THE LOUISIANA PRIVATE-LAW SYSTEM: THE BEST OF BOTH WORLDS

JOACHIM ZEKOLL*

I. INTRODUCTION

Traditionally, the system of private law in Louisiana has been regarded as an exotic outsider, tracing its origins to French and Spanish sources[1] and, in several instances, directly to Roman law.[2] Louisiana's

---

* Associate Professor, Tulane University School of Law. Dr. jur., University of Hannover School of Law (F.R. German), 1986; LL.M., University of California, Berkeley, 1984; LL.B. (Assessorenexamen), University of Hannover School of Law, 1983. This Article is an expanded version of a paper presented to the Tulane Law School faculty in November of 1994.

1. There have been conflicting opinions as to whether Spanish or French sources dominated Louisiana's first codification of civil law, the *Digest of the Civil Laws*. According to Batiza, 85% of all provisions of the *Digest* are of French origin. *See* Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 10-12 (1972). By contrast, Pascal has argued that Spanish law provided the substance for most provisions. *See* Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 605-07 (1972). The dispute was never settled. *Cf.* Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972); 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). On the history of Louisiana law generally, see A.N.

special status as a mixed jurisdiction continues to be recognized by contemporary observers: "Inspired by the continental Roman tradition rather than by English law, the civil code makes Louisiana a civil law island in a common law sea."[3]

We might object to this metaphor by pointing to the largely unfettered rule-making power of the individual states which creates quite diverse currents in that "common law sea." But this caveat is of little relevance for my topic today. For although individual states may arrive at different resolutions of specific questions of substantive law, what binds them together, and distinguishes Louisiana's adherence to a Civil Code, is their basis in what we are accustomed to classifying as the common law: legal principles developed according to the traditional English[4] concept of stare decisis, whereby the precedents established by higher courts function as a primary source of law.[5] On the other hand, the same forces

---

Yiannopoulos, *The Civil Codes of Louisiana*, *in* LOUISIANA CIVIL CODE s. XXV ff. (1993); Rodolfo Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and its Implications for Louisiana Law*, 56 TUL. L. REV. 477 (1982); SHAEL HERMAN, THE LOUISIANA CIVIL CODE, A EUROPEAN LEGACY FOR THE UNITED STATES 27 (Louisiana Bar Foundation 1993); John T. Hood, Jr., *The History and Development of the Louisiana Civil Code*, 33 TUL. L. REV. 7 (1958); Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, at 42 LA. L. REV. 1485 (1982).

2. Indeed, there is evidence that no civil code has been more influenced by Roman law than the Louisiana Civil Code. For example, the tripartite distinction between common, public, and private things, still in effect in Louisiana's property law, derives directly from Roman legal principles and can be found neither in French nor German law. *See* LA. CIV. CODE art. 448 (West 1995). There are, for example, articles in the Civil Code of 1870 which have verbatim or near verbatim language derived from Roman sources for which the French Code Civil provides no direct counterparts. For further details, see Bernard K. Vetter, *Louisiana: The United States' Unique Connection to the Roman Law—An Introduction to the 1993 Brendan F. Brown Lecture, The Roman Contribution to the Common Law*, 39 LOY. L. REV. 281, 289 (1993). Lesion beyond moiety, the seller's right to rescind a sale of immovable property sold for less than half its value, provides another direct link to Roman law. Codex 4, 44, 2, as found in REINHARD ZIMMERMAN, THE LAW OF OBLIGATIONS 259 (1990). By contrast, the French Civil Code provides for a seven-twelfths rule which finds its origin in the canon-law notion of the *juste prix*. CODE CIVIL [C. CIV.] art. 1674 (Fr.); PAUL ESMEIN, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS § 211 (Marcel Planiol & Georges Ripert eds., 1952).

3. SHAEL HERMAN ET AL., THE LOUISIANA CIVIL CODE: A HUMANISTIC APPRAISAL 3 (1981) (unpublished manuscript on file with Tulane Law School).

4. Note, however, that an independent legal culture has developed in the United States which clearly distinguishes itself from its English origins. See *Patrick S. Atiyah, Lawyers and Rules: Some Anglo-American Comparisons*, 37 SW. L.J. 545 (1983).

