THE GREAT DEBATE OVER THE LOUISIANA CIVIL CODE'S REVISION

-- PANELISTS --

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Julio Cueto-Rua
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Shael Herman
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Introduction By Melvin Dugas, Managing Editor

In his recent law review article, *The Death of a Code--The Birth of a Digest,*[1] Professor Vernon Palmer of Tulane University shook the foundations underlying the modern ongoing revision of the Louisiana Civil Code. Predictably, the article stimulated heated debates, both in the halls of the law schools and in the offices of the downtown law firms. The questions in both circles were the same: did Professor Palmer's article portend the fourth great crisis of the Louisiana Civil Code? Would the nonrepealed code articles of 1870 be exhumed and walk in equal rank with their newly enacted progeny? If the old articles are concurrently in force, would this fact destroy the coherence and completeness necessary to a code? Furthermore, if the intricate caselaw surrounding the 1870 articles was enshrined in the new articles, would this also have the effect of transforming the Code into a digest?

In an effort to answer these weighty questions, the Tulane Civil Law Society sponsored a discussion between Professor Palmer and a panel of some of the most distinguished experts on Louisiana civil law: Professor A.N. Yiannopoulos of Tulane Law School; Professor Julio Cueto-Rua of the Paul M. Hebert Law Center at the Louisiana State

1. 63 Tul. L. Rev. 221 (1988). Briefly stated, the thesis of Professor Palmer's article is that by "amending and reenacting" new articles of the revision, the legislature did not expressly repeal the earlier Code articles. If these old articles do not substantively conflict with the new articles, they may still be good law even though they are no longer in the Code. Further, the Revision incorporates the Louisiana jurisprudence into the scheme of the Code and radically changes the context in which the new articles function. For a variety of reasons the author concludes that a civil code, as defined in the French tradition, has been lost and has been replaced by a civil law digest.

University; Mr. Shael Herman of the New Orleans law firm of Sessions, Fishman, Boisfontaine, Nathan, Winn, Butler and Barkley; Associate Justice James L. Dennis of the Louisiana Supreme Court; and Professor David Gruning of the Loyola University School of Law. Professor Cynthia Samuel of the Tulane Law School served as moderator. The lively discussion of this panel took place on April 7, 1989 and was transcribed for publication in the Tulane Civil Law Forum. Each speaker was given an opportunity to edit and annotate his section for purposes of clarity; however, it was the intent of the Forum to retain the format of a dialogue. For this reason, the following piece lacks the voluminous footnotes typical of law review articles. Nonetheless, the editors of the Forum hope this symposium will shed some much needed light on whether we really have witnessed the death of a code and the birth of a digest.

The Panel Discussion

Professor Samuel:

I'm delighted to see such a good audience today, both civil law students and common law students, common law faculty, civil law faculty, practitioners. It's a wonderful response to the program the Civil Law Society has set up for today. I want to give you a little background into the kind of discussion you are likely to hear today because those of you who are young may be a bit surprised to see how lively the debate may be.

For almost 200 years, the people of Louisiana have been trying to create their own breed of that civil law animal known as a "civil code" and secure for it a habitat in which it could flourish. Recently, the breeding stock of laws has come from an increasing number of sources, European, South American, even the common law, with the expert breeders differing over the merits of each. As with any breeding program, if you know anything about animals, there are risks: the appearance of new but unwanted characteristics, regression to old undesirable characteristics, failure to thrive, unacceptable expense,

unanticipated delay, and even sudden death. Because this enterprise is so perilous, we keep the evolving animal under constant observation.

Those who observe the animal and its habitat have not always agreed on their conclusions, and on at least two prior occasions the disagreement has been quite lively. Both times an article in the Tulane Law Review set off a great debate. In 1937, LSU Professor Gordon Ireland came to the conclusion that "Louisiana is today a common law state." (11 TLR 585,598). This was like bombing Pearl Harbor, and his own colleagues, Dean Hebert and Professors Daggett, Dainow, and McMahon, went to war against him in the following issue of the TLR.

In 1971, Professor Batiza of Tulane traced the literal sources of the Louisiana Digest of 1808, that Digest being the first systematic legislative rendering of Louisiana civil law. His conclusion, that the sources of the Digest were essentially French, was challenged by Professor Pascal of LSU, who said they were essentially Spanish. This controversy was not just of historical interest, for the Digest of 1808 was in large part incorporated into the Code of 1825, which is the basis for the 1870 codification, which, with revisions, is our present codification. So the controversy had a direct impact on the origin of parts of our present codification and suggested the tools we could use for interpreting it. Dean Sweeney termed this controversy a tournament of scholars in recognition of the dedication and élan with which each opponent put forth his case.

And now we have another provocative article from the TLR in the December 1988 issue, this time by Professor Vernon Palmer of Tulane, entitled *The Death of a Code, the Birth of a Digest*, in which he examines the latest generation of Louisiana Civil Code and has spotted some characteristics that may not be desirable.

The procedure I propose, if the panelists will agree, is to give Professor Palmer a few minutes to synopsize his article in case there are a few people who haven't read it and all the footnotes, and then I'd like to divide Professor Palmer's position into its two major issues. Then I will ask each of the professors on the panel, including our practitioner-professor, to comment on the first issue. After the

professors have argued back and forth, I'm going to ask the judge to decide the case. Then we'll do the same thing with the second issue.

Professor Yiannopoulos:

We can have a jury, too !

Professor Samuel:

O.K. Professor Palmer, will you begin?

Professor Palmer:

I, too, wish to thank the Civil Law Society and its energetic president, A.J. Herbert, for this gathering which allows us the opportunity to have this discussion and to present all points of view. I also want to thank my students who turned out in numbers for this gathering, and I beg the indulgence of others in the audience as I address immediately their only intellectual concern in these proceedings - Yes: it will be on the final exam, which will be closed book. [Laughter] No: you don't have to remember the Code articles by number. [Laughter]

Let me begin with just a few words of background information that may not be familiar to everyone of you. There has been no true revision of the Louisiana Civil Code since its adoption in 1825. A technical revision took place in 1870, but this was a verbatim reenactment, merely intended to drop the unconstitutional slavery provisions of the original Code and to add certain amendments that had been passed by the legislature in the interim between 1825 and 1870. Then, in 1948, recognizing that the Code was becoming anachronistic and very old, the Legislature entrusted the task of Code revision to the Louisiana Law Institute. Since 1938, the Louisiana Law Institute has been the official law revision commission and official law reform agency of the state of Louisiana. The Institute has already given us a number of highly successful codifications in this century, including the Criminal Code of 1942, the Revised Statutes of 1950, the Code of

Procedure of 1960, and others. As to the Civil Code's revision, this preparatory work began in 1968, and the first fruits of the revision came about 10 years later when the revised property articles were first enacted into law between the years 1976 and 1979. Now from the beginning, a political decision was made, or a strategic decision was made, to revise the Civil Code incrementally, piece by piece, so it is often called by those in the field "a piece-meal revision" - one set of articles at a time. It is a book-by-book, title-by-title revision of the Civil Code, so that the Legislature could more easily enact, and more palatably digest it.

After property, there was enacted the following revised Code Articles:

(1) The Matrimonial Regime (1979),
(2) Partnership (1980),
(3) Successions (1981),
(4) Occupancy, Possession, and Prescription (1982-83),
(5) The Law of Obligations (1984),
(6) The Preliminary Titles (Articles 1 - 24 or 25) in 1987,
(7) The Law of Natural and Juridical Persons (1987),
(8) Suretyship (1987) which is at the other end of the Code; and
(9) Marriage (1987).

Thus, we have seen book-by-book, title-by-title, incremental revision of the Civil Code in no particular sequence or logical order. And the result as we sit here today is that after more than 20 years of this process, about 40% of the Code articles of the 1870 Code have been revised.

My essay, *The Death of a Code*, consists of my reflections upon that revision and the effects that it is having upon the civil law in Louisiana. What has led me to the rather lugubrious conclusion that the Code is dead and that the Code is now a Digest? Briefly, my conclusion is based upon two very different but complementary analyses: first, I've analyzed closely the legislation enacting the revision, the 16 separate pieces of legislation. This reveals that the

legislature has neither expressly nor impliedly repealed the old Code articles that were under revision. The result is that the old Code articles, despite the revision continue to live and continue to be law in force. This conclusion disagrees with all conventional assumptions, but no one was looking at the legislature's enactments; no one was really analyzing what the legislature had in fact done or said, and no one was reading this legislation in light of Code principles about repeal, nor in light of historic crises of the 19th Century in Louisiana where courts applied these Code principles, sometimes to the amazement of the legal community, and held that old, prior law was still in force concurrently with a new Code or Digest that was subsequently enacted.

The second part of my analysis starts from the fact of non-repeal and then goes on to look at the new Code articles themselves in their substance and structure. My study of the revision's structure and substance leads to the conclusion that the Code has adopted now the architecture and the methodology of a digest rather than that of a code. Most new articles come pre-glossed, pre-annotated by old jurisprudence. Many new articles are caught in the contradiction of a rule/counter-rule methodology which pits the text against the comment, or pits text and comment versus old jurisprudence. Such new provisions cannot stand on their own two feet, so heavily reliant are they upon non-legislative sources of law. I haven't enough time in my introductory remarks to lay the foundation which supports the second conclusion. I am sure it will come out in later discussion. For the moment I will only address the first question - the analysis of the legislation and the effect of non-repeal.

Before turning to this analysis, however, let me define two terms: code and digest. In the civil law, a digest may refer to a less scientific kind of codification that preceded the modern European codes. A civil law digest does not break with the past sources but simply summarizes and synthesizes them. Such were the general characteristics of Justinian's Digest, the first kind of code ever possessed by the Romans. A civil law digest may also refer to a partial and incomplete form of codification that is supplemented by non-codified, pre-existing law and does not break with its legal antecedents.

This was apparently the reason why in 1808 the Louisiana redactors chose to call that codification a digest, rather than a code.

