

A.N. YIANNOPOULOS: LOUISIANA'S GREAT OVERLOOKED LEGAL HISTORIAN

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Our understanding of Louisiana law owes passing much to the scholarship of Athanassios N. Yiannopoulos. To be asked, therefore, to offer words of gratitude in this Memorial Issue of the *Loyola Law Review* is a privilege beyond measure. Professor Yiannopoulos was blessed with the gift of enthusiasm, and he was enthusiastic about many things. As a legal scientist, he perhaps cared most about codes, judges, and courts. But as an academician, he cared most about teachers, students, and legal education. And he was, indeed, pure academician. He had no fancy that he was teaching skills that might make his students more effective practitioners, although, of course, he was in fact doing precisely that—by demonstrating the skill of engaging fully and patiently with statutes and cases.

But there was much more. Professor Yiannopoulos had a spontaneity, a rush of accented English, an unquenchable abundance of self and life—recalling, at least for this American, Kazantzakis's *Zorba*¹ or the spirited Melina Mercouri in Jules Dassin's 1960 comedy, *Never on Sunday*.² And always there was the deep and broad learning, employed unpretentiously, naturally, effectively. If today we see farther and clearer in the domain of Louisiana law, it is because we stand on the shoulders of giants, and Professor Yiannopoulos was the last of the old race

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1. *See generally* NIKOS KAZANTZAKIS, *ZORBA THE GREEK* (Peter Bien trans., 2014) (1981).

2. *NEVER ON SUNDAY* (Metro-Goldwyn-Mayer Studios Inc. 1960).

of legal titans.³

A.N. Yiannopoulos moved to Louisiana in the winter of 1958, freshly hired by Louisiana State University (LSU) as a research professor. He came to LSU festooned with law degrees—from the University of Thessaloniki in Greece, the University of Chicago (Master of Civil Law), the University of California at Berkeley (J.S.D.), and the University of Cologne (Dr. Jur.).⁴ “He would ultimately become the state’s premier property-law scholar, but he began his research . . . with mandate and agency.”⁵ From the beginning, then, Professor Yiannopoulos exhibited the *Encyclopediste* approach of a *philosophe* in his legal scholarship, rather than the narrow specialization that typified research agendas by the time he assumed *emeritus* status in the Tulane University School of Law (to which he had moved from LSU in 1979).⁶

While a memorial is no occasion for an extended review of Professor Yiannopoulos’s long and distinguished academic career, I would like to draw attention to a largely overlooked feature of his scholarly work, namely, his contributions in the historiography of Louisiana law. Although he neither wrote essays on the methods and schools of modern legal history, nor expressed an attachment to any particular style of legal history, it is still possible to make plausible surmises, from scattered passages in his history articles, as to his preferred method of historical interpretation—a crucial surmise, given that historians’ theories or methods of history will necessarily shape their historiography.⁷ His occasional *ipse dixits* about socio-economic influences on the shape and shaping of law⁸ suggest only a

3. Tyler G. Storms, *Interview with Professor A.N. Yiannopoulos: Louisiana’s Most Influential Jurist in Our Time, Interviewer’s Note*, 64 LA. BAR J. 24, 24 (June–July 2016) (stating that “the lawyers of this state have seen farther, because they have been able to stand on the shoulders of such a rare genius”).

4. W. LEE HARGRAVE, *LSU LAW: THE LOUISIANA STATE UNIVERSITY LAW SCHOOL FROM 1906 TO 1977*, at 134 (2004).

5. *Id.*

6. *See id.*

7. *See generally* JOYCE APPLEBY, LYNN HUNT & MARGARET JACOB, *TELLING THE TRUTH ABOUT HISTORY* (1994); ROBERT F. BERKHOFER, JR., *FASHIONING HISTORY: CURRENT PRACTICES AND PRINCIPLES* (2008); PETER CHARLES HOFFER, *THE HISTORIANS’ PARADOX: THE STUDY OF HISTORY IN OUR TIME* (2008); GORDON S. WOOD, *THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY* (2008).

8. *See* A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 LA. L. REV. 5, 22 (1992) [hereinafter Yiannopoulos *Two Critical Years*] (stating that “civil codes continue to *mirror* and promote social

restrained, modest belief in the explanatory cogency of the more radical version of the “law and society” school of legal history.⁹ In

change”) (emphasis added).

9. For discussion of this school, see Mark F. Fernandez, *Introduction to A LAW UNTO ITSELF?: ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY* 1, 3 (Warren M. Billings & Mark F. Fernandez eds., 2002) (explaining that the “law and society” school of legal history “emphasized the intersection of law and legal institutions with social and cultural history”). Of course, “intersection” and its modish and abstract form “intersectionality” contain too wide a range of meanings to be usefully descriptive or diagnostic. See also Stanley N. Katz, *The Problem of a Colonial Legal History*, in *COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA* 457, 464–67, 477–81 (Jack P. Greene & J.R. Pole eds., 1984).

Professor Kunal Parker, for example, has described the importance of social context for “legal history today” in such general and shapeless terms as to drain “social forces” of any helpful explanatory authority. Kunal M. Parker, *Writing Legal History Then and Now: A Brief Reflection*, 56 AM. J. LEGAL HIST. 168, 177 (2016) (“Today, I submit, most American legal historians do not operate with a rigorous or substantive conception of either ‘society’ or ‘history.’ . . . [other] than [as] absorptive contextualizing frames that can *accommodate any phenomenon, dissolve it into themselves*, and thereby dethrone its attempts to stand apart from them. What one gets . . . is not so much a confirmation . . . of some thick, substantive idea of the ‘social’ or the ‘historical’ . . . as it is to index a thinned out, ubiquitous frame that acquires its meaning and power *negatively*, by demolishing law’s own ability to stand apart from it. Where everything can be shown to be historically or socially constructed, one does not need an especially rigorous idea of ‘society’ or ‘history.’ It follows, of course, that it makes no sense to separate ‘law’ from ‘society.’”) (emphasis added) (footnote omitted). Parker here establishes himself as a very “mature” question-beggar. As explained in a classic textbook of logic, “[c]ircular definitions are a rather obvious instance [of the fallacy] of question begging. In its full-blown maturity[,] question begging can go on for volumes . . .” W. WARD FEARNSIDE & WILLIAM B. HOLTHER, *FALLACY: THE COUNTERFEIT OF ARGUMENT* 166 (1959). The authors explain that “circular definition” is any “definition which attempts to resolve a point at issue by defining a term so as to preëempt the point. Such a definition ‘begs the question.’” *Id.* at 165. The authors then give an example of question-begging, namely, the “Idealist Fallacy,” as described by the American philosopher Ralph Barton Perry:

Everything in the world is known through experience. An inexperienced fact is inconceivable. There is, then, a constant equation between fact and experience . . . Now experience obviously requires an experiencing intelligence. Idealism draws the evident conclusion: the universe is mental. . . .