5. This should not serve to create the impression that common-law systems lack legislative input. Indeed, these systems experience a growing number of legislative regulations. What distinguishes those from the continental European tradition, which Louisiana has retained until

which have encouraged the development of an American legal style that transcends state divisions are present in Louisiana as well. These forces include integrated interstate markets operating in a country devoid of language barriers, a legal profession which functions within a strictly adversarial environment based on a common core of procedural rules, and a largely unified system of legal education premised on instructional materials and teaching methods that emphasize common rules rather than distinctions of individual states. Such economic and institutional conditions are also conducive to the larger movement towards legal unification or legal harmonization, without always requiring binding national legislation.

As a first conclusion, then, it is safe to say that Louisiana's continental tradition of civil law is exposed to constant pressure for conformity with what exists or emerges in the sister states. But does this pressure erode the "civil law island"? Is Louisiana in the process of emulating common-law rules that prevail in the other states? The main purpose of this Article is to show that these questions are based on doubtful premises and assumptions. I argue that the influence of one legal system on another is rarely discernible in clear-cut and unilateral terms. As the Louisiana example so eloquently demonstrates, legal principles imported into a foreign system may require adaptation to fit the particular needs and prevailing conditions of the adoptive system.[6] More

---

now, is the fact that legislative action in common-law systems is highly specific and regulates only limited legal categories, such as specific aspects of consumer protection. It is not the objective of this type of legislation to systematically codify the entire body of private law; rather, it attempts to identify specific areas involving special interests (e.g., consumer protection) and to remove these areas from judicial law-making. Legislation of this type will do little to change the primacy of case law in the American states. This holds true even for those states that introduced a civil code, still in effect today, based on Field's draft of 1865. In the absence of any scholarly attention and practical use, these codes, which are still officially in effect today, have degenerated to subject matter indices for the cataloguing of judicial decisions. *See* Joachim Zekoll, *Zwischen den Welten—Das Privatrecht von Louisiana als europäisch-amerikanische Mischrechtsordnung*, *in* AMERIKANISCHE RECHTSKULTUR UND EUROPÄISCHES PRIVATRECHT 22 (Reinhard Zimmermann ed., 1995).

6. I disagree with Watson, who argues that an adaptation of legal transplants is usually not needed:

> This is so even when the rules come from a very different kind of system. The truth of the matter seems to be that many legal rules make little impact on individuals, and that very often it is important that there be a rule; but what rule actually is adopted is of restricted significance for general human happiness. . . . It follows . . . that usually legal rules are not peculiarly devised for the particular society in which they now operate and also that this is not a matter of great concern.

importantly, perhaps, the current status of Louisiana law demonstrates a convergence of civil law and common law that is becoming increasingly evident in other systems as well. These conceptual boundaries, under the pressures of commercial interaction, have begun to blur in the United States and in so-called civil-law systems, including Louisiana. Particularly in the fields of private and commercial law, the influences on Louisiana can thus no longer be attributed either to the civil law or common law, but instead to rules that do not belong in either category. Nevertheless, the process of convergence is not all-encompassing. In certain areas of private law, such as family law and the law of successions, each system remains firmly rooted in a special environment whose substantive and procedural rules reflect distinct local values.[7] In most areas, however, one can conclude that the traditional distinction between common law and civil law is becoming less relevant through the gradual convergence of private law.[8]

In light of these observations, I argue that Louisiana can serve as a role model for other legal systems as an already-existing microcosm of what we see developing elsewhere, and because it has proven capable of integrating new rules into an established system in a way that does not compromise basic values and assumptions. These are broad assumptions, which we will substantiate in three steps. First, we will briefly examine the general trend towards convergence noticeable in all major legal systems. Second, we will tamper with the widespread assumption that convergence is a one-sided process in which rules of Anglo-American origin invariably dominate. Finally, a closer look at the reception of American law in Louisiana will reveal that many of the adopted rules are not common-law products, and that even the reception of the trust, which

---

ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 97 (2d ed. 1993). The issues associated with trust law in Louisiana suggest to me that Watson overstates his point (*see infra* notes 88-119 and accompanying text).

7. Differences remain even between the various civil-law systems and common-law nations. For example, the European Parliament, which has twice suggested the creation of a European Civil Code, does not contemplate including in such a code rules pertaining to persons, family law or successions. Diverging national traditions continue to stand in the way of unification or harmonization of these areas of law. *See* Winfried Tilmann, *Zweiter Kodifikationsbeschluß des Europäischen Parlaments*, *in* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 534, 541 (1995).

