

Sounding the Retreat: The Exit of Spanish Law in Early Louisiana 1805-1808

Vernon Valentine Palmer*

I.	INTRODUCTION	122
II.	OF LEGENDS, MYTHS AND PREJUDICE	126
	A. <i>Justice at the Cabildo</i>	126
	B. <i>Laughing at Spanish Judges: “Liberty in Louisiana”</i>	128
	C. <i>The Towering Shadow of the Inquisition</i>	130
	D. <i>Creole Mythology</i>	132
III.	THE DISMEMBERMENT OF THE SPANISH SYSTEM	133
	A. <i>The Dismantlement of the Cabildo</i>	133
	B. <i>Replacing Spanish Civil Procedure</i>	135
	C. <i>The Swift Overthrow of Spanish Criminal Law</i>	138
	D. <i>The Repeal of Spanish Slave Law</i>	140
	E. <i>The Gradual Ouster of Spanish Commercial Law</i>	142
	F. <i>A Turn ‘In Advance’ to French Private Law: The Marriage Act of 1807</i>	142
IV.	THE DIGEST OF 1808 AND THE RETREAT OF SPANISH PRIVATE LAW	144
V.	CONCLUDING OBSERVATIONS	146

[Always] to be kept in mind is an interesting matter of prejudice: what is good in Louisiana law is attributed to France, what is medieval to Spain, and what is bad to the common law.

—Ferdinand Fairfax Stone¹

* © 2017 Vernon Valentine Palmer. Thomas Pickles Professor of Law, Co-Director of the Eason Weinmann Center of International and Comparative Law, Tulane University. I wish to thank the Portalis Society, the Eason Weinmann Center of International and Comparative Law, and Tulane Law School for sponsoring the colloquium *Early Louisiana and Her Spanish World*, which was held in November 2016 at Tulane Law School. I am grateful to the participants who presented papers at the colloquium, and I thank Lo Faber, Sally Kittredge, and John Cairns for reading my paper and sharing their constructive comments.

1. Ferdinand Stone, *The Law with a Difference and How It Came About, in THE PAST AS PRELUDE, NEW ORLEANS, 1718-1968*, at 42 (Hodding Carter ed., 1968).

From their English forbears and other non-Spanish Europeans, Anglo Americans had inherited the view that Spaniards were unusually cruel, avaricious, treacherous, fanatical, superstitious, cowardly, corrupt, decadent, indolent, and authoritarian—a unique complex of pejoratives that historians from Spain came to call the Black Legend, la leyenda negra.

—David J. Weber²

I. INTRODUCTION

This essay focuses on a short period in Louisiana history, the first codification period 1805-1808. These four critical years encompassed key decisions about the future shape and content of the legal system. A central question that could not be avoided was what would be the role, the scope, and the place of Spanish law in the future legal order. Spanish codes, *cédulas*, and decrees, both public and private, substantive and procedural, were the law of the land at the time of the colony's cession to the United States in 1803, and this law remained in force down to the beginning of the period under study. Spanish Governor Alejandro O'Reilly had the authority to introduce this system, and he in fact did so by an Ordinance of Nov. 25, 1769, which subsequently received approval by royal *cédula*.³ The conjectures by President Jefferson, Gustavus Schmidt and John Tucker that Louisiana at the time of the Purchase was still governed by French law proved unhistorical and have ceased to be credited.⁴

A conventional view is that this period in Louisiana history was a contest between protagonists of the common law and those of the civil law, a characterization largely justified. But the common law/civil law question principally concerned the future orientation of the private or personal law of Louisiana, to the neglect of other Spanish laws which were also in force and could have a bearing on my subject. In the 1970s attention focused upon an interesting subtopic of the common law/civil

2. David J. Weber, *The Spanish Legacy in North America and the Historical Imagination*, 23 W. HIST. Q. 7 (1992). Further on the Black Legend, see THOMAS INGERSOLL, MAMMON AND MANON IN EARLY NEW ORLEANS: THE FIRST SLAVE SOCIETY IN THE DEEP SOUTH 1718-1819, at 153-54 (1999).

3. See A. N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in LOUISIANA'S LEGAL HERITAGE 87-106 (Edward Haas, Jr. ed., 1983); Hans Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in 'Notarial Jurisprudence'*, 53 TUL. L. REV. 1 (1978). O'Reilly's actions changed the official law but may not have changed all the "law in action" (French folkways, for instance, were still followed), for the province was culturally and linguistically French and still attached to a French way of life.

4. Gustavus Schmidt, Introductory Note, *Were the Laws of France Which Governed Louisiana Prior to the Cession of the Colony to Spain Abolished by the Ordinances of O'Reilly?*, 1 LA. L.J. 23 (1842).

law theme: to what degree was Spanish law or French law the inspiration behind the Digest of 1808? That question concerned the “inner identity” of Louisiana’s private law and is often referred to as the “Pascal/Batiza debate.”⁵ John Cairns’ important essay in this symposium is the latest iteration of this continuing debate.⁶ My paper may be of some relevance to this debate but it has a different starting point and treats a different subtopic: Conceding that a complete system of Spanish law was in force at the time of the Cession, then the broad and recurring question in the period 1805-1808 was what parts of that law to keep, what parts to discard, and what to replace it with? Some dismantling of the Spanish legal system was inevitable following the change of sovereignty and its American constitution, but after that point, where would it stop? What should remain? Legal and extralegal factors might affect legislative decisions on this issue, including cultural attachments, legal chauvinisms, economic and political considerations, the instructions to codifiers, and last but, I believe, equally important, the imbued preconceptions about Spanish law in the popular mind.

In deciding which laws to keep or discard, it seems reasonable to assume that each branch of Spanish law presented different considerations and conjured different perceptions. Spanish criminal law, for example, was burdened with a heavy stigma and was generally regarded as draconian, barbaric, and cruel. Torture as a means to extract evidence was approved by law and had been used in criminal trials in *Luisiana*,⁷ and the horrific punishments outlined in O’Reilly’s “Code” and in *Las Siete Partidas* were apparently still good law.⁸ Spanish civil procedure, although similar to the Romano-canonical procedure

5. See R. Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971); Robert Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972); Yiannopoulos, *supra* note 3, at 98, 101-02.

6. See John Cairns, *Spanish Law, the Teatro de la legislación universal de España e Indias, and the Background to the Drafting of the Digest of Orleans of 1808*, 31-32 TUL. EUR. & CIV. L.F. 79 (2017).

7. Torture as a means of acquiring evidence was not mentioned in O’Reilly’s Ordinance and Instructions, but it was authorized by *Siete Partidas* and was used in criminal trials in Louisiana. See Laura Porteous, *Torture in Spanish Criminal Procedure in Louisiana*, 8 LA. HIST. Q. 5 (1925); E.A. DAVIS, *LOUISIANA: A NARRATIVE HISTORY* 139 (1961).

8. O’Reilly’s Instructions called for brutal punishments. It was particularly severe on blasphemers against the Savior and his Mother (the reviler’s tongue to be cut out and his property confiscated), and homosexuals who committed “the detestable crime against nature” (the body burned), and murderers (dragged to execution at the tail of some animal). Beccaria’s famous work on criminal law *Dei delitti e delle pene* (1764) was translated into Castilian in 1774, but by 1777 it was on the Inquisition’s Index. See Alejandro Agüero & Marta Lorente, *Penal Enlightenment in Spain: From Beccaria’s Reception to the First Criminal Code*, FHI ¶¶ 13 et seq. (Nov. 15, 2012), http://fhi.rg.mpg.de/media/zeitschrift/1211aguero-lorente_1.pdf.

prevalent in most of Europe, attracted a surprising degree of criticism. It was characterized in some quarters as being dilatory, prolix, secretive, and a source of corruption. In contrast, the substantive private law of Spain sometimes received lavish praise, at least from certain elite lawyers. Louis Moreau Lislet and Henry Carleton hailed *Las Siete Partidas* as “the most perfect of Spanish laws [which] could be advantageously compared with any code published in the most enlightened ages of the world.” The *Partidas*, they wrote, were “the unceasing subject of the praise and admiration of every jurist acquainted with them.”⁹ James Workman, no hispanophile, acknowledged in a published letter, “The laws of Spain are generally excellent in themselves; for they are founded on the Roman Code, one of the most perfect and elegant systems of jurisprudence ever promulgated to the world.”¹⁰ While there was no question of the inner merit or the prestigious pedigree of Spanish private law, there were still problems in accessing and applying it. Lawyers regularly complained that the sources were labyrinthine, the confusion (as Livingston put it) “worse than that of babel,”¹¹ and needed books were scarce or unavailable.¹² Adding to the difficulty, many provisions found in texts such as *Siete Partidas* (published 1263, promulgated 1348) were obsolete, archaic, and of uncertain application in modern society.¹³

9. L. MOREAU LISLET & HENRY CARLETON, 1 THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA vii (New Orleans, n. pub. 1820). At another place in the Preface, the translators said “if it [the code of the Partidas] is not the best it is certainly equal to any the world has ever seen.” *Id.* at xxv.

