

Codification of the Law in Louisiana: Early Nineteenth-Century Oscillation Between Continental European and Common Law Systems

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I. INTRODUCTION

The territory that currently comprises the State of Louisiana (USA) is rich in social and legal history. It is a melting-pot of, amongst others, Native American, African, French, Spanish and Anglo-American cultures. In this territory, social and legal history clearly evolved hand-in-hand. Within this joined evolution, Louisiana enlisted in the nineteenth-century codification processes that spread throughout the Western hemisphere. In a five-year period, Louisiana delivered to the codification discourse worldwide no less than seven codes.¹ Codification

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1. Mitchell Franklin, *Concerning the Historic Importance of Edward Livingston*, 11 TUL. L. REV. 163, 169-70 (1937).

in Louisiana was comprehensive and massive during the first thirty years of the nineteenth century, and comprised criminal, civil, commercial, and procedural laws. In each of those areas of law, a clear struggle occurred over the adoption of the continental European or the common law systems of law.

Louisianans were able to elaborate their own provisions, while considering the provisions existing in both systems of law. However, Louisianans were not able to incorporate a system *in totum*. The first Constitution of Louisiana, of 1812, read in part: “The Legislature shall never adopt any system or code of laws, by a general reference to the said system or code, but in all cases, shall specify the several provisions of the laws it may enact.”² Nevertheless, before the Constitution was adopted, Louisiana had already taken isolated steps towards the adoption of codes and laws. Besides, that adoption would also continue after the enactment of the first Constitution.

This Article will centre on the oscillations between the adoptions of provisions from different legal systems in Louisiana. It will look at the codification endeavors that took place in Louisiana during the early American period (1803-1830), from the Louisiana Purchase until well before the developments of the Civil War.³ Initially, the Article will illustrate to the reader on the nineteenth-century codification movements, which will provide a valuable context for the understanding of developments in Louisiana. Secondly, the Article will summarize the rich and unique heritage that Louisiana attained before the Purchase. Louisiana was both a French and Spanish colony, where the laws of each empire applied accordingly. Thirdly, the Article will analyze individually each codification endeavor in Louisiana. In view of that, each endeavor will be developed in a chronological and thematic order. It will start with the analysis of criminal law and procedure endeavors, and will follow with analysis of civil procedure. These early endeavors will be completed with analysis of the events that took place regarding civil and commercial laws. In each area of law, the Article will also comment upon the background of the drafters, the sources they used, and the original ideas they developed. Finally, some remarks will reflect that the oscillations between the adoption of continental European or common law principles did not clearly favor one system over the other.

2. Article IV, § 11; THE FIRST CONSTITUTION OF THE STATE OF LOUISIANA 19 (Cecil Morgan ed., facsimile ed. 1975); see also Dale E. Bennett, *Louisiana Criminal Procedure—A Critical Appraisal*, 14 LA. L. REV. 11, 11 (1953).

3. See the early work by Semmes, which serves as an important precedent to this study. THOMAS J. SEMMES, HISTORY OF THE LAWS OF LOUISIANA AND OF THE CIVIL LAW (1873).

II. NINETEENTH-CENTURY CODIFICATION MOVEMENTS⁴

Codification, as understood today, finds its origins in Europe, where it experienced a significant development during the eighteenth and nineteenth centuries.⁵ A scientific revolution, which originated in Enlightened and Humanistic ideas and was followed by Rationalistic Natural Law Theorizing, led the way for codification.⁶ This revolution advocated a new presentation and form of laws which would replace the existing provisions,⁷ while grouping different areas in an organic, systematic,⁸ clear, accurate, and complete way.⁹ In addition, codification suggested the laying out of a plan with terminology and phraseology.¹⁰ Finally, the endeavors were not limited to civil codes, and tended to cover different areas of law, amongst others, criminal, commercial, and procedural law.

Europe experienced two seminal codifications in the area of civil law. One main endeavor was the drafting of the French Civil Code of 1804 (*Code Napoléon*)¹¹ and the developments of the exegetic school of interpretation that followed. The latter protected the text by a veneration of its words and the drafters' intentions,¹² and ultimately helped develop the influence of the *Code Napoléon* on codification movements worldwide.¹³ Another main endeavor in European codification was achieved by the coming into force of the *Bürgerliches Gesetzbuch* (BGB)

4. See generally Agustín Parise, *The Place of the Louisiana Civil Code in the Hispanic Civil Codifications: Inclusion in the Comments to the Spanish Civil Code Project of 1851*, 68 LA. L. REV. 823, 826-31 (2008).

5. See generally Alain Levasseur, *On the Structure of a Civil Code*, 44 TUL. L. REV. 693 (1970); Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073 (1988).

6. 1 ABELARDO LEVAGGI, *MANUAL DE HISTORIA DEL DERECHO ARGENTINO 185* (2001).

7. 1 LUIS DIEZ-PICAZO & ANTONIO GULLON, *SISTEMA DE DERECHO CIVIL 51* (1982).

8. 1 ARTURO ALESSANDRI RODRIGUEZ & MANUEL SOMARRIVA UNDURRAGA, *CURSO DE DERECHO CIVIL 49* (1945).

9. Genaro R. Carrió, *Judge Made Law Under a Civil Code*, 41 LA. L. REV. 993, 993 (1981).

10. Bergel, *supra* note 5, at 1084–85.

11. CODE CIVIL DES FRANÇAIS. ÉDITION ORIGINALE ET SEULE OFFICIELLE (Paris, De l'Imprimerie de la République, an XII, 1804).

12. 1 LEVAGGI, *supra* note 6, at 195.