8. The observation that we are witnessing an increasing convergence of the two dominant systems is not a new one. Quite appropriately, the latest account of this development originated from an American scholar publishing in German. *See* James Gordley, *Common law und Civil Law: eine überholte Unterscheidung (Common Law and Civil Law: A Moot Distinction)*, *in* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 498 (1993).

is a quintessential common-law institution, does not occur without changes that preserve other established principles of Louisiana law.

II. THE TREND TOWARDS CONVERGENCE

There are many signs of the ever-increasing confluence of common law and civil law. The ongoing effort to harmonize private law in Europe,[9] within and outside of the European Union, is one example. Even though the continental European systems are compartmentalized into one legal family, the civil law, there are significant differences, deeply entrenched through national codification and diverse legal cultures.[10] The approximation of divergent national laws, though partly influenced by American models, is also inspired by what has been termed the "Europeanization"[11] of private law. That is the rediscovery of a European *ius commune* as a shared foundation for all continental European legal systems. The harmonization of law on this basis has, in turn, a profound impact on the development of legal regimes in England and Scandinavia which fall outside the traditional civil-law classification.[12]

---

9. *See, e.g.*, Article 3(h) of the Treaty of European Union, which provides for "the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market." TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY art. 3(h). So far, this objective primarily has been pursued by directives, which are issued by the EC Commission and EC Council and, since the coming into force of the Treaty of European Union, in collaboration with the European Parliament. *See id.* art. 189. The directives are addressed to the member states which are required to achieve the result set out in the directives. *Id.* Depending on the specificity and scope of the directive, there is more or less leeway in the transformation process. Thus, the efforts to harmonize certain subjects through directives have not always been fruitful. For the area of products liability law, where a 1985 directive failed to achieve the desired harmonization, see Joachim Zekoll, *The German Products Liability Act*, 37 AM. J. COMP. L. 809 nn.1-5 (1989). For a more general criticism of legislative attempts to forge a unified European private law, see Reinhard Zimmermann, *Civil Code and Civil Law: "Europeanization" of Private Law within the European Community and the Re-Emergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63, 73-82 (1994/95).

10. For example, Germany and France, the two countries that have had great influence on the development of the civil law throughout the world, follow diverging patterns in many respects. *See* JOHN P. DAWSON, THE ORACLES OF THE LAW 374 (1968). For examples of different solutions in France and Germany, see *infra* notes 81, 82, and 87 and the accompanying text.

11. For a detailed discussion, see Zimmermann, *supra* note 9.

12. *See, e.g.*, Jonathan E. Levitzky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347 (1994). *See generally* THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES, AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY (Basil Markesinis ed., 1994)

True showcases of what I mean by "convergence" or "confluence" are the legal systems in Eastern European nations. In the effort to gain access to the channels of world trade, former socialist nations are making every effort to forge a legal environment that comports with Western standards. Currently, American and European delegations alike are eager to serve as advisers to the new governments. Sometimes these groups fiercely compete to obtain the assignment of drafting new rules, while at other times there is collaboration. The current drafts of the new Estonian Civil Code and Code of Civil Procedure are instances of cooperation, even though the American Bar Association is serving as an organizational clearinghouse for these joint endeavors. The results are predictable: American and European ideas coexist and mingle in their new environment.

International conventions are also an indication of the high degree of convergence that we have reached in the area of private and commercial law. For example, the Uniform Law for the International Sale of Goods under the 1980 United Nations Convention (CISG) is such a hybrid. The rules pertaining to the formation of a sales contract are more reflective of civilian sources while the provisions that define the rights and obligations of the seller and the buyer closely resemble solutions espoused by Article 2 of the Uniform Commercial Code. This Convention, to which the United States and forty other nations are members, governs an increasing number of cross-border transactions. We will return to this subject later. The International Institute for the Unification of Private Law (UNIDROIT)[13] has recently presented further evidence for growing convergence. After more than ten years of deliberation, that institute, through a working group comprising twenty-two members from all the major legal systems, issued the *Principles for International Commercial Contracts* (Principles). These Principles, though not binding, were drafted with a view towards establishing "a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are applied."[14] The rules not only draw on

13. UNIDROIT originated in the late 1920s and in 1930 created a committee of French, German, English, and Scandinavian representatives to begin work on the first draft of the Uniform Sales Law, which was completed in 1935. Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, *in* INTERNATIONAL SALES § 1.01 (N. Galston & H. Smith eds., 1984).