Let me now turn to an analysis of the enacting legislation. The enacting legislation of 1976 - 1987 consists of 16 separate pieces of legislation, which may be summarized as follows:

Of 1535 articles that were revised, only 236 (about 15%) were expressly repealed. The remainder, 1271 articles (minus 28 that were redesignated) were amended and reenacted. The distribution of repeals among these 16 pieces of legislation is fascinating. It has a haphazard, aleatory quality to it. With matrimonial regimes, all 135 of the prior Code articles were repealed. However, when we turn to property, only 51 out of 376 prior articles were repealed. The rest were amended and reenacted. Turning to the obligations articles, on the other hand, 514 articles were amended and reenacted, and only one article was repealed. Consequently, we have almost an indecipherable policy with respect to why or when repeals occur.

And what does this mean? Well, as to the 236 Articles that have been expressly repealed, they will undoubtedly cease to exist, and nothing further need be said about that. It is as though they had never existed. But as to the remaining 1271 Articles (or 85% of the total), their "amendment and reenactment" did not produce their repeal, for we know from the Code itself exactly what is required. An express repeal means "literally" repealed, and the word "repealed" is a sacrosanct word used throughout our history to accomplish that literal declaration. The words "amended and reenacted" do not announce a repeal and have never been construed to mean a literal repeal. And the legislature knows the difference, because in 15% of the cases, it does use the word "repeal"; whereas in the other 85%, it does not. So to say that amended and reenacted is a way of creating an express repeal is putting words in the legislature's mouth, indeed putting the wrong words in the legislature's mouth.

Therefore the conclusion follows that there has been no express repeal of the 1271 articles that were only "amended and reenacted." Secondly, and even clearer, there has been no implied repeal of these 1271 articles because an implied repeal is defined this way: the

subsequent revising law must substantively conflict with the earlier law. The test of an implied repeal is one of substantive conflict. There is very little, or not a great deal, of substantive conflict between the revised articles and the old articles, and to claim that all of these 1271 articles are in substantive conflict, and hence impliedly repealed, will not do the trick. They are not.

Upon analysis, which has yet to be completely or systematically done, very few of the articles will be found to be substantively incompatible. For example, if a later law says that certain close relatives may enter into matrimony but an earlier law says that they may not, then you have a substantive conflict between the provisions and an implied repeal of the earlier law has occurred. If a later law says that a person 18 years old may enter into contract, but an earlier law says that such a person is a minor who may not contract, again there is a substantive conflict.

Now the Code only permits these two forms of repeal, and no third alternative exists. Hence the conclusion must be that the bulk of the old Code articles remain in force, for they have not been expressly repealed by literal declaration, nor impliedly repealed due to a substantive conflict with the new articles.

Now this situation must wreak havoc on the Revision's noble attempt (with which I totally agree) to modernize and clarify the law. It also wreaks havoc on the concept of a Code that is supposed to be logical, coherent, complete, self-sufficient, and a clean break with the past.

The anomaly of having a revision without complete express repeal is clearly reflected in our own legal history. Historically, our present Code revision represents the only example of codification in the 20th Century where the Louisiana Legislature has not expressly repealed the prior law. Look what the Legislature did on the prior occasions when it gave us new Codes. In 1942, when the Criminal Code was enacted, the Legislature published a specific and lengthy list of every prior criminal law that it wanted to repeal expressly, and it simultaneously published a list of those laws it wished to expressly preserve in force. Look what it did in the case of the Revised Statutes

of 1950, where we find elaborate schedules and appendices of the expressly repealed laws. Look what the Legislature did in the case of the old Code of Practice when it enacted the new Code of Procedure in 1960. It declared that every article of the old Code of Practice was repealed. Hence, the relevant query today is: "Why the present deviation from this historical pattern?" What a contrast we now have between those meticulous repeals of the past and the haphazard approach of the current civil code revision.

The early history of the 19th Century shows that the present deviation constitutes a very real danger. In the turbulent legal history of this state, we have witnessed two or three prior occasions where grave situations arose that were remarkably similar to the one before us now. I'm referring in passing to the famous crisis of 1817 and to the decision in *Cottin v. Cottin*,[2] where it was ruled that our 1808 Digest failed to expressly repeal the Spanish law. This therefore meant that the Spanish law continued to be in force in Louisiana into the statehood period, to the extent that these Spanish laws were compatible with the new provisions of the Digest.

A second crisis occurred soon after the enactment of the 1825 Code, and was once again due to insufficient attention to the repeal of prior law. The courts found that certain parts of the old Digest were still in effect and, by extension, there had not even been a clean break with the old Spanish laws. In 1828, three years later, the Legislature recognized the problem and passed the Great Repeal, an express repeal of the 1808 Digest and all the Spanish law which had gone before.[3] The historical lesson is clear: a Code in its true sense cannot function, cannot merit the name of a code, without an express repeal of all prior law.

Today this lesson has been forgotten, but only temporarily I hope. It had been remembered and observed throughout the 20th Century when we had other code and statutory revisions. It seems logical now to recognize that a new crisis over sources is on the

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2. 5 Mart. (O.S.) 93 (La. 1817).

3. This statute, Act 83 of 1828, expressly abrogated the Digest of 1808 and "all the civil laws which were in force before the promulgation of the civil code lately promulgated."

horizon and may soon arrive. If it should come, the crisis could be heralded by a decision similar to *Cottin v. Cottin* in 1817 in which our present Louisiana Supreme Court, or some other court, would give effect to an article of the 1870 Code that had been revised, thereby exploding the conventional belief that those articles had been repealed. At that point some legal historian may suggest that what we need is another Great Repeal, just as we had in 1828. On the other hand, some legal pragmatist might stand up and say that a general repeal would not really be advisable because the new articles he had studied, both structurally and substantively, depend upon the old articles and old jurisprudence. Indeed, the next crisis may start with some famous case and then end with a study showing which articles of the 1870 Code have survived an implied repeal, and which have not. For what has emerged out of the revision is not a coherent, self-contained code, as defined in French tradition. That kind of code is dead. The revision has spawned a digest in which there are two layers of code provisions concurrently in force. There is also a wealth of the old Code's jurisprudence and a new set of revision comments struggling to regulate the interplay between these rival sources. So the roots of the problem, in my judgment, begin with the legislature's failure to repeal the old Code, but then they sink deeper. The revised Code now has the architecture of a digest. Its articles have been designed to synthesize the pre-revision jurisprudence and they presuppose the continued existence of the old Code.

In conclusion, may I recall what the Irish poet, William Butler Yeats, once wrote in his famous poem, "The Second Coming." He said,

> "Turning and turning in the widening gyre,
> the falcon cannot hear the falconer.
> Things fall apart. The centre cannot hold."

I wonder if we, as we extend the ambit of the revision, can we still hear the call of our original traditions and our revered jurisconsults? Must things fall apart? Can the center hold? The answers depend upon other questions. Is a digest a more realistic expression of the system we have and know, rather than the Livingstonian conception that we always revered but imperfectly followed? Will the profession recognize the crisis or perceive the shift of paradigm from code to

digest? Should revision of this kind be continued? Should corrective measures be made to resuscitate the Code?

I'm sorry to end with so many questions, but I believe that to bury the Code without examining these issues would cast dishonor upon the law and upon ourselves as well.

Thank you.

Professor Samuel:

Thank you, Professor Palmer. We look at the first issue you raised and that is, has there been an express or implied repeal of the old Code articles, and something tells me Professor Yiannopoulos is dying to have his say on this. Shall I call you first, Professor Yiannopoulos?

Professor Yiannopoulos:

Shall I have you call time?

Professor Samuel:

Well, you can take as much time as you need.

Professor Yiannopoulos:

Well, I would like to take the time to make a few assertions, too. The thesis of Professor Palmer that I will address is the question of whether there has been an express repeal of the provisions of the Louisiana Civil Code of 1870. I will not address the questions of whether we have created a digest or whether there are faults in the revision. These may be addressed later by others. I am responsible for a part of the revision and if there are faults, well, we can debate the matter at another forum. Here, I need only state that what I read in the article of Professor Palmer is mostly assertions that do not rest on facts and are confused with opinion.

I'm not certain when Professor Palmer states a fact, states an assumption, or states an opinion. He writes, "the old Code articles have not been expressly repealed"[4] on page 224. Is this a fact, Professor Palmer, or is this your opinion? He continues, "they have been simply amended and reenacted,--" Now, is this a fact? "--which means that these old articles have been kept alive provided that they are not contrary to or irreconcilable with the revision." Again, is this a fact or an opinion? I continue: "the result is that two Codes coexist and govern the same subject matter concurrently." Is that a fact or an opinion? "And that," on the same page, "transactions entered into before the effective date of particular revisions will be governed by the old law subject, of course, to the retroactivity provisions of the Louisiana Civil Code Article 6." Now here, this is an illustration of a fact, an opinion, and an assumption all in one. It is not true that transactions entered into before the effective date of particular revisions will be governed by the old law. This is not a fact. Why? Because at least throughout the whole revision of property, the Institute has taken care to have a provision in the title being revised to state that, "Things," in this title "Of Things" shall apply to existing things. The same as to usufruct, limited personal servitudes: "this title shall apply to existing limited personal servitudes." Further, as to predial servitudes, "this title shall apply to existing predial servitudes." Of course, the proviso is there: "unless application of the law retroactively would conflict with the Louisiana Constitution or with the United States Constitution." Article 6 of the Louisiana Civil Code that is being cited has no application and no relevance in that respect.

Turning to Professor Palmer's basic thesis, that there has been no express repeal, the question to ask is "What is express repeal?". Professor Palmer tells us that there is an express repeal when the legislature expressly states that "this article has been repealed, or annulled, or destroyed, or an equivalent expression." Interestingly, no authority is cited for this position, Professor Palmer. I see none, and in my view, this is a much too narrow interpretation of Article 23 of the Louisiana Civil Code which defines express repeal and implied repeal. Besides, if Professor Palmer is correct that there has been no express

4. Palmer, *supra* note 1 at 224.

repeal, then I would suggest we should look to Article 1811 of the Louisiana Civil Code of 1870, which according to my opinion and Professor Litvinoff's opinion, was repealed in 1984. This article defined the word express - and it said "express when evinced by words either written or spoken; implied when it is manifested by actions." This article, Professor Palmer, of course pertains to the expression of intent in the interpretation of contracts. But, we have applied the rules of interpretation of law and interpretation of contracts in Louisiana for 200 years interchangeably, and we have applied Article 1811 in connection with interpretation of law. So if it is not repealed, it still tells you what is express. Express is not only when we use the words: "declared, repealed, or destroyed." Any words used by the legislature can constitute an express repeal.

