

# The First Constitutional Right to Criminal Appeal: Louisiana's Constitution of 1845 and the Clash of the Common Law and Natural Law Traditions

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## I. INTRODUCTION

After lying dormant for decades, the question of a constitutional right to criminal appeal as a fundamental aspect of due process has once again risen to scholarly attention.<sup>1</sup> Since the United States Supreme

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1. David Rossman, "Were There No Appeal": *The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518 (1990); Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 U.C.L.A. L. REV. 503 (1992); Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997). Prominent older works on the subject include LESTER B. ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939) and works by

Court denied that the Constitution guarantees criminal defendants any right to appeal criminal convictions in its 1894 decision *McKane v. Durston*,<sup>2</sup> which extended its 1805 Article III decision *United States v. More*,<sup>3</sup> the question was largely considered settled. The proliferation of statutory rights to criminal appeal in federal law and decisions like *Griffin v. Illinois* regarding state law<sup>4</sup> have changed the landscape, however, giving a constitutional footing to criminal appeals. Now, one might indeed consider criminal appeal rights to be an important aspect of due process and fundamental fairness. The states clearly view it this way: forty-seven states currently provide at least one appeal as of right, and the discretionary appeals in the remaining three states are nearly a matter of right.<sup>5</sup> The basic life and liberty interests involved in criminal justice suggest that a right to criminal appeal might be of the type deserving constitutional recognition. The United States Supreme Court has raised incidents of the right to constitutional status and fifteen states have enshrined the right in their constitutions.<sup>6</sup> The notion of a criminal appeal is therefore one of constitutional stature.

A new wave of literature addresses historical common law appellate procedures and doctrines in juxtaposition with modern federal perspectives on criminal appeals. These studies seek to undercut the Supreme Court's denial of constitutional status to criminal appeals by highlighting historical practices suggestive of an American tradition of appeal rights. These studies do not, however, pursue the course of seeking to understand why the several states that actually *did* enshrine a right to criminal appeal in their own constitutions chose to do so. This Article will attempt to remedy this lacuna in the literature by examining the origins of the first of these express provisions in a state constitution, that of Louisiana's 1845 constitution.<sup>7</sup> In a narrative and analytical format, it will tell that story.

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Roscoe Pound such as *CRIMINAL JUSTICE IN AMERICA* (1930) and *APPELLATE PROCEDURE IN CIVIL CASES* (1941).

2. 153 U.S. 684 (1894).

3. 7 U.S. (3 Cranch) 159, 2 L. Ed. 397 (1805).

4. 351 U.S. 12 (1956) (placing constitutional requirements upon state rights to criminal appeal, when a state provides such a right).

5. Arkin, *supra* note 1, at 513.

6. *See id.* at 518 n.64.

7. LA. CONST. OF 1845 tit. IV, art. 63, *reprinted in* 3 WEST'S LOUISIANA STATUTES ANNOTATED 48 (1977). For a constitutional history of Louisiana, see *IN SEARCH OF FUNDAMENTAL LAW: LOUISIANA'S CONSTITUTIONS, 1812-1974*, at 6 (Warren M. Billings & Edward F. Haas eds., 1993) [hereinafter *IN SEARCH OF FUNDAMENTAL LAW*]. For a brief discussion of the history of Louisiana criminal procedure, see Leon D. Hubert, Jr., *History of Louisiana Criminal Procedure*, 33 TUL. L. REV. 739 (1959).

Before 1845, many state supreme courts had interpreted their state's Article III equivalent as providing both civil and criminal appellate jurisdiction. Louisiana was the first state to make criminal appellate jurisdiction explicit. It was the first to ensure that such jurisdiction conferred a constitutional right to appeal convictions, not mere discretionary or statutory jurisdiction.<sup>8</sup> The Louisiana right was not only the first explicit constitutional right of criminal appeal, but it was also the first guarantee of a right of appeal in criminal cases to exist in the United States. This right under Louisiana law introduced to American law the modern criminal appeal. Criminal appeals as we now know them have their origins in Louisiana's right, which in turn has its origins in Continental Europe rather than England. The Louisiana right was far broader than what the common law would allow. This Article will trace the roots of Louisiana's right through its interconnected sources—institutional, cultural, and philosophical—to show why the 1845 Constitutional Convention overwhelmingly supported the explicit inclusion of the right in the new constitution. It is a story of clashing legal cultures and the harsh pendulum swings that these clashes can cause.

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On the fifth of August, 1844, the members of the convention “called for the purpose of re-adopting, amending or changing the constitution of the state of Louisiana” met in Jackson, Louisiana.<sup>9</sup> After a few weeks of debate, the convention drafted a framework for a new constitution and promptly adjourned, to great controversy, in order to meet the following January in the more lively city of New Orleans.<sup>10</sup> There they would meet for five months, drafting an entirely new constitution (against their

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8. The next state to provide one was Texas, in its constitution of the same year, which was heavily influenced by Louisiana's 1845 constitution. See *Constitution of 1845*, in THE HANDBOOK OF TEXAS ONLINE, <http://www.tsha.utexas.edu/handbook/online/articles/view/CC/mhc3.html>.

9. For a general narrative of the Convention, see Judith K. Schafer, *Reform or Experiment? The Constitution of 1845*, in IN SEARCH OF FUNDAMENTAL LAW, *supra* note 7, at 21.

10. There are four reports of the convention that may effectively be viewed as forming two sets. The first set covers the proceedings, proposed drafts and amendments, and votes of the convention. The JOURNAL OF THE CONVENTION CALLED FOR THE PURPOSE OF RE-ADOPTING, AMENDING OR CHANGING THE CONSTITUTION OF THE STATE OF LOUISIANA (1845) [hereinafter PROCEEDINGS 1844] covers 1844 and early January 1845, and the JOURNAL OF THE PROCEEDINGS OF THE CONVENTION OF THE STATE OF LOUISIANA, BEGUN AND HELD IN THE CITY OF NEW ORLEANS ON THE 14TH DAY OF JANUARY, 1845 (1845) [hereinafter PROCEEDINGS 1845] covers the remainder of the Convention. The second set provides the text of the debates themselves. The OFFICIAL REPORT OF DEBATES IN THE LOUISIANA CONVENTION (1844) [hereinafter DEBATES 1844] covers 1844, and the PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA, WHICH ASSEMBLED AT THE CITY OF NEW ORLEANS, JANUARY 14, 1845 (Robert J. Ker reporter, 1845) [hereinafter DEBATES 1845] cover 1845.

orders), one which the contemporary *U.S. Magazine and Democratic Review* considered to be “doubtless the wisest political Constitution in force over any nation or people in the world.”<sup>11</sup> This new constitution “discovers more political insight, and a more absolute reliance upon the principle upon which popular governments are based, than appears in the fundamental law of any other state in the Union.”<sup>12</sup> Although the Convention spent by far the majority of its time hashing out the provisions for the legislature and executive, it created a new judiciary which the *Magazine* praised as being “more simply, and, at the same time, more efficiently organized than that of any other state in the Union.”<sup>13</sup> This constitution provided a right to criminal appeal in its section delineating the state supreme court’s jurisdiction:

The supreme court, except in cases hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases where the matter in dispute shall exceed three hundred dollars, and to all cases in which the constitutionality or legality of any tax, toll, or impost, of any kind or nature soever, shall be in contestation, whatever may be the amount thereof; and likewise to all fines, forfeitures, and penalties imposed by municipal corporations, *and in criminal cases on question of law alone, whenever the punishment of death or hard labor may be inflicted or when a fine exceeding three hundred dollars is actually imposed.*<sup>14</sup>

Instead of leaving criminal appellate jurisdiction to the will of the legislature, the Convention designed the jurisdiction in order to create a right to a criminal appeal.

## II. THE *LAVERTY* DECISION

When Congress enabled Louisiana to apply for statehood in 1811, all that Congress required was a constitution guaranteeing a republican form of government, the right to a jury trial, and habeas corpus relief.<sup>15</sup>

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11. *The Progress of Constitutional Reform in the United States*, 18 U.S. MAG. & DEM. REV. 243, 247 (1846) [hereinafter *Progress*].

12. *Id.* One of the delegates, former Governor André Roman, thought, however, that this Convention “never would have been called, if a majority of the people would have foreseen that the constitution of 1812 would be entirely put down, and another adopted, in which almost every conservative principle has been set aside.” His concerns related to Jacksonian changes in voting and the judiciary, such as the decrease in judicial independence brought on by elections and short terms. PROCEEDINGS 1845, *supra* note 10, at 339.

13. *Progress*, *supra* note 11, at 246.

14. LA. CONST. OF 1845 tit. IV, art. 63 (emphasis added).

15. An Act to enable the people of the Territory of Orleans, to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes, ch. 21, 2 Stat. 641, § 3 (1811).

With the ratification of Louisiana's first constitution, Congress admitted Louisiana into the Union on April 8, 1812.<sup>16</sup>

The 1812 Louisiana Constitutional Convention was heavily influenced by Kentucky's 1799 constitution.<sup>17</sup> Kentucky's appellate jurisdiction provision read: "The Court of Appeals, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions and regulations, not repugnant to this Constitution, as may, from time to time, be prescribed by law."<sup>18</sup> Louisiana's provision for the jurisdiction of its Supreme Court was more fluid and clear than Kentucky's, and it did not allow for legislative molding: the Supreme Court "shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases when the matter in dispute shall exceed the sum of three hundred dollars."<sup>19</sup>

The legislature established the general shape of the state judiciary in the Judiciary Act of 1813.<sup>20</sup> Louisiana had no intermediate courts of appeal until 1879.<sup>21</sup> The Act is silent regarding any criminal jurisdiction by the Supreme Court. The statute provided that the seven district courts would have criminal jurisdiction for all crimes, as well as broad civil jurisdiction.<sup>22</sup> More districts would be added, and docket pressure would result in New Orleans being granted its own criminal court in 1818.<sup>23</sup>

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16. An Act for the admission of the state of Louisiana into the Union, and to extend the laws of the United States to the said state, ch. 50, 2 Stat. 701 (1812). For a description of the first constitutional convention, see Warren M. Billings, *From This Seed: The Constitution of 1812*, in IN SEARCH OF FUNDAMENTAL LAW, *supra* note 7, at 6. For the text of the 1812 Constitution, see 3 WEST'S LOUISIANA STATUTES ANNOTATED, *supra* note 7, at 27. For the various language versions with introductory matter, see THE FIRST CONSTITUTION OF THE STATE OF LOUISIANA (Cecil Morgan ed., 1975).

17. See, e.g., Samuel B. Groner, *Louisiana Law: Its Development in the First Quarter-Century of American Rule*, 9 LA. L. REV. 350 (1948), reprinted in AN UNCOMMON EXPERIENCE: LAW AND JUDICIAL INSTITUTIONS IN LOUISIANA, 1803-2003, at 137, 151 (Judith K. Schafer & Warren M. Billings eds., 1997) (The Louisiana Purchase Bicentennial Series in Louisiana History Vol. 8) [hereinafter AN UNCOMMON EXPERIENCE].

18. KY. CONST. OF 1799 art. IV, § 2.

19. LA. CONST. OF 1812 art. IV, § 2.

20. An Act to Organize the Supreme Court of the State of Louisiana, and to Establish Courts of Inferior Jurisdiction, 1813 La. Acts 18.

21. LA. CONST. OF 1879 art. 80. For a history of these courts, see generally John T. Hood, Jr., *History of Courts of Appeal in Louisiana*, 21 LA. L. REV. 531 (1961).

22. 1813 La. Acts 18, § 15.

23. This court structure would last, more or less, through 1855. Warren M. Billings, *Origins of Criminal Law in Louisiana*, 22 LA. HIST. 63 (1991), reprinted in AN UNCOMMON EXPERIENCE, *supra* note 17, at 763. The New Orleans criminal court was comprised of three judges—a president and two assistants—any two of whom made a quorum. An Act to Amend the Act Entitled "An Act to Incorporate the City of New Orleans . . . and to Establish a Court of Criminal Jurisdiction, and for Other Purposes," 1818 La. Acts 46, § 2.

The Supreme Court of three judges<sup>24</sup> would exercise its constitutionally-articulated appellate jurisdiction in a manner that would provide review of law as well as of fact, so long as the error in fact be presented “on a special verdict, rendered in a district court, or on a statement of facts, agreed by the parties, or fixed by the court, if they disagree.”<sup>25</sup> In a parry against the common law, the Act forbade reversals for want of form.<sup>26</sup> Importantly, the court was also instructed to publish and disseminate its opinions.<sup>27</sup>

The story of the Louisiana right to criminal appeal begins in the state Supreme Court’s interpretation of the constitution’s appellate jurisdiction provision. The court spoke in *Laverty v. Duplessis*,<sup>28</sup> roundly declaring that there was no right to criminal appeal.

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24. Judges on the Louisiana Supreme Court were not dubbed “justices” until the 1845 Constitution. Its first judges were Dominick A. Hall of South Carolina, George Mathews, Jr., of Georgia, then a judge on the territorial superior court, and Pierre A.C.B. Derbigny of Laon, France. Hall, who soon accepted an appointment to the federal bench, was succeeded as chief judge by Mathews. The open seat remained vacant for nearly two years as the Senate blocked five nominations before finally confirming François-Xavier Martin of Marseilles, the first Frenchman on the territorial superior court, who was then serving on the bench in Mississippi Territory. See Groner, *supra* note 17, at 151; Henry P. Dart, *The History of the Supreme Court of Louisiana*, 113 La. (1913), reprinted in AN UNCOMMON EXPERIENCE, *supra* note 17, at 566, 571.

25. 1818 La. Acts 46, § 11, interpreted by *Abat v. Doliolle*, 4 Mart. (o.s.) 316, 320 (La. 1816). The legislature intended to avoid the problem of trial *de novo* by requiring a special verdict or statement of facts to be provided. *Id.* For a light discussion of some of the jurisdictional and personality issues that faced the early Supreme Court, see generally Robert B. Fisher, *The Louisiana Supreme Court, 1812-1846: Strangers in a Strange Land*, 1 TUL. CIV. L.F. 1 (1973).

26. 1818 La. Acts. 46, § 13.

27. An Act Supplementary to the Act Entitled “An Act to Organize the Supreme Court of the State of Louisiana, and to Establish Courts of Inferior Jurisdiction,” 1813 La. Acts § 4 (Mar. 26, 1813). For a history of the obedience to this requirement, see generally Carla Downer Pritchett, *Case Law Reporters in Nineteenth-Century Louisiana*, in A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY 8 (Warren M. Billings & Mark F. Fernandez eds., 2001) [hereinafter A LAW UNTO ITSELF?].

The legal effect of Louisiana judicial opinions has been the subject of some dispute, because the civilian tradition of judging lived on to some extent in Louisiana. See, e.g., THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS (Joseph Dainow ed., 1974); Symeon C. Symeonides, *The Louisiana Judge: Judge, Statesman, Politician*, in LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 89 (Vernon V. Palmer ed., 1999); Konrad Zweigert & Hans-Jurgen Puttfarcken, *Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704 (1970); Gordon Ireland, *Louisiana’s Legal System Reappraised*, 11 TUL. L. REV. 585 (1937); Harriet S. Daggett et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 15 *et seq.* (1938). Although some scholars assert that “as in France, the common law rule of *stare decisis* does not obtain in Louisiana, where ‘case-law’ has never been anything more than law ‘de facto,’” Louisiana criminal law was governed by the common law, and therefore the judiciary endeavored to act as common law judges at least in the context of the criminal law. Manuel Rodriguez Ramos, “Equity” in the Civil Law: A Comparative Essay, 44 TUL. L. REV. 720, 723 (1970). The degree to which the Supreme Court later followed its precedent in *Laverty* would suggest this to be true.