10. *Letter of LAELIUS*, MISS. MESSENGER, Nov. 30, 1804.

11. *Quoted in Cairns, supra* note 6, at 94 n.69.

12. As Professor Yiannopoulos summarized the chaos: “[T]here were at least six different compilations of Spanish laws and more than 20,000 individual laws, some of which were never intended to apply in the colonies. Conflicts among legislative provisions were not uncommon, and Spanish writers often disagreed as to which laws should take precedence.” *The Civil Codes of Louisiana*, in 1 LOUISIANA CIVIL CODE XLVIII (A. N. Yiannopoulos ed., 2016). It may be added that although needed books were often scarce or unavailable, certain elite lawyers such as Michel de Armas, Edward Livingston, Moreau Lislet, and Pierre Derbigny assembled remarkable libraries. For a detailed study of these libraries, see Florence M. Jumonville, *Formerly the Property of a Lawyer’—Books That Shaped Louisiana Law*, 24 TUL. EUR. & CIV. L.F. 161 (2009).

13. Moreau Lislet and Carleton faced this problem when they attempted to translate this “most perfect of Spanish laws.” Large parts of this thirteenth-century code were either incompatible with the American Constitution or had to be disregarded as obsolete, irrational, or inhumane. Whenever Moreau Lislet and Carleton came across such problematic or incompatible provisions, they simply wrote “Not in Force” and made no translation of the material. In this way they passed over hundreds of pages, sometimes even entire *Partidas*. One estimates this shortened the translation by as much as 650 pages. *Partida I*, for example, which dealt with “all the things that relate to the Catholic Faith,” enacted the mysteries of the Holy Trinity and the Seven Sacraments into positive law. It also codified the position of the Pope as the head of the

The Louisiana legal system under construction during this period was built with the assistance of a talented corps of codifiers.¹⁴ It might be asked, however, how much they knew about Spanish law. What were the sources of their knowledge? How objective was their judgment? None was native born. All were immigrants. None had trained in Spanish law, and none had lived under Spanish rule. It might be fair to say that these men carried their own impressions and information about that system which affected its reputation, status and future acceptability in the new legal order.¹⁵

This essay is an enquiry into the factors, attitudes, and legislative choices that shaped the fate of Spanish law in early Louisiana. It will preliminarily consider a few of the legends, myths, and prejudices that affected the general reputation of Spanish law and Spanish rule in Louisiana, such as its reputation for corrupt judges, venal institutions, cruel and barbaric punishments, and the terrors of the Spanish Inquisition. Furthermore, by 1800 Spain was visibly in decline as a world power, and the prestige of its laws, inevitably, had declined as well.¹⁶ It cannot be said with certainty that these impressions had direct effect upon legislative decisions and policy choices, but it can be said that such ideas were widespread and were not unknown to lawyers,

church. None of this received translation into English. It must have seemed incompatible with the spirit of an American constitution that demanded separation of church and state. For similar reasons, the translators skipped nearly everything in Partida II since this dealt with the monarch as Emperor and King, his powers and qualifications, his duties toward his relatives, nobles, court, and his people, even his role as husband and father. These provisions must have seemed incompatible with a republican and democratic system of government. Partida VII, dealing with accusations, crimes, and punishments, was left untranslated in twenty-eight of its thirty-four titles. To mention some of the deleted titles, the translators skipped the provisions on trial by battle, *capitis diminutio*, homicide, adultery, stuprum, sorcery, heretics, sodomy, blasphemy, torture, and punishments. The dispositions on torture and trial by battle, for example, were obviously inhumane or irrational relics of a bygone era. The benign and approving manner in which the *Partida* accepted the use of torture in criminal proceedings, both arguing for its necessity and condoning its horrific methods, was no longer acceptable and needed no translation into modern law.

14. The principals alluded to in the text are Edward Livingston of New York, Louis Moreau Lislet of St. Domingue, James Brown of Kentucky, Pierre Derbigny of Laon, France, and James Workman of Ireland. As to the traits and backgrounds of the lawyers of the Territorial period, see Kenneth Aslakson, *Immigrant Lawyers and Slavery in Territorial New Orleans*, 31-32 TUL. EUR. & CIV. L.F. 33 (2017).

15. Interestingly, the ancient Louisianians played a subdued role, or at least a less visible role, in the codification projects. This seems ironic in that they had more reason to understand the law of Spain. They lived under Spanish rule from 1769-1803.

16. See WILLIAM H. PRESCOTT, *PRESCOTT'S HISTORIES: RISE AND DECLINE OF THE SPANISH EMPIRE* (1990). Symbolic of Spain's decline was that upon gaining their independence, her former colonies made French law, not Spanish law, their "Northern Star." M. C. MIROW, *LATIN AMERICAN LAW* 138 (2004).

codifiers, officials, and legislators. Secondly the essay will consider the major enactments of the period that impacted Spanish law prior to the Digest of 1808. These enactments show the areas and the extent to which the Spanish system in place at the Cession was surgically dismembered, sector by sector. It will show that by 1807 Spanish law was substantially expelled from the Territory in all legal areas except the field of private law. The pre-1808 measures show a consistent pattern of rejection—a consistent pattern of replacing Spanish law with American, English, and French laws. The last section of this paper briefly considers the Digest of 1808 and asks how it fits within this overall pattern. It is submitted that the preponderance of French sources found in the Digest may be appreciated as the continuation of a clear legislative trend. The turn to French legal sources was another manifestation of the general retreat of Spanish law in Louisiana.

II. OF LEGENDS, MYTHS AND PREJUDICE

A. *Justice at the Cabildo*

Though it may have generally operated as Alejandro O'Reilly decreed in his Ordinances and Instructions of 25 November 1769,¹⁷ the justice administered at the Cabildo has often been portrayed as venal and corrupt. Only a few days after receiving possession of the Territory Governor Claiborne branded the erstwhile Spanish government and its Cabildo as corrupt and consumed in intrigue. In a letter to James Madison he informed the Secretary of State that "Government [under the Spaniards] had scarcely a nerve not wounded by corruption; the Business in every department was wrapped up in Mystery and intrigue and has been left in confusion perhaps inexplicable."¹⁸ Referring to the last Spanish governor before the retrocession to France, Claiborne lamented "it is a shameful fact that under his [Salcedo's] administration not only many posts of Honour and profit in his gifts were sold, but that even when exercising the sacred Character of a Judge, he often vended his decisions to the highest bidder."¹⁹ He expanded the charge: "the same depravities pervade the System in every direction." He reported that the arrears in the courts are very great: "Some of the causes have been pending for upwards of twenty years; corruption has put her Seal upon

17. For the full text translated into English, see *Ancient Jurisprudence of Louisiana*, 1 LA. L.J. 1 (Gustavus Schmidt ed. & trans., Aug. 1841).

18. Letter from Claiborne to Madison (Jan. 2, 1804), in 1 OFFICIAL LETTER BOOKS OF W. C. C. CLAIBORNE, 1801-1816, at 323 (Dunbar Rowland ed., 1917) [hereinafter 1 OFFICIAL LETTER BOOKS].

19. *Id.*

them”²⁰ Given that Governor Claiborne could not speak or read French or Spanish and that he had arrived in Louisiana only weeks earlier, one cannot be sure how he acquired this knowledge or how reliable his information was. For purposes of understanding attitudes about Spanish law in early Louisiana, however, there is little doubt that he himself clearly believed it.