Am I dreaming? No, I submit that I am not, because there is authority of the Louisiana Supreme Court in the case of *City of New Orleans v. Doll*,[5]. There, Act 237 of 1924 repealed "all laws or part of laws, general or special, inconsistent with or contrary to this Act." The issue before the Louisiana Supreme Court was whether this Act repealed specific provisions of the Charter of the City of New Orleans that were inconsistent with the Act. The Louisiana Supreme Court held, "There is no question here of an implied repeal of the important provisions of the city charter; the repeal is express and clearly signifies the intent of the legislature that the provisions of the statute were to be paramount."[6] This is not an isolated decision. As a matter of fact, Louisiana legal history of 200 years will bear me out that the question of express repeal or implied repeal of laws, is essentially a question of the intent of the legislature.

The intent of the legislature to expressly repeal a statute exists when words are used which lead to no other implication except the intent to repeal the particular legislation. There is an implied repeal when an express intent to repeal is not there and yet the intent of the legislature to repeal can be gathered from its action, from its declarations, and from its language in other provisions. Then, of course, this is what Professor Palmer has described as implied repeal:

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5. 224 La 1046, 71 So.2d 562 (1954).
6. 71 So.2d at 564.

when there is conflict and it is impossible to reconcile the new law with the old. Well, simply, this is one of the facts. It is not a criterion. The criterion is, I submit, the intent of the legislature to repeal.

We can now go to specifics and the formula "amend and reenact" to see whether this formula shows an intent to expressly repeal. I have no doubt whatsoever because every year I'm revising, every year I'm editing the Louisiana Civil Code. I have a new edition, and I go to the Acts of the Legislature, and I see at least 30 to 40 acts that are affecting articles of the Louisiana Civil Code of 1870. Now, "repeal" is used only when an article number is taken out. When the legislature, for example, repealed an article that we enacted in the field of property revision (Article 520 dealing with bona fide purchase), it used the word "repeal." Obviously, the Legislature could do nothing else but say, "We repeal this Article," and they did repeal it. But when practically every year the amendments to existing articles are enacted, then the Legislature uses the formula, "We amend and reenact."

In 1988, the Legislature amended and reenacted Article 157 of the Louisiana Civil Code, dealing with rights of children and custody of children. Also, it amended and reenacted Article 1548 dealing with acceptance of donations by deaf and dumb people (they dropped the word dumb). It now only concerns the acceptance of such donations by deaf people. With respect especially to the custody of children, until this year, Article 157 had two paragraphs, Paragraph A and Paragraph B. The 1988 amendment and reenactment dropped Paragraph B, and I'm going to ask Professor Palmer, "Do you mean to say that because the legislature used the form 'amend and reenact,' that Paragraph B is still there although it is reconcilable with the new provisions?" I think no Louisiana court has ever held so with respect to literally thousands of amendments and reenactments of provisions of the Louisiana Civil Code and other laws. So, this is the main problem. With respect to more specifics and especially with respect to the question of the doom that may be upon us, well we may stop here and we can pick up the topic later.

Professor Samuel:

Next, Professor Cueto-Rua.

Professor Cueto-Rua:

The new thesis, as stated by Professor Palmer, is that we have two codes in Louisiana: the old Code and the new Code. Did he have some doubts about this--perhaps the thought that his thesis was just too extreme? And does he therefore say instead that we have only one Code but with two layers of provisions subject to different pressures coming from different sources of the law? Now then, I shall try and seize the extremely important implications of this thesis. If we, who have all studied law, have trouble with one Civil Code, can you imagine the type of difficulty we are going to have with two codes? First you are faced with the problem of determining what articles are to be in one layer, and what are going to be in the other. And then to see what is the impact of the pressures on each there. I think it would be better for you to study biology.

Now, the core of this thesis hinges around the notion of repeal. Revision often means repeal. There is no revision without some repeal, because if you revise and you do not repeal, then you can have, as Professor Palmer says, the new article, and the old one, which is still in force, is law, is valid law, law that ought to be obeyed because there was no repeal. But, where do we get this absolute requirement of repeal as the condition for a valid, effective revision? It is not in the Code; it is not in the Constitution. To the contrary, the Constitution speaks of revision. Revision is contemplated by Section 15, I think, of Article I of the Constitution. But it doesn't say that revision must always take place by repeal. It says "revision" and, in fact, implies perhaps a kind of systematic analysis which is not very consistent with the requirement that we have for each statute, one object. And that's why the Constitution exempts revision from this requirement of one statute, one object, because there is a systematic approach typical of civil law revision.

Now civil law revision does not always require repeal. In fact, most of the tasks involved in revisions of civil codes in civil law jurisdictions do not require repeal. They require different types of acts. I could mention just a few to show you what is involved when you try to revise a code in the civil law. First, you have to revise classifications of materials. Many times, for many reasons, perhaps error, perhaps political pressures, or lack of time, materials are not properly classified in the Code. We have obviously misplaced them. It is typical of revisions to reclassify. To reclassify, you do not necessarily need to repeal, you need reclassification. Secondly, it is very typical of the civil law to generalize. We do not like specific instances. We do not like citing examples. We do not like a string of materials. We have rules which are broadly stated, with logical consistency referenced to a definite number of cases. Generalization does not require repeal. It requires generalization. Also, we have what we call consolidation of materials in the Civil Code. What do we mean by consolidation of materials? Well, we find different sources working, leading to a code. Sometimes we have materials coming from this effort to provide sources and then other arguments for the understanding of other source documents. And then we have the task of consolidation of materials. We do not need repeal. We need consolidation. Likewise, in the revision of the Code, comprising some kind of logical effort to achieve consistency, coherence, generality, and proper classification, the use of definitions can clarify the legal nature of institutions, providing a logical guide to the lawyers and the judges, because an institution is defined by extensive definitions, extensive concepts. Here again we do not need repeal. What we need is definition. What we need is a determination of the nature of an institution, but we need the consistency achieved by working within the Code, reducing the numbers of instances, seeking generality in the plurality.

Laurent, an exceptional legal writer, the author of the famous treatise on the civil law of France and Belgium, had as the key motto for his treatise the expression, "unity in plurality." We do not need repeal for that. What we need instead is the work of finding multiple materials which can be concentrated and then expressed in the form of

definitions of basic concepts. Once you have the basic concept, then you have an instrument, an intellectual instrument, which helps you to understand what the articles mean that deal with that institution. Certainly, we may need repeal in some specific instances, but to think of the traditional task of the civilian, the work done by the French in the revision of their Code, the Italians in the revision of their Code, the Germans with theirs-- that they could not revise a code unless they first repealed--all of it is wrong. This would not have been done or said by the best civilian minds. You are telling them, you did not achieve any revision because you failed to repeal. This is what really troubles me with the thesis developed by Professor Palmer.

If there is express repeal - no question. According to the thesis of Professor Palmer, the repealed articles disappear. If there is contradiction without a repeal, again, proprio jure, there is a repeal.

What happens then to those articles that do not have express repeal? Or obvious implied repeal? For example, those articles which were amended and reenacted with the same or similar substantive content as their source articles had prior to the amendment and reenactment. So we would have the old articles with this content not inconsistent with the Code (Professor Palmer thinks it's about 85% of cases which are consistent), and then we would have the new articles which are not inconsistent with the former articles, which amounts to say that really we have the same rules. No contradiction, no express repeal. In a sense, the legislature says this is the content I want now, but there is no contradiction with the old one. That is what we could refer to in the civil law as redundancy. One of the greatest civilian philosophers has discussed redundancy expressly in his book on law and justice, and he says he will pass the question of redundancy to the task of a good interpretation, determining the meaning of the Code, determining the meaning of the statutes. We have now this surface. Alright, we have one Code, with one kind of articles by the legislature, consented to by the legislature, who wanted these provisions, but they are not in contradiction. So, O.K., let's do what the civilians do: generalize, classify, consolidate, reduce the plurality to the unity, Laurent's motto, the typical task of the jurist, the typical task of the civilian to reduce plurality to unity. Not two codes! One code which,

as properly read by the civilian mind, has consistency, coherence, plenitude. That's what we've got, not two codes.

Now let's just say for the time being that we have two codes. What does it mean to say that we have two codes? Now clearly if you did, you would be suffering, that's what it means. The Code is perfectly alright; it's part of the genius of the people of Louisiana. You live with the Code; you live by the Code. It's a conceptual instrument which facilitates common understanding, which provides instruments for the settlement of disputes. It is alive and effective. You can identify a code. You know what to look for in the Code. You know how to use a code. It is an instrument whereby the life of the community achieves better understanding. It's not a ghost. It's not a phantom. It is not even an idea floating in the air. There is experience of a code, the experience of the Code in Louisiana, the experience as experienced by the courts in Louisiana, by the lawyers in Louisiana, and by the students of law in Louisiana. Why are you taking civilian subjects? Which code have you studied? Number 1 or Number 2? Who has a subject, or has an everyday problem, and says, "What am I using - Number 1 or Number 2?". You don't do that. You live one code. In the experience of Louisiana, we have one code. The lawyers and judges are working with one code.

It's a proven analogue that to some extent I'm implying with my words, but they are references to social reality and social experience, while lawyers are concerned with conflict alone. Alright, in that case, we should be able then to decide and show what the old code is and what the new code is. We should be able then to identify the codes to other groups and then distribute the materials. And that should be a primordial task because without the identification of Code 1 and Code 2 how could you work with the thing, how could you establish, how could you answer questions? If you have a problem for your coming exams in about two weeks, you should perhaps go to your professor and say, "Well, look, tell me, I want this very bad, Old Code or New Code?" You do not experience that. You are not living two codes. You are living one code. Now let us suppose that, perhaps to question my position, you say not two codes, one code with contradictory layers. We have had now close to 13 years since we had

the first article revision. If there had been in effect, as part of the positive law of Louisiana, positive law meaning the law in force, the law in effect, the law which is in force by the judges, the law which is used by the lawyers. We have the first acts of the Revision enacted in 1976 (13 years). Now, how many cases, how many opinions, how many advocates, how many discussions have been developed, have taken place in Louisiana concerning the first layer or the second layer? None. None. Because it's not present. Because you do not have two layers. You have the Code.