28. 3 Mart. (o.s.) 42 (La. 1813).

The court first addressed the question of appellate jurisdiction in *Syndics of Brooks v. Weyman* in 1813.<sup>29</sup> In *Brooks*, the court faced the question of how factual questions would be reviewed in the Supreme Court, by a jury or on the record. The court spontaneously considered the question of appellate jurisdiction itself: “To arrive at a correct decision of the question, it becomes necessary to ascertain clearly what is intended by appellate jurisdiction.”<sup>30</sup> After noting that different countries had various styles of appeal, the court decided that the Convention’s decision to simply use the words “appellate jurisdiction” implies that it intended that the legislature would “prescribe the jurisdiction, within the meaning of the constitution, and to regulate the mode of proceeding.”<sup>31</sup> Believing that such a delegation would entail a “rightful exercise of legislative powers,” and that the purpose of a supreme appellate court “is to settle the law,”<sup>32</sup> a purpose that would be undermined if it was beholden to the “caprice, ignorance, or information of a jury,” the court held that there would be no juries before the Supreme Court: “What can the citizen desire more than to have the facts of his case found by a jury, and any possible point of law that may arise during the trial, settled by the Supreme judiciary of the state?”<sup>33</sup>

*Brooks* set the stage for *Laverty* by stating that “[t]he only constitutional provision is, that it shall not be exercised in cases under three hundred dollars; and confines it, perhaps, (but which we do not decide) to civil cases.”<sup>34</sup> *Brooks* left the undecided question for *Laverty* to answer.<sup>35</sup> The *Laverty* court resoundingly disclaimed criminal appellate rights and jurisdiction in its May 1813 decision.<sup>36</sup>

The procedural history of *Laverty v. Duplessis* is as follows.<sup>37</sup> During the War of 1812, the United States Marshal for the District of Louisiana was ordered to remove certain enemy aliens to a certain distance inland, away from the coast. Among these aliens was one Laverty, an Irishman who claimed American citizenship under a decision

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29. 3 Mart. (o.s.) 9 (La. 1813).

30. *Id.* at 10.

31. *Id.*

32. The court reserved to itself “the authority to declare null any legislative act which shall be repugnant to the constitution; but it must be manifestly so, not susceptible of doubt.” *Id.* at 12.

33. *Id.* at 12-13, 15.

34. *Id.*

35. The *Laverty* decision was handed down just one month later. The reported text of *Brooks* cites *Laverty* as an answer to the question left open.

36. 3 Mart. (o.s.) 42 (La. 1813).

37. These facts are pieced together from the information provided in *Laverty* as well as several later decisions that comment upon it.

of the Louisiana Territorial Superior Court.<sup>38</sup> The state district court discharged Lavery on a habeas motion, but Marshal Duplessis refused to obey the court order without a hearing before the Supreme Court, so he sought leave to appeal the habeas ruling, but the district court denied it. The case went before the Supreme Court on Duplessis's motion for a writ of mandamus to force the district court to allow him to appeal to the Supreme Court. The question before the Louisiana Supreme Court, therefore, was, just as in the United States Supreme Court case *United States v. More*,<sup>39</sup> whether the state could appeal a criminal decision in favor of a defendant.<sup>40</sup> The court interpreted the question as encompassing the ability of either party to appeal a criminal decision, without recognizing any difference between the power of the State to appeal and the power of the defendant. The court denied the marshal's application.

The court began by looking at the words of the 1812 Constitution, which provided that the Supreme Court "shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases when the matter in dispute shall exceed the sum of three hundred dollars."<sup>41</sup> Employing an *expressio unius* interpretation,<sup>42</sup> the court held that only mentioning "civil cases" must have meant that criminal cases were excluded from the court's appellate jurisdiction. To justify this outcome, the court considered federal and state law and the standard contemporary opinion that juries were perfectly effective fact-finders to demonstrate that appellate criminal jurisdiction was unnecessary.<sup>43</sup>

To begin, the court decided that the delegates of the 1812 Constitutional Convention did not have the power to regulate whether the tasks of its constitution's judiciary "shall be done in one court or in many, whether the first decision shall be final, whether there shall exist one appeal or more, or in what cases it may be granted."<sup>44</sup> This assertion, following the statement that "a sovereign State has a right to establish such a judicial system as it pleases,"<sup>45</sup> is dubious at best, and the court left it so by justifying it with a tautology: "this was perfectly understood by

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38. *In re Desbois*, 2 Mart. (o.s.) 185 (La. Super. 1812).

39. See text accompanying *infra* notes 106-108.

40. See *infra* note 59.

41. LA. CONST. OF 1812 art. IV, § 2.

42. 3 Mart. (o.s.) at 49 ("The maxim of law, *expressio unius est exclusio alterius*, applies with peculiar propriety to a case of this nature.").

43. "Before we proceed further, it is important to ascertain, whether appellate jurisdiction be at all essential to the exercise of judicial power—whether it is absolutely necessary in criminal cases—and a sovereign State may not refuse it altogether, or establish it in some cases and deny it in others." *Id.* at 43-44.

44. *Id.* at 44.

45. *Id.*

the convention of this State,” for it simply restrained “appeals in civil cases to sums above the value of three hundred dollars.”<sup>46</sup>

The court actually based its ruling on federal and Kentucky law.<sup>47</sup> It found that criminal appeals had “not been deemed important to the protection of life or liberty, [as] is easily proved from the practice of our own territory for nine years past,” when the Crimes Act of 1805 incorporated criminal common law, “from the organization of the federal courts of the United States, and of other states, particularly of Kentucky.”<sup>48</sup> The court considered *More*, noting accurately but adamantly that federal courts consistently refused to exercise such jurisdiction and Congress never seemed to find it necessary to create such jurisdiction: “they have not thought it essential to the security of life or liberty to establish any such jurisdiction.”<sup>49</sup>

The consideration of state law, however, was cursory. Instead of looking at the many states that granted common law criminal appeal rights, the court merely looked at Kentucky law, noting that under the 1799 Kentucky constitution (which, as previously noted, had heavily influenced the Louisiana constitution), the jurisdiction of the Kentucky Court of Appeals was entirely under the legislature’s control and that legislature had taken the rare step of explicitly forbidding any criminal appeals.<sup>50</sup>

The court ruled that the Constitutional Convention must have necessarily intended to follow the precedents of English, federal, and state common law, summarily ignoring the fact that more than half of the forty-five members of the Constitutional Convention of 1812 were of French origin,<sup>51</sup> ethnic rivalries formed the essence of Louisiana politics,<sup>52</sup> only sixty percent of the fifty-six lawyers sworn in before the new Supreme Court in 1813 were Americans,<sup>53</sup> and that none of the twelve

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46. *Id.*

47. *Id.*

48. *Id.* at 44-45. Interestingly, the court’s reliance upon Kentucky’s example violates the dictum from *Syndics of Brooks v. Weyman* that the wide variety of approaches to appeals found in different nations and states “shews [sic] the impropriety of a technical interpretation derived from the jurisdiction of a particular State.” 3 Mart. (o.s.) at 10.

49. 3 Mart. (o.s.) at 45-46, 51-52 (“Have not their courts, over and over again, refused to exercise it, because it was not given by Congress? . . . Have not cases occurred which might remind Congress to establish such a jurisdiction, if they really thought it necessary?”).

50. *Id.* at 46-47.

51. Billings, *supra* note 16, at 10.

52. See generally JOSEPH G. TREGLE, JR., LOUISIANA IN THE AGE OF JACKSON: A CLASH OF CULTURES AND PERSONALITIES (1999).

53. Elisabeth Gaspard, *The Rise of the Louisiana Bar: The Early Period, 1813-1839*, 28 LA. HIST. 183 (1987), reprinted in AN UNCOMMON EXPERIENCE, *supra* note 17, at 632.

law journals extant in America prior to 1830 circulated in Louisiana.<sup>54</sup> The court expressed its policy clearly:

When we reflect, also, that our criminal Code is perhaps the mildest in the world, and that our mode of trial gives every chance for innocence to vindicate itself; when from long experience we know that the general leaning of courts and juries is in favor of the accused and the sacred regard which is always held for the rights secured to them by the constitution—when we reflect with what diffidence and scrupulosity criminal jurisdiction is exercised, and that the District Courts are presided by men of legal learning, and when we further consider the great advantages resulting to the community from the speedy infliction of punishment after the clear conviction of guilt—when we reflect on the difficulty of removing prisoners from the remote parts of the State, the danger of escape, and the thousand other embarrassments that present themselves in a croud [*sic*]; we are persuaded that the convention of Louisiana never intended to establish this as a court of criminal appellate jurisdiction.<sup>55</sup>

To hammer the point home, the court also disclaimed any general supervisory jurisdiction over the rest of the judiciary. Following principles laid down by John Marshall, it found that the quasi-All Writs Act found in section 17 of the Judiciary Act of 1813 merely provided the court with the power to exercise its appellate jurisdiction fully, nothing more.<sup>56</sup> To prove this point, however, the court felt it necessary to distinguish itself from the greatest of common law courts, the English Court of King’s Bench, for the Supreme Court did not possess the King’s Bench’s “splendid attributes of regal sovereignty.”<sup>57</sup> The Louisiana Supreme Court

is indeed the *Supreme Court* of the State, but supreme only, in the exercise of the jurisdiction assigned to it by the constitution. In that jurisdiction there is no power above it. It is supreme—wherever that jurisdiction extends, it is supreme, but because this court is called *supreme*, to pretend that its supremacy must of necessity extend to all cases is certainly an extraordinary idea.<sup>58</sup>

Although more innocuous than the criminal appeal ruling in *Laverty*, this ruling denying its supervisory powers would ripple through decades of Louisiana law.

*Laverty* is an astounding decision. It was a ruling of enormous impact that ignored many plausible legal and political alternatives. Like the

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54. *Id.* at 634.

55. 3 Mart. (o.s.) at 47-48.

56. *Id.* at 53.

57. *Id.* at 54.

58. *Id.* at 56.

United States Supreme Court at that time, the Louisiana court refused to recognize any theoretical difference between a criminal appeal by a defendant rather than by the State.<sup>59</sup> So insistent upon denying the power of appellate review, it ignored the difference between direct appeals of conviction, original collateral review, and writs of mandamus for review of habeas decisions. More strikingly, the case was overtly political, involving a federal wartime law and a federal officer. The court could easily have ruled it nonjusticiable.<sup>60</sup> A comment by Judge Martin in a later case suggests why the court heard the case. Martin noted that the correctness of the opinion of the territorial superior court in the citizenship case on which *Laverty* based his claim “was questioned by many, and it was thought desirable to have the point settled in this court [in *Laverty*]; but public expectation was disappointed.”<sup>61</sup> Fearful of saying that *Laverty* posed a political question and therefore was nonjusticiable, thereby seeming to shirk the citizenship question, the court embarked on its arduous examination of the federal and state criminal appellate rules in order to deny any criminal appellate jurisdiction or any general supervisory jurisdiction over the inferior courts. In doing so, it created a precedent that would haunt the court for decades—and it was still perceived as shirking the citizenship question. *Laverty* would comprise a key part of the list of judicial grievances that would energize Louisiana to write a new constitution in 1845.

The next section will consider the legal landscape in which the court managed to come to such a decision. The immediate origins of *Laverty* are to be found in the territorial judiciary, the 1812 constitution, and in the territorial government’s criminal statute.

### III. CRIMINAL LAW IN JEFFERSON’S LOUISIANA

Thomas Jefferson appointed fellow Virginian William C.C. Claiborne to act as territorial governor while Louisiana developed the democratic culture it would need to apply for statehood.<sup>62</sup> When

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59. Later Louisiana cases would recognize the distinction. See, e.g., *Chardon v. Guimblotte*, 1 La. 421 (1830) (noting that *Laverty* had been in custody); *State v. Jones*, 8 Rob. 573 (La. Ct. Errors & Apps. 1845) (explaining that federal double jeopardy forbids state from seeking new trial after acquittal), *aff’d*, *State v. Hood*, 6 La. Ann. 179 (La. 1851).

60. *Chardon* based its critique of *Laverty* on the earlier case’s refusal to recognize that the case before the court raised a political question that the court would have been well advised to dismiss on that basis, rather than ruling on criminal appellate jurisdiction. *Chardon*, 1 La. at 423; followed by *Hyde*, 6 La. at 436; and discussed in *Williams*, 7 Rob. at 269.

61. *State v. Williams*, 7 Rob. 252, 269-70 (La. 1844).

62. Jefferson appointed Claiborne territorial governor pursuant to An Act to Enable the President of the United States to Take Possession of the Territories Ceded by France, ch. 1, § 2, 2 Stat. 245 (1803).

Claiborne arrived in Louisiana in 1803, there was no functioning judiciary and the only experienced judges were the members of the former Spanish *Cabildo*. To fill the void, Claiborne created a Court of Common Pleas as the temporary inferior court. Seven common law-trained judges comprised the Anglophone court, with jurisdiction over civil cases under three thousand dollars and over criminal cases with punishments less than two hundred dollars or sixty days detention.<sup>63</sup> Above this court stood the Governor's Court, the Supreme Court of the territory. This was a regal court, in which the governor alone held original criminal jurisdiction over cases with potential fines of more than two hundred dollars or detention greater than sixty days, original civil jurisdiction of cases with over three thousand dollars in dispute, and appellate civil jurisdiction over cases over five hundred dollars.<sup>64</sup> This may well have been the most autocratic violation of the principle of separation of powers that the United States has ever seen.

Naturally this structure could not last long. As part of its act separating the Louisiana Purchase into the two separate territories of Louisiana and Missouri, Congress created Louisiana's territorial government, vesting judicial power in a new Superior Court with original jurisdiction in all criminal cases and exclusive jurisdiction over capital cases, and both original and appellate jurisdiction over civil cases with more than one hundred dollars in dispute.<sup>65</sup> The Legislative Council (a body of thirteen presidential appointees) could ordain and establish inferior courts as it chose.<sup>66</sup>

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63. Ferdinand Stone, *The Law with a Difference and How It Came About*, in AN UNCOMMON EXPERIENCE, *supra* note 17, at 28; BEN ROBERTSON MILLER, *THE LOUISIANA JUDICIARY* 8 (Claitor's 1981) (1932).

64. MILLER, *supra* note 63, at 8; Stone, *supra* note 63, at 29. For a fuller discussion of Claiborne's court system, see Mark F. Fernandez, *Local Justice in the Territory of Orleans: W.C.C. Claiborne's Courts, Judges, and Justices of the Peace*, in *A LAW UNTO ITSELF?*, *supra* note 27, at 79.

65. The act also protected the rights to trial by jury (automatic in capital cases and upon request otherwise) and habeas corpus. An Act Erecting Louisiana into Two Territories, and Providing for the Temporary Government Thereof ch. 38, 2 Stat. 283, § 5 (1804); Mark F. Ferdinand, *State v. McLean et al.*, *Louisiana's First History of Criminal Law*, 36 LA. HIST. 313, 320 (1995); Stone, *supra* note 63, at 29; *see also* An Act Further Providing for the Government of the District of Louisiana ch. 31, 2 Stat. 331 (1805), § 3 (trial by jury), § 4 (three judges).