As noted, the Cabildo operated during the Spanish domination as Alejandro O’Reilly had decreed in his Ordinances and Instructions of 25 November 1769. Judgeships and other offices at the Cabildo were sold to the highest bidder,²¹ and in contrast to the French policy that afforded free legal services to colonial subjects, justice in the Spanish era was expensive for litigants. Legal historian Henry Plauché Dart pointed out that “the system of charges was the real burden which affected the people in Spanish days.”²² Virtually every act, motion, or necessary signature by the judges required the litigant to pay a precise fee, as set forth in an elaborate fee schedule. A document signed by the judge with his baptismal and family name cost four reales in silver dollars. For sessions of the court lasting two hours and a half the charge was two ducats. The opening of a will and the examination of the witnesses to the will required payment of forty-eight reales.²³ Everywhere there seemed to be an outstretched palm, easily giving the impression the system was rigged and corrupt. Yet Dart was clear that this impression was unfounded. His careful review of the archival documents found that the system was not corrupt, indeed the contrary was true. Spanish justice on the whole was handled with “care and skill,” and he found nothing to substantiate the stereotype of the “gold loving” Spanish judges, even though he was aware of contrary accounts.²⁴ A similar study of the New Mexico archives, 1621-1821, also concluded that the Spanish colonial judicial system, rather than being corrupt, was “painfully careful in its deliberations, and above all, remarkably humane in its judgements.”²⁵

20. *Id.*

21. See GILBERT DIN, *NEW ORLEANS CABILDO: COLONIAL LOUISIANA’S FIRST CITY GOVERNMENT 1769-1803* (1996); Derek Noel Kerr, *Petty Felony, Slave Defiance and Frontier Villainy: Criminal Justice in Spanish Louisiana 1770-1803*, at 21 et seq. (1983) (unpublished Ph.D. Dissertation, Tulane University) (on file with La. Research Collection, Tulane University); HENRY PLAUCHÉ DART, *COURTS AND LAW IN COLONIAL LOUISIANA* 35 (1923).

22. *Id.*

23. See Table of Fees, Demandable by Judges, Lawyers, Escribaños, Attorneys, and the Other Officers of Justice, O’Reilly’s Ordinances and Instructions (Nov. 25, 1769), in 1 *LA. L.J.* 55-60 (1841).

24. *Id.* at 46-47.

25. Robert J. Tórréz, *Crime and Punishment in Colonial New Mexico*, N.M. B.J. 23 (2000).

But these studies could hardly counter or correct impressions of venality and corruption which existed in the popular mind and in the Governor's discourse.²⁶

B. Laughing at Spanish Judges: "Liberty in Louisiana"

James Workman—codifier, critic of Spanish law, playwright, jurist, and would-be filibusterer—arrived in New Orleans in late 1804 and was appointed a judge of the County of Orleans. He was chosen to draft and reform the Territory's criminal law, a project he completed in 1805. He practiced law and represented Edward Livingston in his famous litigation over the New Orleans batture, and it was under Spanish law that Workman pressed the New Yorker's claims to the alluvial property.²⁷ Workman professed to have a certain admiration for the substantive Spanish law, stressing its prestigious Roman-law connection,²⁸ but he was sharply critical of its procedural law which, he said, tended to produce corrupt and venal judges. He boldly asserted that:

[N]o rules of practice more efficacious for that purpose [inducing corruption] could have been framed than those which permit the judge to hear, to examine and decide in private: such a system offers strong temptation to the unprincipled, and has been generally found to have produced a corrupt judiciary wherever it has been long established. On the other hand, where the Judge is obliged to act in public he is himself before the severe and vigilant tribunal of public opinion.²⁹

In spreading prejudicial views of this kind, one may wonder whether the highly intelligent Workman was not an unwitting purveyor of the Black Legend in Louisiana.

26. Thomas Ingersoll maintains that the final days of Spanish rule in Louisiana were characterized by levels of corruption that had not existed previously, and this development was responsible for the pejorative views formed by the incoming American officials: "In summary, the groaning descriptions of Spanish law by American officials who arrived in 1803 were based mostly on conditions that developed in New Orleans at the very end of the period when government did indeed become rotten with the love of gold." INGERSOLL, *supra* note 2, at 154.

27. In this public debate over property rights, Spanish civil laws were generally perceived by the public in a positive light. Spanish legal authorities were conceded to be controlling, though Livingston's opponents alleged the American judges had misunderstood the meaning of them.

28. "The laws of Spain," he wrote in a public letter, "are generally excellent in themselves; for they are founded on the Roman Code, one of the most perfect and elegant systems of jurisprudence ever promulgated to the world." *Letter of LAELIUS*, *supra* note 10. Workman once proposed a book subscription to the public in which he would translate the entire Laws of Castile and the Spanish Indies into English.

29. *Quoted in* GEORGE DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* 218 n.76 (revised ed., Lawbook Exchange 2009) (1975).

His early writings contain signs of hispanophobia. In his *Political Essays* (a collection of his earlier writings), Workman deplored the “notorious” oppression of Spanish colonial rule and called for the emancipation of its “enslaved inhabitants.” He proposed an invasion of Spanish America and later became an active organizer of a secret society in New Orleans, the Mexican Association.³⁰ General James Wilkinson arrested him as a Burr-ite or Burr conspirator during the so-called “Reign of Terror,” which led to his being tried on charges of planning an invasion of Mexico. He was easily acquitted, however, because there was no evidence that he had taken active steps to that end.³¹

Prior to his arrival in New Orleans Workman wrote an amusing play called *Liberty in Louisiana* which was published and performed in Charleston in 1804 and subsequently performed in New York, Philadelphia, and Savannah. Apparently the play had a substantial run and was quite successful,³² though curiously it was never performed in New Orleans where the scenes were located. Could it be that its hispanophobic humor played better with Anglo-American audiences than with Creoles who had experienced the reality of Spanish rule? The play brims with contempt for Spanish colonial justice.³³ A comedy with a political aim, *Liberty in Louisiana* efficiently demonized and defamed the Spanish judges and officials who ruled *Luisiana*. It has been called a denunciation (from the stage) of Spanish rule and Spanish law.³⁴

The opening scene takes place in the Hall of Audience of a corrupt Spanish judge, Don Bertoldo de la Plata, pictured on his last day in office in Louisiana, the day before the transfer of power to the American government.³⁵

Don Bertoldo de La Plata: “This, Senor Scrivano, is the last audience I shall hold in Louisiana. I hope it will not be an unprofitable one.” [pulls out an empty bag and shakes it]

30. See Dan Degges, *The Mexican Association: The Secret Society Behind the Aaron Burr Conspiracy* (unpublished research paper), ACADEMIA, www.academia.edu/4358596/The_Mexican_Association_the_Secret_Society_behind_the_Burr_Conspiracy (last visited July 17, 2017).

31. Charles S. Watson, *A Denunciation on the Stage of Spanish Rule: James Workman’s Liberty in Louisiana (1804)*, 11 LA. HIST. 245, 248 (1970).

32. The performance in Charleston was reportedly received “with the most unbounded applause.” PHILA. GAZETTE, July 3, 1804. The play ran through three printed editions. MISS. HERALD & NATCHEZ GAZETTE, Mar. 11, 1807.

33. Sayali Indulkar, *Charleston Theatre 1790-1860* (2014) (unpublished M.A. research paper, University of Central Missouri), https://centralspace.ucmo.edu/xmlui/bitstream/handle/123456789/374/Indulkar_THEATRE2.pdf?sequence=1&isAllowed=y.

34. See Watson, *supra* note 31, at 248.

35. Here Workman seems to have assumed that Spain ceded Louisiana directly to the United States, without the interim retrocession to France.

He calls for the most lucrative case on the docket, and Scrivano summarizes the case of *Don Antonio Gaspar v. Don Felix Pereira*:

Scrivano: “[Don Antonio demands] to be put in possession of the plantation, consisting of one thousand acres, left him by his father, which Don Felix has, without any pretence or title, seized and occupied for five years past. It appears from the defendant’s own declaration, that he has no right whatever to the property in dispute.”

Don Bertoldo: “Tell me not of right but tell me how much the parties have already given.”

Scrivano reports that Don Felix has given one thousand dollars to prolong the suit and has enjoyed five crops from the land, and Don Antonio has given exactly the same sum.

Don Bertoldo: “Let me see—the parties have given equally, then I decree that the plantation be equally divided between them.”

Scrivano: “Nothing can be fairer.”

No doubt the elegant simplicity of Don Bertoldo’s depraved ruling must have produced audience laughter. The purpose was to hold up Spanish despotism to derision and abhorrence. As George Dargo pointed out, the work depicted “the arbitrary, corrupt and heavy-handed Spanish criminal justice system which existed prior to the retrocession to France and the subsequent American takeover.”³⁶ But it may be worth noting that this depiction, written before the author came to Louisiana, caricatured a system that James Workman of Middle Temple had never observed in operation and seemed to know little about.³⁷ After he had worked firsthand with Spanish law as a lawyer and judge, his views became better informed. Eventually he appraised the merits and demerits of Spanish law with greater discrimination.