13. For a survey of the influence of the *Code Napoléon*, see amongst the abundant bibliography, CHARLES SERUZIER, *HISTORICAL SUMMARY OF THE FRENCH CODES WITH FRENCH AND FOREIGN BIBLIOGRAPHICAL ANNOTATIONS CONCERNING THE GENERAL PRINCIPLES OF THE CODES FOLLOWED BY A DISSERTATION ON CODIFICATION* (David A. Combe trans., 1979); JACQUES BOUINEAU ET JEROME ROUX, *200 ANS DE CODE CIVIL (2004)*; COUR DE CASSATION ET AL., *LE CODE CIVIL 1804–2004—LIVRE DU BICENTENAIRE (2004)*; JEAN-LOUIS HALPÉRIN, *THE CIVIL CODE* (David W. Gruning trans., 2001); Ernst Rabel, *Private Laws of Western Civilization*, 10 LA. L. REV. 107 (1950).

in 1900. The BGB resulted from the elaborations of nineteenth-century German legal science and eventually inspired the drafting of several twentieth-century civil codes around the world.¹⁴

Nineteenth-century codification also developed in the Americas, many times building on European sources. In Latin America, codification generally encompassed civil, commercial, criminal, and procedure code projects.¹⁵ The first generation of civil codes started in Haiti, effective since 1826, and continued developing throughout Latin America almost with no interruptions until the present.¹⁶ A significant cluster of first-generation civil codes was enacted during the second half of the nineteenth century,¹⁷ and blueprints were provided mainly by the civil code of Chile (1857) by Andrés Bello¹⁸ and the civil code of Argentina (1871) by Dalmacio Vélez Sarsfield.¹⁹ Currently, a second generation of codes is developing, for example, with the drafting of the civil code of Brazil, effective since 2003.²⁰ Codification also extended to the United States where comprehensive attempts were also made.²¹ In the US several states sought a codified system of laws (for example: Alabama,²² California, Louisiana, Montana, North Dakota, South Dakota,²³ New York, and South Carolina).²⁴ Codification movements in the US mined ideas mainly from three sources: the utilitarian theory advocated by Jeremy Bentham, the text of the *Code Napoléon*, and the works of David Dudley Field.²⁵ The second provided codifiers with a system that seemed to function correctly.²⁶ David Dudley Field, influenced by the works of Bentham, advocated codification in New York where he drafted codes in the period 1847-1865.²⁷

14. See generally Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837 (1990).

15. 1 LEVAGGI, *supra* note 6, at 236-42.

16. See generally Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103 (2009), and especially at 1155. This statement does not contemplate the events in Louisiana, which are developed *in extenso infra*.

17. *Id.* at 1122-23.

18. *Id.* at 1150.

19. *Id.* at 1143.

20. *Id.* at 1131.

21. Parise, *supra* note 4, at 831.

22. 2 EDUARDO ESPINOLA, *TRATADO DE DIREITO CIVIL BRASILEIRO* 447 (1939).

23. Bergel, *supra* note 5, at 1076.

24. CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 121 (1981).

25. *Id.* at 74.

26. *Id.* at 71.

27. Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 422 (1996).

III. UNIQUE LOUISIANA HERITAGE

Spaniards were the first to explore the region of current Louisiana, starting in the sixteenth century.²⁸ Later, during the following century, France expanded its presence in the Americas.²⁹ Hence, in 1682 René Robert Cavelier, sieur de La Salle, took possession of the lower region of the Mississippi River and named it *Louisiane* (i.e., land of Louis)³⁰ in honour of the French King Louis XIV.³¹ In 1712, some years after the first permanent settlement was established, French ordinances and the *Coutume de Paris* were started to be applied in the region.³²

In 1762, France ceded the territory to Spain³³ as a result of the Treaty of Fontainebleau.³⁴ Four year later, Antonio de Ulloa³⁵ arrived at New Orleans acting as the first Spanish governor,³⁶ and was replaced in 1769 by Alejandro O'Reilly.³⁷ The latter implemented the Spanish Colonial system of government and replaced the French laws (for

28. Benard de la Harpe, *Historical Journal of the Establishment of the French in Louisiana (circa 1723)*, in 3 BENJAMIN FRANKLIN FRENCH, HISTORICAL COLLECTIONS OF LOUISIANA 9-10 (1851); see also 1 ALCÉE FORTIER, A HISTORY OF LOUISIANA 3-10 (2d ed. 1966-1985).

29. See generally 1 & 2 CHARLES GAYARRÉ, HISTORY OF LOUISIANA (1903); EDWIN ADAMS DAVIS, LOUISIANA: THE PELICAN STATE 16-65 (1978); Henry Plauche Dart, *The Legal Institutions of Louisiana*, 3 SOUTHERN L.Q. 247 (1918); and J.R. Trahan, *The Continuing Influence of le Droit Civil and el Derecho Civil in the Private Law of Louisiana*, 63 LA. L. REV. 1019, 1021 (2003).

30. DAVIS, *supra* note 29, at 19.

31. See Charles Sumner Lobingier, *The Modern Expansion of the Roman Law*, 6 U. CIN. L. REV. 152, 174 (1932).

32. Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in Notarial Jurisprudence*, 53 TUL. L. REV. 1, 7 (1978); John H. Wigmore, *Louisiana: The Story of Its Legal System*, 1 SOUTHERN L.Q. 1, 2 (1916).

33. See PAUL E. HOFFMAN, LOUISIANA 60-64 (1992); RODOLFO BATIZA, *Origins of Modern Codification of the Civil Law: The French Experience and Its implications for Louisiana Law*, 56 TUL. L. REV. 477, 580-81 (1981); Saúl Litvinoff, *Codificación en Louisiana*, in LA CODIFICACIÓN: RAÍCES Y PROSPECTIVAS II. LA CODIFICACIÓN EN AMÉRICA 127 (2004). See generally JUAN JOSÉ ANDREU OCARIZ, *LOUISIANA ESPAÑOLA* (1975); 2 GAYARRÉ, *supra* note 29; DAVIS, *supra* note 29, at 66-113; 2 FORTIER, *supra* note 28, at 3-215; ALAIN LEVASSEUR, LOUIS CASIMIR ELISABETH MOREAU-LISLET: FOSTER FATHER OF LOUISIANA CIVIL LAW 8-12 (1996); and Henry Plauche Dart, *The Law in Louisiana II*, 3 LOYOLA L.J. 1 (1921).