66. The Council formed a series of county courts, each with an inferior judge, with exclusive jurisdiction over civil cases between fifty and one hundred dollars, concurrent jurisdiction with the superior court over cases with greater amounts in dispute, and concurrent criminal jurisdiction. 2 Stat. 283, § 5; MILLER, *supra* note 63, at 9. Typical common law means of appeal were provided in bills of exception and writs of error. In 1807, the Council returned to a parish-based inferior court system rather than a county system—a symbolic victory for French legal culture—with altered jurisdictions: unlimited civil and probate jurisdiction (appealable to

French opinion in Louisiana did not approve of the act.<sup>67</sup> It divided the purchase into two territories in violation of the terms of the purchase agreement, it only provided for translation of the evidence and the court's charge at trial, and it seemed to recognize Spanish private law.<sup>68</sup> Regarding civil law, the French population wanted recognition of French civil law, not the Spanish, though better Spanish law than Anglo-American.<sup>69</sup> Regarding criminal law, however, Louisianians wanted the protections of the United States Constitution rather than Spain's still somewhat medieval criminal law and procedure.<sup>70</sup> Unfortunately, in the public-private law split, criminal law was deemed private and hence Spanish; the only constitutional rights were therefore habeas corpus and the right to a jury trial.

In this legal landscape, substantive and procedural law was confused, so the legislature commissioned several codes to clarify and rationalize the law. Edward Livingston drafted a Code of Civil Practice and Procedure, based upon French and Spanish sources.<sup>71</sup> The Council adopted Louisiana's first civil code, the "Code of 1808," to resolve the question of substantive civil law. Whether its sources were French or

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the superior court in matters over one hundred dollars) but criminal jurisdiction limited to the power to commit. *Id.* at 10.

67. See Alain A. Levasseur, *Grandeur or Mockery?*, 42 LOY. L. REV. 647 (1997), reprinted in ALAIN A. LEVASSEUR, LOUIS CASIMIR ELISABETH MOREAU-LISLET: FOSTER FATHER OF LOUISIANA CIVIL LAW 612-14 (1996).

68. Stone, *supra* note 63, at 29.

69. For the contemporary debate on the subject, including a provocative "Manifesto," see Elizabeth Gaspar Brown, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 AM. J. LEG. HIST. 35 (1957), reprinted in AN UNCOMMON EXPERIENCE, *supra* note 17, at 109, 117.

70. Stone, *supra* note 63, at 29-30. In this way Schafer's analysis is incorrect in suggesting that just because "[c]olonial Louisianians were unfamiliar with such English common law rights as presumption of innocence, trial by jury, an independent judiciary, and the right of appeal in criminal cases," they would necessarily reject them. She is also legally incorrect in stating that the right of appeal in criminal cases was a common law right that "did not exist in the French or Spanish systems of law." See text accompanying *supra* note 113 (regarding France); *infra* Part III (regarding the common law). JUDITH KELLEHER SCHAFFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 60 (1994).

Edward Livingston, a renowned jurist and aficionado of the civil law, rejected Spain's *Siete Partidas*. "As the legislation . . . was made in the thirteenth century, it is not surprising to find that astrology, witchcraft and incantations, love-powders and wax images make a figure in it," quoted in Mitchell Franklin, *An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript*, 33 TUL. L. REV. 35, 37 (1958). A large literature is devoted to his codification efforts. For biographical treatments of Livingston, see, e.g., WILLIAM B. HATCHER, EDWARD LIVINGSTON: JEFFERSONIAN REPUBLICAN AND JACKSONIAN DEMOCRAT (1940); CARLETON HUNT, LIFE AND SERVICES OF EDWARD LIVINGSTON (1903); CHARLES H. HUNT, LIFE OF EDWARD LIVINGSTON (1864); MEMOIR OF MRS. EDWARD LIVINGSTON (Louise Livingston Hunt ed., New York, Harper & Brothers 1886).

71. LA. CODE CIV. PROC. (1805); Stone, *supra* note 63, at 31.

Spanish remains contentious.<sup>72</sup> The Louisiana Supreme Court held that Spanish law remained in force to the extent that it was not abrogated by the 1808 Code or the 1825 Civil Code.<sup>73</sup> Whether Spanish or French, continental civil law governed. A committee led by James Workman drafted a statute that served as a criminal code, the “Crimes Act of

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72. For example, one of the great issues is whether the 1808 code made Louisiana law French or if it merely codified law that was already essentially French. Jefferson claimed that French law remained in force except to the extent that O'Reilly's Code abrogated it. 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), reprinted in AN UNCOMMON EXPERIENCE, *supra* note 17, at 93, 96. As to his position in the academic battle between Robert A. Pascal and Rodolfo Batiza, Professor Yiannopoulos believes that the official law of Louisiana at the time of the Purchase was Spanish, but that was *civil* law as shared by all the *ius commune* European countries. Therefore basing eighty-five percent of the Code on French sources was not a significant problem. See *id.* at 102-04. Part of the reason why the debate has lingered so long is the fact that aside from the first draft (the *Projet*) and one marked-up text, there is no record of the Code's preparation. See, e.g., Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 46 (1971), reprinted in AN UNCOMMON EXPERIENCE, *supra* note 17, at 54-55; Franklin, *supra* note 70, at 35.

The basic bibliography of Louisiana law is to be found in John H. Tucker's *Source Books of Louisiana Law*, printed in four consecutive volumes of the *Tulane Law Review*. See *Part I: Civil Code*, 6 TUL. L. REV. 280 (1932); *Part II: The Code of Practice*, 7 TUL. L. REV. 82 (1933); *Part III: Spanish Laws*, 8 TUL. L. REV. 396 (1934); *Part IV: Constitution, Statutes, Reports and Digests*, 9 TUL. L. REV. 244 (1935). These illustrate some of the contours of the varying applicable laws.

For a book-length treatment of the Code, see RICHARD H. KILBOURNE, JR., A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839 (1987). On the scholarly debate regarding influences on the Louisiana civil code, see the long bibliography in Joachim Zekoll, *The Louisiana Private-Law System: The Best of Both Worlds*, 10 TUL. EUR. & CIV. L.F. 1 n.1 (1995). Examples of efforts to make increasingly close analyses of civil code provisions can be seen in Joseph Dainow, *Moreau Lislet's Notes: On Sources of Louisiana Civil Code*, 19 LA. L. REV. 43 (1958), and more intensely in Levasseur, *supra* note 67.

For discussions of the Spanish influence on Louisiana law, see Batiza, *supra* note 119; José María Castán Vazquez, *Reciprocal Influence Between the Laws of Spain and Louisiana*, 42 LA. L. REV. 1473 (1982); Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 LA. L. REV. 1485 (1982). For contemporary discussions of Spanish law, see GUSTAVUS SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO (New Orleans, T. Rea 1851); LOUIS MOREAU-LISLET & HENRY CARLETON, 1 THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA (New Orleans, James M'Karaheer 1820).

73. See *Cottin v. Cottin*, 5 Mart. (o.s.) 93 (La. 1817); LA. CIV. CODE art. 3521 (1825); *Flower et al. v. Griffith*, 6 Mart. (n.s.) 89, 92 (La. 1827); An Act to Repeal Certain Articles of the Former Civil Code 1828 La. Acts 66, ch. 40; An Act Further Amending Several Articles of the Civil Code and Code of Practice, 1828 La. Acts 150, ch. 83, § 25. For an interpretive discussion, see generally Brown, *supra* note 69; Vernon V. Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221 (1988); Groner, *supra* note 17, at 137.

1805.”<sup>74</sup> This act would remain the basic law on the subject for over a century.<sup>75</sup>

The Crimes Act of 1805 listed the basic crimes and their elements, but it left many lacunae that dozens of later statutes would attempt to fill. Incorporation of common law procedure was a requirement of statehood.<sup>76</sup> Hence, it firmly placed Louisiana criminal law in the domain of the common law:

[A]ll the crimes, offences and misdemeanors herein before named, shall be taken, intended and construed, according to and in conformity with the common law of England; and that the forms of indictment (divested however of unnecessary prolixity) the method of trial; the rules of evidence, and all other proceedings whatsoever in the prosecution of the said crimes, offences and misdemeanors changing what ought to be changed, shall [be] except as is by this act otherwise provided for, according to the common law.

This implementation of common law criminal procedure caused political strife in Louisiana. The common law was a “new mode of practice . . . little known in Louisiana, [which was] one of the reasons urged against its introduction.”<sup>77</sup> Significantly, the statute only mentions the common law of England, not the growing common law of the America states. This effectively meant that the Act failed to articulate which common law this was; in any case, French Louisianians were loath to incorporate either American or English law. Some jurists, such as Livingston, proposed that the common law should simply mean the local common law—the civil law.<sup>78</sup> A supplementary act passed soon thereafter to start filling in the gaps left by the Crimes Act simply removed reference to England: “all other crimes, offences and misdemeanors, committed by free persons and not provided for by this act, or by the

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74. An Act for the Punishment of Crimes and Misdemeanors 1805 La. Acts, ch. 50 (May 4, 1805); Groner, *supra* note 17, at 145; MILLER, *supra* note 63, at 10.

75. Groner, *supra* note 17, at 145; Billings, *supra* note 23, at 761, 766. Edward Livingston led a movement to create a new criminal code, but his 1825 draft code failed to pass the state legislature. The failure was due to a combination of factors, including the destruction of his first draft in a fire and his long absences in Washington, which delayed its completion until after the excitement about codification had cooled. In 1855, the state legislature passed two comprehensive criminal laws that rationalized the myriad acts following the 1805 Crimes Act, adding another half century of life to the 1805 Act. *See* Billings, *supra*, at 767.

76. For the second grade of territorial government leading to statehood, territories had to incorporate the 1787 Northwest Ordinance’s guarantee that the “inhabitants . . . shall always be entitled to the benefits of judicial proceedings according to the course of the common law.” Brown, *supra* note 69, at 115.

77. LEWIS KERR, AN EXPOSITION OF THE CRIMINAL LAWS OF THE TERRITORY OF ORLEANS 8 (photo. reprint 1986) (1806).

78. Brown, *supra* note 69, at 111.

[Crimes Act], shall be punished according to the common law, and shall be prosecuted and tried according to the said law, in the manner and according to the forms prescribed by the [Crimes Act]. . . .”<sup>79</sup> This did not solve the problem.

Given the newness of the common law in Louisiana, the Act required the governor to “cause to be drawn up and printed and promulgated” in English and French “an exposition and explanation of each and every of the crimes and misdemeanors herein before mentioned which are not herein precisely defined, and of the rules of evidence, the modes of trial, the forms of writs and indictments, and all other proceedings as they are directed to be had” under the common law.<sup>80</sup> Territorial Governor Claiborne appointed Lewis Kerr, one of Louisiana’s few common lawyers, to draft the required exposition to explain to civilians how the common criminal law operated, and to resolve the English versus American source of common law in Louisiana. Kerr tried to smooth out the unhappiness over the intrusion of the common law:

The introduction of English law in this territory is said to have given some offence. The quaintness of its forms, its precision, and perhaps its novelty may have rendered it in some measures objectionable. Exception also may have been taken against it as being foreign law. But the truth is, that the common law as recognized in the United States, is no more the law of England than the civil law can now be deemed the law of Rome. Whatever code be adopted, it must be in some degree foreign . . . we fortunately enjoy the substantial benefits of the English system, without being exposed to many of its asperities or inconveniences.<sup>81</sup>

The statute did give Louisiana judges some power to shape the common law according to Louisiana mores. They could divest the old rules of their “unnecessary prolixity.” Still, the common law had taken over the state’s criminal procedure, and French Louisiana and the likes of Edward Livingston did not like it. Even so, this is why supreme court judges only considered English and American precedent in *Laverty*.

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79. An Act Supplementary to the Act for the Punishment of Crimes and Misdemeanors, 1805 La. Acts 88, ch. 36, § 3 (articulating the elements of first and second degree murder and swindling, as well as providing a catch-all provision).

80. KERR, *supra* note 77, at 8 (partially quoting § 48 of the Crimes Act). This was the only treatise of Louisiana criminal law until Albert Voorhies’ *Treatise on the Criminal Jurisprudence of Louisiana* (1860). Billings, *supra* note 23, at 765.

81. KERR, *supra* note 77, at 6.

## IV. CRIMINAL APPEALS UNDER THE COMMON LAW

Common law criminal procedure provided a narrow array of appeal opportunities. Kerr noted that the convicted defendant might seek a writ of error from the superior court to reverse a county court judgment,<sup>82</sup> bring a habeas corpus claim,<sup>83</sup> or petition the governor for a reprieve or a pardon.<sup>84</sup> The appeal by writ of error was a limited remedy, though, because the superior court's broad original criminal jurisdiction meant that most prosecutions were tried before it.<sup>85</sup> Kerr noted that "[t]here are cases wherein judgments have been reversed without a writ of error, but few, if any, which are applicable to the present situation of this territory."<sup>86</sup>

The common law itself provided no right to appeal convictions. The writ of error procedure provided a *method* of appeal, one quite different from the modern conception of appeal. The procedure created an original action—not a continuation of the existing action—in which the appellate court would examine the trial record for facial errors.<sup>87</sup> Before 1700, these writs were not available as a matter of right in criminal cases, but thereafter they became freely available to *misdemeanor* defendants only.<sup>88</sup> Felony defendants required the Attorney General's leave, given as a matter of grace.<sup>89</sup> This restriction may have derived from the remedy: reversal of conviction for even the slightest error—substantial, reversible, and harmless error are modern doctrines.<sup>90</sup> In addition, courts believed that a criminal defendant would be less likely to be able to pay his expenses or to be easily dissuaded from filing frivolous appeals.<sup>91</sup>

The English Court of King's Bench exercised appellate jurisdiction over some criminal decisions from inferior courts in addition to its original jurisdiction.<sup>92</sup> It could review cases on a writ of error to correct a final decision or a writ of certiorari to remove a case pending in another court.<sup>93</sup> This latter option was only had of right by the Crown in cases

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82. *Id.* at 232-36.

83. *Id.* at 122-30.

84. *Id.* at 232-36.

85. *See supra* text accompanying note 65.

86. KERR, *supra* note 77, at 232.

87. ORFIELD, *supra* note 1, at 216; Rossman, *supra* note 1, at 525; Arkin, *supra* note 1, at 524.

88. Rossman, *supra* note 1, at 525.

89. *Id.* at 525-26.

90. HAROLD POTTER, AN HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 117 (1932).

91. Rossman, *supra* note 1, at 526 n.31; ORFIELD, *supra* note 1, at 40 n.29.

92. Arkin, *supra* note 1, at 525; Potter, *supra* note 90, at 116.

93. Potter, *supra* note 90, at 116.

involving a difficult question of law or a forum hostile to the Crown.<sup>94</sup> Another early English method of appeal arose by a judge reserving a point of law. In 1848, the Court for Crown Cases Reserved was created to allow its five judges to address questions of law that arose at trial.