C. *The Towering Shadow of the Inquisition*

The Spanish Inquisition was an established institution in Spanish colonies, but it was never officially introduced in *Luisiana*, at least not in the form of an *ecclesiastical jurisdiction*.³⁸ Nevertheless, even at a distance, its presence was felt and feared. The Inquisition’s jurisdiction

36. DARGO, *supra* note 29, at 211-12.

37. Although Workman claimed that he had researched all books about the Spanish colonies in the languages known to him, which included Spanish and French. Watson, *supra* note 31, at 250.

38. O’Reilly introduced, at least nominally, the tribunal of the Saint Hermandad, whose principal object was “to repress disorders and to prevent the robberies and assassinations committed in unfrequented places by vagabonds and delinquents . . .” In practice the brotherhood’s members worked and were allied with the Inquisition tribunals.

over the importation of prohibited books and materials gave it a particular reason to police behavior in port cities such as New Orleans.³⁹ Thus in 1786 the Cartagena Inquisition appointed a Capuchin friar in New Orleans to be its investigating Commissary. Father Antonio de Sedella conducted investigations into cases of heresy, blasphemy, bigamy, the reading of books on the Index (which burgeoned with works of the Enlightenment), and lack of orthodoxy among the Indians.⁴⁰ He collected dossiers on Louisianians, which in some cases led to their arrest and prosecution when they ventured abroad.⁴¹ After his appointment was renewed and reaffirmed in 1789 by the Inquisitor General of Spain, Père Antoine (as locals frenchified his name) began to assert his authority more forcefully, putting pressure on Governor Esteban Miró to supply him with the necessary troops “to carry on my operations.”⁴² These demands alarmed the Governor, who had the friar arrested and deported back to Spain. In defense of his action the Governor stated that the spectre of the Inquisition operating in *Luisiana* would be a hindrance to trade, commerce, and the ability to attract foreign immigrants.⁴³ As he explained to his superior in Madrid, “these foreigners are imbued with, and very frightened of the power of the Holy Office which they consider absolutely despotic and discriminatory, notwithstanding the uprightness, stature, and circumspection of its most just proceedings.”⁴⁴ It was a tactful warning that the Inquisition’s reputation for fanaticism, cruelty, and torture was a serious liability for a Spanish administrator attempting to govern non-Catholics and non-Spaniards. In short, the Inquisition was perhaps the most powerful negative image associated with Spanish law in the popular mind.

39. MIROW, *supra* note 16, at 28.

40. Richard E. Greenleaf, *The Inquisition in Spanish Louisiana 1762-1800*, 50 N.M. HIST. REV. 45, 51 (1975).

41. The arrest of Don Juan Longouran, a prominent New Orleanian while traveling abroad, led to his trial by the Holy Office in Mexico City. He was subjected to a lengthy incarceration and confiscation of his property. *Id.* at 58-60.

42. “[I]t is necessary that I have recourse at any hour of the night to the Corps de Garde from which I may draw the necessary troops to assist me if they are necessary to carry on my operations.” *Id.* at 53-54.

43. The traveler Berquin Duvallon gave this fanciful account of de Sedella’s deportation: “Once it was contemplated to establish the tribunal of the inquisition in New-Orleans; but the Monk charged with the mission of the holy office, found himself so obnoxious to the people, that, to avoid being stabbed, or thrown over the pier, he decamped back in haste to Spain.” PIERRE-LOUIS BERQUIN-DUVALLOIN, TRAVELS IN LOUISIANA AND THE FLORIDAS, IN THE YEAR, 1802 (John Davis transl., New York, I. Riley & Co. 1806).

44. *Id.* at 55.

D. Creole Mythology

Gilbert Din and John Harkins speak of a Creole mythology of the late 19th century, of which Alcée Fortier and Grace King were leading exponents, that portrayed Spanish government as intolerant, cruel, and corrupt.⁴⁵ The mythology characterized Spain's thirty-four year "domination" of Louisiana as a kind of superficial occupation with no lasting effect, except for a few place names to commemorate their stay.⁴⁶ French Creoles survived the domination by not learning or speaking Spanish, and French life and culture was uninterrupted in any appreciable way.⁴⁷

The narrative resembles a Creole version of the Black Legend. Certainly it denigrates and minimizes the Spanish contribution to Louisiana.⁴⁸ It overlooks, for example, that in material terms Louisiana flourished under Spain as it had never done under France. The population rose from 12,000 under France to 50,000 under Spain; shipping increased many times over; the value of exports rose five fold.⁴⁹ After the great fires of 1788 and 1794 reduced New Orleans to ashes, Spain rebuilt the city largely at the Crown's expense, in the process altering its architectural styles.⁵⁰ According to Din and Harkins, the long-held idea that French Creoles did not learn Spanish is blatantly untrue. Two of the first newspapers established in New Orleans were in Spanish: *El Misisipi* appearing in 1808 and *El Mensajero* in 1810, indicating that there was a substantial Spanish-literate population. According to one estimate, 50% of New Orleans' white population in 1803 was Spanish,

45. GILBERT DIN & JOHN HARKINS, *THE NEW ORLEANS CABILDO: COLONIAL LOUISIANA'S FIRST CITY GOVERNMENT 1769-1803*, at xvi-xvii (1996).

46. *Id.*

47. CHRISTINA VELLA, *INTIMATE ENEMIES: THE TWO WORLDS OF BARONESS DE PONTALBA* 13 (2004):

French remained the language of the colony throughout the Spanish period—even the deliberations of the Cabildo might lapse into French—and when Spanish was required for a formal proceeding, a translator was generally present. The Spaniards in Louisiana, right up to Governors Galvez and Miro, married the daughters of Creole planters, served Bordeaux at their official dinners, danced the galopade, sedulously gambled their money at bourré, and reared children who could not speak a word of Spanish.

48. For a full retrospective on the Spanish contribution (demographically, architecturally, linguistically, in the arts, in medicine, etc.), see JOSE MONTERO DE PEDRO, *ESPAÑOLES EN NUEVA ORLEANS Y LUISIANA* (1979).

49. Arthur P. Whitaker, *The Commerce of Louisiana and the Floridas at the End of the Eighteenth Century*, 8 *HISP. AM. HIST. REV.* 190 (1928).

50. RICHARD CAMPANELLA, *BIENVILLE'S DILEMMA: A HISTORICAL GEOGRAPHY OF NEW ORLEANS 304-08* (2008).

that is, about twelve hundred persons, not including Spanish soldiers and sailors who numbered another thousand.⁵¹

Perhaps for legal historians the most glaring omission in the Creole narrative is the neglect of Spain's contributions to Louisiana civil law. A demographic effect still reverberating in modern times was the exceptional number of free people of color who gained their freedom as a result of Spanish emancipation laws.⁵² Spanish private law governed the lives of Louisiana citizens for decades after the Spanish departed. Under the Digest methodology, Louisiana judges went well outside the rules found in the Digest of 1808 and enforced some of the most obscure provisions of Spanish law.⁵³ Having mastered the Spanish system, the judges clung to it with unequalled tenacity, refusing to recognize several repeals passed by the Legislature. The situation eventually drove the Legislature to commission the translation of the *Siete Partidas* into English.

The point here is not to refute or correct legends or myths of this sort but rather to suggest they would have had an attitudinal impact on legal decisions in the first codification era. They form one of the extralegal factors that seem to have expedited the expulsion of Spanish law in early Louisiana. They may help us understand why the legislative pattern to be discussed below is clear and consistent.

III. THE DISMEMBERMENT OF THE SPANISH SYSTEM

A. *The Dismantlement of the Cabildo*

The rejection of Spanish law in the Territory of Orleans started even before the Cession to the United States had taken place. French Prefect Pierre Clément de Laussat, whose Memoirs betray his visceral antipathy toward Spain,⁵⁴ by an *arrêté* of 10 November 1803 dismantled the

51. DIN & HARKINS, *supra* note 45, at 10. All of the codifiers mentioned above (*see supra* text accompanying note 14) were literate in Spanish or spoke it fluently.

52. By the time of the Cession, the number of *gens de couleur libre* reached 1819. DIN & HARKINS, *supra* note 45, at 12.

53. See VERNON VALENTINE PALMER, THROUGH THE CODES DARKLY 141 (2012); *see also* Vernon Valentine Palmer, *The Quest To Implant the Civilian Method in Louisiana: Tracing the Origins of Judicial Methodology*, 73 LA. L. REV. 793 (2013). For enforcement of obscure Spanish laws, see *Cottin v. Cottin*, 5 Mart. (OS) 93 (La. 1817).