Ralph Barton Perry showed that this argument for Idealism rests on the [defined] truth that whatever is meant by “experience,” it will attend all knowledge. Perry argued that this kind of constant attendance does not prove a causal relation [between “fact” and “mind”]. . . .

It might be added that the term “experience” is so inclusive that it incorporates “knowledge” and even “fact.” When such terms occur in argument, there is open invitation to circularity. The circularity here is *something* like the following: Experience attends everything, and it is mental; the universe is everything; so experience causes the universe; therefore, the universe is mental. . . . This is . . . question-begging

Id. at 167. If one substitutes Parker’s “history, social context, any phenomenon” for Perry’s “experience, mental, universe,” Parker’s question-begging argument can be seen to perfectly track Perry’s Idealist fallacy. And like Perry’s example of a question-begging argument, Parker’s argument—that “society” and “history” are

its extreme iteration, this school practices “social” or “contextual reductivism,”¹⁰ the belief that the fullness of social context accounts for all (or almost all) legal context and development—society proposes and law disposes.¹¹ But if “context is everything,”¹² then law is nothing, for overstressing social context can drain generalized meaning from every event or idea, just as it can drain the ability (or even the desire) of historians to explain or find meaning in past events.¹³

Furthermore, because society is prolix and Procrustean, anyone who practices the “social context” approach to legal history can always be one-upped (or many-upped) by other historians who render their historiography even more contextual by enumerating even more circumstantial detail. As explained by cultural historian, Peter Burke, “Like the Protestant appeal to individual judgement, the appeal to context would seem to lead . . . to intellectual microhistories which become smaller and smaller until they disappear altogether.”¹⁴ Moreover, “thick

merely “absorptive contextualizing frames that can accommodate any phenomenon”—is full of abstract nouns and complex sentences that do not convey much meaning and therefore do not amount to much of an argument. Unless the reader swallows the central premise that “society” and “history” are nothing other than “absorptive contextualizing frames,” the rest of Parker’s “Reflection on Legal History,” does not make a lot of sense. But from the needlessly abstract, even pedantic, style in which his long “Reflection” is couched, Parker has demonstrated that he can stay on this question-begging, reductivist carousel for pages and pages without getting dizzy.

10. See PETER BURKE, *SECRET HISTORY AND HISTORICAL CONSCIOUSNESS: FROM THE RENAISSANCE TO ROMANTICISM 179–80* (2016) (describing and criticizing the modern historiographical fallacy of “contextual reductionism”).

11. Such an expansive view of the pervasive role of socio-economic forces in shaping law ranges from the “necessitarian” to the utilitarian, i.e., from those that are premised on a full-throated, Marxian determinism to those that fully incorporate telic human agency. See generally MICHAEL OAKESHOTT, *THE VOCABULARY OF A MODERN EUROPEAN STATE* 48–50 (Luke O’Sullivan ed., 2008); Jane Frecknall-Hughes, *Re-examining King John and Magna Carta: Reflection on Reasons, Methodology and Methods*, in *MAKING LEGAL HISTORY: APPROACHES AND METHODOLOGIES* 244 (Anthony Musson & Chantal Stebbings eds., 2012); David M. Rabban, *Methodology in Legal History: From the History of Free Speech to the Role of History in Transatlantic Legal Thought*, in *MAKING LEGAL HISTORY: APPROACHES AND METHODOLOGIES* 88 (Anthony Musson & Chantal Stebbings eds., 2012); John Henry Schlegal, *Critical Legal Studies*, in *A COMPANION TO AMERICAN LEGAL HISTORY* 524 (Sally E. Hadden & Alfred L. Brophy eds., 2013).

12. DOUGLAS R. EGERTON, *REBELS, REFORMERS, & REVOLUTIONARIES: COLLECTED ESSAYS AND SECOND THOUGHTS* 21 (2002).

13. See WOOD, *supra* note 7, at 144 (noting American historian “Richard D. Brown’s pessimistic claim that postmodernism would inevitably lead to the writing of microhistories” rather than large-scale explorations and explanations of the past).

14. BURKE, *supra* note 10, at 180.

contextualization” undermines the very possibility of any causal explanations for legal change: “[I]f there really are only dependent variables in history, then how do historians establish and confirm causal relations among them? How, if everything depends on everything else, can we ever know the cause of anything?”¹⁵

Professor Yiannopoulos’s historical studies implicitly reject the twin dangers of reductivism and microscopic contextualization;¹⁶ for, at its best, his legal history respects the elusiveness of historical reconstruction by focusing on legal rules and ideas as containing within themselves influential charms and attractions that are capable of enlisting human loyalty and agency. On this score, then, Professor Yiannopoulos is less in harmony with the “economic interests” explanations of law and politics contained in Charles A. Beard’s major books¹⁷ or Morton J. Horwitz’s “economic instrumentalism”¹⁸ than with Alan

15. JOHN LEWIS GADDIS, *THE LANDSCAPE OF HISTORY: HOW HISTORIANS MAP THE PAST* 92 (2002).

16. As will be demonstrated below, *see infra* text accompanying notes 39–42, 57–90, Yiannopoulos’s historical studies place human thinking at the center of the story. Hence, they avoid the kind of reductivism described by English religious historian Rupert Shortt as “like analyzing a symphony in terms of the decibels in its constituent bars.” Rupert Shortt, *At the Prow of History*, *THE N.Y. TIMES LITERARY SUPPLEMENT*, Dec. 16, 2016, at 3, 5.

17. *See generally* CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* (1913); CHARLES A. BEARD, *ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY* (1915).

18. *See generally* Howard S. Erlanger ed., *Review Symposium on the 25th Anniversary of Horwitz’s Transformation I*, 28 *L. & SOC. INQUIRY* 1119–60 (2003); James L. Huffman, *American Legal History According to Horwitz: The Rule of Law Yields to Power*, 37 *TULSA L. REV.* 953 (2002); Jenny B. Wahl, *Twice-Told Tales: An Economist’s Re-Telling of the Transformation of American Law, 1780–1860*, 37 *TULSA L. REV.* 879 (2002). For a study of Beard and the Beardians, see James Étienne Viator, *Give Me That Old-Time Historiography: Charles Beard and the Study of the Constitution*, 36 *LOY. L. REV.* 981 (1991); James É. Viator, *Give Me That Old-Time Historiography: Charles Beard and the Study of the Constitution, Part II*, 43 *LOY. L. REV.* 311 (1997). Watson provided a succinct description of his own views for a leading comparative law casebook. *See* RUDOLF B. SCHLESINGER, HANS W. BAADE & MIRJAN R. DAMASKA, *COMPARATIVE LAW: CASES—TEXT—MATERIALS* 309–10 (5th ed. 1988). Professor Watson wrote that:

Comparative Law as an academic discipline . . . is . . . an investigation into the legal transplants that have occurred . . . Comparative Law as an academic discipline therefore necessarily entails a large historical component. . . . The legal tradition . . . has a vast importance in legal growth, an importance that is usually grossly underestimated.