Although the writ of error was only narrowly available to criminal defendants in America, other procedural safeguards did exist. One was a narrow right for felony defendants to have an issue or their case heard by the highest court in the state, but this was of little value because most serious cases were heard in the high court or by high court judges riding circuit.<sup>95</sup> The more powerful mechanisms were post-conviction motions in arrest of judgment (for errors apparent on the record) and for a new trial (based on evidence), as well as habeas corpus.<sup>96</sup> In cases before panels of more than one judge, either party could seek review by a certificate of division should the judges be in disagreement.<sup>97</sup> Through the middle of the nineteenth century, the legislatures exercised considerable review powers, too.<sup>98</sup>

The motion for *de novo* review was the most important of these avenues, even though English and federal law only provided this for misdemeanors.<sup>99</sup> States that lacked *de novo* review tended to provide writs of error instead.<sup>100</sup> There are several reasons why the common law states preferred *de novo* review to appeals. One was that many states were wary of appellate courts in general—no colonies had created a permanent supreme court with full appellate jurisdiction.<sup>101</sup> Most importantly, appeal was not seen as a great protector of a defendant's rights, because writs of error did not suspend judgment; they did not protect a convict from the gallows. A convict would have to secure a writ of *supersedeas* from the appellate court, suspending sentence, or a reprieve from the trial court.<sup>102</sup> In any case, appellate courts sat too infrequently and distantly for them to work swiftly, and the criminal trial system was so laden with procedural protections, unlike the civil trial system, that appeals were not seen to carry any great degree of urgency.<sup>103</sup>

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94. *Id.* at 116-17.

95. See Rossman, *supra* note 1, at 529-30.

96. Arkin, *supra* note 1, at 525, 531, 534-42; Rossman, *supra* note 1, at 532-33.

97. Arkin, *supra* note 1, at 531; Rossman, *supra* note 1, at 534-35.

98. ORFIELD, *supra* note 1, at 301.

99. Potter, *supra* note 90, at 117; *United States v. Gibert*, 25 F. Cas. 1287, 2 Sumn. 19 (D. Mass. 1834).

100. Rossman, *supra* note 1, at 541-42.

101. Part of the reason for this, however, included the controversy over the right to appeal to the King in Council. ORFIELD, *supra* note 1, at 215.

102. Rossman, *supra* note 1, at 544.

103. *Id.* at 545.

Many judges simply did not believe that the innocent could ever be convicted.<sup>104</sup>

As mentioned earlier, in the federal system, there was no constitutional right to criminal appeal. Although the United States Supreme Court had entertained a writ of error in a criminal case in *United States v. Simms*,<sup>105</sup> the Court ruled that there was no such constitutional right in *United States v. More*<sup>106</sup> two years later. *More* involved an appeal by the *prosecution* from a judgment of the Circuit Court of the District of Columbia. The government argued that Article III of the United States Constitution vested the Supreme Court with appellate jurisdiction in all cases of law, subject only to Congress's explicit exceptions. The act which created the circuit court provided that its decisions in civil cases could be reviewed by the Supreme Court so long as the value in dispute exceeded two thousand dollars. The prosecution argued that this should mean that the act in no way limited the Supreme Court's criminal appeal jurisdiction, but Chief Justice Marshall, employing an *expressio unius* interpretation, perhaps in an effort to protect the defendant in a spirit of lenity, saw this as implicitly denying any such jurisdiction. "This court . . . will only review those judgments of the circuit court of Columbia, a power to reexamine which, is expressly given by law . . . . On examining the act . . . the court is of the opinion, that the appellate jurisdiction, granted by that act, is confined to civil cases."<sup>107</sup> Although *More* might be read as a narrow precedent, it was interpreted broadly by federal and state courts, including Louisiana's.<sup>108</sup>

When these strands are connected, they show that Louisiana was uncomfortable with the incorporation of common law as its law of criminal procedure. The common law provided some avenues for criminal appeals, but *Laverty* closed even these few avenues, leaving habeas corpus writs as the only remaining option. By disowning the King's Bench heritage, *Laverty* denied to Louisianians seeking to appeal criminal convictions much of what the common law did offer. This alone

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104. *Id.* at 547.

105. 5 U.S. (1 Cranch) 252 (1803).

106. 7 U.S. (3 Cranch) 159 (1805). *More* underlay the court's more sweeping rejection of the right in *McKane v. Durston*, 153 U.S. 684 (1894) (stating that criminal appeals are not "a necessary element of due process of law").

107. 7 U.S. (3 Cranch) at 173. Congress did not authorize the circuit courts to issue writs of error until 1879—and then only by its discretion. Between 1889 and 1911, Congress developed and then abolished a narrow array of broader federal appellate rights. Arkin, *supra* note 1, at 521.

108. *Laverty v. Duplessis*, 3 Mart. (o.s.) 42 (La. 1813) (viewing *More* as the definitive opinion denying a federal constitutional right to criminal appeal).

might have been enough to offend, but it was far worse, for it was a harsh swing away from the tradition of criminal appeal rights that had existed in Louisiana for over a century before the Purchase. A look at the law, courts, culture, and theory of criminal appeals in Louisiana before *Laverty* will show why *Laverty* was entirely out of step with Louisiana's tradition of appeal rights, and why the state rebelled against it.

#### V. LOUISIANA COURTS AND CRIMINAL PROCEDURE IN THE COLONIAL PERIOD (1682-1803)

Criminal appeals existed in Louisiana since its beginning. The colony's first court, the Superior Council, founded in 1716, embodied Louis XIV's authority to act as a legislature and court of last resort in all civil and criminal cases.<sup>109</sup> The council soon had appellate jurisdiction over all civil and criminal cases arising in the New Orleans court, the nine district courts, and the four "notable's" courts.<sup>110</sup> Some cases were able to be reviewed by the king as a matter of grace, and later some appeals from the Superior Council were allowed to go to the Council of State at Versailles.<sup>111</sup>

All of these French courts applied the major French statutes, such as Royal Civil Ordinance, the *Coutume de Paris*, the Royal Criminal Ordinance of 1670, and the procedural rules then in use at the Chatélet in Paris.<sup>112</sup> The most important of these was the 1670 ordinance, for by it France communicated to its new world the French tradition of criminal appeals.<sup>113</sup> This ordinance provided for criminal appeal by both the defendant and the state of both final judgment and interlocutory rulings.<sup>114</sup> Criminal appeals were, therefore, an established part of the court structure in French Louisiana.

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109. Alain A. Levasseur, *The Major Periods of Louisiana Legal History*, 41 LOY. L. REV. 585, 586 (1996), first of three articles reprinted in LEVASSEUR, *supra* note 67; Henry P. Dart, *The Legal Institutions of Louisiana*, 3 S.L.Q. 247, 249 (1918); Alice M. Magee, *History of the Courts of Louisiana*, 33 LAW LIB. J. 253, 253 (1940). Scholars should note that Magee's article is not consistently accurate.

110. MILLER, *supra* note 63, at 3; Levasseur, *supra* note 109, at 587.

111. MILLER, *supra* note 63, at 2. This was a narrow category of cases that is currently difficult to delineate but seems to include at least some criminal cases. Henry P. Dart, *Courts and Law in Colonial Louisiana*, 22 RPT. LA. BAR. ASSOC. 17, 34-35 (1921).

112. Levasseur, *supra* note 109, at 586.

113. See A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE, WITH SPECIAL REFERENCE TO FRANCE (1913). For criminal appeals prior to 1670, see *id.* at 51. Although France had long provided criminal appeal procedures, it made criminal appeals a matter of right in 1808. *Id.* at 539.

114. *Id.* at 239 *et seq.*

The French monarchy decided that its political priorities made it unable to maintain Louisiana, so the king ceded the colony to Spain by the secret Treaty of Fontainebleau on November 3, 1762.<sup>115</sup> Charles III of Spain saw no reason to create a new legal system in his new territory, so he left French law in force and the Superior Council as the top court, but stripped it of its power to legislate.<sup>116</sup> Nationalistic French residents rioted, threatening Spanish control of the colony. In response, Charles dispatched Don Alejandro O'Reilly, an Irishman and Spanish general, to take full control of the colony for Spain.<sup>117</sup> O'Reilly executed his orders swiftly and forcefully. In two ordinances published in French on November 25, 1769, he abrogated all French law except for Louis XV's *Code Noir*, instituting Spanish civil and criminal law in their stead.<sup>118</sup> All new laws would have to be made in conformity with the foundational Spanish civil and criminal laws in force in Spain and its other colonies, such as the *Recopilaciones* (including the *Nueva Recopilacion de Castilla* and the *Recopilacion de Las Indias*), the *Fuero Viejo*, *Fuero Juzgo*, *Siete Partidas*, *Leyes de Indias*, *Autos Acordados*, and the Royal Schedules.<sup>119</sup> For explanation of these laws, especially civil laws, the usual sources of the civilian tradition were used: the *Corpus Iuris Civilis*, its commentators (usually French ones), and later Spanish commentators.<sup>120</sup>

One of the ordinances abolished the Superior Council, replacing it with the *Cabildo*, a city council and court which existed explicitly "for the administration of justice and preservation of order."<sup>121</sup> It was in effect the colonial government, with both lawmaking and judicial powers. The

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115. Stone, *supra* note 63, at 20, 23.

116. *Id.* at 23-24; Levasseur, *supra* note 109, at 588.

117. Stone, *supra* note 63, at 23-24; Levasseur, *supra* note 109, at 589.

118. Stone, *supra* note 63, at 26. For a full translation of these two ordinances, the Cabildo Ordinance and the Procedure Ordinance, see Gustavus Schmidt, *Ancient Jurisprudence of Louisiana*, 1 (Issue 2) LA. L.J. 1 (1841).

119. *Id.*; Rodolfo Batiza, *The Influence of Spanish Law in Louisiana*, 23 TUL. L. REV. 29 (1958), reprinted in AN UNCOMMON EXPERIENCE, *supra* note 17, at 47, 49. For further discussion of each law in relation to Louisiana, see Groner, *supra* note 17, at 137, 140. For contemporary interpretations of the Spanish law and its lasting importance, see MOREAU-LISLET & CARLETON, *supra* note 72; SCHMIDT, *supra* note 72.

120. Batiza, *supra* note 119, at 49. Judge Martin noted that until Moreau-Lislet and Carleton published their translations of Spanish laws (*supra* note 119), copies of these musty laws were extremely rare; a complete collection of them was in the hands of no one, and of very many of them, not a single copy existed in the province. To explain them, Spanish commentators were consulted, and the *Corpus Iuris Civilis*, and its own commentators were resorted to, and to eke out any deficiency, the lawyers, who came from France or Hispaniola, read *Pothier*, *D'Aguesseau*, *Dumoulin*, &c. See Gustavus Schmidt, *On the Administration of Justice in Louisiana*, 1 (Issue 4) LA. L.J. 132, 137 (1842)).

121. Levasseur, *supra* note 109, at 590.

*Cabildo* was comprised of six perpetual *Regidores*, two Ordinary *Alcades*, an Attorney-General-Syndic, and a clerk.<sup>122</sup> The *Alcades* each acted as a judge of civil cases and over criminal cases in which the defendant did not enjoy the privilege of trial under military law (*fuero militaría*) or ecclesiastical law (*fuero eclesiástico*).<sup>123</sup> The *Cabildo* would hear civil appeals from judgments by the Governor (O'Reilly) or by the Ordinary *Alcades* when the sum was less than 90,000 maravedis.<sup>124</sup> Appeal for higher sums would go to the *Audencia* at Havana.<sup>125</sup> For criminal appeals the procedure was identical, but leave to appeal could only be granted by the trial judge, and he was discouraged from granting it: "although in criminal causes an appeal should not be admitted, yet [it may be] if the judge shall have doubts, or from some difficulties on the trial he shall think it advisable to submit the same to the examination of a superior tribunal."<sup>126</sup> Although discouraged as a matter of policy, Spain therefore also provided criminal appeals.

On October 1, 1800, Spain ceded Louisiana back to France to restore the *status quo ante* the Seven Years' War under the terms of the Treaty of San Ildefonso. France did not receive legal delivery of the colony until two years later, on October 15, 1802. Within weeks, the French minister abolished the *Cabildo*, providing instead a legislative municipal council.<sup>127</sup> This move had the side-effect of abolishing the judiciary.<sup>128</sup> France only controlled Louisiana for three weeks; Napoleon sold Louisiana to the United States before he could start to build a new colonial judiciary.<sup>129</sup> When the United States bought Louisiana, it purchased a territory with a civil law tradition that had long been accustomed to the right to appeal in criminal cases, but with no functioning judiciary.

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122. MILLER, *supra* note 63, at 4. Commissions as *regidor* and clerk were for sale; the *Regidores* selected the *Alcades*. *Id.* at 4-5.

123. *Id.* at 5.

124. *Cabildo* Ordinance § 1(16). This provision is based upon Law 17, Title 12, Book 5 of the *Recopilacion de las Indias*. Such appeals would be heard by a panel comprised of two *regidores* and the trial judge. *Cabildo* Ordinance § 1(17), based upon Law 2, Title 18, Book 4 of the *Recopilacion*.

125. Dart, *supra* note 111, at 56-57; *see also* Procedural Ordinance § 4.

126. Procedure Ordinance § 3(15) (leave to appeal), § 4 (civil appellate procedure).

127. MILLER, *supra* note 63, at 7; Stone, *supra* note 63, at 27.

128. MILLER, *supra* note 63, at 7.

129. France transferred possession to the United States on December 20, 1803. Stone, *supra* note 63, at 27.

## VI. APPEALS AND THE NATURAL LAW TRADITION IN LOUISIANA

The civilian tradition in Louisiana brought with it the continental natural law tradition. Civil law jurisdictions provide a right to appeal as a general rule.<sup>130</sup> Scholars have extensively researched the contours of the continuing influence of the civil law in Louisiana, and that needs no rehashing here.<sup>131</sup> Instead, this Part will briefly set out the principles of natural law governing the civilian right to appeal. The natural and civil law concept of “equity” will play a large part.

The natural law tradition alive in Louisiana was different from the one that inspired the nation’s founders. When Anglo-Americans used “the old label of ‘right reason,’” they

were not employing medieval notions of natural law, for they understood natural law within the context of their modern natural rights analysis. . . . [E]ighteenth-century Americans tended to describe natural law as founded upon assumptions about humans in the state of nature, particularly—if they

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130. JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 127 (1969). In addition to technical appeals, dissatisfied parties have a right to a hearing in a yet higher court. In France and Italy this is known as “cassation” and in Germany “revision.” *Id.* at 128.

131. *See, e.g.*, sources cited *supra* note 72; the long bibliography in Symeon C. Symeonides, *An Introduction to “The Romanist Tradition in Louisiana”: One Day in the Life of Louisiana Law*, 56 LA. L. REV. 249, 249 n.1 (1995); as well as articles such as Rodolfo Batiza, *Roman Law in the French and Louisiana Civil Codes: A Comparative Textual Survey*, 69 TUL. L. REV. 1601 (1995); and Rodolfo Batiza, *Justinian’s Institutes and the Louisiana Civil Code of 1808*, 69 TUL. L. REV. 1639 (1995).