54. See, for example, his description of the Spanish Judge-Advocate, Nicolas Maria Vidal, ("There was not a more diseased heart, a more twisted mind, a more mealy-mouthed disposition hidden behind a yellow countenance shaded by black . . .") but then his effort to generalize Vidal's character traits as being typically Spanish, i.e. "the personification of the Spanish spirit in this country." This appears to be the rhetoric of the Black Legend. PIERRE CLÉMENT DE LAUSSAT, MEMOIRS OF MY LIFE (Robert D. Bush ed., Sister Agnes Josephine-Pastwa trans., 1978).

Cabildo, the complex Spanish institution that had exercised unseparated executive, legislative, and judicial powers in *Luisiana*.⁵⁵ The abolition of the Cabildo effectively deprived Louisiana of a court system, and his further decree creating a Municipal Council in New Orleans, to consist of a Mayor and twelve Council Members, did nothing to fill the judicial vacuum he had created.⁵⁶ The demise of the organ of government would soon create an institutional opening for Governor Claiborne to Americanize the judiciary and court system. In a letter to Madison in late December 1803, Claiborne embraced Laussat's decision completely: "*He [the French Prefect] abolished the Cabildo, or City Council: This body was created on principles altogether incongruous with those of our Government;*—It was in part an Hereditary Council. In action feeble and arbitrary and supposed to be devoted to the views of the Spanish Government."⁵⁷ Claiborne soon introduced American-style courts onto the scene, a move which would soon made it pointless to continue to use Spanish procedural law and rules of evidence. Those laws were basically incompatible with the way common-law courts operated. Governor Claiborne began to fill the judicial void by establishing a Court of Common Pleas, modeled after the common law tribunal of the same name, which he staffed with American appointees.⁵⁸ Thereafter Congress created the Superior Court, a three-judge court on the American pattern, with general jurisdiction in criminal and civil matters.

55. On Laussat's twenty days in power and governmental changes he made, see EBERHARD L. FABER, *BUILDING THE LAND OF DREAMS: NEW ORLEANS AND THE TRANSFORMATION OF EARLY AMERICA* 103-06 (2016).

56. See Arrêté 30 November 1803, *reprinted in* LAUSSAT, *supra* note 54, at 30. Laussat acknowledged "le pays se trouve en ce moment sans Tribunaux" but he anticipated that the American government would soon create a court system. At the persistent request of creole planters, Laussat also ordered the repeal of Spanish slave law on December 17, 1803, but this last-minute decree was apparently ignored. ("The members of the local government tormented me to sanction yet one more decree relative to the regulation of the Negroes. They pointed out that they daily felt an extreme need for it. They came back to the charge several times. I kept refusing on the grounds that this was on the eve of my laying down my ephemeral power. Finally, I gave in.") LAUSSAT, *supra* note 54, at 87.

57. Letter from Claiborne to Madison (Dec. 27, 1803), *in* 1 OFFICIAL LETTER BOOKS, *supra* note 18, at 312-14 (emphasis in original).

58. This court dealt only with civil matters under \$3000. It met for the first time on January 10, 1804. The more important cases would go to the Governor's Court. H. Ward Fontenot, *The Louisiana Judicial System and the Fusion of Cultures 1803-2003*, 63 LA. L. REV. 1149, 1158 (2003). Claiborne noted in his *Letter Book*, "On my arrival in Louisiana I found a disorganized Government and a dissatisfied People. The colonial prefect had abolished all the former Spanish Tribunals. In lieu of the Cabildo, I found a Municipality, organized upon French principles and no regular Judiciary in existence." 2 OFFICIAL LETTER BOOKS OF W. C. C. CLAIBORNE 1801-1816, at 354-55 (Dunbar Rowland ed., 1917) [hereinafter 2 OFFICIAL LETTER BOOKS].

B. Replacing Spanish Civil Procedure

Edward Livingston's Practice Act of 1805 became the first legislation to repeal an entire sector of Spanish law.⁵⁹ It recognized the Superior Court of the Territory, provided simplified rules for civil causes, established trial by jury, required testimonial evidence to be given in open court, and made the acceptance of the common law rules of evidence inevitable.⁶⁰ Historians have sometimes debated whether Livingston's code of practice was principally inspired by Chancery practice or whether it in fact owed a debt to Spanish procedural ideas,⁶¹ but in truth Livingston's code represented a more revolutionary step than the debate acknowledges. It was designed to regulate an adversarial "trial" in the American sense, that is, a type of trial unknown to Spanish law. The Practice Act presupposed an open, public, adversarial proceeding in the common law manner, in which the judge presided and played no role as a fact gatherer. It represented a sea change from the *in camara*, inquisitorial judicial proceedings formerly conducted by Spanish colonial tribunals. The Practice Act was fundamentally incompatible with the Spanish civil procedure set forth in Governor O'Reilly's Instructions of 1769.

The changeover to the American mode of trial may well have been animated by a confident belief in the superiority of American courts, but it also reflected the low value placed upon Spanish procedural law. Many American lawyers and officials apparently arrived in Louisiana already imbued with negative impressions, and Spanish procedure was a convenient target. American litigants entangled in Spanish courts complained that the proceedings were slow, oppressive, overly written, and lacking in finality. Writing of an experience in the courts of Puerto Rico, one merchant complained that:

59. An Act regulating the practice of the Superior Court in civil causes, ch. XXVI, 1805 Stat. 210-60.

60. See Henry George McMahon, *The Exception of No Cause of Action in Louisiana*, 9 TUL. L. REV. 17, 19 (1934): "The Practice Act of 1805 . . . was nothing less than a grossly inadequate and extremely refined common law system." Professor McMahon later modified his original view, however, finding there was more Spanish influence than he previously thought. Henry G. McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1, 7 (1960). Professor Robert W. Millar believed that the Practice Act was primarily a refinement and simplification of contemporary American chancery practice. Robert Wyness Millar, *The Fortunes of the Demurrer*, 21 ILL. L. REV. 596, 604 (1937); see also Kent A. Lambert, *An Abridged History of the Absorption of American Civil Procedure and Evidence in Louisiana*, in VERNON VALENTINE PALMER, *LOUISIANA—MICROCOSM OF A MIXED JURISDICTION* 110 (1999).

61. The various points of view are discussed in McMahon, *The Exception of No Cause of Action*, *supra* note 60, at 8 et seq.

It is not merely against the results of the adjudications in Spanish tribunals that we have to complain, but against the slow and deleterious nature of their proceedings. With them every thing must be done in writing, and must originate with the governors. No oral testimony is received and no oral pleadings permitted. The accused is [not] confronted with the accuser; the defendant never heard at the same time with the plaintiff. The first step is always a petition to the governor intendant in which the case is stated and justice demanded. He seldom decides himself but refers to the auditor of war, or of marine as the case may be. Perhaps after a detention of a fortnight or three weeks, the judge may decide upon it; perhaps he may refer it to the other party, who applies by another petition which is proceeded upon in a similar manner. Each however or each decree produces a new remonstrance: and thus memorial follows memorial, answer follows answer, and decree follows decree, until circumstances are multiplied to a countless number and the proceeding in a trifling cause swells to immeasurable volume. The process . . . would make a volume larger than Coke upon Littleton.⁶²

Digression on Spanish Procedure and the Treason Trials

General O'Reilly introduced Spanish procedure in 1769 when he established a Cabildo in New Orleans composed of six regidores and two elected 'ordinary judges' (*alcaldes ordinarios*) in accordance with the *Recopilación de las Indias*. At that time he promulgated, in French, a small Code summarizing the procedures which the *alcaldes* should follow in deciding civil and criminal cases. It was basically a procedural and administrative guidebook for Cabildo officials and *alcaldes*, with almost no substantive law content.⁶³ The Governor explained his purpose as follows:

And as the want of advocates in this country, and the little knowledge which his new subjects possess of the of the Spanish laws might render a strict observance of them difficult, and as every abuse is contrary to the

62. TELEGRAPHE & DAILY ADVERTISER (Baltimore, Maryland), Mar. 5, 1806. For a more favorable view of Spanish procedure, see AMOS STODDARD, SKETCHES OF LOUISIANA: HISTORICAL AND DESCRIPTIVE 281 (Applewood books reprint 2016) (1812) ("The change produced by the operation of the laws of the United States, the dilatory proceedings of our courts, the introduction of the trial by jury, and the expenses of legal contests, gave a temporary check to trade, and to the credit of merchants, particularly in Upper Louisiana. Experience led them [the merchants] to believe, that the Spanish mode of decision, grounded on equitable laws, was much the most wise and salutary; and they murmured at a system calculated to produce delays, and in many instances to create expenses equal in amount to the sums demanded. They preferred the judgment of one man to that of twelve; and it is but justice to observe that their judicial officers were in most instances upright and impartial in their decisions.").

