also made statements suggesting that the subscription was not onerous but merely a gratuitous contract exempt from the form rules for donations. In this vein, the Court suggested that the donor’s motivation “may have been a spirit of liberality and a desire to be distinguished as the patron of letters.”<sup>228</sup> The Court then

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224. *Id.* at 164.

225. LA. CIV. CODE art. 1967.

226. *Id.*

227. *La. Coll.*, 10 La. at 167.

228. *Id.*

confusingly continued by stating, “[i]n contracts of beneficence, the intention to confer a benefit is a sufficient consideration.”<sup>229</sup>

Similarly, the court in *Baptist Hospital* acknowledged that the charitable pledge made for the construction of a new nurses’ home is enforceable but seemed equally confused as to why.<sup>230</sup> At one point, the court seemed to suggest that the pledge is onerous because the donor received a benefit: “Defendant does not show that any benefit he expected to receive from the new nurses’ home has been in any way lessened or that he has been in any way injured by the change in plans; therefore, he is bound by his pledge.”<sup>231</sup> In another part of the opinion, however, the court suggested that the contract was a purely gratuitous one:

[The defendant] testified that his purpose in making the pledge was to prevent the standing of the training school being withdrawn and thereby causing the ladies in training to lose the time they had spent in training there. It was his kind feeling for the young ladies in training and his generosity that caused him to sign the pledge.<sup>232</sup>

Thus, the language in the existing judicial opinions concerning charitable subscriptions could reasonably lead one to conclude that courts treat charitable pledges as enforceable either because (1) they view them as onerous contracts exempt from traditional form requirements, or (2) they view them as gratuitous contracts that are de facto exempt from the form requirements for donations *inter vivos*. The Louisiana Supreme Court, in dicta, seems to have endorsed the former rationale:

Close examination therefore reveals that the courts deciding such cases found the promises to be onerous so that they might then be enforced, since there was no writing requirement for the promises at issue if they could be characterized as onerous, as opposed to gratuitous promises.<sup>233</sup>

To say that the logic of treating a gratuitous promise as an onerous contract is tortured is a vast understatement. First, it is hard to read cases such as *Baptist Hospital* and *Louisiana College* and find any significant onerous component. The donors in both cases possibly made subscriptions

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229. *Id.*

230. *See* *Baptist Hosp. v. Cappel*, 129 So. 425, 426 (La. Ct. App. 1930).

231. *Id.* at 427.

232. *Id.*

233. *Morris v. Friedman*, 663 So. 2d 19, 24 (La. 1995). For an informative essay in support of the court’s position, see Thomas B. Lemann, *Enforceability of Charitable Pledges*, 2 CIV. L. COMMENTS. 1 (2009).

because they wanted to either have a “college at his own door” or a nurses’ home nearby.<sup>234</sup> But even if that were true as a factual matter, this hardly seems to be a significant enough degree of onerosity to make the entire transaction onerous or to make the donor’s “cause” for making the donation the close proximity of the institution. This is especially true in the *Baptist Hospital* case where the court suggests that the “[d]efendant does not show that any benefit he expected to receive . . . has been in any way lessened” by the relocation of the nurses’ home.<sup>235</sup>

Second, the other reasons the courts offer for finding the contract to be onerous simply make little sense. The Court in *Louisiana College* suggests that the donor may have been motivated by the “desire to be distinguished as the patron of letters.”<sup>236</sup> Certainly, however, that is not an onerous motive. No one would doubt that birthday gifts made by friends or relatives are “purely gratuitous,” even if they are only made by the desire to be distinguished as a good friend or beneficent relative of the recipient. Certainly a contract is gratuitous even if a donor’s internal motivation is less than 100% pure. Courts do not and should not inquire into the quality of one’s mind when making an uncompensated gift. After all, the very definition of a gratuitous contract is one in which one party is benefited “without [the other] obtaining any advantage in return.”<sup>237</sup> Psychological benefits of being known as a good mother, a good friend, or a patron of letters are surely outside the scope of the benefits contemplated by article 1910 of the Civil Code. If they were not, the category of gratuitous contracts would arguably cease to exist altogether.