The extent of the influence of the Roman civil law upon American legal culture in general has also received treatment in depth. *See, e.g.*, Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591 (1992); R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 649 (1992); M.H. Hoeflich, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723 (1992); Roscoe Pound, *The Influence of the Civil Law in America*, 1 LA. L. REV. 1 (1938). Despite assertions such as Hoffman’s 1832 contention that close analysis would show that not only was U.S. law more influenced by Roman law than was England’s, but it was as influenced by Rome as was German law, it is presumed that few would dispute the contention that civilian legal culture had a far more profound impact upon Louisiana than upon the rest of the United States. *Professor Hoffman’s Lecture: The Civil Law*, 8 AM. JURIST & L. MAG. 203, 204 (1832). As Chancellor Kent colorfully noted, in response to a book review of Frederick Charles von Savigny’s *Treatise on Possession After the Principles of Roman Law* (1840): “I admire the Roman law, but I am too old (by the way I am 78 this day), or too dull, or too much disciplined in the English common law, to relish greatly the metaphysical theories and philological minutiae of the German Philosophers and Jurists.” *Letter from Chancellor Kent*, 1/2 LA. L.J. 159 (1841). Indeed, a scholar remarked at the turn of the century that until “[a] few years ago a large majority of lawyers in England and in our own country were in conscious or unconscious sympathy with the views of Blackstone, and thought of the civil law as something closely associated with arbitrary power in government and persecution in religion.” William Wirt Howe, *Roman and Civil Law in America*, 16 HARV. L. REV. 342 (1903), *reprinted in AN UNCOMMON EXPERIENCE*, *supra* note 17, at 39.

were discussing political theory—the principles of equal freedom and self-preservation.<sup>132</sup>

This American natural law tradition, rooted in the Hobbesian view of law as founded “in the physical world,” the law of “freedom in the state of nature,” focuses upon the conflict between civil rights and natural rights, and addresses the extent to which natural rights are surrendered upon entering civil society and the extent to which natural law should guide and shape civil law.<sup>133</sup> The post-Hobbes divergence between continental and British natural law thought can be seen in Blackstone’s use of natural law. No matter how highly he touted it, his use was merely a “negative use of the law of nature,”<sup>134</sup> not to be seen as having any practical effect.<sup>135</sup> Louisiana’s continental tradition, on the other hand, is about higher law. It finds its roots in the Enlightenment response to the Roman, *ius commune*, and Scholastic tradition of natural law as higher law, be it the dictate of reason or of God.<sup>136</sup> Alan Watson generally describes the tradition as follows:

Over a period of centuries natural law is a perennial, if not always the predominant, theory of law. Natural law appears in many guises; as the law of God, the law of reason, the law of living in harmony with nature, and so on. But the various forms of the developed theory have in common that they provide an external standard by which existing territorial law can be evaluated.<sup>137</sup>

The tradition finds its roots in Roman law, but its growth was partially due to the use of natural law as a means of updating the Roman law.<sup>138</sup> Western civil law systems are formally rational as a “result of treating the *Corpus iuris civilis* as authoritative,” and they are philosophical because “doctrinal advances in civil law systems, particularly before codification, lie largely in the hands of academics” rather than judges.<sup>139</sup>

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132. Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907, 937 (1993).

133. *Id.* at 923-24.

134. H.L.A. Hart, *quoted in* Paul Lucas, *Ex Parte Sir William Blackstone, “Plagiarist”: A Note on Blackstone and the Natural Law*, 7 *AM. J. LEG. HIST.* 142, 153 (1963) (analyzing the roots of Blackstone’s natural law theory in Roman law, Grotius, and Burlamaqui). Bentham, on the other hand, used natural law for censorious purposes of reform. *Id.* at 154.

135. J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 259 (1992).

136. Hence this Article will discuss the right to criminal appeal as immanent to natural law, but will avoid using the term “natural rights” due to potential conflation with the different American definition.

137. ALAN WATSON, *THE MAKING OF CIVIL LAW* 84 (1981).

138. *Id.* at 89.

139. *Id.* at 24, 84.

There are two aspects of nature in this continental outlook. The first is nature writ large in the sense of higher law. As is widely noted, this was first viewed as the divine law, but from Grotius onward into the Enlightenment, this changed to a law based on reason. The second, however, remained constant. This is a notion of “nature” premised upon human nature. The beauty and power of the Roman civil law, according to many of its advocates, lay in its attention to human nature.<sup>140</sup>

In moving away from the Scholastic notion of natural law, reason-based natural law theorists would find support in the work of the Stoics like Cicero. For example, Cicero in the *de Legibus* states, “True law is right reason in agreement with nature, diffused among all men. . . .”<sup>141</sup>

Appeals were a part of the Roman civil and criminal law. Criminal appeal took the form of the action known as the *provocatio*.<sup>142</sup> More is known, however, about civil appeals, for there are several passages regarding appellate procedure in the Digest.<sup>143</sup> Ulpian, for instance, noted the broad importance and support for appellate rights: “There is no one who does not know how frequent and how necessary is the custom of appealing since it corrects the unfairness or ignorance of those who judge. . . .”<sup>144</sup>

In the Middle Ages, Aquinas created a comprehensive system of reason and Christian higher law: “the light of natural reason, by which we discern good from evil, and which is the natural law, were nothing else than the impression of the divine light in us. So it is clear that the natural law is nothing else than the participation of the eternal law in rational creatures.”<sup>145</sup> The early Enlightenment theorist Grotius found a middle way between the divine will of Scholastics and Francis Bacon and the deniers of higher law such as Hobbes.<sup>146</sup> Instead of viewing mankind as a selfish animal in the brutish Hobbesian mode, Grotius created a vision of natural law based upon man as a social animal.<sup>147</sup> This

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140. As Leibniz noted, “The doctrine of law, taken from nature’s strict confines, presents an immense field for human study.” LEIBNIZ, *CODEX IURIS GENTIUM* (1693), *quoted in* Peter Stein, *Civil Law Maxims in Moral Philosophy*, 48 TUL. L. REV. 1075, 1077 (1974).

141. Cicero, *quoted in* KELLY, *supra* note 135, at 58.

142. THOMAS GLYN WATKIN, *AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW* 337 (1999).

143. Many of these address the two or three day window before a judgment becomes final (a rule that lived into Louisiana law). *See, e.g.*, Ulpian D.49.4.1.5-12. An important provision delays execution of judgment pending an appeal. *See* Ulpian D.49.7.1.

144. Ulpian D. 49.1.1.

145. KELLY, *supra* note 135, at 142-43; Aquinas, *quoted in* Kelly, *supra* note 135, at 144.

146. KELLY, *supra* note 135, at 223-25; HEINRICH A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* 70 (Thomas R. Hanley trans., 1948).

147. KELLY, *supra* note 135, at 224-25.

theory, as it would be developed by Pufendorf,<sup>148</sup> Burlamaqui,<sup>149</sup> and Enlightenment thinkers such as Descartes and Montesquieu,<sup>150</sup> viewed natural law as the command of right reason.<sup>151</sup> For Grotius, natural law was based either upon reason or consent.<sup>152</sup>

The success of this theory was largely to enable Protestants, who refused to find the Catholic Church authoritative, to believe in reason as authoritative of higher law, while still providing a venue and common language for Catholic natural lawyers. Enlightenment philosophers such as Burlamaqui helped by bridging the theoretical gap between reason and the divine: “By natural law we understand a law, that God imposes on all men, and which they are able to discover and know by the sole light of reason, and by attentively considering their state and nature.”<sup>153</sup> By the

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148. “Grotius and Puffendorf may be considered as the fathers of the modern science of natural law.” *Jouffroy on Natural Law*, 18 AM. JURIST & L. MAG. 11, 13 (1837).

149. “Since Grotius, the last name, which had become famous in this philosophic branch of law [natural law theory], was that of Burlamaqui.” *Critical Notices*, 18 AM. JURIST & L. MAG. 532 (1838).

150. Puffendorf and Montesquieu were, of course, quite influential to the American founders, which highlights the blurriness of the line separating the natural law of the founders and that of the continent.

151. KELLY, *supra* note 135, at 226.

152. It is worth noting that Grotius and other natural lawyers studied international law. Their consideration of natural law was grounded in the Roman notions of *ius naturale* and *ius gentium*. The notion of the law of peoples (*ius gentium*) was to be based upon natural law (*ius naturale*). It is unnecessary for the purposes of this essay to consider the confusion regarding the overlapping meanings of these two terms generated by the introductory provisions of Justinian’s and Gaius’s *Institutes*. See Inst. I, 2, pr., §§ 1-2; Gaius I, § 1. It will suffice to note Vattel’s merger of the concepts: “the law of nature is not less obligatory with respect to states, or to men united in political society, than to individuals.” Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* 1 (P.H. Nicklin & T. Johnson, Philadelphia 1829) (1758). Portalis makes a similar statement: “Natural law and the law of nations (*ius gentium*) do not differ in terms of substance, only in terms of their application. Reason, insofar as it governs all men, is called natural law, and this is called the law of nations (*ius gentium*) when applied to relations of one people with another.” Portalis, *Preliminary Discourse on the Project of a Civil Code*, quoted in Alain Levasseur, *Code Napoleon or Code Portalis?*, 18 TUL. L. REV. 762, 773 (1968).

153. J.J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 87 (Nugent trans., Cambridge, Harvard Univ. Press 1807) (1748). Limiting the authority of the Church to define the rules of natural law are his statements such as: “We must therefore set out with acknowledging, as a fixt and incontestable principle, that the human understanding is naturally right, and has within itself a strength sufficient to arrive at the knowledge of truth.” *Id.* at 4. Erskine bridged the gap similarly in civilian Scotland:

The law of Nature is that which God, the Sovereign of the Universe, has prescribed to all men, not by any formal promulgation, but by the internal dictate of reason alone. It is discovered by a just consideration of the agreeableness or disagreeableness of human action to the nature of man; and it comprehends all the duties we owe either to the Supreme Being, to ourselves, or to our neighbor,—as reverence to God, self-defence, temperance, honour to our parents, benevolence to all, a strict adherence to our engagements, gratitude, etc. This law is improperly attributed to the brute part of

nineteenth century, the popularity of Enlightenment natural law faded in the Protestant world, leaving Catholic countries free to return to a Aristotelian-Thomist perspective.<sup>154</sup> French Catholic Louisiana would fluidly continue this tradition, comfortable with higher law as either reason or the divine. The Church's divine natural law flourished, encouraged by the degree of reverence—"secular scripture"—given to the Code Napoleon.<sup>155</sup> A broad culture of natural law flowed from France to Louisiana and remained strong there.

In relatively undereducated Louisiana, with its somewhat undereducated bar,<sup>156</sup> the French commentators and codifiers, steeped in the natural law tradition, were the best-known authorities in Louisiana law. They were far better known than state or federal supreme court cases and subordinate only to the Louisiana Civil Code.<sup>157</sup> Cujas, D'Agessseau, Charles Dumoulin, Domat, Portalis, and Pothier were authorities in nineteenth century Louisiana legal writing.<sup>158</sup> These commentators instilled in the French civil law a respect for the *ius commune* and Roman law.

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creation; for brutes act from necessity, and are not capable of proper obedience, nor consequently of law.

ERSKINE, PRINCIPLES OF THE LAW OF SCOTLAND bk. I, tit. I, § 2 (1773).

154. KELLY, *supra* note 135, at 333.

155. See Shael Herman, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 U. ILL. L. REV. 597.

156. For inferences as to the education and membership of the early bar, see Gaspard, *supra* note 53, at 630. A postbellum commentator pithily described the condition of Louisiana's early bar:

If there were any very learned jurists residing in the city of New Orleans during the first years of the present century, their fame has certainly not come down to men of the present generation . . . [but] in a very few years the Crescent City became filled with . . . accomplished members of the bar . . . . Among these were some men whose fame is destined to live as long as this great republic shall itself continue to stand.

HENRY S. FOOTE, *THE BENCH AND BAR OF THE SOUTH AND SOUTHWEST* 193 (St. Louis, Soule, Thomas & Wentworth 1876). By 1840, bar membership since statehood totaled 535. See Gaspard, *supra* note 53.

157. For studies of educational requirements for the early Louisiana bar, see generally Warren M. Billings, *A Course of Legal Studies: Books that Shaped Louisiana Law*, in *A LAW UNTO ITSELF?*, *supra* note 27, at 25; Gaspard, *supra* note 53. For a list of the books in the libraries of the most noted Louisiana lawyers and codifiers, see Mitchell Franklin, *Libraries of Edward Livingston and of Moreau Lislet*, 15 TUL. L. REV. 401 (1941); Gaspard, *supra* note 53, at 634.

158. For a list of the commentators most frequently relied upon in Louisiana, see Batiza, *supra* note 72, at 73-74, as well as the works cited in *supra* note 157. In hagiographic terms, early twentieth-century Louisiana legal historian Henry P. Dart wrote:

It was a fortunate period for the human race—the period that produced Cujas, D'Agessseau, Charles Dumoulin, Montesquieu, Domat and Pothier . . . . They inherited the spirit of all the law; they were the law incarnate . . . . Of these creators, Pothier is to us as though he were a man of yesterday . . . . [H]e survives in the jurisprudence of the world, through the majesty of the reason of his Code.

Henry P. Dart, *Address of Mr. Henry P. Dart, Sr.*, 13 RPT. LA. BAR. ASSOC. 21, 25 (1911).

The concept of “equity” in the civilian natural law tradition expressed the belief in a higher law to which all lower decisions and statutes could be appealed. The continental tradition of equity stretches far into history, but the version that breathed its current life into Louisiana law was imposed by the Code Napoleon.<sup>159</sup> As described by Portalis, civilian equity is the resort to natural law when a textual interpretation of the code provides no answer or only an incomprehensible one. “When the legislation is clear, it must be followed; when it is obscure, we must carefully analyze its provisions. If there is no particular enactment, custom or equity must be consulted. Equity is the return to natural law, when positive laws are silent, contradictory, or obscure.”<sup>160</sup>

Judge Martin of the Louisiana Supreme Court spoke of the force of civilian natural law in the 1839 case *Reynolds v. Swain*.<sup>161</sup>

The civil or municipal law, that is, the rule by which particular districts, communities, or nations are governed . . . is necessarily confined to positive or written law. It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, . . . and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept.<sup>162</sup>

Equity was always a part of Louisiana’s court system, without the distinctions in pleading and practice as existed in common law systems.<sup>163</sup> It was directly adopted into the 1808 Civil Code. “[W]here there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent.”<sup>164</sup> As elaborated by the 1825 Code:

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159. Most French members of the Louisiana bar were new immigrants, the “foreign French,” rather than long-resident Creoles. See Gaspard, *supra* note 53, at 632 (“Creole influence on the early Louisiana bar was slight.”).

160. Quoted in Levasseur, *supra* note 152, at 771. When inserting the notion of equity into Spanish law, Garcia Goyena noted, “Equity . . . is nothing more than reason or natural justice, that is, a supplement to the written law,” quoted in Manuel Rodriguez Ramos, “Equity” in *The Civil Law: A Comparative Essay*, 44 TUL. L. REV. 720, 724 (1970).

161. *Reynolds v. Swain*, 13 La. 193 (La. 1839).

162. *Id.* at 198.

163. Henry P. Dart, *The Place of the Civil Law in Louisiana*, 4 TUL. L. REV. 163 (1930), reprinted in AN UNCOMMON EXPERIENCE, *supra* note 17, at 166-67. As Judah Benjamin told the 1844-1845 Constitutional Convention, “When we are told that the Chancellor of England cannot give the same remedies in chancery as he can at common law, we laugh at this artificial distinction.” Speech of Mr. Benjamin, Apr. 16, 1845, DEBATES 1845, *supra* note 10, at 677.