Now, what about those references to case law - jurisprudence? Well, those are sources of the law. You do not have two codes with two case laws. You don't have the old code with old jurisprudence and the new code with new code jurisprudence; you have one jurisprudence because it began as an expression of experience, because it had been done by the judges. The decisions of the judges, they do not have, I haven't seen a single case, a single argument, by a single judge, that says that we have two layers of complete new rules. In other words, in my opinion, the basic weakness of this argument is that it refers to an entity which is not present.

Professor Samuel:

The next speaker is Justice James Dennis.

Justice Dennis:

Thank you, Professor Samuel. Professors Litvinoff, Yiannopoulos, and others in the civil law have often scolded me for the fact that my court rarely grants writ applications in the area of the civil law, except in torts and things of that nature. I want to thank Professor Palmer because it may appear to the forty-eight court of appeal judges that we have in the state that there are two codes and that the jurisprudence has been converted into law. Consequently, I'm sure we're going to have to grant a lot of writs in this area of the civil law.

I find myself pretty much in agreement with Professor Cueto-Rua and Professor Yiannopoulos; however, I would like to say that I

want to congratulate Professor Palmer because I think this is very thought-provoking and may be a good thing because it may prevent the courts from going astray. I'm sure it could have been a cleaner revision. I don't know. There may be some problems that I don't know about, but it looks to me like the revision might be cleaner if enhanced by express repeals of certain provisions. However, I don't think that some of the fears and monsters that he warned us against will come about if the judiciary acts intelligently in interpreting the Code because, just speaking broadly, after all the judiciary has the exclusive prerogative to say what the law means and what the Code means. And even if the legislature lays down some formal rules of interpretation and then ignores them or walks away from them, I think the judiciary, the courts, are authorized to follow the latest intention of the Legislature. In other words, I don't believe the Legislature can paint itself into a corner and come up unintentionally with two codes. I believe, as Professor Yiannopoulos said, we can look at individual sections, articles, and provisions in the Code, and if we believe that the Legislature intended by enacting those provisions to do away with, abandon, or in some way repeal other sections, I don't think it matters if the repeal was done according to the formal rules of repeal that are set forth in the Code. I think we interpret the latest intention of the Legislature and if we think they intended to repeal something or do away with it or replace it, then we find that intention.

Also, I think perhaps Professor Palmer renders a service here, too, because we quite often forget the jurisprudence is not the law. We don't know exactly what it is. It's very influential, and it decides a lot of things, but it is really not the law, and the courts are free to change it because it's not the law. So, a legislative act that does not expressly incorporate jurisprudence or does not expressly disapprove of jurisprudence, I don't believe makes any law. I do think Professor Palmer does a good job of pointing out perhaps the overuse of the comments in the new revision by setting forth jurisprudence in the comments and leading some people to believe that perhaps this jurisprudence is incorporated in the Article.

Actually, if it is viewed correctly from a civilian standpoint, I don't think those comments are the law. I don't think the jurisprudence

mentioned in the comments of the law are necessarily incorporated in the Article. They're simply, as Professor Cueto-Rua said, the jurisprudence. It's part of our experience. We quite often do look back to it and interpret it in the present Article, but we're not bound to do that, and there are many, many instances in which we shouldn't do that. And for goodness sakes, there is no need to put anything in the Code as a savings clause to allow us to rely on the previous jurisprudence. For example, in the opinion I wrote, which I hope is correct, in *Bergeron v. Bergeron*,[7] we pointed out that the Legislature adopted a jurisprudential principle dealing with the "best interest of the child" in deciding custody and that by doing that, it did not necessarily intend to repeal all the other jurisprudential rules which had been formulated by the judiciary along with that. When the Legislature doesn't set forth a savings clause, it doesn't necessarily do away with or incorporate any previous jurisprudential rules. That's up to the court to decide.

I do think there's danger here, and I think Professor Palmer points it out very well. I haven't gone back and reread the *Cottin* decision, maybe never did read the *Cottin* case and wasn't really aware that we had the Supreme Court saying that we had two codes at a previous time in our history. I may be off base, but my superficial impression of that era in history is that the court was just probably lost. This is what Professor Palmer is really telling us to guard against. It would be a horrible situation if my court, because of a hard case, that it couldn't solve otherwise were to all of a sudden say, "Oh, well we have another code over here. Our old code is still alive. We can go to it for the answers." I think that would be wrong. It would be clear error. We should guard against it, and he points out the danger there. But I don't think that the court needs to do that. I think that we can legitimately say that when the Legislature intends to leave behind previous articles and means to revise them in a certain way, that it's obvious they intend for you to take that out of the book and throw it away. It is for all intents and purposes repealed, and we should not go down the path of the old *Cottin* case.

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7. 492 So.2d 1193 (La. 1986).

I wanted to ask Professor Palmer, I probably should know this, but what about the slavery provisions under the 1825 Code? Were they expressly repealed? I don't know whether they were or not. My impression is that maybe they weren't. Maybe they just restated the Code in 1870 and left them out. If they weren't expressly repealed, who would contend today that those Articles are still alive in a second code and authorize slavery, a regular slavery, in the state of Louisiana. I may be just completely wrong in my assumption of that, but I think we do have a lot of old provisions like that that nobody really believes the Legislature intended to keep alive. And just because the Legislature may not have repealed it according to a formal rule for repeal, I don't think that fact keeps it from being repealed because, if we think the Legislature intended to repeal it, it's repealed.

Professor Samuel:

The next speaker is Shael Herman.

Mr Herman:

First, I would like to congratulate Professor Palmer on his stimulating article and today's presentation. His study should encourage practitioners to climb out of their trenches and to survey the horizon for new perspectives on our common enterprise.

On any panel, there is bound to be someone who doesn't know his own mind on the issues under consideration; today I might fit that description. Although I am an adjunct teacher at Tulane Law School, I practice every weekday and too many weekends. Other panelists have discussed the theoretical sides of the themes suggested by Professor Palmer. The practical implications of the issues today cannot be ignored either. When you students in the audience grasp this practical context, you may not judge us too harshly for ignoring the problems on which Professor Palmer has focussed.

The entire bar has few practicing lawyers who may be fairly characterized as "civilians." Virtually no practitioner thinks about the

Louisiana Civil Code as a cultural artifact. No one cares if it is a code or a digest and how those legal forms differ. After all, the Louisiana Civil Code is the only civil code we know. Except for brief interludes offered by panels like this one, most lawyers have neither the inclination nor the free time to compare the Civil Code with an ideal type.

In our firm, which consists of about two thirds litigators and about one third office lawyers, the litigators focus on procedural law. A typical litigator has the "bathtub approach" to substantive law. When he gets a new file, he fills up the tub with the substantive law for his particular facts, plugs up the tub, and when the case settles or is finally decided, he pulls the plug. Out goes the substantive law. Three years later, another similar case might come his way, for which he will relearn the substantive law, by then changed through new jurisprudential accretions.

Civilians are apt to be found among office lawyers, not litigators. This is so because office lawyers, generally spared the detailed study of procedural rules, are called on by their clients to analyze issues of substantive law. A civilian must care primarily about substantive law because the Civil Code consists almost entirely of substantive rules. Besides, a civilian, because his or her outlook is informed by the Roman law tradition, instinctively stresses substantive law over procedural or adjectival law. The point to remember here is that many practitioners do not think systematically about any substantive law, whether it appears in the Civil Code, the United States Code, or the revised statutes.

How does that point play itself out practically? In a firm of about 65 lawyers, perhaps as many as four lawyers on any day will turn their attention to issues that arise in the Civil Code. Most of us do not identify ourselves as civilians. The minority who do consider ourselves civilians find it difficult to make sense of our experience in a hybrid jurisdiction like Louisiana. Derived from a European tradition, the law of the Civil Code was written in languages that most of us cannot read. No justice on the Louisiana Supreme Court reads French or Spanish well enough to conduct research for his opinions. In short,

our ability to tap our doctrinal sources has dried up. This inability affects our perceptions of the Civil Code.

As confused as we may be about whether we have both a shadow code and a real code, we few civilians in the office are far more certain about the code than we are about other areas of the law. A manageable domestic confusion may grow out of law you have learned systematically in school, but an unmanageable imported chaos grows out of other jurisdictions, including foreign countries. In many matters we, in a diverse federal system, are flying blind. Many deals are struck without reference to Louisiana law. Many cases do not apply Louisiana law at all. Before you apply the substantive law of your state, no matter how confusing, you confront issues of 'choice of law' and 'conflicts of law'. During preliminary skirmishes with your adversary, you hope that you'll persuade him and the judge to apply your law unless you believe that your law will lead to a bad result for your client. Normally, you think you know your own law better than the opponent's law. So, all other things being equal, you prefer your law, whatever it is. You prefer the domestic confusion of the civil code over imported chaos.

If you want to see our reaction to unmanageable chaos, you should note the local bar's reaction to the enactment in Louisiana of Article 9 of the UCC. The passage of this law surprised most of the bench and bar. As we learned only after the enactment of Article 9, Governor Roemer decided that repeal of our traditional financing statutes would solve some of our economic problems. Today, practically nobody in Louisiana knows anything about Article 9 except Chancellor Hawkland at LSU and a few law teachers at each law school. With the imported chaos swirling all around us, we could easily miss the domestic confusion described by Professor Palmer.