14. *See* INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS at viii (1994) [hereinafter UNIDROIT Principles].

existing international commercial custom, but also attempt to solidify the emerging *lex mercatoria* and serve as a future model for legislators.[15]

III. EUROPEAN RULES IN AMERICAN LAW

It can hardly be disputed that the influence of American law on legal developments in Europe and elsewhere has been steadily growing since World War II. It has even become popular among European scholars to compare the importation of American legal ideas and culture with Europe's rediscovery of Roman law and the gradual reception within Europe between the twelfth and sixteenth centuries of a *ius commune* inspired by Roman law.[16] While I am rather skeptical about the vision of American law as the *ius commune* of our days, there are areas of law in all European nations—particularly rules of commercial law—that have felt an increasing American influence. Factoring, franchising and leasing, for example, are but a few of the concepts that evolved in an active and creative American business climate and have served as models for legal reform in other nations.

Despite this tendency, it has not only been the United States that has set the pace in this process of growing international consensus. Frequently, the rule that finds international acceptance originated in Europe. Thus, before we evaluate the impact of American substantive law on the Louisiana civil-law system, it may be instructive to identify a few rules of European origin that have found their way into American law.

A. *Consideration*

The "arcane doctrine"[17] of consideration, a concept that Louisiana never adopted and which does not exist in most other legal

---

15. The Preamble reads in pertinent part as follows:

> (The rules) may be applied when the parties have agreed that their contract be governed by 'general principles of law,' the 'lex mercatoria' or the like. They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law. . . . They may serve as a model for national and international legislators.

Id. at 1.

16. *See, e.g.*, Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 *passim* (1991).

17. JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 284 (2d ed. 1991).

systems, has been increasingly eroded in the United States, even for purely domestic transactions.[18] The Uniform Commercial Code, whose sales provisions were drafted under the leadership of Karl Llewellyn, a "civilian in disguise,"[19] entirely dispenses with this requirement for firm offers of merchants (§ 2-205) and contract modifications (§ 2-209). In international sales to which the CISG applies, consideration also is unnecessary for promises not to revoke an offer (Article 16(2)) and for the modification of sales contracts through party agreement (Article 29). Likewise, the UNIDROIT Principles dispense with consideration by providing that "(a) contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement" (Article 3.2).

---

18. Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45 (1993); *see also* Mark B. Wessman, *Retaining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. (forthcoming 1995).

19. Llewellyn's contacts with Germany—both in personal and academic respects—were profound and had a long-lasting impact on him: he graduated from high school in Schwerin where he studied from 1908 to 1911; between 1928 and 1932 he visited Germany for two nine-month stays, both to study law and sociology, and to give lectures in Leipzig and many other German cities; for a brief period, he even served as soldier in the German army during World War I. *See* Ulrich Drobnig, *Llewellyn and Germany*, *in* RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT: KARL N. LLEWELLYN UND SEINE BEDEUTUNG HEUTE 17-43 (Ulrich Drobnig & Manfred Rehbinder eds., 1994). The question whether similarities that exist between Article 2 of the U.C.C. and German law can be traced to Llewellyn's exposure to German influences is a difficult one. *See, e.g.*, Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987); James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987). However, in some instances, the resemblance of U.C.C. provisions to preexisting German models is so obvious that this influence can hardly be denied. For example, U.C.C. § 2-615 dealing with commercial impracticability closely follows the German doctrine of *Wegfall der Geschäftsgrundlage*, and it has been argued that Llewellyn must have been aware of this doctrine. U.C.C. § 2-615 (1995). *See* Stefan A. Riesenfeld, *Reminiscenses of Karl Llewellyn*, *in* RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT: KARL N. LLEWELLYN UND SEINE BEDEUTUNG HEUTE, *supra*, at 11, 15-16. Nevertheless, the assumption that Llewellyn relied on German sources is hard to prove because he apparently never admitted to having done so. At least one account suggests, however, that Llewellyn stayed silent for another reason: "He mentioned the failure of courses in comparative law and told me never to reveal when I relied on an idea coming from continental Europe, because that would be the 'kiss of death'. . . ." *Id.* at 14.