164. LA. CIV. CODE ch. IV, art. 21 (1808).

This equity intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others to do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the laws of the land, and that which the parties have made for themselves by their contract are silent, courts must apply these principles to determine what ought to be incidents to a contract which are required by equity.<sup>165</sup>

As Judge Derbigny said, the Civil Code “is dictated by nature itself”;<sup>166</sup> equity completed natural law’s hold on the civil law. It is this vision of natural law which sees a higher law inspiring all civil law and provides appeal rights to a higher tribunal with a panel of multiple judges.<sup>167</sup> As the Louisiana Supreme Court described this natural law-inspired view of appeal rights, “Whilst this court will not assume powers not given by the constitution and the law, it will not rigidly restrict its jurisdiction, and deprive a citizen by rigid rules and technical standards, of the right of coming before it, to claim his rights or redress his wrongs.”<sup>168</sup>

#### VII. THE CONFLICT BETWEEN THE COMMON LAW AND THE CIVILIAN NATURAL LAW TRADITION IN LOUISIANA CRIMINAL PROCEDURE

Louisiana’s criminal legal history up until *Laverty* falls neatly into two periods: a long civilian period and a short common law period. The common law attempted to oust the civilian criminal law. The thirty years after *Laverty* were years of conflict, as French Louisianans sought to edge at least some aspects of the civilian system back into what the common law had taken over.

There had been some earlier inroads into the common criminal law, such as the provision in the Civil Code or Digest of 1808 that “[t]he judge cannot, in a criminal matter, supply by construction anything omitted in the law.”<sup>169</sup> This provision directly conflicted with the Crimes

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165. LA. CIV. CODE art. 1965 (1825); *see also* LA. CIV. CODE ch. IV, art. 18 (1808) (“The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it.”).

166. *Cottin v. Cottin*, 5 Mart. (o.s.) 93, 95 (La. 1817).

167. The territorial superior court was unpopular, for instance, because only one judge usually presided. Schmidt, *supra* note 120, at 141.

168. *Rowley v. Rowley*, 19 La. 557, 567 (1841). An additional reason for the strength of the right to civil appeal in Louisiana may have been that with civilian civil procedure, which favored written pleading over oral argument, the power of the appellate court to review facts made new trials less necessary than they would otherwise have been. Dart, *supra* note 163, at 169, 174. Louisiana civil procedure has generally been civilian in style. Pleading, for instance, was encouraged over oral argument. *Id.* at 169.

169. LA. CIV. CODE ch. IV, § 22 (1808).

Act of 1805 and its incorporation of the common law doctrine of constructive offenses. It is based upon the Roman law maxims *nullum crimen sine lege* and *nulla poena sine lege*, which directly oppose constructive offenses.

The long effort to make the criminal law less common and more civilian, while still respecting the core federal constitutional criminal procedure rights, resulted in an admixture of Roman, French, Spanish, and common law “elements of law . . . blended in so confused a manner, that it is often extremely difficult to trace the lines of demarcation, or to determine, what the law is on any given subject.”<sup>170</sup> This confusion—in a civil law tradition—encouraged codification.

A codification craze hit Louisiana in the early 1820s. The 1808 Code was supposed to have included a codification of the criminal law.<sup>171</sup> Edward Livingston, who in 1795 had proposed a codification of federal law while serving in Congress, secured approval from the legislature (of which he was a member) to draft a criminal code for Louisiana. He began work in 1820, and in February 1822 the legislature approved Livingston’s revised plan.<sup>172</sup> At the same time he, Louis Moreau-Lislet (coauthor of the 1808 Code), and Judge Derbigny of the Supreme Court also revised the 1808 Civil Code, codified procedural law, and worked on a draft codification of commercial law.<sup>173</sup>

One of Livingston’s goals was to do away with the doctrine of constructive offenses. Cesare Beccaria’s theory of *nullum crimen sine lege* and *nulla poena sine lege* in his work *Of Crimes and Punishments* (1764) had a great influence upon Livingston. The preamble of his *Code of Crimes and Punishments* lays out his purpose: to rationalize the law in the Bentham mode, to seek the benefits of codification, and to rid the criminal law of its common law attributes.<sup>174</sup> Article 8 specifically prohibits constructive offenses and the judicial creation of offenses, for Livingston viewed independent judicial lawmaking as a violation of natural law. His viewpoint was intimately connected to the notion of appellate criminal review, for it did not allow a judge to rule by fiat. Hence Chancellor Kent’s vituperative admonition that by annihilating

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170. Schmidt, *supra* note 120, at 132.

171. *Id.* at 135.

172. Resolution approving plan for a criminal code, 1822 La. Acts 108; Stone, *supra* note 63, at 34.

173. Resolution appointing three juriconsults to revise the Civil Code, 1822 La. Acts 108.

174. A Code of Crimes and Punishments, intro. tit., ch. 1, pr., *reprinted in* 2 EDWARD LIVINGSTON, THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 3 (New York, National Prison Association 1873).

constructive offenses “a great deal of fraud and villainy, and abuse and offence will escape unpunished,” had little effect on Livingston.<sup>175</sup>

Although the 1825 Civil Code and Code of Practice were completed and voted into force, Livingston’s criminal code never made it into law.<sup>176</sup> Even though never enacted, it continued the fight to apply reason to the common criminal law.<sup>177</sup> Livingston’s code was a crucible for Louisiana’s constitutional right to criminal appeal, for it articulated many of the rationalizing, civilian tenets that much of Louisiana wished to apply to its criminal law, but did so while not actually implementing them. This encouraged the popular dissatisfaction with the state Supreme Court that grew sufficiently in the late 1830s and early 1840s to lead to the calling of a new constitutional convention.

*Laverty* had a great deal to do with this discontent. It stripped the court of any control over the development of criminal law in the trial courts. A backlash against *Laverty* can be seen in the commissioning of a criminal code with civilians as drafters, in several supreme court decisions, and in an 1832 statute regulating the jurisdiction of the criminal court of the First District.<sup>178</sup> The 1832 statute created a limited right to appeal from the execution of judgments (either by the defendant or the State) as if they were civil suits, so long as “the amount of the payment shall exceed the sum of three hundred dollars.”<sup>179</sup> At a time

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175. See Kent’s Letter, reprinted in *Letter from Chancellor Kent to Edward Livingston*, 16 AM. JURIST & L. MAG. 361, 363 (1837).

176. Completion of the code was difficult. This was partially due to his decision to compose four related codes, one for criminal substantive law and sentences, one for evidence, one for procedure, and one for prisons. Politically, his code ran into opposition because his prison code strongly advocated rehabilitation rather than punishment and the abolition of capital punishment. From a more practical perspective, the code was delayed for years because of his service in Washington. He was elected to Congress in 1823 and to the Senate in 1829, and appointed Secretary of State by Jackson in 1831 and ambassador to France in 1833. This schedule was made worse by the loss of his first draft in a fire in his New York residence. See, e.g., Billings, *supra* note 23, at 766.

177. Outside Louisiana, the code had an enormous influence on the criminal codes of, for example, Maine, New York, Mississippi, India, Texas, and Guatemala, where it was enacted in verbatim translation. There is a considerable body of contemporary and later literature regarding Livingston’s codes. See, e.g., *Review of Plan of a Penal Code*, 17 N. AM. REV. 242 (1823); *Review of System of Penal Law for the State of Louisiana*, 18 N. AM. REV. 298 (1836); Mitchell Franklin, *Concerning the Historic Importance of Edward Livingston*, 11 TUL. L. REV. 163 (1937); Grant M. Lyons, *The European Response to Edward Livingston’s System of Criminal Laws*, 24 LOY. L. REV. 621 (1978). For a general history of penology in Louisiana, see MARK T. CARLETON, *POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM* (1971).

178. An Act Granting Certain Powers to the Criminal Court of the First Judicial District, 1832 La. Acts 98. For light annotation, see 1 MEINRAD GREINER, *THE LOUISIANA DIGEST, EMBRACING THE LAWS OF THE LEGISLATURE OF A GENERAL NATURE ENACTED FROM THE YEAR 1804 TO 1841, INCLUSIVE AND IN FORCE AT THIS LAST PERIOD* ¶ 616 (New Orleans, B. Levy 1841).

179. 1832 La. Acts 98, § 1.

when the definition of public law was widening, the First District was also given jurisdiction of all prosecutions and suits “for any violation of a public law” occurring in its territory, “reserving to the parties the right of appeal to the supreme court in all cases in which an appeal is allowed by law.”<sup>180</sup> This preserved the ability to challenge the execution of fines, which carried the important power to question the constitutionality of a public law in a court higher than the trial tribunal. Although this was a narrow inroad upon the common law, a strong supporter of the common law on the supreme court bench later opined that “[t]he cases are innumerable to which this statute is applicable. It embraces actions upon penal statutes, generally.”<sup>181</sup>

The multiplicity of lower courts, without any intermediate appellate courts, left the criminal law of Louisiana a confused shambles. As this problem loomed more and more over the years, the Supreme Court began to exercise supervisory powers incidental to its appellate jurisdiction via writs of procedendo and mandamus.<sup>182</sup>

The court occasionally sought to loosen the *Laverty* prohibition against criminal appeals by allowing appeals of civil habeas decisions. By bending the definition of civil imprisonment, the court allowed some criminal appeals to proceed by camouflaging them as civil.<sup>183</sup> For instance, in a decision soon following *Laverty*, the court dismissed a criminal appeal and openly invited the appellant to bring it again as a civil appeal: “the case may come fairly before this court, as a civil suit; but, viewing it, as it now stands, as a proceeding entirely criminal, the court feels itself bound to dismiss the appeal.”<sup>184</sup> In the same decision, the court also noted that defendants could argue affirmative constitutional defenses in appellate courts by means of a suit on the execution of an inferior court judgment, which would enjoin execution of the judgment.<sup>185</sup> The denial of such a suit would be appealable to the

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180. *Id.* § 2.

181. *State v. Williams*, 7 Rob. 252, 278 (La. 1844) (per Bullard, J.).

182. *State v. Judge Bermudez*, 14 La. 478 (1840); *State v. Judges of Probate for the City of New Orleans*, 17 La. 486 (1841); *State v. Judge of the Commercial Court of New Orleans*, 4 Rob. 48 (La. 1843). See MILLER, *supra* note 63, at 19-20.

183. *Martin v. Ashcraft*, 8 Mart. (n.s.) 313 (La. 1829). *Martin*, the first decision to distinguish between civil and criminal habeas corpus writs, was viewed as a landmark decision at the time. See, e.g., *Chardon v. Guimblotte*, 1 La. 421 (1830); *Hyde et al. v. Jenkins*, 6 La. 427 (1834); *Ex parte Emanuel*, 4 La. Ann. 424 (1849) (Slidell, J., dissenting).

184. *Ogden*, 3 Mart. (o.s.) at 307.

185. *Dodge's Case*, 6 Mart. (o.s.) 569, 571 (1819); *Ogden*, 3 Mart. (o.s.) at 306. The relevance of this option only extended to noncapital punishments, as hangings were performed swiftly upon judgment.

Supreme Court.<sup>186</sup> Even when narrowed, though, *Laverty* was the dominant rule.<sup>187</sup>

The Supreme Court fumbled with the tension between the common and civil laws. In 1844, the tension erupted into a full battle between Judges Martin and Bullard on the questions of *Laverty*, appeals, and constructive offenses. It was one of the most complete articulations of the conflict between civil and common law in Louisiana history. *State v. Williams*<sup>188</sup> was a prosecution for violation of an act forbidding the importation of slaves—but providing no punishment—in which the appellant claimed that the law was really not criminal but civil.<sup>189</sup> Judge Bullard simply applied *Laverty* to the case at hand. The proceeding was by indictment “and was, therefore, a criminal proceeding; and if the court did not pronounce a proper sentence, we can afford no relief.”<sup>190</sup> His reasoning was simple: “Since the decision in the case of *Laverty*, the question has been considered as at rest; and, for the purpose of this argument, it must be assumed that we are without jurisdiction in criminal cases.”<sup>191</sup> Besides, he deemed it immoral to set a convict free.

And is it not essentially immoral knowingly to let loose convicted felons upon a Christian community? Can that be said to be a thing harmless in itself, and merely forbidden by positive law? . . . Having shown that, according to the *principles of the common law*, the statute has created an offence against the public, it is clearly the duty of the Attorney General to prosecute in the name of the State.<sup>192</sup>

Judge Martin disagreed completely. To him, the maxim *nulla poena sine lege* applied. No matter what the Crimes Act of 1805 stated,

[n]ow we have no common law offences in Louisiana. All crimes and offences against our law are created and punishable by statute . . . We have no punishment at common law, or by common law; consequently, we could

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186. *Ogden*, 3 Mart. at 306.

187. *See, e.g.*, *State v. Williams*, 7 Rob. 252, 271 (La. 1844) (Bullard, J.); *Ogden*, 3 Mart. at 305; *Martin v. Ashcraft*, 8 Mart. (n.s.) 313 (La. 1829); *Bermudez*, 14 La. at 478; *State v. Judge Watts*, 8 La. 76 (1835). *Chardon*, 1 La. 421, was one of the few pre-1840 decisions to openly question *Laverty*.

188. *State v. Williams*, 7 Rob. 252 (La. 1844).

189. It is important to note that the reporters do not make clear which decision is the majority decision. Only Martin’s and Bullard’s decisions are reported, but the editorial notes identifying the majority opinion (Martin) and the dissent (Bullard) contradict the editorial notes regarding the disposition of the appeal.

190. *Williams*, 7 Rob. at 278 (per Bullard, J.).

191. *Id.* at 271.

192. *Id.* at 273 (emphasis added).

not indict or punish a violation of a law which merely forbids, but does not prescribe any punishment for a certain act.<sup>193</sup>

The attorney general had acted improperly and outside his power “by indicting the defendant, instead of instituting a civil suit, to deprive him of the right of appeal.”<sup>194</sup> For this reason alone the defendant’s appeal should be sustained.

Judge Martin then questioned the entire existing structure. Following the line of opinions that suggested that *Laverty* was decided in avoidance of the real questions presented in that case, Martin declared that *Laverty* should be a dead letter. All the court ruled regarding criminal appeals in that case “must be considered as *obiter dicta*, of no utility in the examination of the question before them, and of no authority in that case or posterior ones.”<sup>195</sup>

Legal observers chafed at the *Laverty* regime, bemoaning the loss of the right to criminal appeal and the resulting entropy in the criminal law of the state. The Supreme Court was the target of popular criticism for its inefficiency and ineptitude.<sup>196</sup> The authors of the articles in Louisiana’s sole antebellum law journal, Gustavus Schmidt’s *Louisiana Law Journal: Devoted to the Theory and Practice of the Law*, devoted many of its pages to the problem. Although it would only run four numbers, the *Journal* provided an important medium for critical legal comment that had not theretofore existed. The critics complained of the court’s fundamental functional defects.<sup>197</sup> The most problematic issue, they thought, was the lack of uniformity in criminal judging. The lack of a “superior tribunal . . . to give uniformity to the decisions of our courts in criminal cases” was “unaccountable.”<sup>198</sup>

We have in Louisiana ten different tribunals in criminal cases, each independent of the other and without any common head to correct or control them—so that laws are not only differently construed in different parishes, but also at different times in the same parish where, under the

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193. *Id.* at 268 (per Martin, J.).