Do we have a double-layered code? Yes and no, which should make either answer accurate in your final exam, if you support your arguments. The "yes" and "no" do not seem to have much to do with whether there was a formal repeal of the old articles, or an amendment and reenactment of them. Those matters are not discussed among the four "civilians" in our office. In practice, we think the code has two layers because we always suspect that in the right case, the old law will

poke up like weeds between the cracks in the pavement, as it did in *Cottin v. Cottin*[8] in the nineteenth century. Let me illustrate. Professor Palmer mentions new articles 1949-1952[9] on error. According to the official comments, these articles articulate, in lapidary fashion, principles of several old articles on error. But, Professor Palmer asks, what happened to old article 1837[10] on the "architect of eminence"? Was this nice example repealed or does it survive? What is its authority? I believe that a good lawyer could successfully argue that old article 1837 survives, at least as a persuasive guide.

Bear in mind that most of our old law never was in the French civil code. So it is beside the point to test the Louisiana revision against the standard of the French counterpart. We embraced the old law because it made sense and it was all we had. Much of the old law that no longer appears in the Louisiana Civil Code consisted of doctrinal material, making it about a third to 40% longer than the French civil code. This material was unknown to French lawyers unless they searched for it in old treatises. Many French lawyers who read our unrevised Code probably feel that it is more of a digest than they are used to. It is more talkative, and much heftier than the French counterpart. Many rules in the Louisiana Civil Code, unlike those in the French Civil Code, seem to be summaries of cases, and not always consistent with one another. On some matters, like offer and acceptance, the French Civil Code contains virtually no legislative regulation. By contrast, the Louisiana Civil Code, both before and after the "piecemeal" revision, has extensive titles on the subject.

As Professor Palmer indicates in a quotation of the late Mitchell Franklin, the Louisiana Civil Code was "a code, a law school and doctrine all at once".[11] In reading the streamlined provisions in the revision, we shall often miss the law school features, and the doctrine. We are cut off from the invisible analytical moorings in the old code articles. Even if repealed, these old provisions are among the few guides we have. When the "superseded" old provisions are not

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8. 5 Mart. (O.S.) 93 (La. 1817).
9. La. Civ. Code Ann. arts. 1949-1952 (West Supp. 1988).
10. Palmer, 63 Tul. L. Rev. at 256.
11. Palmer, 63 Tul. L. Rev. at 255, n. 96.

conceptually at odds with the new articles, there generally is nothing wrong with continuing to consult them even if they were repealed. Of course, we must be careful when inconsistencies do appear.

I would like to finish by returning to a point raised by Professor Palmer in his effort to distinguish a civil code from a digest. According to Professor Palmer and the scholars he mentions, a civil code, unlike a digest, must be comprehensive within its scope and must make a clean break with the past.[12] These are laudable goals, but I doubt that even the French Civil Code, which was hurriedly assembled in a unique historical moment, achieved them. The greatest of the French drafters, Portalis, argued that in drafting the French Civil Code, the French would have been wrong to cut themselves off from their past and to have ignored a tradition of common sense and rules that embodied the spirit of centuries.[13] The point of Portalis' admonition is even sharper in Louisiana's specific situation, because we are cut off from other sources of doctrinal nourishment enjoyed by Quebec and most of the rest of the continent. As a consequence, we are apt to ransack sources including the old code articles. Faced with a novel case, a lawyer who finds in an old provision a helpful rule might say "Ah,ha? This old provision will solve my problem, and the comment to the new article does not really say it is dead. The old provision, at least in spirit, does not seem inconsistent with the new provision, so I'm going to argue that it's still good law and see who criticizes me for it." If she has done her homework thoroughly, no one will. Of course, that is the pragmatic answer for the trenches. But as Professor Palmer warns us, our heritage and our devotion to the Civil Code may dictate another answer based on intellectual honesty, not pragmatism.

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12. *Id*. at 226.

13. This admonition appears in Portalis' preliminary discourse on the French Civil Code, translated in Levasseur, "Code Napoleon or Code Portalis?" 43 Tulane L. Rev. 762, 767 (1969) The entire speech repays close study, especially for code drafters. It should operate as a brake upon the impulse to repeal history as they prepare new civil legislation.

Professor Samuel:

The next speaker will be Professor David W. Gruning.[14]

Professor Gruning:

I'd like to thank Professor Palmer for having written his article. Regardless of any conclusion about this thesis, one must admit that he has ensured a stimulating and useful discussion.

At the moment, I would count myself with those members of the panel and audience who are as yet unconvinced that Professor Palmer is simply "right" or "wrong." Because of that, I think it may be more helpful at this point in the discussion to try to summarize where we have been guided so far in our analysis, and perhaps where that analysis should go as a next step.

Professor Palmer's remarks, I think, are in two major parts. In the first part, he makes the following claim: during the current process of civil code revision in Louisiana (mostly in the last decade), an express repeal of the prior articles of the Code of 1870 has seldom occurred. Professor Palmer supports this claim by an argument based upon the Code and by an argument based upon legislative intent.

Looking first to the Code, one finds that repeal of a law is either express or implied: it is express "when it is literally declared by a subsequent law," and implied "when the new law contains provisions contrary to or irreconcilable with those of the former law." See OA 23 and NA 8.[15] There is no third method. Thus, express repeal of a civil code article requires a verbal formula that is particular and specific. The language of repeal, Professor Palmer concludes, must use words

14. Associate Professor, Loyola University School of Law, New Orleans. This is a liberally reconstructed version of a transcript of the author's informal remarks at the Symposium. A few additions and changes have been made to the text and a few notes added, but the author hopes to address these issues more systematically elsewhere.

15. La. Civ. Code art. 23 (1870), and La. Civ. Code art. 8 (1987 La. Acts No. 124). (For convenience, the articles of the 1870 Code are preceded simply by OA for "old article" and those after the recent legislative action by NA for "new article.")

that make a "literal declaration" unambiguously. "Repeal" does it, as does "abrogate" (from the French abroger).[16] Therefore, to amend and reenact legislation does not accomplish an express repeal for the simple reason that the words essential for the act of repeal have not been pronounced by the legislature.

Professor Palmer also supports his argument that there has been no express repeal with an analysis of legislative intent. The legislature knows how to repeal and how to amend and reenact, he points out, and it distinguishes between them. He supports this by reference to the enactment of the Code of Civil Procedure and the Criminal Code, which he indicates contained express repeal of the statutes that preceded them. Indeed, in the recent legislation on Obligations in General and on Conventional Obligations, the legislature stated that it was amending and reenacting Titles III and IV of Book III of the Civil code, with the exception of one article, which the legislature specifically repealed.[17] From this, Professor Palmer concludes that when the legislature intends to repeal, it does so, and he concludes that to amend and reenact simply does not show this intent.

Professor Palmer then adds that there is ample precedent for these conclusions in *Cottin v. Cottin.*[18] His remarks give one ground to believe that after a full briefing and argumentation of the issue, a contemporary court might reach a similar decision about our contemporary Code. Concluding the first part of his argument, he states that if such a decision occurs, we will have two codes side by side, or two layers of a single code, existing in an unhappy equilibrium. For, when there is no express repeal, an implied repeal

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16. Express repeal, on this view, is a kind of speech act that, like contemporary marriage or formal contracts at Roman law, requires a particular verbal formula for one to conclude that the event contemplated or intended has in fact occurred. For classic discussions of speech acts, *see* J.L. Austin, *How To Do Things With Words* (2d ed. 1962); J. Searle, *Speech Acts: An essay in the Philosophy of Language* (1969). A recent attempt to integrate such notions directly into legal analysis is Comment, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 Cal. L. Rev. 189 (1986). Discussions of contracts verbis or formal contracts appear at B. Nicholas, *An Introduction to Roman Law*, 193-94 (1962) and S. Litvinoff, 6 *La. Civ. Law Treatise: Obligations*, 357-58 (1969).

17. See the specific repeal of OA 2268 in the revision of Book III, Titles III and IV, while other articles were amended, reenacted, transferred, or redesignated. Preamble, 1984 La. Act 331.

18. 5 Mart. (o.s.) 93 (La. 1817).

only occurs when provisions of the old law cannot be reconciled with the new law. To decide that question in a particular case will require a great deal of interpretation, most likely through costly and time-consuming litigation.

Professor Yiannopoulos takes Professor Palmer to task primarily on this first point. He concentrates on refuting our principal speaker's argument that Code repeal requires a particular formula; as for intent, Professor Yiannopoulos continues, it seems certain that the legislature most certainly did not "intend" to create such a strange, multi-layered code, and did intend to repeal all the former articles. (Justice Dennis' measured remarks might indicate a predisposition on the part of the judiciary to avoid the crisis of sources altogether, if possible.)

What would happen, though, if the revision had expressly repealed the former articles of the Code, or if judicial interpretation worked the same result? Would Professor Palmer's view of the Code fare much better if there had been an express repeal? On the contrary, if seems that the most important insights of Professor Palmer's remarks would remain intact. And these insights form the second part of his remarks (which his article states more systematically[19]).

In this second part we see that what really troubles Professor Palmer is the erosion of a particular view of codification during the Louisiana revision process. This view of codification strongly recalls, I think, the one taken by the drafters of the Code Civil of 1804. On that view, a civil code must be complete in two important senses. First, it must be a revolutionary break with the past, so as to free the civil life of the modern individual from the oppressive law of an ancien regime. Second, it must be sufficient in itself to generate substantially all private law for the literate, modern individual: recourse to judicial opinions and doctrine would be superfluous.[20] A civil code forms,

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19. Palmer, *The Death of a Code--The Birth of a Digest*, 63 Tul. L. Rev. 221 (1988).

20. I am almost surely overstating the tenor of Professor Palmer's remarks here, but I feel somewhat comfortable in doing so because it is a point of view to which I myself am perhaps too sympathetic. The revolutionary code is "a complete legislative statement of principles . . .. This involves enactment of new law which is intended to replace the law of the past." This is contrasted mainly with a "reform" code, "an effort at

then, a sort of constitution of private law. One who takes this view of the Code looks with deep suspicion on those who would jeopardize these principles of codification.