34. ALEJANDRO DEL CANTILLO, TRATADOS, CONVENIOS Y DECLARACIONES DE PAZ 485 (1843). On the treaty, see Arthur S. Aiton, *The Diplomacy of the Louisiana Cession*, 36 AM. HISTORICAL REV. 701 (1931).

35. For additional readings on de Ulloa, see John Preston Moore, *The Good Wine of Bordeaux: Antonio de Ulloa*, in 2 THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY: THE SPANISH PRESENCE IN LOUISIANA 1763-1803, at 59 (Gilbert C. Din ed., 1996).

36. DAVIS, *supra* note 29, at 70.

37. For additional readings on O'Reilly, see BIBIANO TORRES RAMÍREZ, ALEJANDRO O'REILLY EN LAS INDIAS (1969).

example, *Coutume de Paris*) with the Spanish-*Indiano* laws.³⁸ Hence, Spanish laws were from that point forward the law in Louisiana.³⁹ Amongst the new provisions were the *Ordinances and Instructions (Ordenanzas e Instrucciones)*⁴⁰ and the *Instructions as to the Manner of Instituting Suits (Instrucciones de Carácter Procesal)*,⁴¹ both of November 25, 1769, and which regulated procedure in the region.

On October 1, 1800, Napoleon Bonaparte secured the return of Louisiana to France⁴² through the Secret Treaty of San Ildefonso.⁴³ The territory would live shortly under French control, because during the first days of May 1803,⁴⁴ James Monroe met with Robert Livingston and François Barbé-Marbois⁴⁵ to settle what would be the Treaty of Paris, which resulted in the Louisiana Purchase.⁴⁶ The territory subject to the Purchase comprised 2,144,476 square kilometres⁴⁷ and covered most of the current central part of the US,⁴⁸ from the Gulf of Mexico to the 49th

38. See the analysis in Rodolfo Batiza, *The Unity of Private Law in Louisiana Under the Spanish Rule*, 4 INTER-AM. L. REV. 139 (1962).

39. Alain Levasseur, *La Réception du Système de la Common Law par le Système Législatif Français en Louisiane*, in LA RÉCEPTION DES SYSTÈMES JURIDIQUES: IMPLANTATIONS ET DESTINS 381, 382 (Doucet & Vanderlinden eds., 1994); Rodolfo Batiza, *The Influence of Spanish Law in Louisiana*, 33 TUL. L. REV. 29, 30 (1958); Francisco Eduardo Trusso, *El derecho hispano indiano en el derecho civil de Louisiana y su influencia a través de éste en el Código Civil Argentino*, LA LEY, 1986-B, 961.

There is some debate on the abrogation of French law. See Gustavus Schmidt, *Were the Laws of France, Which Governed Louisiana Prior to the Cession of the Country to Spain Abolished by the Ordinances of O'Reilly?*, 1:4 LA. L.J. 23 (1842); LEVASSEUR, *supra* note 33, at 8-12. The memoirs of Laussat (Papeles de Cuba, Legajo, 220. 5 Luisiana) include a document that seems to put an end to the debate. *Id.* at 34-35.

40. Text available in English in Gustavus Schmidt, *Ancient Jurisprudence of Louisiana*, 1:2 LA. L.J. 1-27 (1841). See the recent study by Shael Herman, *Under My Wings Every Thing Prospers: Reflections upon Vernon Palmer's The Louisiana Civilian Experience—Critiques of Codification in a Mixed Jurisdiction*, 80 TUL. L. REV. 1491, 1565 (2006).

41. Text available in English in Schmidt, *supra* note 40, at 27-60.

42. FRANCOIS-XAVIER MARTIN, *THE HISTORY OF LOUISIANA FROM THE EARLIEST PERIOD* 286 (1975) (1827).

43. Text available in English at http://avalon.law.yale.edu/19th_century/ildefens.asp (last visited Mar. 14, 2011).

44. The documents were dated April 30, 1803. See THOMAS MAITLAND MARSHALL, *A HISTORY OF THE WESTERN BOUNDARY OF THE LOUISIANA PURCHASE 1819-1841*, at 7-8 (1914).

45. DAVIS, *supra* note 29, at 119.

46. Text available in English at http://avalon.law.yale.edu/19th_century/louis1.asp (last visited Mar. 14, 2011).

47. Text available in English at http://avalon.law.yale.edu/19th_century/louis2.asp (last visited Mar. 14, 2011); see also CHARLES E FENNER, *THE GENESIS AND DESCENT OF THE SYSTEM OF CIVIL LAW PREVAILING IN LOUISIANA* 18 (1886).

48. Albert Tate, *The Splendid Mystery of the Civil Code of Louisiana*, 25 LA. BAR J. 29, 33 (1977); Shael Herman, *The Influence of Roman Law upon the Jurisprudence of Antebellum Louisiana*, 3 STELLENBOSCH L. REV. 143, 147 (1992); Elizabeth Gaspar Brown, *Law and Government in the Louisiana Purchase: 1803-1804*, 2 WAYNE L. REV. 169, 177 (1955).