194. *Id.* at 270.

195. *Id.*

196. Mark F. Fernandez, *From Chaos to Continuity: Early Reforms of the Supreme Court of Louisiana*, 28 LA. HIST. 19 (1987), reprinted in AN UNCOMMON EXPERIENCE, *supra* note 17, at 676, 678.

197. S.W. Downs, *Notes on Criminal Law*, 1 (Issue 3) LA. L.J. 30 (1842); E.A. Canon, *Of the Necessity of a Court of Appeals in Criminal Cases*, 1 (Issue 2) LA. L.J. 78, 81 (1842); J.E. Morese, *Observations on the Present Judiciary System*, 1 (Issue 4) LA. L.J. 18 (1842).

198. Downs, *supra* note 197, at 30-31.

circuit system a different judge happens to preside.<sup>199</sup> It is not an unfrequent [*sic*] occurrence now for a criminal to escape before one judge that would be convicted before another, and *vice versa*.<sup>200</sup>

Another critic noted that “The want of a court of appeal in criminal cases, has long been felt and complained of. Lawyers and legislators have, year after year exclaimed aloud against that awful and dangerous chasm in our judicial system; and great efforts have been made to fill it, but always without effect.”<sup>201</sup> Another commentator painted the scene more colorfully:

We have no high court of chancery, or of errors, no court of cassation. Our decisions, harder than those of the Medes and Persians, are never revoked, but affect more or less the property of nearly half of the States of the Union . . . . [So] unless some other system of appellate jurisdiction, or an increase of the Supreme Bench is introduced into the new constitution, business must so accumulate, that at no distant day it will become in reality the “*bottomless pit of Chancery*.”<sup>202</sup>

To make “the matter still worse,” the publication requirement of the Judiciary Act, as amended, only applied to the Supreme Court.<sup>203</sup> Lower criminal cases were not reported at all. Publication, “irregular and inconsistent” as it would be, “would throw some light on the subject.”<sup>204</sup> “Publication of notes of decisions in important cases in some well established and generally read periodical” was essential as a means to lessen “these evils” until “a more effectual remedy for these evils, in the establishment of a court of appeals in criminal cases can be obtained.”<sup>205</sup> One problem led this commentator to provide several pages of case notes of the most significant decisions. Given the lack of published opinions or a court that could settle diverging opinions, it is little wonder that some years earlier Livingston had called it “the present confusion of criminal law.”<sup>206</sup>

The critics in Schmidt’s journal argued that the best remedy to the present confusion would be for the legislature to create a court of appeal for criminal cases. A court of five members would by its very existence

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199. Another author notes that even the rules of practice were in a constant state of flux as a new circuit riding judge would arrive every six months with rules of his own. Morese, *supra* note 197, at 21.

200. Downs, *supra* note 197, at 31.

201. Canon, *supra* note 197, at 82.

202. Morese, *supra* note 197, at 19-20.

203. *Supra* Part V; see also *supra* note 27.

204. Downs, *supra* note 197, at 31.

205. *Id.* at 31-32.

206. D.R. Le Breton & Mitchell Franklin, *A Late Letter by Edward Livingston on the Criminal Law of Louisiana*, 17 TUL. L. REV. 283, 287 (1942).

address these fundamental institutional problems for a relatively modest financial cost to the state (though Louisiana paid its judges handsomely).<sup>207</sup> The only “plausible argument against it” would be the question of delay of sentence, which might run counter to the institutional value of swift justice.<sup>208</sup>

These authors did not just want criminal appellate jurisdiction; they wanted a *right* to criminal appeal. One author used vivid terms describing the risks of placing the lives of citizens into the hands of unsupervised judges: the judge may be “pettish, truckling, weak, vacillating, and a strong party man . . . in such a case he becomes the worst of tyrants . . . a legal tyrant, a constitutional despot, and every citizen must tremble for his honor, his life, his fortune and the peace of his family.”<sup>209</sup> The right to move for a new trial was the only right a defendant then had. “[S]uppose that a new trial is refused, and that sentence is passed. Where and how shall the accused find a refuge against the errors or the malice of the judge? Nowhere, for there is no court of appeals in criminal cases.”<sup>210</sup> The governor might grant a pardon or a reprieve, “but it is a favor, not a right. We are treating of a right which the accused ought to have.”<sup>211</sup> Such a right had centuries-old roots in the legal tradition of which Louisiana was part. Another, more sober, commentator presumed that

there would be one sentiment in the State as to the propriety of doing away with that anomaly in the laws of Louisiana, which grants to every man an appeal to the highest legal tribunal, in all matters exceeding three hundred dollars, and refuses him a revision of a judgment which affects his life and liberty.<sup>212</sup>

By 1841, Louisiana was ready to get rid of *Laverty*.

## VIII. THE CONSTITUTIONAL RIGHT TO CRIMINAL APPEAL

### A. *Changing the Constitution*

Had the 1812 Constitution not intentionally made amendment prohibitively difficult, it is quite possible that the *Laverty* system would have been overturned earlier.<sup>213</sup> Pressure to fix the judiciary mounted

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207. Canon, *supra* note 197, at 83.

208. Morese, *supra* note 197, at 21.

209. Canon, *supra* note 197, at 80.

210. *Id.* at 80-81.

211. *Id.* at 79.

212. Morese, *supra* note 197, at 21.

213. In order to protect the status quo of the ethnic political balance of power created by the first convention, Article VII of the first constitution subjected proposed amendments to a series of nearly impossible hurdles. A majority of each house had to vote for an amendment, with

through the 1830s. In 1841, a Louisiana pamphleteer noted that “unavailing efforts . . . have been made by the liberal members of our legislature for the last five years to pass the bill required by the present constitution . . . and . . . during the last session [we] beheld the contemptible trick resorted to by the minority to defeat the bill after it had passed.”<sup>214</sup> According to him, “A large portion of the people have great objections to the present constitution. . . .”<sup>215</sup> This movement, rooted in Jacksonianism, was part of “a strong and increasing desire . . . to simplify the action and restrain the power of government, to secure effectually the political rights of the mass, and to introduce direct responsibility to the people, on the part of all who are entrusted with power.”<sup>216</sup> By 1841, the state legislature was ready to call a constitutional convention.

In January 1841, the legislature prepared an act “for taking the sense of the good people of this State as to the expediency of calling a Convention to Amend the Constitution.”<sup>217</sup> The debates of the judiciary committees in each house do not seem to exist, but the floor debates suggest that the constitutional protection of a right to criminal appeal commanded broad support. On the floor of the Senate, S.W. Downs lamented how *Laverty* had denied Louisiana even the criminal appeal opportunities afforded in England. “In England and in almost every other state of the Union except Louisiana, there is an appeal in important criminal cases which is denied us here.”<sup>218</sup>

The Supreme Court that had decided *Laverty* was very unpopular. Downs continued, “It is known to those conversant with the judicial history of the State, that the decisions and proceedings of judges in certain cases have called forth an array of talents and feelings against

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its text specified, within the first twenty days of its session. Should such a bill pass, then at the next election cycle there would be a referendum on having a constitutional convention. Should the referendum pass, then there would be *another* referendum the *next* year. Then, if that second referendum passed, then at the *next* legislative session, the legislature would call for a convention the size of the legislature to be elected at the *next* election. After all that, a convention could occur. Unsurprisingly, the 1844-1845 convention was the first to occur after 1812. For a discussion of the ethnic politics of early Louisiana that inspired this obtuse system, see generally TREGLE, *supra* note 52; GEORGE DARGO, *JEFFERSON’S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* (1975).

214. REMARKS ON THE PROPRIETY OF CALLING A CONVENTION TO AMEND THE CONSTITUTION OF THE STATE OF LOUISIANA, BY A CITIZEN 4 (New Orleans, D.W. Noble 1841).

215. *Id.*

216. *Id.* For the history of Jacksonianism in Louisiana, see generally TREGLE, *supra* note 52.

217. 1841 La. Acts (Jan. 30, 1841).

218. 1841 LA. S. DEB., 15th Legis., 1st Sess., 13.

them that no other department of the government could have withstood.”<sup>219</sup>

In the Act calling for a referendum and the eventual convention, the convention was ordered to amend the constitution “so as to enable the Legislature, if they deem proper, to enlarge the jurisdiction of the Supreme Court, by conferring on it a general supervisory control over inferior Courts, and making it a Court of Errors in civil and criminal cases.”<sup>220</sup> The legislature had finally taken the plunge.

### *B. A Criminal Appeals Court*

The constitutional convention remained an uncertain number of years away. During the wait, the legislature decided to act. In 1843, it created a Court of Errors and Appeals for Criminal Matters.<sup>221</sup> The court was granted final appellate jurisdiction over questions of law (but not fact).<sup>222</sup> Anyone facing prosecution for crimes “where the punishment may be death or imprisonment at hard labor” had the right to appeal his conviction for any question of law arising in the course of the prosecution to a panel of appellate judges.<sup>223</sup> A right to criminal appeal existed once again in Louisiana.

An impetus for the creation of this new court may have been the Supreme Court’s 1840 rule of practice that all criminal procedure would be based on the common law, for the new court was now instructed to employ common law *civil* procedure.<sup>224</sup> Louisiana’s nineteenth-century law of civil procedure was the law of Livingston’s 1805 Code of Practice in Civil Cases and its 1824 revision.<sup>225</sup> Both are very French in principle

219. *Id.*

220. 1841 La. Acts, § 1(4) (Jan. 30, 1841).

221. An Act to Establish a Court of Errors and Appeals in Criminal Matters, and for Other Purposes, 1843 La. Acts 59, ch. 93. For a general study of the court, see Sheridan E. Young, *Louisiana’s Court of Errors and Appeals, 1843-1846*, 33 LA. HIST. 61 (1992).

222. 1843 La. Acts 59, § 2.

223. *Id.* § 5. Three judges were appointed to the Court of Errors and Appeals, any two of whom comprised a quorum. In panels of two, dissension resulted in affirming the lower court judgment. *Id.* § 8. The court’s first judges were Thomas C. Nicholls, as presiding judge, Isaac Johnson, and George Rogers King. King, a graduate of the University of Virginia Law School, was the only one to be formally trained in the common law. Johnson would resign in 1846 to run for governor, from which position he would appoint the other two to the new Supreme Court. William D. Boyle, a state representative, briefly filled Johnson’s seat until the appeals court was abolished. See Young, *supra* note 221, at 65-67.

224. *Id.* § 2 (emphasis added). Although the act required the use of bills of exception or writs of error, these were mere formalities, unlike their common law namesakes.

225. Wheelock S. Upton’s *Code of Practice in Civil Cases for the State of Louisiana* (1839) was the most recent version as used by the new court, but it merely reprints, at least in the relevant areas, the Code of 1824.

and style.<sup>226</sup> They provide appeals for all final judgments<sup>227</sup> and appeals of interlocutory rulings if such rulings would cause irreparable injury.<sup>228</sup> The two codifications even allowed aggrieved third parties to appeal decisions injurious to them.<sup>229</sup> The Supreme Court would correct lower court decisions: it “shall pronounce . . . the judgment which the lower court should have rendered.”<sup>230</sup> If a party was dissatisfied with the judgment, that party could petition for rehearing within three days, after which judgment became final.<sup>231</sup>

The method of appeal had little to do with contemporary common law criminal appeals. For instance, the Louisiana requirement for a “writ of error” merely required that for appeals based on an error on the face of the record, the appellant would have to bring the record to the court and file “a written paper, stating specially such errors as he alleges.”<sup>232</sup> Appellate decisionmaking was also protected against common law encroachments by a provision rooted in the 1812 Constitution that required the Supreme Court to state the “reasons of its judgment by citing, as exactly as possible, the laws on which it founds its opinion,” so as to avoid general references to common law rules.<sup>233</sup>

The rules of the Code of Practice ensured that the new court would provide a true appellate structure. The question that might remain would be whether it would interpret its role broadly or narrowly; it responded broadly. In fact, it was so careful to interpret the right to appeal broadly that it allowed (with one dissenting vote) appeals by the state on the basis that the court’s organic statute did not forbid such appeals.<sup>234</sup>

The court also broadly applied appellate procedure, for although the court occasionally dismissed appeals for want of form,<sup>235</sup> the only hard and fast rule the court consistently applied was the requirement that if the appeal was brought on a bill of exceptions, the appellant had to state an

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226. For the pre-1845 development of civil appellate procedure, see Dart, *supra* note 24, at 577.

227. LA. CODE CIV. PROC. art. 565 (1824).

228. *Id.* art. 566.

229. *Id.* art. 571.

230. *Id.* art. 905.

231. *Id.* arts. 911-914.

232. *Id.* art. 897.

233. *Id.* art. 909; LA. CONST. OF 1812 art. IV, § 12.

234. Double jeopardy would still provide the defendant with some protection, however. *State v. Jones*, 8 Rob. 573 (La. Ct. Err. App. 1845); *see also State v. Brown*, 8 Rob. 566 (La. Ct. Err. App. 1844).

235. *See, e.g., State v. Major*, 8 Rob. 553 (La. Ct. Err. App. 1844) (appeal dismissed for lack of trial judge’s signature).

appellate claim, embodied in the facts as presented in the bill.<sup>236</sup> This was speedier than English chancery practice. This sensible requirement had the multiple results of forcing attorneys to explain their cause for appeal, shrinking the differences between the exception and error procedures, and granting the court some power to address mixed questions of law and fact.

The court interpreted the creation of a criminal court to mean that the legislature intended to grant a *right* to criminal appeal. “The granting of new trials in *all* cases, is coeval, in Louisiana, with the government; and the proper exercise of this power is one of the safeguards of the people.”<sup>237</sup> American incorporation of the English rule that never allowed a new trial in capital cases, embraced even by eminent jurists like Justice Story, showed the “fallacy of . . . attempting to adopt a principle, homogeneous to the common law of England, [believing it] absolutely and indispensably necessary to make it harmonize, and consistent” with English law.<sup>238</sup> Instead of this English rule “being the perfection of reason, (as its eulogists proclaim it to be,) it would be the perfection of iniquity, despotic oppression and injustice.”<sup>239</sup> Judge Nicholls thought it quite clear that the several states should think for themselves, purge themselves of the “bloody” elements of the common law, and provide for a new trial “in capital, as in all other cases,” for in so doing “you restore the beauty and symmetry of the whole law.”<sup>240</sup> In Louisiana, which could now enjoy a new dose of reason in its criminal law, the court decided that “all judges who are empowered to hear and determine indictments for crime, are invested with a discretionary power to grant new trials in capital cases, as well as in misdemeanor.”<sup>241</sup>

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236. *State v. Charlot*, 8 Rob. 529, 531 (La. Ct. Err. App. 1844). For a dismissal on this basis, see, e.g., *State v. Sheldon*, 8 Rob. 540 (La. Ct. Err. App. 1844).

237. *Charlot*, 8 Rob. at 530.

238. *Jones*, 8 Rob. at 579.

239. *Id.* at 578.

240. *Id.* at 579-80. In more florid language he continues:

In other words, these men were condemned to be hanged, and were, accordingly, executed, under an apprehension that, if a new trial were accorded them, this *humane* principle of the law would be violated. The invocation of such a principle was a mockery of justice . . . . It would be in vain for the court to inform them, that, through the benignity of the law, and as a special favor to them, they must be hanged *now*, lest, by granting a new trial, the constitution of the United States might be violated, and their own precious lives be put in jeopardy *twice* for the same offence.