A better explanation for why charitable subscriptions are enforceable is simply that they are a special form of gratuitous contract and thus that they are exempt from the form requirements for donations *inter vivos*, just as other gratuitous contracts are. This is not only faithful to the existing jurisprudence on the topic of charitable pledges, but it is also more logically defensible. Cases such as *Baptist Hospital* and *Louisiana College* stand for the proposition that charitable subscriptions are enforceable without using an authentic act. Having rejected their characterization as onerous contracts, the explanation as to their enforceability must lie elsewhere. Because these subscriptions are unquestionably gratuitous in nature, the requirement of the authentic act exists only for transactions that are traditionally characterized as donations *inter vivos*, not for all contracts that are gratuitous in nature.<sup>238</sup> Many types of gratuitous contracts are not

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234. *La. Coll.*, 10 La. at 167; *Baptist Hosp.*, 129 So. at 427.

235. *Baptist Hosp.*, 129 So. at 427.

236. *La. Coll.*, 10 La. at 167.

237. LA. CIV. CODE art. 1910 (2016).

238. *See id.* art. 1541.

subject to the form requirements for a donation *inter vivos*. For example, a remission of debt is a gratuitous contract that can be accomplished without an authentic act, as can uncompensated loans, mandates, pledges, and deposits.<sup>239</sup> Despite the similarity between charitable subscriptions and donations, a more practical treatment of charitable subscriptions may demand that they be treated like other gratuitous contracts that are not subject to the burdensome authentic act form or perhaps as merely a jurisprudential and customary exception to the rule of article 1541. Such a distinction appears completely appropriate, given the societal desire to facilitate these gratuitous pledges.

Finally, the Louisiana Supreme Court has stated that “where a Louisiana Civil Code article has been derived from a French Civil Code article, interpretation of the latter is highly instructive for, if not determinative of, the interpretation of the former.”<sup>240</sup> Although some French cases have similarly adopted the characterization of pledges as onerous contracts,<sup>241</sup> Planiol, in his treatise on French civil law, adopts a different rationale:

Subscriptions opened to create or sustain a work of charity of public utility are donations which ought to fall within the principle of solemnity, inasmuch as there is no text which excepts such donations. But practically, the multiplicity and the small amount of the individual subscriptions make the use of solemn forms impossible . . . . It is thus preferable to consider this as a special contract, sanctioned by reason of custom, a contract which is not a donation but serves to realize a liberality.<sup>242</sup>

More recent authors on comparative donations law agree. Richard Hyland in a work on the comparative law of gifts has stated the following with regard to the French law of charitable subscriptions:

The case law appears to validate charitable subscriptions as indirect gifts *sui generis*. Because only modest sums are generally involved, notarial form is impractical. . . . In deciding that such gifts are exempt from form requirements, the Cassation Court

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239. See, e.g., *id.* art. 1890 (remission); *id.* art. 2904 (loan); *id.* art. 2993 (mandate); *id.* art. 3149 (pledge); *id.* art. 2929 (deposit).

240. *Howard v. Adm’rs of Tulane Educ. Fund*, 986 So. 2d 47, 57 (La. 2008).

241. Smith, *supra* note 20, at 7–8 (“It has not been difficult for the French to resolve the question by holding that the cause in such a case is not a will to give or spirit of liberality but rather the intention of arriving at the end sought, the creation or perpetuation of an agency in which the subscriber is interested.”).

242. 5 PLANIOL & RIPERT, *supra* note 116, § 418 (Author’s translation).

employs the same language that is often used to validate indirect gifts.<sup>243</sup>

Whatever the rationale, charitable pledges are enforceable in Louisiana and elsewhere even without an authentic act. This Article suggests that they are special gratuitous contracts, by virtue of custom and practice, that should be treated as such and not as donations *inter vivos*. Consequently, they are exempt from the traditional form requirements for donations *inter vivos* and in compliance with the general rules of gratuitous contracts.