Parallel⁴⁹ and from the Mississippi River to the Rocky Mountains.⁵⁰ During the second French period, the applicable law was still Spanish and no significant changes were made to the jurisprudence of the region.⁵¹

That same year of 1803, on December 20,⁵² the French flag⁵³ was replaced in Louisiana by the flag of the US.⁵⁴ The first proclamation of W.C.C. Claiborne, then Commissioner, was to preserve the laws that applied at the time of the Purchase⁵⁵ (*i.e.*, Spanish laws and the French *Code noir*). Later, an act of the US Congress dated March 26, 1804, divided the acquired region into the Territory of Orleans and the District of Louisiana.⁵⁶ The same act established in section 11 that “the laws in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified, or repealed by the legislature.”⁵⁷ On April 30, 1812, on the ninth anniversary of the Louisiana Purchase, Louisiana was admitted as the eighteenth state of the Union.⁵⁸

IV. CODIFICATION IN LOUISIANA (EARLY AMERICAN PERIOD, 1803-1830s)

Codification endeavors in Louisiana started immediately after the Louisiana Purchase, and reflected an oscillation between the adoption of the continental European and the common law systems. The first generation of codes was drafted during the first quarter of the nineteenth century. In a five-year period, drafters in Louisiana delivered no less than seven codes,⁵⁹ some which were never adopted.⁶⁰ Drafting in

49. William Wirt Howe, *Law in the Louisiana Purchase*, 14 YALE L.J. 77, 78 (1904).

50. E.T. Merrick, *The Laws of Louisiana and Their Sources*, 3 ALBANY L.J. 268, 269 (1871).

51. 1 LOUIS MOREAU LISLET & HENRY CARLETON, *THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA*, at xxi (1820); A.N. Yiannopoulos, *The Civil Codes of Louisiana*, in 1 WEST’S LOUISIANA CIVIL CODE li, liii (Yiannopoulos ed., 2008); Brown, *supra* note 48, at 186-87.

52. DAVIS, *supra* note 29, at 122.

53. The nature of the secret treaty delayed the actual possession by France. Actual French possession was on November 30, 1803. MARSHALL, *supra* note 44, at 19.

54. David Gruning, *Bayou State Bijuralism: Common Law and Civil Law in Louisiana*, 81 U. DET. MERCY L. REV. 437, 442 (2004); Samuel B. Groner, *Louisiana Law: Its Development in the First Quarter-Century of American Rule*, 8 LA. L. REV. 350, 357 (1947).

55. MARTIN, *supra* note 42, at 319.

56. Text available in English at http://avalon.law.yale.edu/19th_century/2us283.asp (last visited Mar. 14, 2011).

57. *Id.*

58. DAVIS, *supra* note 29, at 136.

59. Franklin, *supra* note 1, at 169-70.

Louisiana was massive and covered criminal law, civil law, criminal and civil procedure, and commercial law. Endeavors were undertaken by a select group of individuals, who not only found inspiration for their works in European precedents,⁶¹ but also created new provisions for the newly created territory.

A. *Criminal Law and Criminal Procedure*

The activities towards codification of criminal law started before the first anniversary of the replacement of the French flag in New Orleans. On December 5, 1804, John Watkins, George Pollock, and Benjamin Morgan were appointed by the Legislative Council to prepare a criminal code.⁶² The task was undertaken by James Workman,⁶³ who delivered what would be approved on May 4, 1805, as *An Act for the Punishment of Crimes and Misdemeanors* (Punishment Act).⁶⁴

James Workman⁶⁵ acted as judge in the County of Orleans from 1805-1807,⁶⁶ and had been in the US as early as 1799.⁶⁷ Workman was born in Ireland and studied common law at Middle Temple.⁶⁸ He was also known for writing a play entitled *Liberty in Louisiana* (1804),⁶⁹ which depicted conditions in New Orleans before the Louisiana Purchase

60. This Article will not cover the drafting, enactment, and application of the Black Code of 1806. That text was adopted by the Legislature on June 7, 1806, and applied to the enslaved inhabitants in the region (1807 La. Acts 150). For further readings on the Black Code see, amongst the abundant literature, Francis P. Burns, *The Black Code*, 5 LOYOLA L.J. 15 (1923); KATE WALLACH, RESEARCH IN LOUISIANA LAW 45-46 (1960); Hans W. Baade, *The Law of Slavery in Spanish Louisiana*, in LOUISIANA'S LEGAL HERITAGE 43 (Edward F. Haas & Robert R. Macdonald eds., 1983); Thomas N. Ingersoll, *Slave Codes and Judicial Practice in New Orleans, 1718-1807*, 13 LAW & HIST. REV. 23 (1995); Vernon Valentine Palmer, *The Origins and Authors of the Code Noir*, 56 LA. L. REV. 363 (1996).

61. For studies on the practice before local courts, see, for example, the reception of Spanish laws and treatises in Louisiana until 1828 (Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 LA. L. REV. 1485 (1982)) and the practice before the territorial court during 1804-1808 (Richard H. Kilbourne, *An Overview of the Work of the Territorial Court, 1804-1808, A Missing Chapter in the Development of the Louisiana Civil Code*, in LOUISIANA'S LEGAL HERITAGE 107 (Haas ed., 1983)).

62. See the newspaper LOUISIANA GAZETTE, Dec. 14, 1804, cited by WALLACH, *supra* note 60, at 61.

63. WALLACH, *supra* note 60, at 60.

64. 1805 La. Acts 416.

65. For additional readings on James Workman, see Ernesto de la Torre Villar, *Dos Proyectos para la Independencia de Hispanoamérica: James Workman y Aaron Burr*, 49 REVISTA DE HISTORIA DE AMÉRICA 1 (1960).

66. Charles S. Watson, *A Denunciation on the Stage of Spanish Rule: James Workman's Liberty in Louisiana (1804)*, 11:3 LOUISIANA HISTORY 245 (1970).

67. *Id.* at 247.

68. *Id.* at 246-47.