63. The one exception is that the code set forth the law governing wills and testaments, apparently due to the practical significance of the subject.

intentions of His Majesty, we have thought it useful, and even necessary to form an abstract or regulation drawn from the said laws, which may serve for instructions and elementary formulary in the administration of justice and in the economical government of this city, until a more general knowledge of the Spanish language may enable every one, by the perusal of the aforesaid laws, to extend his information to every point thereof.⁶⁴

Thus the O'Reilly Code was not an attempt to summarize or translate the private law of Spain, and it did not make Spain's substantive law accessible to its new Francophone subjects.

The drafters of the code were Dr. Don Manuel Joseph de Urrustia and Don Felix Rey, and their main sources, as identified in their footnotes, were the *Nueva Recopilación de Castilla* and the *Recopilación de las Indias*.⁶⁵ Under the regulations, the regidores would elect on the first day of every year two judges (the *alcaldes ordinarios*). The office of *alcalde* was to be given to "capable persons" at least twenty-six years of age, though "new converts" to the faith were ineligible. *Alcaldes* should make their appearance in public "with decency and modesty, bearing the wand of royal justice" and were to "hear mildly" the cases of those who sought justice. An *alcalde* must be impartial and must recuse himself in certain cases of blood relationship or friendship with an adverse party.

Civil litigation was essentially conducted in writing, beginning with the plaintiff's opening petition and followed by a series of replies, declarations, and exceptions taken by the parties.⁶⁶ Criminal proceedings would commence with the judge drawing up a *procès-verbal*, then the conducting an inquiry that led to the *escribano's* draft of a statement of facts. In both civil and criminal proceedings the testimony of witnesses was taken in secret and not made "public" until shared with the parties at a given point later on. The Instructions required that "The testimony of the witnesses shall be so secretly given that neither of the parties shall have knowledge of the depositions of his own witnesses, nor of those of the adverse party." A judge's reasons for judgment were secret too and were not to be revealed. Castilian law, and by extension colonial legal systems, forbade magistrates from issuing a written explanation (*sentencia fundada*) of their decision.⁶⁷

64. *Ancient Jurisprudence of Louisiana*, *supra* note 17, at 2-3.

65. Section II, Article 12, Ordinances and Instructions, *translated in* 1 LA. L.J. 1 (1841-1842) (Gustavus Schmidt trans.).

66. From plaintiff's opening petition down to the taking of an appeal, the procedure called for no less than thirteen written interactions between the parties.

67. MIROW, *supra* note 16, at 52-53; CHARLES R. CUTTER, *THE LEGAL CULTURE OF NORTHERN NEW SPAIN 1700-1810*, at 36 (1995).

Governor O'Reilly followed these procedures in the treason trials he conducted after his arrival, in which six colonists (headed by Lafrenière) who had revolted against the Spanish Crown were executed.⁶⁸ To those accustomed to English or American notions of due process, those proceedings have been remembered, understandably, as appallingly unfair. Historian Henry Plauché Dart relates that the rebels were separated and detained in dungeons, where lawyers brought from Havana conducted a secret investigation.

It was a secret inquiry, the witnesses . . . were examined secretly and under instruction not to disclose either the fact that they had testified nor the substance of their testimony. . . . It is probable O'Reilly was the sole judge and at best he may have been attended only by his military attachés. . . . Gayarré's report indicates the accused were not present at this "trial." They were convicted, so far as we know, by a decree rendered out of their presence.

The treason trials undoubtedly exacerbated negative perceptions of Spanish justice, but the charge that O'Reilly conducted a *secret* trial may actually amount to the charge that he followed the romano-canonical procedure of Spanish law.

C. The Swift Overthrow of Spanish Criminal Law

The next blow to the Spanish law in place was struck by the Crimes Act of 1805 drafted by James Workman. In a single stroke, it repealed and replaced the Spanish criminal law with the English law of crimes.

The Crimes Act succinctly listed the English crimes that it recognized, without providing definitions or any elaboration. It then stated that the forms of indictment, method of trial, and rules of evidence would conform to the common law of England.⁶⁹ Something of an expository work was thought to be desirable in order to explain the Crimes Act in more detail, so Lewis Kerr in his *Exposition of the Laws of the Territory* set forth the elements of the individual crimes, often

68. DART, *supra* note 21, at 27.

69. Section 33 of the Act provided:

That all 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 said common law.

An Act for the punishment of crimes and misdemeanors, ch. 50, 1805 Stat. 416-52.

relying upon definitions and distinctions drawn from the *Commentaries* of Sir William Blackstone.⁷⁰

Research has not uncovered any public protest or outcry about this abrupt shift to the English law of crimes, even by the French population. On the one hand the American constitution now imposed the right to trial by jury, the protection of habeas corpus, relief from cruel and unusual punishments, and other guarantees that were either in conflict with Spanish law or in some cases were unknown to that system. Those requirements were not debatable. Spanish criminal law was swiftly overthrown probably because of its unflattering reputation for harsh punishments, use of torture, and secret proceedings closed to the public. Those perceptions helped hasten its exit.

Claiborne's inspection of the prisons in New Orleans may have been the initial catalyst for his later actions. The small cells of the Calabozo, some of which were underground, afforded little light or air. According to Amos Stoddard's description "[the Calabozo] was a wretched receptacle of vice and misery; like the grave it received many tenants, who were soon forgotten by the world: Some of them perished with age and disease, and others by the hands of assassins."⁷¹ Apparently Claiborne became further appalled after his interviews with prisoners. A few weeks after assuming the duties of governor, he gave an account of his impressions to Secretary of State James Madison in a letter dated January 2, 1804. He informed Madison of his intent to make a general jail delivery, which meant freeing all prisoners held in the jails. It appeared he had no trust or faith in the judicial system which had led to their incarceration.

In the different prisons of this City I have found upwards of one hundred prisoners, some of whom had been there from ten to thirteen years, on Suspitions of Crimes of which it does not appear they were ever convicted; and Some for offences of a very trivial nature. . . . I have already released five and shall proceed to set I believe the whole at large. Their detention would be attended with a heavy public expense, and would answer no good purpose, as it appears to me very questionable, whether any principle of law would justify our noticing offences of which we had no cognizance at the time of their commission. It is also to be presumed that many of them are innocent, and if others less deserving should be

70. LEWIS KERR, AN EXPOSITION OF THE CRIMINAL LAWS OF THE TERRITORY OF ORLEANS (New Orleans, Bradford & Anderson 1806). Kerr's English draft was translated into French by Moreau Lislet.

71. STODDARD, *supra* note 62, at 154.

included in the general Amnesty, it is more pleasing that our error should be on the Side of Mercy.⁷²

Approximately eleven months later Claiborne addressed the Legislative Council and recommended a whole new system. “You will find the existing code of criminal law imperfect and not adapted to the present constitution of the territory.”⁷³ He spoke of the need for an “energetic” system of criminal jurisprudence but not a “sanguinary or cruel” one, and these adjectives may have been an allusion to traits attributed to Spanish law. In replying to a pamphlet highly critical of his administration, he simply remarked, “The criminal System of Jurisprudence could not be preserved for the Liberty of the Citizen was not secured thereby.”⁷⁴

D. The Repeal of Spanish Slave Law

The new Black Code passed in 1806-1807 suppressed Spanish slave law and replaced it with a repressive, security-conscious law of the Creoles’ own devising that was drawn from American sources.⁷⁵

The old Spanish *Código Negro*, with its liberal (and thus objectionable) concepts of slave self-purchase (*coartación*), recognition of the slave’s *peculium* (slave property), religious entitlements, and more egalitarian stance toward free persons of color, had for many years been an irritant to the planters and other slave owners. On more than one occasion during the Spanish domination the wealthy *regidores* who controlled the Cabildo had signaled their displeasure with it, taking steps, ultimately to no avail, to bring about a return of the old French *Code Noir*.⁷⁶ From their point of view Spanish law was excessively liberal regarding the emancipation of slaves, and it produced a dangerously large class of free people of color that was a threat to public security. Probably, if the slaves and free people of color could have expressed themselves, they might have said Spanish law was actually preferable to French or

72. 1 OFFICIAL LETTER BOOKS, *supra* note 18, at 325-26.

73. *Address to the Legislative Council*, WILMINGTON GAZETTE, Feb. 26, 1805.

74. The pamphlet was entitled *Esquisee de la situation*. It appeared anonymously but was widely attributed to Pierre Derbigny. See 2 OFFICIAL LETTER BOOKS, *supra* note 58, at 356.