When, as [I do], one adds to the picture the claim that legal rules are frequently and for long stretches of time dysfunctional; ill-adapted to meet the needs and desires of the society at large, its ruling elite or any recognisable group, then one can see . . . that law exists as culture Comparative Law . . .

Watson's argument for the primacy of the lawyer's "taught tradition" in the formation and transmission of law.¹⁹ Watson's preferred term for the transmission of law from one country to another is "legal transplant."²⁰ Watson's explanation of legal-transplanting emphasizes the primacy of legal doctrines, texts, and traditions in the development and borrowing of law. If Watson is correct, then the "social context" historians must be wrong, for if there is an inherent causal connection between society and law, then "legal transplants ought to be virtually impossible."²¹

The best known legal-history essay of Professor Yiannopoulos is the one lawyers and law professors receive a new copy of every January: his superb historical and exegetical

is [thus] a powerful tool and, in [my] view, the only satisfactory tool for unravelling the causes of legal change and . . . the nature of the relationship between law and the society in which it operates.

RUDOLF B. SCHLESINGER, HANS W. BAADE & MIRJAN R. DAMASKA, *COMPARATIVE LAW: CASES—TEXT—MATERIALS* 309–10 (5th ed. 1988) (footnotes omitted). And the casebook authors encapsulate Watson's own succinct description in one extremely accurate sentence: "Professor Watson emphasizes the autonomous intellectual history of the law, and minimizes the degree to which that intellectual history may have been impacted by social and political events." *Id.* at 310.

19. See generally ALAN WATSON, *SOCIETY AND LEGAL CHANGE* (2d ed. 2001); ALAN WATSON, *LAW OUT OF CONTEXT* (2000); ALAN WATSON, *FAILURES OF THE LEGAL IMAGINATION* (1988) [hereinafter *WATSON LEGAL IMAGINATION*]; ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974) [hereinafter *WATSON TRANSPLANTS*]; Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121 (1983); Alan Watson, *Comparative Law and Legal Change*, 37 *CAMBRIDGE L.J.* 313 (1978).

20. See generally *WATSON TRANSPLANTS*, *supra* note 19.

21. Edward M. Wise, *The Transplant of Legal Patterns*, 38 *AM. J. COMP. L. SUPP.* 1, 2 (1990). Indeed, in his study of how Justice Joseph Story's *misunderstanding* and misinterpretations of the Romanist European scholarship on the conflict of laws created the orthodox school of conflicts law in 19th-century America, see ALAN WATSON, *JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICTS OF LAWS* (1992), Watson explained how a mistaken reading of European legal doctrine became the regnant American law of conflicts, thereby offering the strongest possible confirmation of the Watson Thesis of legal development; for he presented a paradigmatic instance of law being transplanted by jurists and attorneys, which transplantation was out-of-synch not only with the contours of the transplanting society but also with the true content of the original texts, see generally *id.* Watson explained that one of his law-faculty colleagues teasingly accused him of subscribing to the "accident theory" of legal development." *Id.* at x. But Watson embraced the charge, because "legal accidents"—transplants based on misunderstanding of the original source materials—are extremely revealing: they highlight the legal thinking and (mis)understanding of the judges or legislators who wanted to transplant the "foreign law" in their own jurisdictions. "Consequently," Watson concluded, "[legal accidents] illuminate the absence of fit that there may be between a society and its law." *Id.* at x (footnote omitted).

treatment of “The Civil Codes of Louisiana,” published in one version or another, since 1980, as an introduction to the West Publishing Company’s annual paperback edition of the Louisiana Civil Code.²² This introductory essay has instructed generations of law students and lawyers not only in the statutory keystone of Louisiana’s mixed legal system,²³ but also in the historical legal regimes that sealed Louisiana’s status as the only mixed Romanist-common-law legal system in the American Union.²⁴

Although suitable as a brief introduction for lawyers and judges to the Louisiana Civil Code, the thirty-odd pages of this introduction to “The Civil Codes of Louisiana” were not sufficient, however, for the sort of thorough schooling in Roman and Romanist law mandated by LSU Law School’s 1-L first-semester course, “Introduction to Civil Law Systems.”²⁵ As a result, Professor Yiannopoulos composed and published a book for that course in 1971,²⁶ with another edition appearing in 1977,²⁷ followed by a 1999 edition for use in his 1-L “Civil Law Property” course in the Tulane University School of Law.²⁸ Virtually everything Yiannopoulos wrote was historically informed,²⁹ even

22. See, e.g., LOUISIANA CIVIL CODE OF 1980: AS AMENDED THROUGH THE 1979 REGULAR SESSION OF THE LEGISLATURE xi–xxv (A.N. Yiannopoulos ed., 1980); LOUISIANA CIVIL CODE 1985: ANNOTATED THROUGH THE 1984 REGULAR SESSION OF THE LEGISLATURE xiii–xxvii (A.N. Yiannopoulos ed., 1984); 1 LOUISIANA CIVIL CODE 2015: AS REVISED AND AMENDED THROUGH THE 2014 REGULAR SESSION OF THE LEGISLATURE xlix–lxx (A.N. Yiannopoulos ed., 2015).

23. The nomenclature of “mixed jurisdiction” was developed by T.B. Smith to describe a nation or state whose “Civilian or Romanistic foundations have been overlaid by Anglo-American jurisprudence.” T.B. SMITH, STUDIES CRITICAL AND COMPARATIVE ix (1962). See generally A STUDY OF MIXED LEGAL SYSTEMS: ENDANGERED, ENTRENCHED OR BLENDED (Sue Farron, Esin Örüçü & Seán Patrick Donlan eds., 2014); MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND (Vernon Valentine Palmer & Elspeth Christie Reid eds., 2009); *First Worldwide Conference on Mixed Jurisdictions—Salience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities*, 78 TUL. L. REV. 1–501 (2003).

24. Mathias Reimann, *Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues*, 73 TUL. L. REV. 1337, 1343 (1999).

25. See HARGRAVE, *supra* note 4, at 189.

26. A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM: COURSE OUTLINES, PART I (1971).

27. A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM: COURSEBOOK, PART I (1977).

28. A.N. YIANNOPOULOS, CIVIL LAW SYSTEM: LOUISIANA AND COMPARATIVE LAW, A COURSEBOOK: TEXTS, CASES AND MATERIALS (2d ed. 1999).