69. *Id.* at 246.

and condemned the corruption of the Spanish court system.⁷⁰ Workman advocated the system of law that new inhabitants of Louisiana were familiar with,⁷¹ and which he found more alluring than the existing Spanish provisions.⁷²

The Punishment Act derived from the US Congress Act of March 26, 1804.⁷³ In 52 short and clear articles, written both in French and English,⁷⁴ the text regulated crimes, punishments, and procedure. It generally provided enumerations of crimes and seldom gave definitions (for example: arson,⁷⁵ forgery⁷⁶). Punishments generally were included in the same articles that included the enunciation of crimes (for example: death penalty,⁷⁷ life imprisonment,⁷⁸ physical punishment by slashes with whips,⁷⁹ fines⁸⁰). Procedural aspects generally followed enunciation of crimes (for example, article on trial of persons indicted for perjury⁸¹) but were developed more extensively, as for example article 33. The general principle established in the latter article, by which trials were to be on the principles of the common law, read:

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, [. . .] the method of trial, [. . .] shall be except as is by this act otherwise provided for, according to the said common law.⁸²

In the Punishment Act, Spanish justice was replaced by a local variant of American principles.⁸³ The Spanish regime did not survive in the articles of the Punishment Act,⁸⁴ except when dealing with slaves. Article 47 established that “every slave accused of any crime shall be

70. *Id.* at 258.

71. Henry P. Dart, *The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana*, 6 TUL. L. REV. 83, 85 (1931).

72. Watson, *supra* note 66, at 258.

73. William K. Dart, *History of the Louisiana Judicial System*, 1 LA. DIG. 1, 42 (1917).

74. The practice of printing laws in Louisiana both in French and English ended in 1867. WALLACH, *supra* note 60, at 10.

75. 1805 La. Acts 416, art. 3.

76. *Id.* art. 14.

77. *Id.* art. 1.

78. *Id.* art. 2.

79. *Id.* art. 7.

80. *Id.* art. 21.

81. *Id.* art. 17.

82. *Id.* art. 33; see also Warren M. Billings, *Origins of Criminal Law in Louisiana*, 32:1 LA. HIST. 63, 70 (1991).

83. Billings, *supra* note 82, at 69.

84. RICHARD HOLCOMBE KILBOURNE, *A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS 1803-1839*, at 29 (1987).

punished according to the laws of Spain for regulating her colonies.”⁸⁵ Hence, slaves would be subject to other procedures, closer to Spanish provisions and later according to the dispositions of the Black Code.⁸⁶

The Punishment Act immediately generated reactions in the legal community of Louisiana. W.C.C. Claiborne relied on Lewis Kerr, a member of his household who was familiar with the law, to elaborate on the Punishment Act.⁸⁷ Kerr presented his *Exposition* in 1806,⁸⁸ and in his words, his work “shall proceed, first, to an exposition of the several offences recited by the statute [*i.e.*, Punishment Act]; secondly to a sufficient detail of criminal proceedings, and the principal rules of evidence; and shall conclude with some forms of records and other process, adapted to the existing laws of the territory in criminal cases.”⁸⁹ The work of Kerr was seen as a handy tool for instruction on the practice before courts of Louisiana.⁹⁰

Endeavors towards a more elaborated code of crimes were still envisioned in Louisiana. A set of amendments was made to the Punishment Act during the following years.⁹¹ In addition, in 1814, the Governor claimed that criminal law was in a confusing state in Louisiana, since it contained elements of common law, local enactments, and derivations of Roman law principles.⁹² Therefore, on February 10, 1820, the local legislature stated that a criminal code was needed and that it was “of primary importance, in every well-regulated state, that the code of criminal law should be found on one principle, viz. the prevention of crime.”⁹³ Edward Livingston was appointed to comply with

85. 1805 La. Acts 416, art. 47.

86. Judith Kelleher Schafer, *Under the Present Mode of Trial, Improper Verdicts are Very Often Given: Criminal Procedure in the Trials of Slaves in Antebellum Louisiana*, 18 CARDOZO L. REV. 635 (1996).

87. Billings, *supra* note 82, at 70; WALLACH, *supra* note 60, at 60.

88. AN EXPOSITION OF THE CRIMINAL LAWS OF THE TERRITORY OF ORLEANS: THE PRACTICE OF THE COURTS OF CRIMINAL JURISDICTION; THE DUTIES OF THEIR OFFICERS, WITH A COLLECTION OF FORMS FOR THE USE OF MAGISTRATES AND OTHERS (1806). On the exposition of Kerr, see Warren M. Billings, *A Neglected Treatise: Lewis Kerr's Exposition and the Making of Criminal Law in Louisiana*, 38:3 LA. HIST. 261 (1997).

89. AN EXPOSITION OF THE CRIMINAL LAWS OF THE STATE OF LOUISIANA OR KERR'S EXPOSITION 3 (rev. ed. 1840).

90. Billings, *supra* note 82, at 71.

91. *Id.* at 72.

92. Ira Flory, *Edward Livingston's Place in Louisiana Law*, 19 LA. HIST. Q. 3 (1936), reprint at 25.

93. *An Act Relative to the Criminal Laws of This State (February 10, 1820)*, in EDWARD LIVINGSTON, PROJECT OF A NEW PENAL CODE FOR THE STATE OF LOUISIANA, at v (1824).

that task on February 13, 1821,⁹⁴ and he presented his plan of work one year later.⁹⁵

Edward Livingston may be included amongst the most brilliant minds in the legal history of the United States.⁹⁶ He was born in New York in 1764,⁹⁷ and was brother of Robert Livingston (negotiator during the Louisiana Purchase).⁹⁸ He studied at Princeton University and read law with Judge Lansing, being admitted to practice in 1785.⁹⁹ He moved to New Orleans in 1804¹⁰⁰ where he became a successful lawyer and drafted key legislative provisions for the future state.