*Id.*

241. *State v. Hornsby*, 8 Rob. 583 (La. Ct. Err. App. 1844). Related to the term misdemeanor, the court also used its unifying powers to clear up some legal problems, such as the frequency with which the term “felony” was used in statutes. “The term felony, although defined and well understood in England, is unknown to the laws of Louisiana.” *Charlot*, 8 Rob. at 529.

The court was also happy to finally breath life into the 1805 Crimes Act provision for divesting the common law of its “unnecessary prolixity.” Judge Nicholls declared that “Error, however sanctified by authority, or hoary by time, cannot be permitted to invoke the antiquity of its existence as a justification of its aberrations, but, on the contrary, should be renounced whenever and wherever it is discovered to lurk.”<sup>242</sup> These absurdities were vanishing before the “advancing light of reason and law.”<sup>243</sup>

### C. *An Explicit Constitutional Right*

Once the hurdles were crossed, a convention met in Jackson in 1844. Louisiana was finally able to reform its judiciary. As a contemporary commentator noted, “The chief reason for calling the Convention together was the reform of the Judiciary department of the Government. For this reform there was great need. We had been laboring under an odious system until patience had ceased to be a virtue.”<sup>244</sup>

The *U.S. Magazine*, in its article extolling the 1845 Constitution, noted:

The debates contain much eloquence, and appear to have been conducted with great dignity; but they are superficial. No subject appears to have been exhausted before the Convention, nor do the speakers ever, in their speeches, seem to have encountered the difficulty *of principle*, upon which the subject of their discussions was depending. We are far from believing, however, that the subjects brought to the notice of that body were, in fact, superficially considered, for the results of their deliberations were marked by quite too much wisdom to admit of such a suspicion being permanently entertained.<sup>245</sup>

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242. *State v. Ferguson*, 8 Rob. 613, 615 (La. Ct. Err. App. 1846).

243. *Id.* The judges would disagree on the extent of this power to alter the law. For instance, in one of Judge King’s decisions, he believed that the legislature had intended the judges not to legislate on criminal procedure but merely to “omit those prolixities which were acknowledged to be such at common law.” *State v. Kennedy*, 8 Rob. 590, 601 (La. Ct. Err. App. 1845). Judge Nicholl’s dissented, finding the court’s discretion to be broader, for “[t]o aver that in Louisiana crimes are prosecuted according to the common law of England, is not strictly and critically true.” Instead, Louisiana criminal law was “[t]he common law of England . . . purified, modified and pruned.” *Kennedy*, 8 Rob. at 604 (Nicholls, J., dissenting).

244. SAMUEL F GREEN, *THE NEW CONSTITUTION OF THE STATE OF LOUISIANA, WITH A COMPARATIVE VIEW OF THE OLD AND NEW CONSTITUTIONS OF THE STATE* 7 (1845).

245. *Id.* at 245.

The criticism is apt, but for reasons other than those anticipated by its author.<sup>246</sup> The pressure to reform the judiciary, to provide criminal appeals and supervisory jurisdiction, had coalesced in the 1841 referendum act to clarify what needed to be done at the convention. At least as regards criminal appeals, the debates on the floor of the convention were few, for the issues had been settled in advance.

The Democratic majority on the Judiciary Committee issued its preliminary report on August 20, 1844, providing that “The supreme court shall have appellate jurisdiction in criminal cases on questions of law alone, in all cases in which the punishment of death or hard labor may be inflicted, or on a fine exceeding three hundred dollars is actually imposed.”<sup>247</sup> The minority report also provided such a right, broadening it to include any “greater punishment than an imprisonment,” and granting the legislature power to determine the extent of appellate review of facts in civil and criminal cases.<sup>248</sup>

The Convention did not return to the question of the Judiciary until April 1845, after lengthy debates regarding details of the other branches of government.<sup>249</sup> When John Grymes presented the majority report again, the criminal appeal jurisdiction provision was immediately adopted on motion.<sup>250</sup> Although the debate is quite brief, it is quite clear that to the delegates, they were not merely providing jurisdiction over criminal appeals, they were providing a *right* to criminal appeal. This may be gleaned from, for example, the quick and overwhelming denial of Mr. Lewis’s motion providing that “[t]he supreme court shall have civil

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246. It is important to note the important caveat that much of the real business of the debate took place in the committees formed to draft the provisions for each branch of government and each title of the Constitution, and these committee debates are not reported. The terms of reference for the judiciary committee, like the other branch committees, read: “That a Committee composed of \_\_\_ members be appointed with instructions to recommend such changes, alterations and amendments, if any they may deem proper and expedient, on the subject concerning the Judiciary Department as set forth in the 4th article of the constitution, as early as possible.” DEBATES 1844, *supra* note 10, at 17. The reference was made upon Ratliff’s August 3, 1844, motion. PROCEEDINGS 1844, *supra* note 10, at 14.

247. Proposed art. IV § 7, Majority report presented August 20, 1844 by John R. Grymes, PROCEEDINGS 1844, *supra* note 10, at 49.

248. Proposed art. IV, § 4, Minority report presented August 22, 1844 by Mr. Read, PROCEEDINGS 1844, *supra* note 10, at 55. The other major difference was in form: the minority report included the entire appellate jurisdiction of the state Supreme Court in one section, whereas the majority report dissected it into several separate sections.

249. After extremely long debates on the citizenship requirement for voting rights and districting of the state legislature, “the Convention proceeded to the consideration of the formation of the judiciary department,” on Jeffersonian Democrat Solomon Downs’s April 15th motion. DEBATES 1845, *supra* note 10, at 666; 1 A DICTIONARY OF LOUISIANA BIOGRAPHY 254-55 (Glenn R. Conrad ed., 1988).

250. April 15, 1845. PROCEEDINGS 1845, *supra* note 10, at 189.

and criminal jurisdiction on appeals or writs of error in such cases as the legislature may direct, which shall be exercised in the manner prescribed by law.”<sup>251</sup> The Convention thus refused to follow the Kentucky or federal approaches, which gave the legislature control.

One issue that concerned the delegates was the workload of the court. For instance, George Eustis, Sr., a former judge on the state Supreme Court who would become its chief justice in 1846, feared that since the court had “a labor to perform as extensive as it was complicated,” he was “indisposed to extend its jurisdiction to criminal matters.”<sup>252</sup> Even though he believed that “there never has been flagrant injustice done in the court of the first instance,” he bowed to public pressure: “the community were in favor of a court of errors in criminal matters.”<sup>253</sup> He proposed that to ease the court’s workload, its slow factual jurisdiction should be eliminated for civil cases, as well as criminal ones.<sup>254</sup> Others, such as Cyrus Ratliff, would find other ways to ease the Supreme Court’s workload, because it was a given that the criminal appeal right would be granted.<sup>255</sup>

The question of the relation of appeals to habeas corpus occupied more of the Convention’s time, for they were unsure whether there should be appellate jurisdiction over criminal habeas corpus writs. This question was important, for *Laverty* and subsequent cases were usually conceived as appeals of habeas decisions. The delegates debated whether the court’s new appellate jurisdiction would vitiate any need for it to also have the power to issue writs of habeas corpus or whether the power would overload it. Proposals ranged from complete appellate jurisdiction over habeas decisions<sup>256</sup> to entirely abolishing its habeas powers.<sup>257</sup>

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251. April 28, 1845 Motion by Mr. Lewis, DEBATES 1845, *supra* note 10, at 815. In the context of debating the factual appellate jurisdiction of the court, he noted that jury verdicts were more likely to be wrong in criminal rather than civil trials, he believed that new trials were a sufficient remedy. April 26, 1845 Speech by Mr. Lewis, DEBATES 1845, *id.* at 800, 802.

252. Speech of Mr. Eustis, April 15, 1845 evening session, DEBATES 1845, *supra* note 10, at 673; 1 A DICTIONARY OF LOUISIANA BIOGRAPHY, *supra* note 249, at 290.

253. Debates 1845, *supra* note 10, at 673.

254. Speech of Mr. Eustis, *supra* note 252. Interestingly, Judah P. Benjamin, a Whig, thought that review of questions of fact was what kept the Supreme Court from having unlimited jurisdiction. Speech of Mr. Benjamin, April 18, DEBATES 1845, *supra* note 10, at 715; 1 A DICTIONARY OF LOUISIANA BIOGRAPHY, *supra* note 249, at 63.

255. Speech of Mr. Ratliff, April 18, DEBATES 1845, *supra* note 10, at 713.

256. *See, e.g.*, Speech of Isaac T. Preston, Debate of April 15, evening session, DEBATES 1845, *supra* note 10, at 671.

257. Eustis, for example, notes that the attorney general promised that “no great hardship could arise” since the court would take on cases of great import anyhow. Speech of Mr. Eustis, *supra* note 252. At least one delegate, Ratliff, noted that appellate and collateral review are distinct concepts. *See, e.g.*, Speech of Isaac T. Preston, Debate of April 15, evening session, DEBATES 1845, *supra* note 10, at 671.

Delegates were divided as to the propriety of allowing appeals of criminal habeas decisions, ignoring the fact that under the *Laverty* system, civil habeas appeals were common.<sup>258</sup> After a lively debate,<sup>259</sup> the delegates agreed to empower supreme court justices to issue habeas writs “at the instance of all persons in actual custody under process, in all cases in which they may have appellate jurisdiction.”<sup>260</sup>

On May 9th, the committee presented its revised report, which was textually identical regarding the court’s criminal appellate jurisdiction.<sup>261</sup> Three days later the committee presented its final version for approval. This draft included the majority’s definition of the court’s appeal jurisdiction in a general jurisdictional section, *à la* the minority report. The text of section 63 as accepted reads:

The supreme court, except in cases hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases where the matter in dispute shall exceed three hundred dollars, and to all cases in which the constitutionality or legality of any tax, toll, or impost, of any kind or nature soever, shall be in contestation, whatever may be the amount thereof; and likewise to all fines, forfeitures, and penalties imposed by municipal corporations, *and in criminal cases on question of law alone, whenever the punishment of death or hard labor may be inflicted or when a fine exceeding three hundred dollars is actually imposed.*<sup>262</sup>

The Convention finished its business, approved the final draft, and adjourned on May 14th. The public promptly approved it by a landslide vote of 12,227 to 1,385.<sup>263</sup>

Without any hesitation, the Constitutional Convention enshrined a right to criminal appeal in its 1845 Louisiana Constitution. This was the first time that such a right was made explicitly constitutional in any American constitution. The next legislature abolished the Louisiana Court of Errors and Appeals, transferring criminal appeals directly to the

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258. As James F. Brent noted, “The writ of habeas corpus was an original writ. He had never heard of an appeal upon a writ of habeas corpus.” *Id.* at 672-73.

259. In one exchange, Preston declared that the court should “issue a writ of mandamus, of precedendum, or prohibition, as the case might require [for] habeas corpus is an original writ of right,” for he was certain that “[t]here is no such thing as an appeal.” At this which the German supporter of the Louisiana civil law, Christian Roselius, spiritedly responded, “No where but here!” *Id.* at 672.

260. LA. CONST. OF 1845 art. 67. Charles M. Conrad, however, found “insuperable objections” to giving the court the power to issue habeas writs under such a notion, for how would it know if it would have appellate jurisdiction over such a writ until the writ was returned by the inferior court? *Id.* at 672.

261. The only difference was that the location had moved to section 8. PROCEEDINGS 1845, *supra* note 10, at 278.

262. La. Const. of 1845, art. 63 (emphasis added).

263. See Schafer, *supra* note 9, at 36.

Supreme Court, ensuring that the court would hear criminal appeals “by preference over civil cases.”<sup>264</sup> To help guarantee an effective right, convicts did not need to post an appeal bond or security for costs.<sup>265</sup> The only limitation on the right to appeal a criminal conviction to be seen any time soon was the court’s 1846 decision not to extend its jurisdiction to appeals on habeas corpus petitions, reasoning that the court only had appellate jurisdiction over final judgments. In the court’s view, habeas decisions were never final judgments.<sup>266</sup> Although this may have limited the right to appeal some interlocutory rulings, each judge on the court had original habeas jurisdiction, so the court did not see its decision as hampering the right to criminal appeal.<sup>267</sup>

#### IX. CONCLUSION

Although the United States Supreme Court has declared that there is no right to criminal appeal under the federal constitution, several states have deemed the right sufficiently important to protect it in their own constitutions. The effort to understand the roots of the first explicit constitutional protection of the right to criminal appeal has borne out Louisiana Judge John T. Hood, Jr.’s assertion that the right to appeal is “of civil law origin.”<sup>268</sup> The fact that the right finds its roots in the civil law in its conflict with the common law does not pigeon-hole this history into the library of parochial legal novelties, for other states soon adopted similar rights. Indeed, the Louisiana right entered the common law stream that very year as borrowed by Texas in its new constitution. Indeed, modern American criminal appeals come not from the common law but the civil law. As Roscoe Pound noted, “Appeal in the modern sense developed in Rome under the Empire and was carried further in the canon law, from which the procedure in modern Europe was largely taken.”<sup>269</sup> It passed into America through Louisiana.

The legal history of the Louisiana constitutional right to criminal appeal is the story of the interconnection of institutional needs with legal culture and theory. It is the meeting of the natural law belief in higher law with the functional disarray caused by *Laverty* and the conflict

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264. An Act to Abolish the Court of Errors and Appeals in Criminal Matters, and to Transfer the Power and Duties thereof to the Supreme Court of the State of Louisiana, 1846 La. Acts 102, ch. 127, § 7.

265. An Act to Organize District Courts in the State of Louisiana, Except in the Parishes of Orleans and Jefferson, 1846 La. Acts 99, ch. 125, §§ 8-9.

266. *Ex Parte Mitchell*, 1 LA. ANN. 413, 414 (1846).

267. *Id.*

268. John T. Hood Jr., *The Right to Appeal*, 29 LA. L. REV. 498, 499 (1969).

269. Roscoe Pound, Introduction to ORFIELD, *supra* note 1, at 6.

between the common law and civil law traditions touched off by the Crimes Act of 1805. Although Chief Justice Marshall saw no functional problem with disclaiming criminal appellate rights in *More*, federal criminal law was as yet so miniscule that a lack of a unifying, supervisory federal court for criminal matters caused no problem. Such an institutional lacuna in a state in the federal system, however, caused grave functional difficulties. That *Laverty* did not need to rule as it did exacerbated the confusion it caused and laid seeds of discontent.

Louisiana had always had criminal appeals until *Laverty* cut them off even beyond what England offered. In a territory lacking sufficient resources to develop its own legal system, the introduction of a foreign, entirely new criminal law could not but cause confusion. The two legal cultural traditions clashed, as they continue to do. Louisiana's natural law-based civilian legal culture demanded the right to criminal appeal to a higher tribunal as a fundamental individual right.

These philosophical, cultural, and functional pressures linked together, pushing for a new constitution. When the nearly impossible amendment requirements of the 1812 Constitution were finally met, the fruit of these interconnected pressures was a constitutional right to criminal appeal. The right is constitutionally explicit because the legislature and the Convention were utterly determined to prevent a decision like *Laverty* from ever happening again.