29. See, e.g., A.N. YIANNOPOULOS, PROPERTY, 2 LOUISIANA CIVIL LAW TREATISE (1967, 2d ed. 1980, 3d ed. 1991, 4th ed. 2001); A.N. YIANNOPOULOS, PERSONAL SERVITUDES, 3 LOUISIANA CIVIL LAW TREATISE (1968, 2d ed. 1978, 3d ed. 1989, 4th

his speeches and his more informal essays, such as his optimistic 1980 article on Louisiana Civil Law as an allegedly lost cause,³⁰ and his sober second thoughts on the same topic are that much more convincing because of the elegiac sequel's deeper historical roots.³¹ Indeed, if anyone ever faces the necessity of explaining to students colonial Louisiana's French-Spanish-French-American peregrinations, there is no better, no more concise description to be found anywhere than the three pages he devoted to the topic in his elegy.³²

Nor is there a better critical guide to the famous "Tournament of Scholars"—which had been fought on the *champ clos* of the disputed "national origins" of Louisiana law during the American territorial period³³—than his contribution to a collection of historical studies of the Louisiana legal tradition.³⁴ In his "Critical Appraisal" of the Tournament, he adroitly summarized and evaluated the contending and contentious views of Tulane Law School's Rodolfo Batiza and LSU Law School's Robert Pascal concerning the national pedigree of Louisiana law at the time the Digest of 1808 was composed.³⁵ In his 1983

ed. 2000); A.N. YIANNPOULOS, *PREDIAL SERVITUDES*, 4 LOUISIANA CIVIL LAW TREATISE (1983, 2d ed. 1997, 3d ed. 2004).

30. A.N. Yiannopoulos, *Louisiana Civil Law—A Lost Cause?*, 54 TUL. L. REV. 830 (1980).

31. A.N. Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 TUL. L. REV. 379, 409 (2003) ("Louisiana has been, and most probably will continue to be, a mixed jurisdiction."); *Id.* at 408 ("Vernon Palmer proclaimed the death of the Louisiana Civil Code more than ten years ago. . . . The news of the demise of the Code was not highly exaggerated, but the diagnosis of the cause of death was mistaken.") (footnotes omitted).

32. *Id.* at 381–83.

33. See Joseph A. Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972). For two of the more recent and probing critical essays on the Tournament, see John W. Cairns, *Spanish Law, the Teatro de la legislación universal de España e Indias, and the Background to the Drafting of the Digest of Orleans of 1808*, 31 TUL. EUR. & CIV. L.F. 79, 91–96, 118–20 (2017) [hereinafter Cairns *Spanish Law*]; John W. Cairns, *The de la Vergne Volume and the Digest of 1808*, 24 TUL. EUR. & CIV. L.F. 31, 35–38 (2009).

34. See A.N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in LOUISIANA'S LEGAL HERITAGE 87 (Edward F. Haas ed., 1983) [hereinafter Yiannopoulos *The Early Sources*]; see also Morris S. Arnold, *Book Review*, 45 LA. L. REV. 1325 (1984) (reviewing LOUISIANA'S LEGAL HERITAGE (1983)).

35. See Yiannopoulos *The Early Sources*, *supra* note 34, at 87, 100–01; see also Arnold, *supra* note 34. I can still see the mischievous glee of Yiannopoulos's smile during a conversation when he pointed out the irony that the Spaniard Batiza's thesis was that our law in 1803–1808 was thoroughly French, see Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971); Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and*

summation on the Batiza-Pascal Tournament,³⁶ Yiannopoulos opened by noting:

In [the] late eighteenth-century “civil law” was considered to be the common law of Europe It was [only] after the era of codification that civil law was “nationalized,” that is, [it then] acquired a distinctive national flavor in the various countries of Europe. Prior to the era of codification [therefore] the civil law prevailing in . . . France, in Spain, . . . [was] essentially the same³⁷

Thus, employing best practices of the modern science of history,³⁸ Yiannopoulos explained that the tournament debaters had committed the fallacy of “presentism,”³⁹ which turned the

Speculation: A Rejoinder, 46 TUL. L. REV. 628 (1972), while the New Orleans French Creole Pascal, countered that the law of Orleans Territory was solidly Spanish, see RICHARD HOLCOMBE KILBOURNE, JR., A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803–1839, at 73–74, 152–54 (1987) (concluding that the Digest of 1808 was grounded in Louisiana’s Spanish colonial law); see also James Étienne Viator, *Book Review*, 33 AM. J. LEGAL HIST. 368–69 (1989) [hereinafter Viator *Book Review*] (reviewing A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803–1839 (1987)); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972); GEORGE DARGO, JEFFERSON’S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS 105–74 (1975). For legal *Kulturkampf* similar to Louisiana’s, see STUART BANNER, LEGAL SYSTEMS IN CONFLICT: PROPERTY AND SOVEREIGNTY IN MISSOURI, 1750–1860 (2000); CHARLES R. CUTTER, THE LEGAL CULTURE OF NORTHERN NEW SPAIN, 1700–1810 (1995).

36. For another Louisiana *champ clos*—dedicated to the meaning and significance of the word “Creole”—see James Étienne Viator, *Kreyol-ye, Kadjen-ye e Lalwa a Langaj Dan Lalwizyann*, 60 LOY. L. REV. 273 (2014); see also James Étienne Viator, *Les Creoles, les Cadiens, et le Droit de Langue en Louisiane*, 60 LOY. L. REV. 297 (2014).

37. See Yiannopoulos *The Early Sources*, *supra* note 34, at 100–01 (footnote omitted).

38. See JAMES M. BANNER, JR., BEING A HISTORIAN: AN INTRODUCTION TO THE PROFESSIONAL WORLD OF HISTORY 34–62, 211–37 (2012); RICHARD J. EVANS, IN DEFENSE OF HISTORY 89–110, 193–220 (1999); GILBERT J. GARRAGHAN, A GUIDE TO HISTORICAL METHOD 33–80, 143–67, 330–37 (1946); HOFFER, *supra* note 7, at 9–64, 106–27.

39. See DAVID HACKETT FISCHER, HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 135 (1970) (“The *fallacy of presentism* is a complex anachronism, in which the antecedent in a narrative series is falsified by being defined or interpreted in terms of the consequent. Sometimes [it is] called the fallacy of *nunc pro tunc*”); Lynn Hunt, *Against Presentism*, AMERICAN HISTORICAL ASSOCIATION: PERSPECTIVES ON HISTORY (May 1, 2002), <https://www.historians.org/publications-and-directories/perspectives-on-history/may-2002/against-presentism> (explaining that presentism is the tendency to interpret “the past in terms of present concerns [and] usually leads us to find ourselves morally superior; the Greeks had slavery, even David Hume was a racist Our forbears constantly fail to measure up to our present-day standards” and stating that we moderns therefore “must question the stance of temporal superiority that is implicit in the western . . .

tournament into a shadow-boxing match: Batiza and Pascal were contending over a modern “nationalistic” distinction (and agenda) that people in the late-eighteenth and early-nineteenth centuries did not themselves make.