By 1825, Livingston had already formulated a system of criminal laws for Louisiana.¹⁰¹ Livingston devoted at least four years to the execution of his plan,¹⁰² which resulted in his *system of penal law*, comprising a book of definitions and four codes: crimes and punishments, procedure, evidence, and reform and prison discipline.¹⁰³ In the words of Livingston, the first code contained “the description of all acts or omissions that are declared to be offences; with the punishments assigned to each;”¹⁰⁴ the second code contained “the means provided for preventing offences that are apprehended, and for repressing those that exist; and it directs the mode of proceeding for bringing offenders to justice;”¹⁰⁵ the third code contained “the whole of evidence, applicable as well to civil as to penal cases;”¹⁰⁶ and the fourth code contained “a system of prison discipline, in all the stages in which imprisonment is used,

94. See the certification by the Secretary of State, J. Chabaud, dated March 28, 1822. *Id.* at vii.

95. EDWARD LIVINGSTON, REPORT MADE TO THE GENERAL ASSEMBLY OF THE STATE OF LOUISIANA ON THE PLAN OF A PENAL CODE FOR THE SAID STATE (1822).

96. For additional readings on Edward Livingston, see CHARLES HAVENS HUNT, LIFE OF EDWARD LIVINGSTON (1864); 1-2 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE: CONSISTING OF SYSTEMS OF PENAL LAW FOR THE STATE OF LOUISIANA AND FOR THE UNITED STATES OF AMERICA (1873); Flory, *supra* note 92; Franklin, *supra* note 1; Carleton Hunt, *Life and Services of Edward Livingston*, LOUISIANA BAR ASSOCIATION ANNUAL REPORT 7 (1903); Eugene Smith, *Edward Livingston and the Louisiana Codes*, 2 COLUM. L. REV. 24 (1902); Mitchell Franklin, *Libraries of Edward Livingston and of Moreau Lislet*, 15 TUL. L. REV. 401 (1941).

97. HAVENS HUNT, *supra* note 96, at 15.

98. Hunt, *supra* note 96, at 50.

99. FREDERICK C. HICKS, MEN AND BOOKS FAMOUS IN THE LAW 160 (1921).

100. *Id.* at 161.

101. WALLACH, *supra* note 60, at 60.

102. Smith, *supra* note 96, at 31.

103. See the complete text of the codes in EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW, FOR THE STATE OF LOUISIANA (1833).

104. *Id.* at 360.

105. *Id.*

106. *Id.*

either as the means of detention or punishment.”¹⁰⁷ For each code he had a detailed report explaining the reasons and principles he followed. Amongst his innovations was paramount the abolition of the death penalty,¹⁰⁸ which in the words of Livingston was “the great characteristic of the code.”¹⁰⁹

Livingston worked with a diversity of sources and found inspiration in the work of many reformers.¹¹⁰ The methodology of his work was grounded in the writings of Bentham: It regarded the scientific aspect of legislation as being controlled by interacting general principles.¹¹¹ Livingston mainly developed his ideas from the sources he could procure: books, epistles, and his own empirical research (for example, inquiries on criminal conditions to governors, penitentiary authorities, foreign ministers, and notable citizens from around the world).¹¹² In one of his reports, Livingston said “this information could only be obtained by collecting the returns and official reports of the different establishments, and inducing men of eminence and abilities to communicate their observations on the subject.”¹¹³ Above all, Livingston was open to receiving criticism on his works.¹¹⁴ The codes and corresponding reports include references to Roman and Spanish law, although the clear majority of references are to the common law.¹¹⁵

The works of Livingston on criminal law were never enacted in Louisiana. The adoption and reforms to the Practice Code¹¹⁶ had created a sort of opposition to codification by 1826 in Louisiana.¹¹⁷ In addition, other governmental and political affairs were diverting attention.¹¹⁸ Hence, the drafts of Livingston were not completely welcomed and generated reactions expressed in writing.¹¹⁹ For example, in 1825 Judge Seth Lewis wrote his *Strictures on Dr. Livingston’s System of Penal*

107. *Id.*

108. Hunt, *supra* note 96, at 33; Flory, *supra* note 92, at 29.

109. LIVINGSTON, *supra* note 103, at 148.

110. On the content and influence of the projects of Livingston, see Elon H. Moore, *The Livingston Code*, 19 J. AM. INST. CRIM. L. & CRIMINOLOGY 344 (1928).

111. Hunt, *supra* note 96, at 33.

112. Flory, *supra* note 92, at 25 & 27.

113. LIVINGSTON, *supra* note 103, at 5.

114. Moore, *supra* note 110, at 347.

115. *See generally* LIVINGSTON, *supra* note 103.

116. *See infra* Part IV.B.

117. RICHARD HOLCOMBE KILBOURNE, *LOUISIANA COMMERCIAL LAW: THE ANTEBELLUM PERIOD* 42 (1980).

118. Dart, *supra* note 73, at 43.

119. KILBOURNE, *supra* note 117, at 41.

Laws,¹²⁰ “vindicating the prevailing common law [and uncodified] system, and showing the evils of change.”¹²¹

The *system of penal law* of Livingston developed into a major source for criminal law codification around the world.¹²² Many works since then used the ideals and principles included in the different codes.¹²³ For example, the works of Livingston were published in France¹²⁴ and England,¹²⁵ and well circulated in Sweden and other European nations.¹²⁶ The ideas of Livingston also reached South America. In Brazil the criminal code of 1830 found a valuable source in the projects for Louisiana.¹²⁷ Finally, the works of Livingston were a useful source for the Indian Great Reform of 1833.¹²⁸

In the period 1805-1830s the legislature of Louisiana added, periodically during its sessions, provisions to the local body of criminal law.¹²⁹ While codification was not achieved in that period, some works brought coherence to the growing legislation. For example, in 1841, Merritt M. Robinson published a well circulated work entitled *A Digest of the Penal Law of the State of Louisiana*.¹³⁰ The local legislature then approved the circulation of that work amongst state officials.¹³¹ The author of that digest perceived that “it has become not a little difficult to ascertain, among the mass of statutes that have been accumulated since the organization of the territorial government, what portion still retains the force of law.”¹³²

120. SETH LEWIS, STRICTURES ON DR. LIVINGSTON’S SYSTEM OF PENAL LAWS, PREPARED FOR THE STATE OF LOUISIANA (1825).

121. MARTIN, *supra* note 42, *cited by* KILBOURNE, *supra* note 117, at 42. The first opposition by Lewis was published in 1825 and the second opposition in 1831 when a revival of codification took place in Louisiana. See a review of the work of Lewis in 23:53 N. AM. REV. 478 (1826).