### *C. Commutative, Independent, Aleatory, and Certain*

Perhaps the most vexing conceptual puzzle in the modern Louisiana contract classification scheme is the one distinguishing commutative from aleatory contracts and differentiating commutative contracts from bilateral ones. The biggest innovation in this area was the addition in 1825 and then subsequent deletion in 1984 of “independent” contracts in contrast to “commutative” ones and “certain” contracts in contrast to “aleatory” ones.<sup>244</sup> Common law sources, which have been suggested as a possible source for these additions,<sup>245</sup> do not appear fruitful, as Anglo-American treatises on contract law were largely unknown in the eighteenth century and Blackstone gives little time to the topic of contracts in his commentaries.<sup>246</sup> Powell, writing in 1790, published the first doctrinal work on contract law. But no evidence of the newly added contracts can be found in Powell (1790),<sup>247</sup> or in Comyn (1823),<sup>248</sup> Newland (1821),<sup>249</sup> or Colebrooke (1818)<sup>250</sup>—the latter of whom demonstrates a heavy reliance on Pothier and Roman law. Colebrooke, writing in 1818, however, distinguishes commutative contracts from contingent ones and notes that in commutative contracts the equivalent is exchanged, but when the “equivalent consist[s] in the risk of loss, or the chance of gain,

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243. RICHARD HYLAND, GIFTS 398 (2009).

244. Compare LA. CIV. CODE arts. 1762, 1768 (1825), with LA. CIV. CODE arts. 1911, 1912 (2016).

245. LITVINOFF, *supra* note 20, § 91, at 143.

246. GORDLEY, PHILOSOPHICAL ORIGINS, *supra* note 6, at 134.

247. JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS (2d ed. 1790).

248. SAMUEL COMYN, A TREATISE OF THE LAW RELATIVE TO CONTRACTS AND AGREEMENTS NOT UNDER SEAL (1823).

249. JOHN NEWLAND, A TREATISE ON CONTRACTS WITHIN THE JURISDICTION OF THE COURTS OF EQUITY (1821).

250. H.T. COLEBROOKE, TREATISE ON OBLIGATIONS AND CONTRACTS (1818).

dependent on an uncertain event, the *contract* is contingent and *aleatory* or *hazardous*.”<sup>251</sup> Pothier, on whom Colebrooke appears to rely, makes a similar juxtaposition and provides a similar explanation.<sup>252</sup> Still absent, however, is the distinction between “aleatory” and “certain” contracts adopted by the revision of 1825. Story, writing in 1856, observes a distinction between an “absolute contract,” defined simply as “an agreement to do or not to do something, at all events,” and a “conditional” one, defined as “a contract, whose very existence and performance depend on a contingency and condition.”<sup>253</sup>

### 1. *The Division in the 1825 Code*

Despite the historical uncertainty of the origin of independent and certain contracts, the divisions or classes of contracts set out by the 1825 Civil Code and preserved in Louisiana law until 1984 did create a seemingly sensible pairing for contracts, even though different from the French. Commutative contracts were defined as “those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given or promised by the other.”<sup>254</sup> In contrast, independent contracts were “those in which the mutual acts or promises have no relation to each other, either as equivalents or as considerations.”<sup>255</sup> This distinction was one “in relation to [the contracts’] substance.”<sup>256</sup> What was essential was an interdependence between the parties’ obligations. The *Expose des Motifs* suggests that this distinction was introduced to make clear the application of the defense of non-performance: “The redactors of the Civil Code of 1825 were greatly concerned with the *exceptio non adimpleti contractus*. That concern, no doubt, led them to introduce the distinction between ‘commutative’ and ‘independent’ contracts.”<sup>257</sup> In other words, when one party to a dependent obligation does not perform his obligation, the other party is not obliged to perform his. On the other hand, if obligations are independent of each other, nonperformance of one would give the other party a claim for specific performance or damages but would not serve as basis for not performing his own independent obligation. For example, in *Poole v.*

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251. *Id.* at 17.

252. *See* POTHIER, *supra* note 87, at 9.

253. WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS 30–31 (1856).

254. LA. CIV. CODE art. 1768 (1870).

255. *Id.* art. 1769.

256. *Id.* art. 1767.

257. *Exposé des Motifs of the Projet of Titles III and IV of Book III of the Civil Code of Louisiana*, in 6 LA. CIV. CODE, at 6 (West 2008).

*Ward*, the court found that a donation of a fractional interest in various certificates of deposit in connection with the donees subsequent agreement not to contest the succession proceedings through which the donor had inherited the interest were not separate independent obligations but were rather two dependent ones that formed part of the same compromise.<sup>258</sup>

Considered in terms of the “effects” of the contracts, the 1825 Civil Code noted that contracts could be “certain” or “aleatory.”<sup>259</sup> The object of certain contracts would occur “in the usual course of events,” but performance under an aleatory contract depended upon “an uncertain event.”<sup>260</sup> In truth, the category of “certain” contracts seems somewhat artificial and expounded only to provide a residual category for all those ordinary contracts where performance was not dependent upon an uncertainty.

## 2. *The Division in Modern Law*

Present law, however, omits “independent” and “certain” and creates an apparent pairing between commutative and aleatory contracts. The current Louisiana Civil Code defines a commutative contract as one in which “the performance of the obligation of each party is correlative to the performance of the other.”<sup>261</sup> No explanation, however, of what is meant by “correlative” is provided.<sup>262</sup> Comment (b) to article 1911 reminds the reader of the importance of the term, whatever it might mean: “correlative performances are *the* essential feature of commutative contracts.”<sup>263</sup> Lest one think this definition is reminiscent of the definition of “bilateral contracts,” the reader is quickly reminded that “[a] distinction is thus made between correlative obligations, which make a contract bilateral . . . and correlative performances, which make the contract, not only bilateral but also commutative.”<sup>264</sup> Comment (c) then proceeds to explain that the “correlative performances” of commutative contracts, rather than correlative obligations of bilateral ones, “set[] forth the ground for the traditional defense of nonperformance (*exceptio non adimpleti contractus*) that operates in the sphere of commutative contracts alone.”<sup>265</sup> After all,

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258. *Poole v. Ward*, 576 So. 2d 1089, 1090 (La. Ct. App. 1991).

259. LA. CIV. CODE art. 1775 (1870).

260. *Id.* art. 1776.

261. LA. CIV. CODE art. 1911 (2016).

262. *See* LEVASSEUR, *supra* note 5, at 8.

263. LA. CIV. CODE art. 1911 cmt. b (emphasis added).

264. *Id.*

265. *Id.* cmt. c. In France, this defense seems more appropriately a characteristic of bilateral contracts, as opposed to commutative ones. *See, e.g.*, NICHOLAS, *supra*

article 2022 provides that “[e]ither party to a commutative contract may refuse to perform his obligation if the other has failed to perform or does not offer to perform his own at the same time, if the performances are due simultaneously.”<sup>266</sup> Simultaneity of performances, then, is suggested by this comment and article 2022 as the hallmark of commutative contracts under the current law—a conclusion bolstered by comment (c) to the very article, which provides that it applies “only where the performances of the parties are to be rendered simultaneously.”<sup>267</sup> By way of clarification, the comment continues to provide an example of a bilateral contract that cannot benefit from this article, even though the obligations are reciprocal, because the performances are not due simultaneously: “[the article] does not apply where the performances are not to be rendered simultaneously as in the case of a lease.”<sup>268</sup>

But this is surely a mistake. The defense of non-performance is more appropriately applied to bilateral contracts, not commutative ones. Although the text of article 2022 seems to limit its application to “commutative” contracts, it should not be further limited by the comments suggesting that performance is due simultaneously. The simultaneity explanation of commutative contracts has been ably critiqued by Alain Levasseur, who has noted that, under this approach, the non-reciprocity of performances could exist only when one performance is subject either to a suspensive term or a suspensive condition.<sup>269</sup> In either instance, classification of the performances as “correlative” seems a poor way to express the code articles on term and condition.<sup>270</sup> Additionally, it is hard to see what such a characterization adds to the Civil Code “except for confusion and redundancy.”<sup>271</sup>