75. For details, see PALMER, *supra* note 53, at 115-23. I am treating two different statutes as comprising one Black Code. The first, consisting of forty provisions, was dated June 7, 1806, and was actually entitled “Black Code.” The second, entitled “An Act to regulate the conditions and forms of the emancipation of slaves” was dated March 9, 1807, and covered a subject normally dealt with in such a code.

76. There were two attempts to resuscitate the old Code Noir of 1724, once by the Cabildo around 1777 when it produced a draft Code Noir or Loi Municipale, and again in 1803 when Creole leaders prevailed upon Prefect Laussat to resurrect it. *Id.* at 113.

American laws since they obtained greater rights under the former. As mentioned earlier, the number of *gens de couleur libre* in the population greatly increased during the Spanish domination as a direct result of it.⁷⁷

The Black Code passed by the Territorial legislature in 1806 was not a civilian document in any sense; it was a crude statute probably drafted by the same committee of the Legislature that authored the 1807 law on slave emancipations.⁷⁸ It marked the first occasion when the Creoles felt free to fashion a law of their own choosing, without interference from the French or Spanish Crowns. They now borrowed legal ideas from a reactionary source, the South Carolina Act of 1740.⁷⁹ A significant transplant from South Carolina was the establishment of lay tribunals (consisting of “freeholders” sitting with a judge or justice of the peace) to deal with slave crimes. Slave self-purchase was suppressed, and the formerly recognized spiritual entitlements of slaves, such as baptism, marriage, Sunday rest, and burial within the church, simply disappeared from the law. In many provisions the Code embodied the *angst* and fear of a society on high alert against slave uprisings.⁸⁰ It strictly controlled slave assemblies, free movement, and the amassing of weapons. It provided that any slave away from his usual place without a white accompanying him could be questioned, seized, and subdued by any “freeholder.” Many provisions dealt with the capture and return of runaway slaves. The tremors of the slave rebellion in Haiti increased fears of similar uprisings in Louisiana, fears which soon proved

77. See *supra* note 52.

78. The Legislature resolved in January 1807 “That Messrs. Boré, Parrot and Hazure de L’Orme be a committee to revise the *Black Code*.”—ORLEANS GAZETTE & COM. ADVERTISER, Feb. 5, 1807, at 2. One section of the Crimes Act of 1805 directed that slaves would continue to be punished for crimes in accordance with Spanish criminal law, but this vestige of Spanish criminal law was repealed shortly thereafter.

79. For details on this source of slave law, see PALMER, *supra* note 53, at 116-18.

80. As Christina Vella expressed the level of fear:

Rumors of rebellion were constantly in the air, and the events at Pointe Coupee and Santo Domingo haunted the whites. “I can recall when our position in this colony was ever so critical,” Pontalba wrote to his wife a year after Pointe Coupée, “when we used to go to bed only if armed to the teeth. Often then, I would go to sleep with the most sinister thoughts creeping into mind, taking heed of the dreadful calamities of Saint Domingue, and of the germs of insurrection only too widespread among our own slaves. I often thought, when going to bed, of the means I would use to save you and my son, and of the tactics I would pursue if we were attacked.” Pontalba’s wife must have had her own sinister fears; when she was a young girl, her father had been murdered by one of his slaves.

VELLA, *supra* note 47, at 20.

warranted. In 1811, a few miles from New Orleans, Louisiana witnessed the largest slave rebellion in the history of the United States.⁸¹

E. The Gradual Ouster of Spanish Commercial Law

Gradually but steadily, the American law merchant ousted the Spanish commercial law. At first it was by judicial decisions, rather than legislation, that this began to occur. The main source of commercial law at the time of the Cession was a Spanish Ordinance, the Ordenanza de Bilbao of 1737, and ambiguously enough, this law was never explicitly repealed. What occurred instead was a studied movement, led from the bench, to supplement, replace, or disregard the Ordenanza. Its “gradual death” commenced as early as the period under study (1805-1808), as the Louisiana judges began to accept American law as authority in such fields as bills of exchange, promissory notes, and insurance.⁸²

F. A Turn ‘In Advance’ to French Private Law: The Marriage Act of 1807

We can add to this pattern a statute that was passed immediately before the 1808 Digest. This was the Marriage Act of 1807 in which, without explanation or prior warning, many provisions were taken verbatim or almost verbatim from the *Projet* of 1800 and the *Code civil* of 1804. It was the first clear turning away from Spanish law in a sensitive area of personal law. It mimicked, in technique and sources, the large-scale shift to French law that took place in the drafting of the Digest of 1808, but now with an interesting difference: in 1807 there were no accompanying instructions to the drafter(s) of the statute about permitted sources, and hence there was no question of whether they did or did not follow their instructions.⁸³ Up to twenty-three provisions of the Marriage Act were drawn verbatim or almost verbatim from these sources. It became a two-step reception of French law. Firstly the redactors of 1807 borrowed directly from the *Projet* or the *Code civil*,

81. Recounted in DANIEL RASMUSSEN, *AMERICAN UPRISING: THE UNTOLD STORY OF AMERICA’S LARGEST SLAVE REVOLT* (2011).

82. In the second half of the century, the Legislature took the lead in enacting a host of uniform commercial laws, and before the century was out, Louisiana’s law merchant was decidedly American. For details, Vernon Valentine Palmer, *A Descriptive and Comparative Overview*, in *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 80 (V. V. Palmer ed., 2012).

83. Because of its style, sources, and subject matter, one suspects the drafters of the Act were probably Moreau Lislet and Brown, but this is conjecture.

then the juriconsults in 1808 inserted those provisions into the Digest with no alterations whatsoever.⁸⁴

- (A) The following is an example in which the *Code civil* (1804) provided the source of the Marriage Act (1807) provision, which in turn, both in French and in English translation, became a provision of the Digest (1808):

Code civil, article 212:

Les époux se doivent mutuellement fidélité, secours, assistance.

Marriage Act (1807), section LX, page 127:

Le mari et la femme se doivent mutuellement fidélité, secours et assistance.

Digest (1808), article XIX, page 26:

Le mari et la femme se doivent mutuellement fidélité, secours et assistance.

- (B) The following is an example in which the French *Projet* (1800) was the source of the Marriage Act (1807) provision, which in turn, in French and in English translation, became a provision of the Digest (1808):

Projet (1800), article II, page 31:

Elle [la Loi] ne reconnaît que le mariage contracté conformément à ce qu'elle a prescrit.

Marriage Act (1807), section III, page 105:

La Loi ne reconnaît que les mariages qui sont contractés et solemnisés conformément aux règles qu'elle prescrit.

Digest (1808), article II, page 25:

La loi ne reconnaît que les mariages qui sont contractés et solemnisés conformément aux règles qu'elle prescrit.

Obviously those who drafted the Marriage Act had copies of the *Projet* and *Code civil* in their possession (it was once incorrectly claimed that only the *Projet* was available).⁸⁵ They allowed themselves a certain freedom to depart from Spanish law in this area of personal law. For example the Marriage Act now revived a distinct French institution that did not exist in Spanish law, spontaneously resurrecting an old institution

84. In some provisions, there is such complete identity between all three sources that it is impossible to be sure about the sequence of borrowing. The English translation in the Marriage Act was also inserted verbatim into the Digest.

85. See FRANÇOIS-XAVIER MARTIN, *THE HISTORY OF LOUISIANA FROM THE EARLIEST PERIOD* 344 (New Orleans, Pelican Press reprint 1963).

known as the “family council” (*assemblée de la famille*). Spanish law did not recognize this institution (its roots were in the *Coutume de Paris*). It had been expressly abolished by Governor Unzaga’s decree thirty-six years earlier, yet it sprang to life due to the turn toward the *Code civil*.⁸⁶

As mentioned earlier, there were no specific instructions to explain this free dependency on French texts. We also cannot be sure who the redactors were. So far as I have been able to discover, it produced no public expression of surprise or displeasure, either from the Legislature or in the press. It is therefore tempting to believe that this recourse to French sources was expected all along by the Legislature and was, in their minds, consistent with the instructions applicable to the Digest (“to make the civil law the groundwork”), which had been issued in 1806.

IV. THE DIGEST OF 1808 AND THE RETREAT OF SPANISH PRIVATE LAW

Thus far we have seen six instances in which a consistent pattern of rejecting Spanish law took place. This background is often neglected or forgotten in the debate over the sources of the Digest of Orleans. As a backdrop it allows us to ask whether the Digest should be considered a deviation from the pattern or merely a continuation of it.