122. See, e.g., HAVENS HUNT, *supra* note 96, at 276-81.

123. Smith, *supra* note 96, at 32.

124. See, for example, a French edition of 1872. 1-2 EDWARD LIVINGSTON, EXPOSÉ D’UN SYSTÈME DE LÉGISLATION CRIMINELLE POUR L’ÉTAT DE LA LOUISIANE ET POUR LES ÉTATS-UNIS D’AMÉRIQUE (1872).

125. See, for example, the report printed in London in 1824. LIVINGSTON, *supra* note 93.

126. Kjell Modéer, *Carl und Gustavus Schmidt als Zeitschriftenherausgeber. Zwei schwedische Juristenbrüder als Pioniere juristischer Zeitschriften im 19. Jahrhundert*, in JURISTISCHE ZEITSCHRIFTEN IN EUROPA 55, 63 (2006).

127. 1 LEVAGGI, *supra* note 6, at 240.

128. Thomas Jones Cross, *The Eclecticism of the Law of Louisiana: A Charcoal Sketch of the Legal System of That State*, 55 AM L. REV. 405, 412 (1921).

129. J. Denson Smith, *The Louisiana Criminal Code (Its Background and General Plan)*, 5 LA. L. REV. 1, 2 (1942). *n.b.*, that author extends his references to 1940.

130. M.M. ROBINSON, A DIGEST OF THE PENAL LAW OF THE STATE OF LOUISIANA, ANALYTICALLY ARRANGED (1841).

131. WALLACH, *supra* note 60, at 61.

132. ROBINSON, *supra* note 130, at iii.

Codification in these areas of law was reached only in the twentieth century. Codification of criminal procedure took place in Louisiana in 1928,¹³³ while codification of criminal law was delayed until 1942.¹³⁴ It seems clear that the criminal law of Louisiana followed to a great extent common law principles, and that the continental European system was neglected.

B. Civil Procedure

Changes in civil procedure were also tackled early on during the territorial period. The Spanish period had been marked by the previously mentioned *Ordinances and Instructions* and *Instructions as to the Manner of Instituting Suits* of 1769 by O'Reilly.¹³⁵ These texts mainly regulated practice and procedure in the region, together with some French practices that persisted even though Spain had gained control of the region.¹³⁶ Soon after the Purchase, Claiborne advocated unsuccessfully for the establishment of a court of common pleas, which would follow the common law model.¹³⁷

The year 1804 reflected changes in civil procedure. As mentioned before, the US Congress Act of March 26, 1804 divided the region into two territories, and provided the right to administer justice through a superior court and inferior courts.¹³⁸ Claiborne encountered a need to comply with the governmental requirements which at that time demanded implementations in the area of judicial practice.¹³⁹ In December, Claiborne asked the local legislature to settle jurisdiction, trial and practice procedures, and to divide the region in feasible judicial districts.¹⁴⁰ An account of that year stated that there was confusion in the courts of law of Louisiana and that judges were trained either in common

133. WALLACH, *supra* note 60, at 43. On the Louisiana Code of Criminal Procedure, see Bennett, *supra* note 2.

134. WALLACH, *supra* note 60, at 43. On the Louisiana Criminal Code of 1942 see the early work of Clarence J. Morrow, *The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges yet Unanswered*, 17 TUL. L. REV. 1 (1942). See also Dale E. Bennett & Cheney C. Joseph, Jr., *The Louisiana Criminal Code of 1942—Doctrinal Provisions, Defenses, and Theories of Culpability*, 52 LA. L. REV. 1083 (1992).

135. See *supra* note 40 and accompanying text.

136. John H. Tucker, Jr., *Source Books of Louisiana Law—Part II: The Code of Practice*, 7 TUL. L. REV. 82 (1932).

137. *Id.* at 83.

138. *Id.*; *supra* note 56, Part V.

139. GEORGE DARGO, JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS 219 (rev. ed. 2009).

140. *Id.*

or continental European systems, while claims were addressed before courts in different languages, by different lawyers.¹⁴¹

A solution to the depicted scenario could not wait. On March 5, 1805, John Watkins presented to the local legislature a draft delineating rules on civil procedure that had been elaborated mainly by Edward Livingston.¹⁴² The draft was adopted by the local legislature on April 10, 1805 and was entitled *An Act Regulating the Practice of the Superior Court, in Civil Causes*¹⁴³ (Practice Act¹⁴⁴). The text was written both in French and English and comprised 22 articles. Amongst the provisions of the Practice Act were those establishing written petitions when initiating suits before courts;¹⁴⁵ the serving¹⁴⁶ and answering of petitions, the latter to be in English and French;¹⁴⁷ the duties of sheriffs;¹⁴⁸ and the self-government of courts, as long as they did not conflict with the Practice Act or other laws of the territory.¹⁴⁹ The main features of the Practice Act were the establishment of jury trials,¹⁵⁰ the requirement of open court examination of witnesses,¹⁵¹ and the issuance of writs of *quo warranto*, *procedendo*, *mandamus*, and *prohibition*.¹⁵² Finally, the Practice Act included forms that would assist lawyers in their practice before the courts.¹⁵³

The sources of the Practice Act have been previously studied. On the one hand, it has been said that they derived from restatements of Spanish law and legislative additions that followed the Purchase.¹⁵⁴ Civil procedure, therefore, was mainly based on the preexisting Spanish procedure, *i.e.*, the works of O'Reilly.¹⁵⁵ On the other hand, it has been said that the sources of the Practice Act derived from a simplified version

141. *Id.* at 198.