Indeed, the comments to the Civil Code requiring simultaneity of performances appear to have confused commutative contracts with those recognized in French contracts as being due instantaneously as opposed to successively. French scholars recognize this distinction as being traditional even if not part of formal French law. Terré, Simler, and Lequette write of contracts à *exécution instantanée*, which give rise to obligations susceptible of being executed at one time, such as a sale or

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note 119, at 39; 2 FRANÇOIS CHABAS, OBLIGATIONS 89, in LEÇONS DE DROIT CIVIL (8th ed. 1991); 2 PLANIOL, *supra* note 199, at 549; 2 RIPERT & BOULANGER, *supra* note 121 at 32; PLANIOL & RIPERT, *supra* note 116, at 36.

266. LA. CIV. CODE art. 2022.

267. *Id.* cmt. c.

268. *Id.*

269. See LEVASSEUR, *supra* note 5, at 9.

270. *Id.*

271. *Id.*



exchange.<sup>272</sup> Simultaneity of performance is not part of the law and should not be read into the requirements of commutative contracts.

The revision documents appear to show that no change in meaning was intended when the definition of commutative contracts was altered from requiring “equivalents” to requiring “correlative performances.” In fact, the concept of “equivalents” apparently was removed from commutative contracts in a somewhat ill-fated attempt to clarify the law. The reporter of the revision of the law of contracts explained the changes as follows:

The word “equivalent” may suggest more than it really means. In fact, if [Civil Code] article 1768 is read alone, it would seem that an exchange of equivalent values is required. If read together with [articles] 1860 and 1861, however, it becomes clear that, for the sale of immovable at least, price and value of the thing are regarded as equivalent when the former is no less than one half of the latter. In such a context, all that is accomplished by the use of the word “equivalent” is to connote an element of exchange. As such element is also connoted by the word “commutative,” the term “equivalent” may be eliminated from [article] 1768 without altering its meaning. The word “equivalent” was written into article 1104 of the Code Napoleon, from where it found its way into [Louisiana Civil Code article] 1768, owing to the writings of Pothier. A more realistic approach to commutative contracts is very much in order today.<sup>273</sup>

But exact equivalents have never been required of commutative contracts, as even Aquinas provided that relief should only be granted for “large deviations” or *laesio enormis*.<sup>274</sup> As further evidence that the modern revision was not intended to usher in a new approach, comment (a) to current article 1911 also makes clear that the 1984 revision “does not change the law.”<sup>275</sup> The idea of performances being considered as

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272. FRANÇOIS TERRE, PHILIPPE SIMLER & YVES LEQUETTE, *DROIT CIVIL: LES OBLIGATIONS* 83 (10th ed. 2009).

273. Saul Litvinoff, Revision of Book III of the Louisiana Civil Code of 1870: Memorandum No. 2, at 12 (La. State Law Inst., Jan. 20, 1973) (Materials Prepared for the Meeting of Committee) (on file with Author) (citations omitted); *see also* Saul Litvinoff, Revision of Book III of the Louisiana Civil Code of 1870: Obligation Revision (La. State Law Inst., Feb. 2–3, 1979) (Materials Prepared for the Meeting of Committee) (on file with Author); Minutes of the Council (La. State Law Inst., Feb. 2–3, 1979) (on file with Author).

274. *See supra* text accompanying note 79.

275. LA. CIV. CODE art. 1911 cmt. a (2016).

“equivalent[s]” then should not be read strictly but still remains a part of the concept of commutative contracts.