Moreover, as convincingly demonstrated by Richard Kilbourne and others in their discussions of early American law, early-national and antebellum lawyers and judges, whether in Louisiana or New England, had a shared view of the nature and sources of case law *and* legislation, which explains why the long-standing debate over whether Spanish or French civil law provided the content of the Digest of 1808 is fundamentally misconceived—misconceived because it is premised on a modern and therefore anachronistic philosophy of law.⁴⁰ To be sure, Yiannopoulos was correct to point out that all eighteenth-century continental European laws, of whatever kingdom or principality, bore a strong family resemblance in style and content, for these laws were all Romanist in origin, content, and development.⁴¹

historical discipline”); William Safire, *On Language: Hair-Raising Fund-Raising*, N.Y. TIMES, Nov. 2, 1997, at 26–27 (Presentism “[is] when a historian sees events in the past through the prism of present-day standards,’ the lawyer-historian [Annette Gordon-Reed] tells me. ‘For example, Thomas Jefferson is often judged harshly as a sexist even though the notion of complete equality between the sexes was almost unthinkable in his era.’ Gordon-Reed calls it the ‘why wasn’t Jefferson like Alan Alda’ question. . . . When we apply today’s morality to yesterday’s mores, we indulge in *ex post facto* judgment. That’s presentism, imposing the present on the past, which is usually unfair, so don’t do it.”). For a brief against “temporal superiority” that warns contemporaries to forgive historical figures their trespasses in hopes future generations might forgive ours, see CHUCK KLOSTERMAN, BUT WHAT IF WE’RE WRONG?: THINKING ABOUT THE PRESENT AS IF IT WERE THE PAST 10–17 (2017) (arguing that just as the past often looks foolish to us, so too will we look foolish to the future). See also WOOD, *supra* note 7, at 11 (stating that to possess a “historical sense” means “[t]o be able to see the participants of the past in [a] comprehensive way . . . in the context of their own time, to describe their blindness and folly with sympathy, to recognize the extent to which they were caught up in . . . circumstances over which they had little control, and to realize the degree to which they created results they never intended . . .”).

40. See WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 34–36 (1995); KILBOURNE, *supra* note 35, at 62–64; MICHAL JAN ROZBICKI, CULTURE AND LIBERTY IN THE AGE OF AMERICAN REVOLUTION 147–50 (2011) (noting that collective natural rights, individual natural rights, and natural law all harmoniously co-existed in 18th-century America); MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM (1994) (exploring how republican natural-law ideas came to be blended in 18th-century America with Lockean natural-rights thinking); Charles L. Barzun, *Common Sense and Legal Science*, 90 VA. L. REV. 1051, 1069–74 (2004); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993).

41. The most recent legal historian to scrutinize the “Tournament of Digest

Moreover, all those versions of Romanist law were not merely similar, but similarly binding on all Europeans, for all European (and American) lawyers of the long eighteenth century were natural-law lawyers.⁴²

To the extent, then, that the long-standing controversy over the precise national “legal source” of the Digest of 1808 seemed important to generations of late-twentieth-century Louisiana lawyers and jurists,⁴³ that seeming importance was fostered by historical anachronism.⁴⁴ As any number of legal historians have noted, the dominant twentieth-century theory of the foundation of law—legal positivism⁴⁵—is so vastly different from eighteenth-

Sources” essentially agrees with Yiannopoulos, while providing more argument and evidence to support the “Romanist” conclusion. See Cairns *Spanish Law*, *supra* note 33, at 119 (Noting that the Act of the territorial legislature calling for the creation of a civil code “emphasized that the law in the Territory of Orleans was the civil law in the sense of laws based on the Roman law. The Spanish law was represented as just a modern variation [of continental Roman law].”).

42. See CASTO, *supra* note 40, at 2; KILBOURNE, *supra* note 35, at 75–76; Hamburger, *supra* note 40, at 914 (observing that “an eighteenth-century American, whether prominent or obscure, . . . probably took for granted that his audience shared at least some of his assumptions about natural rights”) (footnote omitted).

43. See Viator *Book Review*, *supra* note 35, at 368 (stating that “the bar and the law-school community of Louisiana . . . have for too long been mired” in long-standing debate about the legal sources of the Digest of 1808).

44. See WOOD, *supra* note 7, at 39 (describing “anachronism” as the fallacious practice of historians’ projecting their “contemporary consciousness back into the past”); *id.* at 37 (criticizing political scientist James MacGregor Burns for implying that a radical reform movement “was fermenting just below the surface” of antebellum politics, but that it never happened because a talented and effective potential leader *might have* catalyzed this movement into a governing majority, but we will never know “because such a leader did not arise,” and explaining that this sort of speculation about the failure of unknown Teddy or Franklin Roosevelts to step forward is an egregious historiographical error, and concluding that it would be “[b]etter to put clocks in ancient Rome than to create this kind of anachronism”).

45. Legal positivism is the “view of law which advocates the study of actual legal systems, and eschews the search for independent justifications in terms of *natural law: i.e. the view which assumes that all law is *positive law.” ROGER SCRUTON, A DICTIONARY OF POLITICAL THOUGHT 364 (1982). In the phrase “legal positivism,” the root “term ‘positive’ has here the sense of that which is given or laid down, that which has to be accepted as we find it and is not further explicable; the word is intended to convey a warning against the attempts of theology and metaphysics to go beyond the world given to observation in order to enquire into first causes and ultimate ends.” ANTHONY FLEW, A DICTIONARY OF PHILOSOPHY 283 (rev. 2d ed. 1984). Legal positivism originated in the work of Thomas Hobbes, who described law as, simply and purely, whatever is commanded by the governing political sovereign. See JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 71 (1992). The conventional, though foreshortened, view is that Jeremy Bentham founded the school of legal positivism. See, e.g., DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION

century natural-law ideas about the foundations of all civil and criminal laws, whether case law or statutory law, that “many of the Founding Generation’s thoughts and actions cannot be understood without setting positivism aside and studying those earlier thoughts and actions in their original natural-law context.”⁴⁶ This the original Tournament participants neglected to do—they failed to set aside their unspoken and anachronistic understanding of law solely in terms of legal positivism. Given the unrivaled dominance of legal positivism in mid-twentieth-century American jurisprudence,⁴⁷ especially when coupled with the “civilian revival” among Louisiana jurists and professors during the 1930s through 1970s,⁴⁸ it must have seemed imperative to unearth and identify the precise European roots of Louisiana’s codes, for those national roots would influence the judicial interpretation of the codal statutes. The European sovereign that had transplanted its law in Louisiana would define the interpretive provenance of the code articles to be applied by judges in the regular course of litigation.

Of course, that sort of positivism was unknown to Louisiana’s antebellum judges. Indeed, following enactment of Louisiana’s first true code, the Code of 1825, founded, as it was, on the Napoleonic principle of absolute legislative supremacy and exclusivity in law-making, there ensued a fifteen-year struggle between the legislature and the supreme court over the exclusivity of the Code as the premier source and statement of

DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 267–74 (1989); Gerald J. Postema, *Bentham’s ‘Revisionist’ Positivism* (Mar. 12, 2014), <https://www.mixcloud.com/BenthamSeminar/professor-gerald-j-postema-benthams-revisionist-positivism>; Xiaobo Zhai, *Bentham on the Interpretation of Laws*, 38 J. LEGAL HIST. 282, 282 (2017).