B. *Statute of Frauds*

Another change of American law which was precipitated by exposure to foreign standards involves the requirement that certain agreements be evidenced by a writing. This requirement hampers commercial transactions and defeats the purpose of new technologies which make possible instantaneous and paperless communication. In most legal systems, agreements involving commercial dealings need not comply with a statute of frauds. Even the UK Sale of Goods Act disposed of it in 1954.[20] In the United States, this English provision, which traced its origins to 1677 when the English Parliament enacted a Statute of Frauds, served as model for the Uniform Sales Act of 1896 and for its successor, § 2-201 of the Uniform Commercial Code.[21] The U.C.C. rule is lengthy and convoluted. It allows for exceptions which significantly undermine the rule of requiring a writing for the enforceability of sales contracts; however, it is costly to litigate the applicability of the rule or its exceptions. By contrast, the solution espoused in Louisiana comports with the modern trend not to impose a writing requirement. Louisiana Civil Code Article 2441 provides in pertinent part that "the verbal sale of all movable effects, whatever their value, is valid." In Louisiana this principle has been applied since 1808.[22] The rule is in effect in most other legal systems as well, even in those common-law jurisdictions that initially adopted the English Statute of Frauds.[23] Both the International Sale of Goods Convention and the UNIDROIT Principles follow this trend.[24] The declining importance of this form requirement has not gone unnoticed in the United States. Indeed, a drafting committee appointed by the National Conference of Commissioners of Uniform State Laws to revise U.C.C. Article 2 recognized the outsider status of the United States and recommended the repeal of the statute of frauds contained in § 2-201 of the Uniform

---

20. *See* HONNOLD, *supra* note 17, at 183.

21. *See id.*

22. LA. CIV. CODE art. 2, ¶ 3 (1808).

23. *See* HONNOLD, *supra* note 17, at 183.

24. CISG Article 11 provides that "(a) contract need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." Article 1.2 of the UNIDROIT Principles contains virtually identical language: "Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses."

Commercial Code, "thus bringing Article 2 into line with the British Sale of Goods Act and the CISG."[25]

C. *Warranty*

It would be odd, of course, and quite unrealistic to attribute legal changes solely to foreign influences or comparative research and to exclude other factors, such as domestic economic conditions. *Caveat venditor*, for example, already existed in Louisiana sales law and other civil-law jurisdictions which adopted the Roman law *actiones redhibitoria* and *quanti minoris*[26] at a time when common-law courts still expected the buyer to beware.[27] The gradual shift of American common law towards favoring consumer interests, primarily by way of implied warranty actions in the late 19th century, did produce similar results,[28] but there is no evidence suggesting that civil-law models inspired this development. Instead, an array of intricate domestic factors, such as the friction between commercial and societal needs evolving in the age of mass production, generated case law and codifications[29] that favored the buyer's interest[30] and undermined the maxim *caveat emptor*.[31]

---

25. Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1315 (1994) (footnotes omitted).

26. *See* LA. CIV. CODE art. 2520 (redhibitory action); *see also* C. CIV. art. 1641 (Fr.).

27. *See* Shael Herman, *The Influence of Roman Law Upon the Jurisprudence of Antebellum Louisiana*, 3 STELLENBOSCH L.R. REGSTYDSKRIF 143, 149-50 (1992).

28. *See* LAWRENCE M. FRIEDMANN, A HISTORY OF AMERICAN LAW 541 (2d ed. 1985) ("By 1900, the results of the cases (if not the way their doctrines were phrased) were probably about the same as those produced by the bleeding hearts of civil law.").

29. See, for example, Section 15 (2) of the Uniform Sales Act, which provided an early exception to the rule of *caveat emptor*: "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." UNIFORM SALES ACT § 15(2). For comments on this provision, see SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW UNDER THE UNIFORM SALES ACT §§ 227-257 (1948). In response to the developing case law, the U.C.C., as successor of the Uniform Sales Act, established the implied warranty of merchantability as a rule in § 2-314. U.C.C. § 2-314 (1995).

30. For a detailed account of this development, see Karl N. Llewellyn, *On Warranty of Quality, and Society* (Part I), 36 COLUM. L. REV. 699 (1936). Part II of the article appears at 37 COLUM. L. REV. 341 (1937).

31. It has even been suggested that the introduction of this principle into American contracts law may have been due to a historical misunderstanding. *See* Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 945 (1974).