The juxtaposition of the article on “commutative” contracts with the one immediately succeeding it on “aleatory” contracts, however, suggests that more than mere “equivalence” is required. From a stylistic point, it would be odd to have articles 1911 and 1912 operate independent of each other and thus without any correspondence, given that the classification articles in the Civil Code are provided in pairs: 1907 and 1908 on unilateral and bilateral contracts; 1909 and 1910 on onerous and gratuitous contracts; 1913 on principal and accessory ones; and 1914 on nominate and innominate ones.<sup>276</sup> But the definition of an aleatory contract as “uncertain” hardly seems the opposite of the definition of a commutative one without building into commutative contracts the concept of “certainty” of performance and equivalence. The Quebec Civil Code has adopted this approach and states that “[a] contract is commutative when, at the time it is formed, the extent of the obligations of the parties and of the advantages obtained by them in return is certain and determinate.”<sup>277</sup>

The prior law did just that and paired “certain or aleatory” contracts together.<sup>278</sup> The French Code Civil likewise discusses commutative (*commutatif*) and aleatory (*aléatoire*) contracts in the same article, creating the same correspondence between the two in light of surrounding articles discussing unilateral and bilateral and onerous and gratuitous contracts.<sup>279</sup> In combining the concepts of “equivalence” and “certainty” for commutative contracts, the characteristic quality of commutative contracts in contrast to aleatory ones is that in the former the performances are interdependent and their equivalence is immediately obvious and certain, whereas in the latter no such interdependence or equivalence is required. Further, the uncertainty of the performance of an aleatory contract or the extent thereof often depends upon subsequent events, such as when an insurance contract pays out an uncertain amount only upon the occurrence of an uncertain event. Similarly, many French commentators write about commutative and aleatory contracts as if they are two sides of the same coin. Denis Tallon explains that commutative contracts, in contrast to aleatory ones, require some knowledge of the certainty of what is owed by noting that the difference is “the possibility of estimating at the time of concluding the contract the scope of what is owed.”<sup>280</sup> Other commentators have explained that commutative contracts are “susceptible

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276. *Id.* arts. 1907–1910, 1913, 1914.

277. Civil Code of Québec, S.Q. 1991, c. 64, art. 1382 (Can.).

278. LA. CIV. CODE art. 1775 (1870).

279. C. CIV. art. 1104 (Fr.).

280. Tallon, *supra* note 99, at 208.

to be immediately evaluated and not dependent, after the contract, on an eventual uncertainty,” such as a sale of a house or a rent of an apartment.<sup>281</sup> Similarly, Amos and Walton write that a contract is commutative “when the extent of the [performances] which are owed by each of the parties is immediately apparent.”<sup>282</sup> Planiol and Ripert provide similarly.<sup>283</sup> In fact, Planiol explains the difference as follows:

[C]ommutative [contracts] are those in which each of the contracting parties receives an equivalent for what he gives, as in the contract of sale, the seller ought to give the thing sold, and receive a price, which is the equivalent; the buyer ought to give the price, and receive the thing sold, which is the equivalent. . . . Aleatory (or hazardous) contracts are those by which one of the contracting parties, without contributing any thing on his part, receives something from the other, not by way of gift, but as a compensation for the risk which he runs. All games of chance, wagers, and contracts of insurance, are contracts of this description.<sup>284</sup>

As evident from the above, the functions and definitions of both “commutative” and “aleatory” contracts under current law are not significantly different from their predecessors in the code of 1870. Both current article 1912 and prior article 1776 are clear that a contract is aleatory when performance “depends upon an uncertain event.”<sup>285</sup> Comment (a) to article 1912 makes clear that the 1984 revision “does not change the law.”<sup>286</sup>

In fact, correct thinking reveals that commutative and aleatory contracts have an additional correspondence, as both are sub-classifications of onerous contracts.<sup>287</sup> French law is clear that neither commutative contracts nor aleatory ones can be gratuitous because the intent in performing each

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281. EUGENE GAUDEMET, *THEORIE GENERALE DES OBLIGATIONS* 24 (1937) (Author’s translation); PHILIPPE MALAURIE, LAURENT AYNES & PHILIPPE STOFFEL-MUNCK, *DROIT CIVIL: LES OBLIGATIONS* 201 (4th ed. 2009).