46. CASTO, *supra* note 40, at 2. See also CARL J. RICHARD, *THE BATTLE FOR THE AMERICAN MIND: A BRIEF HISTORY OF A NATION’S THOUGHT* 262–65 (2004) (describing Oliver Wendell Holmes, Jr., as a moral relativist who was chiefly responsible for the 20th-century replacement of natural law with legal positivism); C. Bradley Thompson, *On Declaring the Laws and Rights of Nature*, in *NATURAL RIGHTS INDIVIDUALISM AND PROGRESSIVISM IN AMERICAN POLITICAL PHILOSOPHY* 104 (Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul eds., 2012) (seeking to describe accurately the common understanding of most 18th-century Americans about natural law by examining that understanding in the larger intellectual and political context of that era).

47. See ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 2 (1998) (noting that “scholars today treat legal positivism as a major – if not the major – jurisprudence in the United States”).

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

Louisiana private law.⁴⁹ And this institutional struggle was not merely a turf war; instead, this institutional disagreement was virtually mandated by the prevalent antebellum view of law, the natural-law view.⁵⁰ William Blackstone, among others, described this view as the “oracular” or “declaratory” theory of law-making,⁵¹ whether it be employed by judges or legislators.⁵² And because, according to the declaratory theory, all civil (private) law was founded on reason and custom, antebellum Louisiana, in common with the other states in the Union, had no attachment to

49. See KILBOURNE, *supra* note 35, at 131–64.

50. See Viator *Book Review*, *supra* note 35, at 368.

51. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 42 (1765) (“Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. . . . and . . . human laws are only declaratory of, and act in subordination to, the [divine and the natural law].”); *id.* at 68–69 (“As to general customs, or the common law, properly so called; this is that law, by which . . . the king’s ordinary courts of justice are guided But . . . how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositary of the laws; the living oracles, who must decide . . . all cases . . . according to the law of the land. Their knowledge of that law is derived from experience and study”); see also STONER, *supra* note 45, at 11–47. For the natural-law thinking of an important Framers, Ratifier, and Justice of the Supreme Court—James Wilson—see various of his “Lectures on Law,” especially his lectures “Of the General Principles of Law and Obligation” and “Of the Law of Nature.”

In the former lecture, Wilson maintained that there are only two categories of law: divine and human. The first category contains, *inter alia*, the laws of nature. One part of the laws of nature governs the material world: “That law, by which the irrational and inanimate parts of creation are governed.” JAMES WILSON, *Of the General Principles of Law and Obligation*, in 1 THE WORKS OF JAMES WILSON 97, 124 (Robert Green McCloskey ed., 1967). Another part of the law of nature is for the governance of humankind:

That law, which God has made for man in his present state; that law, which is communicated to us by reason and conscience, the divine monitors within us, and by the sacred oracles, the divine monitors without us. This law . . . has been known by distinct appellations, according to . . . the different objects which it respects.

As promulgated by reason and moral sense, it has been called natural; as promulgated by the holy scriptures, it has been called revealed law.

As addressed to men, it has been denominated the law of nature; as addressed to political societies, it has been denominated the law of nations.

But it should always be remembered, that this law, natural or revealed, made for men or for nations, flows from the same divine source: it is the law of God.

Id. at 124. See also Edouardo Velásquez, *America’s Modernity: James Wilson on Natural Law and Natural Rights*, in HISTORY OF AMERICAN POLITICAL THOUGHT 192 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 2003).

52. BLACKSTONE, *supra* note 51, at 54 (“[N]o human legislature has power to abridge or destroy [natural rights or natural duties]. . . . For that legislature in all these cases acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts.”).

any sort of Hobbesian-Benthamite legislative positivism.⁵³ Therefore, Louisiana judges, employing common-law judicial techniques, deemed themselves as well situated as legislators to discover and declare the authoritative commands of custom and received precedents and maxims.⁵⁴ In sum, totally unknowing of a future populated with twentieth-century positivist Louisiana jurists and law professors who would endeavor to identify the precise national source of a code article as an aid to illuminating and applying its substantive legislative command, our nineteenth-century forebears had far less interest in the exact historical origins of an article than they had in its authority as a pre-existent custom or received Louisiana precedent or practice. Louisiana's nineteenth-century jurists would have found strange and a bit atavistic the Tournament's twentieth-century quest for the exact European lineage of each article of the Digest.⁵⁵

Not content to examine only the formative era of Louisiana's code tradition, for his "John M. Tucker, Jr. Lecture in Civil Law," Yiannopoulos focused on the drafting history of the code most neglected by legal historians—the Civil Code of 1870.⁵⁶ If he had written no other legal history article, this revisionist lecture alone would secure his place as a noteworthy historian of Louisiana law. Virtually alone among Louisiana legal historians,

53. See KILBOURNE, *supra* note 35, at 56, 59.

54. *Id.* at 155; Viator *Book Review*, *supra* note 35, at 368.

55. Indeed, the justices of the antebellum Louisiana Supreme Court were so thoroughly cloaked by the veil of time against the winds of 20th century legal positivism that they did not believe the Digest to be repealed by the Code of 1825: thus, the supreme court continued to regard the Digest as a valid body of law to be consulted along with the new code in every case heard after 1825. This judicial practice prompted the legislature to pass two "repealing" statutes in 1828 that declared all pre-1825 civil laws to have been abrogated by the new code. See KILBOURNE, *supra* note 35, at 140. These statutes failed, however, to have their intended effect. As late as 1839, the supreme court openly stated that the Code of 1825, despite the two 1828 repealing statutes, was not the sole source of law to be applied in litigation. In *Reynolds v. Swain*, Chief Judge François Xavier Martin maintained that the legislature lacked any authority to abrogate prior jurisprudence. *Reynolds v. Swain*, 13 La. 193 (La. 1839). Therefore, reasoned Judge Martin, the legislature could *not* have intended "to abrogate those principles of law which had been established or settled by the decisions of courts of justice." *Id.* at 198. As Richard Kilbourne concludes, the exclusivist claims of the 1825 Civil Code and the 1828 repealer were powerless to sway centuries of conviction that natural law was the only authoritative source of all law, whether declared by judges or legislators. See KILBOURNE, *supra* note 35, at 162–63. In a word, legislative command (legal positivism) did not alter the Louisiana Supreme Court's beliefs concerning its power to discover and declare the law for case decisions. See also WATSON LEGAL IMAGINATION, *supra* note 19, at 107–31.

56. See Yiannopoulos *Two Critical Years*, *supra* note 8.

Yiannopoulos was curious about the overlooked history behind the drafting of the 1870 Code. This history had likely been overlooked for so long because of the conventional historical estimation that the Code of 1870 was nothing more than the Code of 1825 shorn of its articles pertaining to slavery.⁵⁷ In revising this standard interpretation, Yiannopoulos accomplished a singular feat of historical sleuthing in his identification of the nominal *and* actual draftsmen of the 1868-1869 codal revision and of the reasons that spurred Louisiana legislators to undertake the revision.