D. *Maritime Law*

Despite the reservation that internal reasons alone may bring about change, intensifying international trade relations have been a fertile ground for the reception—and exportation—of legal transplants. Nowhere is this growing interdependence and the resulting interaction more evident than in the area of maritime law, which, in origin and development, is dominated by civil-law principles.[32] It is particularly in this field that American law has accepted significant change inspired by foreign law.[33] For example, the general rule under common law that there is no duty to rescue is not in effect under maritime law principles. These rules establish that

> the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land. From time immemorial, seamen have been called the 'wards of admiralty'; and in this country, as elsewhere, the Legislature has enacted an elaborate system of legislation for their protection.[34]

---

32. *See* 1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY 15 (7th ed. 1993); GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 1-11 (2d ed. 1975); VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE 11 (3d ed. 1994); William Tetley, *The General Maritime Law—The Lex Maritima*, 20 SYRACUSE J. INT'L L. & COM. 105, 112 (1994).

33. *See* GILMORE & BLACK, *supra* note 32, at 47; *see also* Moragne v. State Lines, Inc., 398 U.S. 375, 386-87 ("Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law.") (quoted by Tetley, *supra* note 32, at 124).

34. Harris v. Pennsylvania R.R., 50 F.2d 866, 868 (4th Cir. 1931). The court went on to state:

> Regardless of legislation, it is uniformly recognized that it is the duty of a vessel to care for a seaman who is taken sick or receives an injury on a voyage in the service of the ship, to the extent of providing medical care and attendance, and, if possible, a cure at the expense of the ship. And it is even required, where a serious accident occurs, that the master shall exercise a reasonable judgment as to putting into the nearest available port, in order that proper treatment may be secured.

Id.

The principle of comparative negligence, different versions of which are now in effect in 46 American states,[35] provides another illustration of the importance of maritime law and, hence, civil-law influence in this country. Within the debate over its adoption, which led to the abandonment of the "all-or-nothing" results under the old common-law rule of contributory negligence, courts and commentators evoked with regularity the role of civil law and maritime law in the development of comparative negligence.[36]

There are more examples of solutions developed in civil law that gained subsequent acceptance in the United States and other common-law systems.[37] These few illustrations shall suffice, however, since they merely serve as a reminder that impulses for convergence do not only emanate from ideas originally conceived in this country.

---

35. Only the following four states have maintained contributory negligence as a defense in tort actions: Alabama, Maryland, North Carolina, and Virginia. *See* JOHN J. PALMER & STEPHEN M. FLANAGAN, COMPARATIVE NEGLIGENCE MANUAL app. II, at 2-3 (1986).

36. See, for example, Vincent v. Pabst Brewing Co., 177 N.W.2d 513, 518-19 (Wis. 1970), in which Chief Justice Hallows (dissenting) stated:

> In the field of general negligence the European countries under civil law had moved toward comparative negligence at least 100 years earlier than its adoption as an admiralty rule. . . . In the country of its birth, the doctrine of Butterfield v. Forrester was laid at rest when England abolished contributory negligence by the English Reform Act of 1945. This history is convincing that the unjust doctrine of contributory negligence as a bar to a cause of action does not fulfill the needs of society and ought no longer be harbored and nurtured by the common-law courts at the expense of comparative negligence which mitigates damages as justice requires.

Id. (Hallows, J., dissenting). Justice Hallows dissented from the majority's decision not to introduce a pure comparative negligence standard through court decision but to await legislative action in this respect. Oddly, in Louisiana, contributory negligence was a valid defense until 1979; this was the result of court decisions that simply ignored LA. CIV. CODE art. 2323 and its predecessor, Article 2303 of the 1825 Louisiana Civil Code, both of which allowed for the apportionment of damages on the basis of comparative fault. On the subject of Louisiana's civil-law system and the long-lasting adherence to contributory negligence, see Wex S. Malone, *Comparative Negligence: Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945). In 1979, the Louisiana legislature rewrote Article 2323 to introduce comparative negligence as the prevailing rule. *See* Wex S. Malone, *Symposium on Comparative Negligence in Louisiana: Prologue*, 40 LA. L. REV. 293 (1980).

37. *See, e.g.*, Richard H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649 (1992); THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD (Mathias Reiman ed., 1993); *see also* Peter Stein, *The Attraction of the Civil Law in Post Revolutionary America*, 52 VA. L. REV. 403 (1966).