282. LAWSON ET AL., *supra* note 127, at 151.

283. PLANIOL & RIPERT, *supra* note 116, at 42 (“*Un contrat est commutatif lorsque l’entendue des prestations que se doivent les parties est immédiatement certaine.*”); *see also* TERRÉ, SIMLER & LEQUETTE, *supra* note 272, at 81.

284. POTHIER, *supra* note 87, at 8.

285. LA. CIV. CODE art. 1912 (2016); LA. CIV. CODE art. 1776 (1870).

286. LA. CIV. CODE arts. 1911 cmt. a, 1912 cmt. a (2016).

287. BEUDANT & LEREBOURS-PIGEONNIÈRE, *supra* note 110, at 28; GAUDEMET, *supra* note 281, at 24; BÉNABENT, *supra* note 114, at 3; 1 POTHIER, *supra* note 87, at 9; NICHOLAS, *supra* note 119, at 45; LAWSON ET AL., *supra* note 127, at 151.

is to secure a counter performance.<sup>288</sup> Because onerous contracts are those in which each party performs in order to procure a counter performance, one can readily see that if that performance is certain and regarded as equivalent, then the performances are correlative and the contracts are commutative.<sup>289</sup> If performances are subordinated to a hope or chance, they are aleatory.<sup>290</sup> In addition to being onerous contracts, commutative and aleatory contracts under the Louisiana Civil Code are also bilateral as the defining civil code articles require that more than one party must assume or undertake a performance or an obligation.<sup>291</sup>

The significance of this distinction is seen primarily in the case of the defense of nonperformance as discussed above. In addition, lesion is allowable in cases of commutative contracts but never in the case of aleatory ones.<sup>292</sup> Although the articles on lesion do not by their terms limit their application to commutative contracts, it is clear that the basic conceptions of commutative justice espoused by Aristotle and built into contract law by the late scholastics and subsequent scholars limit this remedy to instances of commutative justice when equivalents are exchanged but not ultimately provided. Louisiana law has likewise limited this remedy to commutative contracts. In *McDonald v. Grande Corp.*, the court refused to cancel a mineral lease and concluded that “[t]he enforcement of [aleatory] contracts cannot be avoided on the grounds of lesion, the chances of loss being of the essence in that kind of contract and compensated by the chances of gain.”<sup>293</sup>

In short, the modern Louisiana Civil Code leaves much to be desired in its presentation of commutative and aleatory contracts. Although purporting to clarify the law, the latest revision seems to have created more confusion than it avoided and created more uncertainty than is merited, especially in light of the relative unimportance of this dichotomy. Even so,

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288. MALAURIE, AYNÉS & STOFFEL-MUNCK, *supra* note 281, at 201.

289. *Id.*; BEUDANT & LEREBOURS-PIGEONNIÈRE, *supra* note 110, at 28.

290. MALAURIE, AYNÉS & STOFFEL-MUNCK, *supra* note 281, at 202.

291. LA. CIV. CODE art. 1911 (defining commutative contracts as those in which both parties have performances); *Id.* at art. 1912 (defining an aleatory contract as one in which “either party’s obligation” is subject to some uncertainty); *see also* MALAURIE, AYNÉS & STOFFEL-MUNCK, *supra* note 281, at 201 (defining the distinction between aleatory and commutative contracts as a sub-distinction of bilateral contracts under onerous title).

292. GAUDEMET, *supra* note 281, at 24–25; BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 129, at 246; MALAURIE, AYNÉS & STOFFEL-MUNCK, *supra* note 281, at 203. For a good discussion of the history and development of lesion law in Louisiana, see Dian Tooley-Knoblett & David Gruning, SALES, *in* 26 LOUISIANA CIVIL LAW TREATISE 623–49 (2012).

293. *McDonald v. Grande Corp.*, 214 So. 2d 795, 806 (La. Ct. App. 1968).

this comparative and historical analysis suggests that the distinction might still be tenable.