Not long after the adoption of the "Reconstruction" Louisiana Constitution of 1868, the legislature passed an act that established a joint committee for the revision and organization of the statutory law of the state.⁵⁸ During the summer and early autumn of 1868, this committee appointed state Senator John Ray of Monroe to revise the general statutes and the Civil Code.⁵⁹ On account of this formal appointment, Senator Ray has usually been assumed to have drafted the Civil Code of 1870,⁶⁰ but in truth, he only drafted, with the assistance of his brother, the revised general statutes.⁶¹ The actual draftsmen for the codal revision were two accomplished lawyers, Isaiah and Franklin Garrett, hired by Senator Ray for the task of revising the Code of 1825.⁶²

Although the Garretts may have wielded the drafting pens, they were not the effective force behind codal retention and

57. See, e.g., John H. Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280, 295 (1931-1932) ("The Code of 1870 is substantially the Code of 1825 with these changes: (1) Elimination of all articles relating to slavery; (2) Incorporation of all Acts . . . passed since 1825 . . ."); Chas. E. Fenner, *Introduction* to K. A. CROSS, A TREATISE, ANALYTICAL, CRITICAL AND HISTORICAL ON SUCCESSIONS vii, at xxv (1891) (concluding that the 1870 "revision [of the Code] consisted merely in the embodiment of amendments and laws previously passed, and was a simple work of clerical compilation").

58. See Yiannopoulos *Two Critical Years*, *supra* note 8, at 7.

59. See *id.* at 7-8.

60. See *id.* at 14. Yiannopoulos described Ray as a quotidian lawyer, whose sole claim to a historical reputation was that he had served as the attorney who represented Myra Clark Gaines in the longest, most notorious private-law litigation in United States history. See *id.* at 13-14. See generally ELIZABETH URBAN ALEXANDER, NOTORIOUS WOMAN: THE CELEBRATED CASE OF MYRA CLARK GAINES (2001); see also James Étienne Viator, *Book Review*, 23 L. & HIST. REV. 707, 727-28 (2005) (reviewing ELIZABETH URBAN ALEXANDER, NOTORIOUS WOMAN: THE CELEBRATED CASE OF MYRA CLARK GAINES (2001)).

61. See Yiannopoulos *Two Critical Years*, *supra* note 8, at 14.

62. See *id.* at 8.

revision. Instead, as suggested by the legal historian Alan Watson,⁶³ the guiding force was the “taught tradition” of Louisiana law, as impressed upon and internalized by the lawyers who served in the Radical-Republican-dominated legislature of 1868.⁶⁴ Professor Yiannopoulos shrewdly discerned that the Radical-Republican legislative dominance presents, rather than solves, the central historical question—why did the 1868-1869 legislatures choose to revise, rather than repeal, the 1825 Code? One might have expected that pursuant to the imperatives of Radical Reconstruction, “adopting the common law that prevailed in northern states would . . . be the simplest solution for the legitimation, preservation, and expansion of the radical ideals.”⁶⁵ “However, no such proposal seems to have been made, formally or informally.”⁶⁶

Thus, without citing or expressly relying on Alan Watson’s “taught tradition” explanation for the modesty of legal change across time and geography, Yiannopoulos seems to have independently arrived at the same insightful conclusion: when creating law, lawyers are guided more by the legal doctrines they have learned than by “Beardian” socio-economic currents.⁶⁷ Hence, the lawyers in the Republican legislature “were the men who opted for Civil Code revision,” rather than replacement.⁶⁸ In sum, nineteenth-century Louisiana lawyers were schooled in and inured to the received tradition of codalism, which inclined them to abjure—more, not even to consider—the wholesale replacement of the Louisiana Code of 1825 with an entire common-law regime.

Furthermore, the stubbornness of the “taught tradition of law” was featured even more prominently in the failed effort, during the first decade of the twentieth century, to modernize the

63. See *supra* note 18.

64. See Yiannopoulos *Two Critical Years*, *supra* note 8, at 11; *supra* notes 18–19.

65. Yiannopoulos *Two Critical Years*, *supra* note 8, at 11.

66. See *id.* Had the legislature chosen this “radical ideals” path, it would have provided a textbook example of Horwitz’s “instrumental” thesis of American law-making. See *supra* note 18.

67. See Viator, *supra* note 18; see generally *supra* note 19.

68. Yiannopoulos *Two Critical Years*, *supra* note 8, at 11. See also *id.* at 21 (“[S]ocial change, though inevitable, is not a prime concern of the legal system. The purpose of the law is to reflect existing social order and to guarantee its preservation. . . . Leaving extreme positions aside [e.g., the view that law is and should be an instrument of social transformation], we should accept as true the proposition that written law, and particularly a civil code, reflects the existing legal order.”) (footnote omitted).

Code of 1870, which Yiannopoulos styled, “A Revision that Fizzled.”⁶⁹ The code-modernization movement began in the 100th anniversary year of the Digest of 1808. Act 160 of 1908 authorized the governor to appoint a commission of three lawyers to prepare a draft revision of the Code of 1870.⁷⁰ What exactly prompted this failed “modernization” of the code? The short answer might be “events.”⁷¹

In the roughly twenty-five years since the adoption of the 1870 Code, a small-town localized economic structure⁷² had rapidly become urban and industrial:⁷³ Thomas Edison had opened his laboratory in Menlo Park; Abner Doubleday had established at Cooperstown the National Pastime of the next 125 years; Alexander Graham Bell had invented the telephone;⁷⁴ and Joseph Glidden had invented barbed wire in the mid-1870s, which meant that the last American frontier, the Great Plains, would soon be enclosed by immigrant farmers who would transform the western and southern plains into an immense grainery to the world, all on account of accelerating agricultural mechanization and the incredible proliferation of American railroads.⁷⁵ Manufacturing had transitioned from domestic workshops to huge, productive factories, with unprecedented wage levels, that by 1870, “one in five Americans owned their own home, and immigrants purchased and owned homes at greater rates than the native-born.”⁷⁶

The code commissioners appointed by the governor to

69. Yiannopoulos *Two Critical Years*, *supra* note 8, at 24.

70. *Id.*

71. When United Kingdom Prime Minister (1957–1963) Harold Macmillan was asked by a journalist what might be most likely to thwart his government’s legislative agenda, he answered in his languid, aristocratic fashion, “Events, my dear boy, events.” See Henrik Bering, *Taking the Great out of Britain*, POLICY REVIEW (Oct. 1, 2005), <https://www.hoover.org/research/taking-great-out-britain>; see also Jason Stitt, *The Private Member Battleground: The Future of Private Member’s Bills at the Manitoba Legislative Assembly*, 36 *Man. L.J.* 157, 179 (2013).

72. Yiannopoulos *Two Critical Years*, *supra* note 8, at 17. See also *infra* text accompanying notes 78–79.

73. Yiannopoulos *Two Critical Years*, *supra* note 8, at 28.

74. See RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896* (2017); H.W. BRANDS, *LEVIATHAN: AMERICA COMES OF AGE, 1865–1900* (2007).