Commissioned in 1806 and completed in 1808, the Digest was, on the face of the legislative instructions, to have been a continuation of the laws then in force in Louisiana. The Legislative Council and House of Representatives resolved “That the two juriconsults shall make the civil law by which this territory is now governed, the ground work of said code.”⁸⁷

The meaning of these instructions has received different interpretations. For some scholars it is plain that by the words “the civil law by which this territory is now governed,” the Legislature instructed the redactors to follow the subsisting Spanish civil law that had been in force since Governor O’Reilly took possession of the province.⁸⁸ When

86. This was not the only instance of spontaneous reversion to French law in this early period. Professor Baade’s research shows that during the Spanish period, formal Castilian law did not govern the notarized marriage contracts except in New Orleans. Paris notarial prototypes were used in the rest of the province. Soon after the Purchase, however, registered marriage contracts in New Orleans stopped following Castilian law and reverted to the Paris notarial forms. See VERNON VALENTINE PALMER, *THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION* 78-79 (2005).

87. Resolutions of June 7, 1806, *in* ACTS PASSED AT THE FIRST SESSION OF THE FIRST LEGISLATURE OF THE TERRITORY OF ORLEANS 214-19 (New Orleans, Bradford & Anderson Printers 1807).

88. See Pascal, *supra* note 5.

the Digest was finally produced, however, it appears the drafters interpreted their remit more widely. The instruction to make *the civil law* “the groundwork” was taken to mean that the civil laws of Rome would form the ground work, not the civil law of a particular national system. The words “ground work” were quantitatively indefinite and fell short of requiring more than a foundation of Roman civil law. This wider reading of the instructions was supported by two other documents in the legislative history of the code—the Declaratory Act of 1806 and the Manifesto of 1806—both of which ranked the sources of the “existing laws” in the following order: first, the Roman civil law; second, the Spanish civil law.⁸⁹ The primary emphasis given to Roman civil law would permit either French or Spanish sources of that law (even the works of leading French, Spanish, and English authors expressing the civil law) to make up the foundation of the code. Under this reading, heavy borrowing from codified French law was not necessarily a violation of their instructions. Professor Batiza’s research revealed that nearly 85% of the provisions of the Digest had sources in French law, with more than 1500 provisions taken directly from the *Code civil* of 1804 and the *Projet du Gouvernement* of 1800.⁹⁰ His research confirmed that Spanish law was the source of a considerable number of provisions,

89. The Declaratory Act of 1806 ranked Roman civil law in first place and treated Spanish law as a secondary source. The Legislature was attempting to answer the question—“What laws are presently in force in the Territory?”—by declaring in part:

1. The Roman civil code, as being the foundation of the Spanish law, by which this country was governed before its cession by France and to the United States . . .
2. The Spanish law, consisting of the books of the recopilation de Castillo and autos acordados being nine books in the whole; the seven parts or partidas of the king Don Alphonse the learned, and the eight books of the royal statute (fueroreal) of Castilla; the recopilation de indias . . .

The Act’s full title was “An Act declaring the laws which continue to be in force in the Territory of Orleans, and authors which may be recurred to as authorities within the same.” The Act is set forth in full in Elizabeth Gaspar Brown, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 AM. J. LEGAL HIST. 35 (1957).

In The Manifesto of 1806, the Creoles spoke of the “old laws,” which they desired to keep as being “nothing but the civil or Roman law modified by the laws of the government under which this region existed . . .” The document connected these “old laws” of Louisiana to the *ius commune* of Europe by saying: “the Roman law which formed the basis of the civil and political laws of all the civilized nations of Europe presents an ensemble of greatness and prudence which is above all criticism.”

90. See Batiza, *supra* note 5, at 11. Professor Pascal dismisses this research as purely “philological” since in his view it does not trace the *substantive* sources of the Digest, but merely dwells upon word and phrase analysis. Pascal, *supra* note 5. Professor Yiannopoulos subsequently analyzed the meaning of the word “sources” and opined that Batiza’s use of the word—which identified a verbatim or almost verbatim borrowing as a source—was a “legitimate” one and one which is commonly used by legal historians. Yiannopoulos, *supra* note 3, at 98, 101-02.

yet in relatively small proportion compared to the far greater number of provisions taken from the French legislation.⁹¹ Batiza's research showed too that the drafters drew upon English, French, and Spanish writers such as Blackstone, Domat, Febrero, and Pothier. Clearly this was a cosmopolitan selection from across national systems. Their decision to choose in this way may have owed much to the liberating influence of natural law thinking on their method. Their decision to take so much material from non-Spanish sources furthered the process of expelling Spanish law from Louisiana.

V. CONCLUDING OBSERVATIONS

Mitchell Franklin once observed that the Louisiana legal system proposed by the Territorial Legislature in 1806 would have consecrated a complete system of medieval Spanish law in Louisiana.⁹² The Declaratory Act of that year used compendious terms to designate the law then in force in the Territory of Orleans. Franklin apparently read the Act's broad language as a proposal to receive the ultramarine Spanish system *in globo*. It would have continued the laws instituted by Governor O'Reilly in 1769, though now stating them in a more expansive way that would have produced the same system as then obtaining in Mexico as well as in the whole Spanish colonial world.⁹³

In my view, however, the sweeping reception of Spanish law described by Professor Franklin simply could not have been the intent of the Legislature in 1806. By that date, as we have seen, Spanish law had already been substantially expelled from the Territory. The Cabildo had been abolished, and an American court system was in place. Rules of

91. For example, Batiza's research found that Siete Partidas was the source of sixty-seven provisions and Febrero Adicionado of fifty-two provisions. Batiza, *supra* note 5, at 12.

92. Mitchell Franklin, *The Eighteenth Brumaire in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806*, 16 TUL. L. REV. 514 (1942) [hereinafter Franklin, *Eighteenth Brumaire*]; see also Mitchell Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 TUL. L. REV. 319 (1942) [hereinafter Franklin, *Place of Thomas Jefferson*].

93. Franklin, *Eighteenth Brumaire*, *supra* note 92, at 547. Professor Batiza noted that the Spanish regime in Louisiana replaced the French legal system with a simplified version of the system in force throughout the Spanish Empire. Based primarily on the Compilation of the Laws of Castile and the Compilation of the Laws of Indies, Spanish law in Louisiana was supplemented by other enactments, principally las Siete Partidas. R. Batiza, *The Actual Sources of the Louisiana Project of 1823: A General Analytical Survey*, 47 TUL. L. REV. 1, 5-6 (1972).

On the other hand, Professor Baade held that O'Reilly's laws transformed Louisiana into a Spanish ultramarine province, governed by the same laws as the other Spanish possessions in America and subject to the same system of judicial administration. Constitutionally, these possessions were part of the Crown of Castile, and their legal orders were derived from Castilian law to the exclusion of other peninsular *fueros*. Baade, *supra* note 3, at 40.

Spanish civil procedure, criminal procedure, and evidence were no longer in force. The English criminal law replaced Spanish penal law. The commercial law was moving to an American footing. The old Código Negro was about to be repealed.⁹⁴ Thus far from resembling the legal system of Mexico or other Spanish colonies, the Territory's legal system resembled in many respects Louisiana's present-day mixed system. It is difficult to see the Declaratory Act as an attempt to undo the sector-by-sector dismemberment of Spanish law that had already taken place. Actually the Declaratory Act avoided that possibility by saving clauses that expressly maintained "the changes and modifications which may have already been made by the Legislatures of the said Territory" and also excluded "whatever might be contrary to the constitution of the United States."⁹⁵ In my view the most that could have been expected or intended by the 1806 proposal was a general reception (by reference) of the *substantive* private law of Spain. Even within the private law sector, however, the 1806 proposal was qualified and would have permitted a discerning selection. It emphasized Roman civil law ("which is composed of the institutes, digest and code of the emperor Justinian, aided by the authority of the commentators of the civil law")⁹⁶ as the principal legal element to be extracted from Spanish law, as opposed to the idiosyncratic features of Spain's *ius proprium*, such as Castilian fueros, special jurisdictions, and obsolete legal rules. An important indication of Creole sentiment on the eve of codification, the 1806 proposal was intended as a placeholder to last "untill (sic) the Legislature may form a civil code for the Territory."⁹⁷ It demonstrated a willingness to preserve Roman-Spanish law, but no more than temporarily; it was meant to give interim protection against the efforts of Governor Claiborne and President Jefferson to implant the common law.

94. The Black code was apparently pending in the Legislature on the date of the Declaratory Act and became law a few days later.

95. The full text of the Act is found in Franklin, *Place of Thomas Jefferson*, *supra* note 92, at 323-24.

96. *Id.*

97. *Id.*