#### *D. Principal and Accessory*

The fourth distinction of contracts in Louisiana law is that between principal and accessory.<sup>294</sup> Principal contracts are those in which secured obligations arise by virtue of a contract, whereas accessory ones are made to “provide security for the performance of an obligation.”<sup>295</sup> The meaning of this dichotomy is clear. “A principal contract is one which can stand on its own; it needs no legal (contractual or otherwise) support than its own to exist . . . .”<sup>296</sup> An accessory contract, on the other hand, needs a principal contract to exist. It supports and bolsters a principal contract but cannot exist on its own. A sale, lease, and loan are principal contracts, whereas a suretyship, mortgage, or pledge is an accessory one.<sup>297</sup>

The distinction between the principal and accessory contracts is obvious but important. An accessory contract cannot exist without a principal one, but the reverse is not true.<sup>298</sup> A mortgage is not valid once the loan has been extinguished. A pledge is not enforceable if the underlying obligation is not valid. The invalidity of a suretyship or other accessory obligation, however, does not affect the validity of the underlying principal obligation.

#### *E. Nominate and Innominate*

The fifth and final distinction in Louisiana contract law is between nominate and innominate contracts.<sup>299</sup> Nominate contracts are those with special designation or names, such as “sale, lease, loan, or insurance.”<sup>300</sup> Innominate contracts are those “with no special designation.”<sup>301</sup> The distinction is important because nominate contracts, such as sale or lease, are governed by special rules, whereas innominate ones are subject to the general rules on contracts. Unlike Roman law, the classification of the contract does not affect its enforceability. As stated long ago by the Louisiana Supreme Court, “[i]f there be a valid existing cause for a

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294. LITVINOFF, *supra* note 20, § 110, at 194.

295. LA. CIV. CODE art. 1913 (2016).

296. LEVASSEUR, *supra* note 5, at 11.

297. LA. CIV. CODE art. 1913.

298. BEUDANT & LEREBOURS-PIGEONNIÈRE, *supra* note 110, at 37.

299. LA. CIV. CODE art. 1914.

300. *Id.*

301. *Id.*

contract, it is immaterial that it should not fall under some contract particularly named or classified in the Code.<sup>302</sup> In *Thielman v. Gahlman*, a grantor conveyed property to a grantee in exchange for support and a home during the life of the grantor and burial after death.<sup>303</sup> Given the uncertainty involved in the grantee's performance, the court appropriately noted that this contract was aleatory and thus could not be attacked on the grounds of lesion.<sup>304</sup> Moreover, given the performances to be exchanged in this bilateral contract and the uncertainty as to the price, this contract was innominate and thus subject to the general rules on contracts.

#### CONCLUSION

In conclusion, the classification of contracts clearly has a long history in the civil law. Although the purpose of classifying contracts has changed over the years, almost as much as the categories themselves, modern law still attaches many important consequences to the classification scheme. Through the use of historical analysis and comparative research, this Article has articulated and clarified those consequences.

It is beyond cavil that the scheme adopted by the drafters of the Louisiana Civil Code is far from perfect, and this Article has not been reluctant to criticize the modern approach. The current classification system, however, is still relevant for ascertaining remedies and, in many instances, the applicable law. As has been noted elsewhere, "in matters of law, as it is also the case in other sciences, classifications should always be taken with some reservations."<sup>305</sup> Classification systems are useful as rules of thumb, but must not be pursued blindly and without attention to the outcomes they produce.<sup>306</sup> Cautious skepticism should always prevail, as Louisiana's contract classification systems are "but tentative conceptual schemes that are valid only to the extent they are useful. When they cease to be useful, they should be abandoned."<sup>307</sup> The Romans realized this when they allowed for the enforceability of a variety of innominate contracts outside their traditional four-fold system. Louisiana scholars, judges, and lawyers should, too.

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302. *Kirk v. Kansas City, S. & G. RY. Co.*, 25 So. 457, 461 (La. 1899).

303. *Thielman v. Gahlman*, 44 So. 123, 124 (La. 1907).

304. *Id.*

305. LITVINOFF & TÊTE, *supra* note 149, at 133.

306. *Id.*

307. *Id.*