75. STUART BRUCHEY, *THE WEALTH OF THE NATION: AN ECONOMIC HISTORY OF THE UNITED STATES 77–81* (1988).

76. Allen C. Guelzo, *In a Gilded Cage*, 18 *CLAREMONT REV. BOOKS* 50–51 (Winter 2018) (reviewing RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896* (2017)).

modernize the Code of 1870 unveiled their “Plan of Code Revision” at the 1909 annual meeting of the Louisiana Bar Association.⁷⁷ Their written report stressed the whirlwind pace of social and economic change in the prior thirty or so years:

[T]here have been rapid strides made in every branch of industry; [and] there have been phenomenal developments in science and art, and . . . with this development, changes have been wrought that call for new rules governing the relations that exist between citizens When the Code Napoleon was promulgated, science and discovery were in their infancy. Little practical use was derived from the power of steam: electricity had not been harnessed . . . to do man’s bidding. . . . It is universally conceded that the provisions of our own Code are inadequate rules to govern these complex [developments].⁷⁸

As Yiannopoulos observed, it was against this dynamic industrial and economic backdrop that the commissioners completed their draft revision and submitted it to the legislature a few days before the 1909 regular session opened.⁷⁹ Then, during its 1910 annual meeting, the Louisiana Bar Association appointed and charged a committee of seven bar members to “go over and criticize and review the 1910 code projet,”⁸⁰ and report to the Association the committee’s recommendations.

Three years later, the seven-lawyer committee finally completed its report “and recommended that the Association should request [that] the legislature *not* enact the proposed revision of the Civil Code.”⁸¹ The report noted that the 1910 projet was marred “by omissions and inconsistencies which inject difficulties in the administration of law upon matters of no intrinsic importance yet ultimately determinative of the most valuable rights.”⁸² Furthermore, antiquated articles remained unamended, while articles that should have been left alone were haphazardly revised to the degree that their substantive benefits

77. See Yiannopoulos *Two Critical Years*, *supra* note 8, at 24.

78. *Id.* (quoting R.E. Milling, *The Plan of the Code Revision*, Rep. of the La. B. Ass’n 111, at 112, 114 (1909)).

79. See *id.* at 25–26.

80. See *id.* at 26.

81. See *id.*

82. See Yiannopoulos *Two Critical Years*, *supra* note 8, at 27 (quoting 14 Rep. of the La. B. Ass’n 81, 346 (1913)).

were decimated or even obliterated.⁸³ For example, ever since 1825, Louisiana had formally rejected the radical legal positivism of the Code Napoleon, which established promulgated legislation as the only source of law.⁸⁴ The Louisiana Civil Code had always been more flexible and liberal than the French Code through its recognition of custom as a binding source of law.⁸⁵ However, article 3 of the 1910 projet declared that custom can acquire the force of law only “in the absence of any law, or contract” and that custom “can never prevail against positive law or contract.”⁸⁶

In sum, then, between 1870 and 1910 there had been such a revolution in social relations, in the economy, and in politics and constitutional law, that there was, at least among business and political elites, a felt need for codal revision.⁸⁷ Nevertheless, despite the poor fit between the Code of 1870 and the perceived demands of modern life, the organized legal profession and the legislature dismissed the proposed codal revision, preferring, instead, a Code regarded as obsolete rather than a revision that would turn the Code of 1870 into a common-law digest.⁸⁸ Professor Yiannopoulos's final verdict on the revision that fizzled

83. See Yiannopoulos *Two Critical Years*, *supra* note 8, at 27.

84. Code Napoléon art. 1 (1804), in 1 BRYANT BARRETT, *THE CODE NAPOLEON, VERBALLY TRANSLATED FROM THE FRENCH, TO WHICH IS PREFIXED AN INTRODUCTORY DISCOURSE* 1, 1–2 (1811) (“The laws [les lois] are executory in all the French territory, by virtue of the promulgation thereof made by the Emperor. They shall be acted upon in every part of the empire from the moment their promulgation can be known.”). See also WATSON *TRANSPLANTS*, *supra* note 19, at 104 (“Article 3 of the [Louisiana] Code of 1808 accepts custom as creating law, and it derives almost verbatim from Article 5 of the French *Projet* of the year VIII (1800). Yet custom as a source of law is not mentioned in the *Code civil* . . . Why did Louisiana here follow the *Projet*?”) (footnote omitted). The influx and influence of American common-law jurists and attorneys, with their “declaratory” view of law, after the Louisiana Purchase of 1803 provides the best answer to Alan Watson’s question. See KILBOURNE, *supra* note 35, at 76, 93–94.

85. See LA. CIV. CODE art. 3 (1870) (“Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent.”); LA. CIV. CODE art. 3 (1825) (“Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent.”). The Louisiana Code’s recognition of custom sounds in Lockean liberalism in that customary law is, like legislation, created by majoritarian consent. Article 3 also is strongly democratic, populist, even, in that decentralized community standards and priorities—matters over which politicians and lawyers have no control—can produce binding customary law.

86. Yiannopoulos *Two Critical Years*, *supra* note 8, at 28 (quoting 1910 *Projet* art. 3).

87. See *supra* text accompanying notes 72–78.

88. See Yiannopoulos *Two Critical Years*, *supra* note 8, at 28.

is that the legislature's rejection "proved wise," for the Civil Code of 1870, still in that modern moment, "had preserved its identity, its integrity and its affinity with the civilian tradition."⁸⁹ Thus, the "fizzled revision of 1908-1913" provides textbook proof of the Watson theory of the transmission and preservation of law—a more archetypal instance of lawyers ratifying the "taught legal tradition," over against the forces of a modern utilitarian revisionism, would be difficult to imagine or discover—and this discovery was made by a great civil-law property scholar, whom very few appreciated as a legal historian of the "taught tradition."

Therefore, I conclude this study of an underappreciated legal historian by acknowledging the truth of what has been said of A.N. Yiannopoulos here in these *Loyola Law Review* essays and elsewhere:⁹⁰ that for over sixty years he was a commanding figure in the civilian legal tradition of Louisiana and the world. Judges, students, and law professors alike will continue to profit endlessly from his scholarship. His insights and ideas were ingenious in conception, perspective, and application—of this, his scholarship stands in voluminous confirmation. But there was more. Often unnoticed in the interstices of his formal works were emanations from a liberally educated mind that fully embraced the poetry of life. This *joie d'esprit*, intermittently discernible in his teaching and writing, was always front and center on social occasions. And on this point, I add one personal and cherished confirmation—an evening on a hotel deck overlooking the wine-dark sea surrounding his beloved Greek islands,⁹¹ where a lucky few sat with him and discussed, in light and serious tones, the meaning of glimpses dimly seen in the twilight.

89. See Yiannopoulos *Two Critical Years*, *supra* note 8, at 28.

90. See generally Dean Edward Sherman, *Introduction: A Tribute to Professor Athanassios Yiannopoulos*, 73 TUL. L. REV. 1017 (1999); Storms, *supra* note 3.

91. HOMER, THE ODYSSEY 15 (Ian Johnston trans., 2d ed. 2007).