For example, does the Code retain its central role after the revision? It is apparent that it has moved out of that central position and that its role appears to have changed significantly. Considering the process of reading the Code may serve to demonstrate this. The language of the new articles, as Shael Herman noted, is lapidary. The cross references are gone, the examples are gone. Language that is condensed in this fashion will cry out for interpretation, for guides to reading. How will that reading take place? The reader's eye will drop to the comment. The comment will often explain that the new code article does not change the law (the reader perhaps breathes a sigh of relief), and what was the law that is not being changed? That law was the Code as it stood before revision, and as interpreted in one or more cases, which the comment helpfully cites. Thus, the new Code article in such a situation might come to stand merely for the prior jurisprudential interpretation of the old code article and no more. The new article is just a squib for the holding of a case, and a group of such squibs forms a digest. Thus the Code as such has been lost or dispersed.

The exercise becomes more complex when some disparity between old and new appears. Sometimes, the new article's comment declares that there has been a change in the law. Again, the comment often will supply a helpful cite to a case, whose result has now been banished. What if the language of the new article nevertheless fairly supports that result? Has the law changed? Or has it only changed by excluding that particular result in the banished case? Conversely, the comment to the new article may proclaim that the law has not changed when it is plain that the sense of the new article is quite different from the old. (When teaching new code articles, one quite useful strategy is to lead students to discover such instances in which comment and article seem to be at odds with each other.)

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systematization, clarification, and reform of the law . . .. The Napoleonic Code was originally conceived as a revolutionary code but actually is in part revolutionary and in part a reform code." A. Yiannopoulos, *The Civil Law System* 20 (1977).

Professor Cueto-Rua argues that the revision process in the civilian tradition is what is really at issue here, not the narrow issue of repeal alone. If I understood him correctly, his argument is that in revision, the true civilian discards nothing of the past, but constantly returns to it, re-reads it, and re-analyzes it. In revision, Professor Cueto-Rua argues, nothing of substance really changes: examples are purged from the Code, doctrinal material removed, substance is reclassified, cross-references deleted. Even though it is revised, it is still in essence the same Code. Thus, his conclusion seems to be that the substance of the prior articles is unavoidably drawn into the new ones.[21]

From this debate, one can draw at least two tentative conclusions. First, one cannot deny that the way we read the code has changed. Once it was possible to argue that one could simply rely on the text of the Code itself, applying basic interpretive principles such as analogy to the whole text itself, with doctrine and jurisprudence occupying distinctly secondary positions as tools for reading the Code. Even if we knew, pragmatically, that judicial decisions were very important, nevertheless we seemed to be able to read the Code without being completely constrained by those decisions. Now, however, the Code cannot be read without looking to them. The revised Code contains pre-packaged results that will limit its usefulness in generating results as time passes.

Moreover, this revision seems not only to put doctrine and jurisprudence on a par with the Code itself, but indeed to privilege them over it. This is so because one cannot read the new articles at all without reading the comments (doctrine) and the jurisprudence (to which the comments guide us). Further, the meaning of the words in the new articles, then, will be restricted and bounded by the prior jurisprudence in a way which is distinctly un-civilian.

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21. This view is attractive, if for no other reason than it promises full employment for the academic civilian. Yet we know that slight changes in the law (in the form of legislation, at least) very often carry with them enormous practical consequences for the advocate and counselor.

It seems obvious that if we at one time had a revolutionary code, we do not have one now. It cannot be complete in that way. If it ever could have been, it is now subject to the enormous pressures of judicial opinions, doctrine, public law, and additional legislation. For good or ill, there simply cannot be today one book that performs this function for individuals living in modern states, however much the ideal of that book might encourage us to take part in the process of revision. It is perhaps even less possible in Louisiana, given the pressures of federal law, commercial law, and the residue of Anglo-American common law on our Code. Nor can we overlook the degree to which judicial interpretation has constructed large parts of contemporary private law on narrow foundations in the Code.[22] (It may do so again, avoiding the constraint of the pre-packaging effect Professor Palmer criticizes.)

Thus, just as we had a revolutionary code, we just as surely now have a conservative revision process. Given the powerful role of judicial decisions in Louisiana and given the extraordinary reliance the practicing bar places on them, perhaps no other kind of code revision could be conceived today. It is difficult to imagine that the members of the bar would have recommended any Code revision that was not cautious, incremental, and firmly anchored in past practice. Thus, the problems Professor Palmer has seen may have been inevitable for the Louisiana Code.

Revision toward what end, then? We seem to be in the middle of things. Historically, we are still working out what it means to be a jurisdiction whose private law began in a revolutionary, modern code that is now aging and that will not be renewed through a revolutionary process. On the contemporary plane, Louisiana is still working through what it means to be a mixed jurisdiction (while other pure civil law countries produce mountains of legislation outside their civil codes and while so-called common-law jurisdictions adopt uniform acts and commercial codes).

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22. The jurisprudential evolution of delict in France may be the paradigmatic instance.

When we look back, we see that our immediate tradition of code drafting and analysis was revolutionary in origin. Yet when we consider all that preceded that revolutionary moment, we may conclude that as civilians we must rely on the whole of civilian learning to read law. As for the future, what kind of Code we have or will have in this state, in the last analysis, is up to us. The role that Code revision and codification will play in the future is yet to be decided. Revision perhaps serves as only a small part of an immense task of invention of such a role and such a book. Professor Palmer is thanked for challenging us to take on that task.

Professor Samuel:

Before we move on to the second part of the discussion, let me ask if anybody would like to respond to anyone else's comments, Professor Palmer included.

Professor Palmer:

I've learned much from each panelist's comments, and I'm deeply grateful for each panelist's contribution. I'm not going to comment upon all their remarks because of the time factor, but I've noted them all down and will be thinking about them nevertheless.

As to my colleague, Professor Yiannopoulos' comments - well, first of all, I admit I have opinions, I admit that there's distinction between a fact and an opinion, but I would say this in response. You quoted only from the pages of my article in which I set forth my set conclusions, and not my reasoning or evidence, and in that context they may sound like opinions, but they are factually supported. They are factually supported conclusions, not mere opinions. Therefore, I don't think it's quite justified to quote bare conclusions and imply there's no underlying analysis. After all, you did not read from my analysis and ask me if the analysis was factual. If you had, I would have said, "It is.".

You also said that you don't see the distinction between an express repeal and an implied repeal, that I've cited no authority for the meaning of an express repeal, and that I seem to think that that means the Legislature must say 'repeal,' (or make an equivalent declaration, like abrogate, destroy, etc.) and if it has not, the Legislature has not spoken. Now the underlying word in French was "abroger," and in the old codes, they translated "abroger" into English as repeal.[23] And in the old cases, the judges say this law was "expressly repealed." Now "abroger" and repeal are the only two words, to my knowledge, that have been used in the Louisiana historical experience - the only two words. The Code text defining an express repeal requires a literal declaration.

Now what does 'literally declared' mean? What does 'to declare' mean? To refuse to interpret these words literally would mean that there's no distinction between implied and express repeals - then we are really bowdlerizing the Code. Now I also provide authority for this conclusion in the form of all of the historic materials that I set forth. Three crises have occurred before and in each of these, we have had cases dealing with the subject of repeal, and indeed, each crisis was provoked by the fact that the courts never found any express repeal, or found only a partial express repeal of the prior law. The word repeal, express repeal, was not used or used only partially by the Legislature. What was instead used was an incomplete or implied repeal based upon contrary substance. The test had to be one of substantive content and that's what led to the problem. So, I don't believe that one can ignore this Code distinction.

By the way, our Code is one of the very few in the entire world and was the first, to my knowledge, to have ever enshrined, as articles within the Code, these principles about repeal and these definitions of express and implied repeal. The French Civil Code does not have this, and therefore, we ought to pay strict attention to our own Code Articles.

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23. Thus Article 22 of the Civil Code of 1825 read in French, "Les lois peuvent être abrogées en tout ou en partie par d'autres lois." This was rendered in English as "Laws may be repealed either entirely or partially, by other laws."

Now, it's interesting that the decision Professor Yiannopoulos mentioned, *City of New Orleans v. Doll*,[24] is cast in the language of implied repeal, and it involved a statute but the Civil Code was not involved.[25] And you can find others to that effect, and I have cited these kinds of cases in my article. But the Supreme Court and our other courts have never done this once in the context of our Civil Code, which carries its own definitions of what the repeal means.

Speakers have said that repeal is a question of intent, but what we must get away from is the possibility of ignoring the Code and saying intent can be gathered from political atmosphere or can be gathered from off the legislative record. The Code doesn't permit this. And remember in *Phelps v. Reinach*,[26] the court was construing whether or not the words 'amend and reenact' constituted an express repeal of the French version of the 1825 Code. The question before the court was whether the old underlying French version was repealed when the Legislature in 1870 amended and reenacted the Code solely in the English language. And the Supreme Court answered, "No. The French text still lives." Why? Because 'amend and reenact' language could not accomplish an express repeal. It's not a literal declaration.

On this same theme, I recognize, with Justice Dennis, that the court could ignore the Code provisions or the prior cases, and might find that no crisis exists. I recognize that the courts are ultimately able to say that there has been an effective repeal. I recognize that they exert this inherent power as a matter of their own sovereign authority. However, the courts may well decide not to do that, and may consider it well advised to follow the Code, just as they decided to do on two prior occasions, in the early nineteenth century. These events led the

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24. 71 So.2d 562 (La. 1954).

25. Actually the Supreme Court only held in that case that where a provision of the City Charter dealing with paving liens was in "direct conflict"-- substantive conflict--with a subsequently enacted statute, that the Legislature must have intended a repeal of the City Charter's provision. The only error of the court was to call this an "express" repeal, when it was actually applying the test of implied repeal. Apparently the same result would have been reached had the court realized this. The Court did not even allude to the Civil Code nor attempt to apply the repeal principles enshrined there by Articles 22 and 23. Thus the case is hardly a model or a precedent in any debate over the Civil Code.

26. 38 La. Ann. 547 (1886).

Legislature to decide that it must repeal the old law expressly. I recognize that if those decisions had turned out differently that there would not have been a crisis. It must be recognized, however, that there could well be a crisis if the court follows its own precedents. I think that if the Court looks at the Code, looks at the words 'amend and reenact,' and considers what are the requirements of a literal repeal, that it will not construe amend and reenact to be an express repeal, even though it may be convinced that the political atmosphere was conducive to an opposite conclusion. These principles of repeal found in Code were designed to prevent courts from misconstruing the intent of the Legislature, from taking political atmosphere into account, from giving courts the power to disregard what the Legislature says. Maybe we don't think that there is much clarity or coherence to the intent which emanates from our modern legislatures; we may think that the comments of the redactors are far clearer than the blurry intent of our own Legislature. And yet, in my opinion, when we have a Code laying down, in black and white, rules about repeal, it somehow bothers me to say the Court can just ignore that, simply because it is ultimately the arbiter.

Now, one comment made by Professor Cueto-Rua struck me, too, where he discussed the Constitution of the State. The Constitution of this State, with respect to this issue, is with all due respect a total red herring. All prior Code revisions and codification efforts took place under this same Constitution, and there was never any problem or impediment imposed by the Constitution. The Constitution doesn't require the revision without repeal that we are witnessing. The Constitution says nothing about that. Indeed, there's only one constitutional article that you cited that I think is relevant. It is called the Title Body Clause, which requires that when the Legislature enacts legislation, it must confine the subject matter to the topic stated in the title. The title must reflect what the body of the law is all about. But this particular constitutional provision also states 'expressly' that it does not apply to Code revision. Code revision isn't subjected to this constitutional provision. So that since Code revision is exempted from that limitation, I think the issue must be a red herring.

I believe Professor Cueto-Rua made the statement that we do not need repeal; we need more definition and coherence. But this runs in the face of our entire history - we need repeal, or else why did we have crises in the past? He made an appeal to how the French do it and how other codes abroad are handling this without repeal. Yet the enactment of the French Civil Code, according to Planiol, effectuated the greatest repeal in history. All prior customary law and Roman Law, was supposed to be repealed in order to give self-sufficiency to that document. The law of Ventose 30 of the Year XII brought about, quantitatively, the greatest repeal in history. Few other codes in Europe possess code provisions equivalent to Articles 22 and 23 of the Louisiana Civil Code. The Spanish and Mexican Codes are notable exceptions and have provisions similar to ours.[27] He also mentioned that you had not read of any court or any jurist, outside of myself, who has been mentioning this issue, though a number of years have gone by. Remember this: the 1808 Digest was passed in 1808 and the case that recognized the crisis was in 1817. Well that was nine years later, and indeed that was after the entire Digest had been completed. We've only completed 40% of our present Revision, and merely 10 - 12 years have gone by since the first revision of property took place. It may well be too soon to say that nothing is happening. It may well be too soon to worry about that.

Professor Cueto-Rua also said that there's only a problem of redundancy and there is no real problem presented by the two layers of Code Articles; they may just be redundant. Actually, what's taking place is that the old Code is not just simply redundant; it is sometimes supplemental, sometimes synthesizing, and sometimes contradictory. Where it contradicts, it will be impliedly repealed. But when an old Code article only contains a different or more precise rule without contradicting the new Code articles, then the old Code can come into play in a supplementary way. This is precisely what happened in *Cottin v. Cottin.* The old Spanish law had a more precise rule. It defined an aborted child as a child that did not live for 24 hours, whereas the later digest of 1808 didn't have a precise test. The old law

27. See Codigo Civil Art. 9 (Mex. 1928); Codigo Civil Art. 2(1) (Spain 1889).

was able to preempt the new law for purposes of deciding that case. Was this child, who in fact died eight hours after birth, was he an aborted child or was he an heir? No, he was an aborted child by the Spanish test. So, that's not mere redundancy; that's precision with a difference, and that's what occurs in many situations where the Revision has been stripped of the precisions and rule variations of the older Code. We've been stripping away and streamlining the Code, but if we have had no repeal of the old law, then the streamlining is nugatory - really of no effect.

Thank you.

Professor Yiannopoulos:

May I say something about this, too, and the crisis in the making? All these situations that Professor Palmer has been referring to are clearly distinguishable. Let's start first with *Cottin v. Cottin*.[28] Remember, the Louisiana Civil Code of 1808 never existed. The Louisiana Civil Code of 1808 was merely a Digest. The Legislature expressly enacted a statute called a Digest where it picked up certain pieces of legislation and reenacted them or approved them. It left behind it all the other Spanish laws that were not irreconcilable. The enabling statute said so - that this is merely a Digest and that only those laws that are "irreconcilable with or contrary to" are being repealed, so that *Cottin v. Cottin* was certainly a natural decision. There was a rule of law in the Recopilacion that the Louisiana Supreme Court found that was not intended to be repealed. We did not have an express repeal of the prior law.

With respect to the second crisis, that of 1825, the leading case that caused the problem is the case of *Flowers v. Griffin*.[29] In the 1825 Code, we did have an express repeal. Article 3521 provided that "the Spanish, Roman, and French laws . . . are hereby repealed in every case for which it has been expressly provided in this Code, and that they shall not be invoked as laws even under the pretence that their

28. *Supra*, note 2.
29. 6 Mart. (N.S.) 89 (1827).

provisions are not contrary or repugnant to those of this Code." So you did have as much of an express repeal in the 1825 Code as you could possibly have. And yet in *Flowers v. Griffin*, the Louisiana Supreme Court in 1827 decided that provisions of the prior laws were not repealed unless expressly nullified, suppressed, or superseded. Why? Was this out of the blue? Not really. The Louisiana Supreme Court had good reasons why, because the Louisiana Supreme Court went back to the authority that the Legislature had given to the codifiers. They do say in *Flowers v. Griffin*, "The jurists who were appointed to alter and improve our old Code, in their report to the Legislature, proposed amendments of three kinds. The first, the insertion of new provisions; the second the modification of those already existing; and the third, the suppression of those articles which were incompatible with the changes they thought proper to recommend."[30] This was their authority; that's what they went to the Legislature with, and the Legislature acted upon their recommendation.

Is this distinguishable from the present situation? Of course it is. What do we do now when we go to the Legislature? The Legislature does not amend and reenact particular articles, ladies and gentlemen; they amend and reenact titles of the Civil Code: Title 7 of Book 2, Title 8 of Book 2, Title 23 of Book 3. It's very different from the case of *Flowers v. Griffin*, the second kind of crisis.

With respect to the third kind of crisis after the 1870 Code, Professor Palmer indicates that the French text of the Louisiana Civil Code of 1825 is still alive and well although it was never reenacted in 1870. And he's right; it's alive and well but subject to one limitation. The Louisiana Civil Code of 1870, indeed, reenacted the provisions of the 1825 Code in the English version only, which English version was a translation that completely mistranslated the French. The Louisiana Supreme Court was faced with the interpretation of provisions of the Louisiana Civil Code of 1870 and was looking to the English text, which in certain cases did not make sense, as in the leading case of *Strauss v. New Orleans*.[31] If they were to apply the text of the 1870 Code and the text in English did not make any sense, it was quite

30. *Id.* at 90.
31. 166 La. 1035, 118 So. 125 (1928).

natural to go and look back to the French in order to interpret the provisions of the 1870 Code.

That gets really close to what Professor Cueto-Rua was talking about: the continuity of the tradition. Certainly, Professor Palmer wants to say that, in the interpretation of the new provisions of the revised Civil Code, we're going to be looking to the whole jurisprudence and we're going to be looking sometimes even to the old versions in order to gather the intent of the legislature and what the revisors of the Institute had in mind. Of course, we're going to do that in appropriate cases where the stakes are high. If you have a million dollar case, you are going to do that. If you have the ordinary case that Professor Herman was talking about, it does not call for this kind of review. Most probably you're going to start from the text of the new Code as it is stated and some of the comments and try to argue on the basis of these provisions. The so-called crisis that goes back to the Code of 1808, to the Code of 1825 and to the Code of 1870--all these examples are distinguishable. They do not involve the same type of situation.

I'm not going to say anymore, except for one thing: when Professor Palmer states that in the revision of the law of property, we have only 51 articles that were expressly repealed, and 376 that were reenacted without any repeal, I submit that this is not true. The repeal of these 51 articles was accomplished by two acts of the Legislature: Act 169 of 1977 and Act 170 of the same year. The reason for this was that there was "express repeal," not of the articles but of the titles. Act 69 of 1970 reads, "Title 6 of Book 2 of the Louisiana Civil Code of 1870 containing Articles 856 - 869 is hereby repealed." And you know why, ladies and gentlemen? Because these old articles dealt with "New Works." It was the title of "New Works" that had no longer a reason to exist in the new Code, and the title itself was repealed with these articles, and we put in a new title "Of Boundaries." So we had to repeal the old articles.

In Act 170 there was the converse situation. There, we repealed the old title "Of Boundaries," which had been Title 5, and we made a new one called "Of Building Restrictions," with a totally new subject matter. Under the circumstances when we deal with titles

having different subject matter from that existing in the Civil Code, to "amend and reenact" does not make sense. You must expressly repeal. And that's why the only inconsistency, Professor Palmer, that you see is in connection with the revision of property.

Now, with respect to the revision of the law of Persons, we can find out why there was an express repeal. You know why? It was Article 3556, Section 23, dealing with the definition of Persons. Definitions in different parts of the Code that were contrary to what we were doing, or at any rate, possibly irreconcilable, had to be repealed; otherwise, they would still be standing and would be subject to possible interpretation of implied repeal. And finally, in connection with prescription, the reason that certain articles were expressly repealed was because only a part of a title was amended and reenacted in a particular year, and we could not possibly leave these articles hanging in the air. Wherever a whole title was amended and reenacted, there was no reason for express repeal.

Professor Samuel:

Professor Palmer?

Professor Palmer:

Just a very quick retort on the points you just made. Was that a fact or an opinion? [Laughter] So, what I gather from what you're saying is that there was in fact no repeal of the property articles themselves, just the repeal of titles.

Professor Yiannopoulos:

Correct.

Professor Palmer:

Well, now let's read that again. Let's listen to what the Legislature has said in order to ask seriously whether there's a repeal of the title or the article itself. It says: "Title VI of Book II of the Louisiana Civil Code of 1870 containing Articles 856-869 is hereby repealed, and a new Title VI, Boundaries, containing Articles 784 - 796, is hereby enacted to read as follows: . . ." So, is that to be interpreted as a repeal of the article, or is that to be interpreted, as you narrowly do, as the repeal of the Title? And what difference does your interpretation make? It makes the case even more interesting. It makes the case more interesting for you to maintain the articles are not repealed. For then we just have a wider ambit for the problem that I was discussing.

Professor Yiannopoulos:

You put words in my mouth.

Professor Palmer:

It just makes the situation more revealing.[32] Now with respect to Matrimonial Regimes, where I'll assure you that all 135 articles and not just the titles were repealed, how do you account for the disparate treatment in that case?

Professor Yiannopoulos:

For a very good reason. With matrimonial regimes, "the girls" bunched together to change the laws, and they enacted this statute for a year, and they had to repeal the old articles, because for a year all we

32. With deepest respect for Professor Yiannopoulos, I believe this argument is both revealing and self-defeating, for if it were true that only the titles were repealed, then that would leave the old property articles (as opposed to their titles) completely untouched by legislative action. The old articles would be neither repealed nor amended and reenacted. Consequently, they would be fully in force, which is an unexpected concession to my thesis.

had was a statute in the revised statutes.[33] So, then we had to enact a new title because the titles had been repealed. They were special statutes that did away for one full year - the so-called matrimonial regime articles were in the revised statutes, not in the civil code.

Professor Palmer:

And that effected a repeal of the Code?

Professor Yiannopoulos:

We had to repeal the old provisions of dowry, otherwise, we would still have dowries in the new provisions in the revised statutes.

Professor Samuel:

Well, I don't think the revised statutes ever came into effect.

Member of the Audience:

It didn't.

Professor Samuel:

Well, it [the statute] didn't repeal anything. It never came into effect. So, when you rewrote that revised statute as the Civil Code, you could have just amended and reenacted the existing articles, but you repealed all of them, not just the dowry articles.

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33. The statute referred to is Act 627 of 1978 which dealt with Matrimonial Regimes. Some of its provisions were to take deferred effect on January 1, 1980, others were delayed until 60 days after adjournment of the 1979 regular session of the legislature. The statute never came into effect because it was expressly repealed before its effective dates by Act 709 of 1979.

Professor Yiannopoulos:

We had to repeal that statute, too.

Professor Samuel:

Well, repeal the revised statutes, but . . .

Professor Yiannopoulos:

We should have repealed it back in the civil code. To look to the steps, Professor Samuel, to see really what happened, the statute was enacted repealing the Civil Code Article and did not come into effect, that is correct, in order to give time to the Louisiana State Law Institute to draft it in a civilian fashion, but the statute itself repealed the title. That's what Professor Palmer is referring to. The statute, I don't know the number -

Member of the Audience:

It's Act 627 of 1978.

Professor Yiannopoulos:

-- repeals specifically the articles of the Civil Code.

Professor Palmer:

Then, what is the explanation for that?

Professor Yiannopoulos:

Because the way the statute was enacted by the Legislature it was not replacing a title of the Civil Code. It was a statute put in the revised statutes, and the title of the Civil Code was vacant for a year. That's why.

Professor Samuel:

And do I understand that when you have, say, Title 1 "Of Apples," and then you want to make the new Title 1 "Of Oranges," you feel you have to repeal. Alright, why is that? Because otherwise, people might think "Of Apples" is still in effect if you don't?

Professor Yiannopoulos:

There would be confusion.

Professor Samuel:

But you don't see any confusion when Title 1 is "Of Apples" and a new Title 1 is "Of Apples"? Is it that apples and apples are inherently inconsistent so no one will think the old "Of Apples" is still in effect? I don't see the logic in saying you have to repeal when it's apples and oranges, but you don't when it's apples and apples. But, maybe I'm obtuse.

Member of the Audience:

I thought I remember Professor Yiannopoulos citing to old Article 1811 of the Code concerning the interpretation of contracts. The table at the back of the Civil Code shows it's to be dropped and has no counterpart in the current Code, and yet he cited it.

Professor Yiannopoulos:

You mean in the table?

Member of the Audience:

The table shows that it has no counterpart in the new edition.

Professor Yiannopoulos:

No, no, no. Yes, I did say that. I did say that earlier. I would like Professor Palmer to answer that question. Professor Palmer, article 1811 is still alive and well according to you?

Professor Palmer:

Well now, which article?

Professor Yiannopoulos:

The old article 1811 that defines express consent and implied consent.

Professor Palmer:

You cited it?

Professor Yiannopoulos:

I cited it, yes. I cited it as an example. I would like to question Professor Palmer.

Professor Palmer:

So this is a contract provision?

Professor Yiannopoulos:

Yes, it's in relation to contracts--what's expressed in consent and what's implied. And express consent is defined as "evinced by words" and implied or tacit by acts. It's the same words as used in Article 23. That's what I'm asking. You think article 1811 is still alive and well?

Professor Palmer:

Well, in the first place, article 1811 doesn't apply to legislation. Article 1811 applies to contracts, and we're talking about the repeal of laws, not the interpretation of contracts. So, I don't see the relevance in the first place of this particular Code Article. It seems again to be a red herring. Now, I would say with respect to contracts that if this Article had been simply dropped . . .

Professor Yiannopoulos:

It has been dropped.

Professor Palmer:

If it has simply been dropped, it has been really an "untouched provision," neither amended nor reenacted, consequently simply ignored and dropped.

Professor Yiannopoulos:

Right.

Professor Palmer:

I would then say the Article is still in effect because legislation does not simply fade away by being dropped. It has to be repealed. And if there's nothing expressly contrary, substantively contrary in the Revision that would cause an implied repeal of Article 1811 (and I don't know whether there is or there isn't), but if there is nothing, I believe you'll be finding judicial resort made to it in the proper case.

Member of the Audience:

Wouldn't both of you say that whether it were expressly repealed or not, that 1811 still lives in some sense? Whether it was amended, whether it was dropped, or even repealed?

Professor Palmer:

Well, when an article is repealed, it is quite different than when it is not.

Member of the Audience:

But it doesn't mean the opposite is now true. If you repeal, it's not saying that whatever was in 1811 before is now untrue.

Professor Palmer:

Well, though it is repealed, you might still resort to it as a persuasive article as a matter of general reasoning, whereby you say "this is common sense, this is good logic;" whereas if it is in effect and in force, you are not just appealing to common sense and logic, but you're obliged to consider this article as a source of law. Now there's a great difference between a source of law and an authority which is merely persuasive. That is part of the debate we are having. Even

when an article is repealed, it may not drop out of the logical framework, if that's the point you are suggesting.

Member of the Audience:

So the real conflict in practice between your two positions relates to supplemental rules that are not in conflict; that if Code I has a permissive law in which A occurs, and Code II says that this result occurs if B occurs. The question is what happens if they occur? Is the result the same? You say yes and he says no.

Professor Palmer:

Code I may have a permissive law. Code II may have a similar permissive law, but carrying an exception not found in Code I, whereby the result is not permitted in some defined exceptional case. Since Code I is fully permissive, but Code II is partially restrictive, you have a kind of supplementation or synthesis occurring there. You must join the two articles together. Synthesis or supplementation has already occurred in prior cases.

Professor Cueto-Rua:

Philosophically speaking, statutes and law have the same sources. But following the civilian tradition means that this is what you have to know. What are your sources? How are you going to act? How are you going to compose? What kind of objective reference can you make to justify your position? Isn't it true, Mr. Hermann, that that is what you do? What's wrong then to have references to the provenance of the provision? This is the typical scenario. We have an article and we have the sources which we make use of to interpret the patterns; that's all we have. Now, a code is a statute, the same - same order, same legal hierarchy, same degree of validity. Sources are objective criteria for interpretation of the rules including doctrine, the teaching of the great jurists. Civil law was the greatest thing done by professors of law, by jurists, in the case of the French law--Domat,

Pothier, Portalis, Cambaceres--,and when we tried to learn such law, we had to be acquainted with them. Now the Code is the greatest thing. Not only is it an expression of the will of the legislator, it is an expression of the doctrine of the jurists, and if you want to be very conversant in the civil law, you better know the doctrines of the jurists because if you do not, you do not really understand the civil law. And that's the greatest problem with the civil law in Louisiana. That's what's missing here in the United States.

Now, finally, a digest. What is the digest? Well a digest is a systematic compilation, a putting together. That was done by Tribonian, working under the directive of our friend, Justinian. Let's gather, let's put all of the materials together. Let's have some idea for the classification of materials, goods. Now, a person has to consider Gaius. Almost 1700 years ago he started the process of providing ideas for the classification of materials. What did Gaius mean? What is this classification for? Because we have to put together materials coming from history, and there was at the time of Gaius 600 years of Roman jurisprudence. And when Tribonian completed his work it was 1000 years, 1000 years, you understand? America hadn't been discovered. We were nonexistent at that time. They gathered and that's a compilation, an intelligent gathering under the influence of Gaius. A code is very different, with the intellectual process, with a great deal of intellectual elaboration, with a very concise and special technique of definitions, generalizations, classification, allowing deductions; and therefore you find this degree of coherence and consistency which allows you to interpret any article of the Code as being a part of the Code. And then the Code is a part of the law as a whole. We have never held, civilians have never held, that the Code is without connection with the natural system of law. We have never said that the Civil Code is without link with history, and in the case of the French Civil Code, history means Domat, means Pothier, means DeMoulin, means the great tradition of the French jurists, and the Code elaborates its expression of the talent of these great jurists. That's a code. That's what gathering means, using some ideas developed by Gaius to classify historic material.

Professor Samuel:

Thank you.

Professor Yiannopoulos:

I really don't think there is much disagreement with the second part of the article of Professor Palmer. It's scholarly and it has plenty of good ideas, and, as a matter of fact, whether it's opinion or fact, it's correct.

Professor Samuel:

Any other quick, last comments?

Let me thank the Civil Law Society very much for arranging this and all the panelists for participating. There are refreshments downstairs in the Dean's Conference Room. All are invited.