142. WALLACH, *supra* note 60, at 55; FRANK L. MARAIST, 1 LA. CIV. L. TREATISE, CIVIL PROCEDURE § 1:1; BENJAMIN WALL DART, CODE OF PRACTICE OF THE STATE OF LOUISIANA, at iii (1942). *n.b.* James Brown and Livingston were acquaintances, and some studies claim that Brown co-authored that draft. KILBOURNE, *supra* note 84, at 25-26.

143. 1805 La Acts 210.

144. WALLACH, *supra* note 60, at 55.

145. 1805 La Acts 210, art. 1.

146. *Id.* art. 3.

147. *Id.* art. 5.

148. *Id.* arts. 2, 15-16.

149. *Id.* art. 21.

150. *Id.* arts. 5-6; *see also* Henry G. McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1, 7 (1960).

151. 1805 La Acts 210, art. 19; *see also* McMahon, *supra* note 150, at 7.

152. 1805 La Acts 210, art. 22.

153. *Id.* arts. 14, 19.

154. McMahon, *supra* note 150, at 7.

155. *Id.* at 9.

of US chancery practice.¹⁵⁶ A final assessment in this respect is difficult because there were significant similarities between US chancery practice and Spanish procedure, both systems sharing to some extent origins in canon law principles.¹⁵⁷ Accordingly, the Practice Act reflected a merging of civil and common law principles.¹⁵⁸ Several elements of US procedure were implemented (for example, forms of action and adversarial process¹⁵⁹). At the same time, the Practice Act eliminated sophisticated Spanish forms while neglecting the adoption of burdensome US procedures, establishing above all a simple method of written pleading.¹⁶⁰ For example, Spanish elements blended with the common law adversarial system, jury trial, and “proper notice.”¹⁶¹ As a corollary, the influence of Spanish procedure was paramount; however, evidence and cross examination of witnesses followed the common law, reflecting the appearance of a common law trial.¹⁶²

The Practice Act provided simple modes of procedure.¹⁶³ It required, amongst other things, statements in intelligible language that presented causes of claims and grounds of defence.¹⁶⁴ Livingston said that he could “initiate [a friend] in all the mysteries of practice [in Louisiana] before they sat down to dinner.”¹⁶⁵ Some years later, he mentioned to Jeremy Bentham, perhaps his main influence for the adoption of a simplified procedure,¹⁶⁶ that “Louisiana law books from 1808 to 1823 contained fewer cases depending upon disputed points of practice, than occurred in a single year in New York, where they proceeded according to English law.”¹⁶⁷ However, that simplicity would be quickly defeated by the commercial nature of activities in New Orleans.¹⁶⁸

In April 1805, the local legislature enacted *An Act for Dividing the Territory of Orleans into Counties, and Establishing Courts of Inferior Jurisdiction Therein*.¹⁶⁹ The Practice Act was supplemented by this

156. *Id.* at 7.

157. *Id.* at 8.

158. *Id.* at 6; MARAIST, *supra* note 142.

159. DARGO, *supra* note 139, at 297.

160. Groner, *supra* note 54, at 364.

161. MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 264 (Vernon V. Palmer ed., 2001).

162. McMahon, *supra* note 150, at 10.

163. DARGO, *supra* note 139, at 197.

164. Hunt, *supra* note 96, at 24.

165. *Id.*

166. McMahon, *supra* note 150, at 7.

167. Hunt, *supra* note 96, at 24.

168. Tucker, *supra* note 136, at 83.

169. 1805 La Acts 144.

second act,¹⁷⁰ which contained 25 articles. The second act established, amongst other things, that the territory would be divided into 12 counties,¹⁷¹ the governor would name judges,¹⁷² the jurisdiction of courts would be settled,¹⁷³ and jury trials would be established.¹⁷⁴ In addition, the second act established that all judgments should be pronounced in open court.¹⁷⁵ Many articles of the second act dealt with activities of sheriffs¹⁷⁶ and justices of the peace,¹⁷⁷ and with the method of appeal.¹⁷⁸ Finally, the second act also included forms to assist law practitioners,¹⁷⁹ such as the form of a writ of *Fieri Facias*.¹⁸⁰

The above-mentioned acts of 1805 regulated civil procedure in Louisiana until 1825.¹⁸¹ Amongst the main amendments and changes introduced by the local legislature are the ones derived from the adoption of the Constitution of 1812¹⁸² and the local act of January 28, 1817.¹⁸³ The Practice Act and its contemporaneous act were indeed very succinct and several areas of procedure were not contemplated in their articles. Practice in Louisiana welcomed judicial discretion,¹⁸⁴ and when facing lacunae, practitioners during the 1810s had to

devise means of practice of our own, or to find some by groping through the Curia Fillipica, Febrero, Elizando, Martinez, and the interminable volumes of the Roman and Spanish law to which they refer—examining occasionally the writers on French procedure, to which our adoption of so much of the code of France, would naturally direct our attention—together with the load of English and American reports and other authorities, requisite to explain the law of evidence, and several other regulations which the trial by jury was considered to have introduced.¹⁸⁵

This uncertainty motivated the Louisiana legislature to act. The latter included in a resolution of March 14, 1822, a provision stating that

170. KILBOURNE, *supra* note 84, at 28.
 171. 1805 La Acts 144, art. 1.
 172. *Id.* art. 2.
 173. *Id.* art. 4.
 174. *Id.* art. 6.
 175. *Id.* art. 8.
 176. *Id.* arts. 12-14.
 177. *Id.* art. 23.
 178. *Id.* arts. 16-17.
 179. *Id.* art. 5 (providing a form for citation).
 180. *Id.* art. 9.
 181. Tucker, *supra* note 136, at 83.
 182. *Id.*
 183. KILBOURNE, *supra* note 117, at 214.
 184. *Id.* at 44.
 185. *Judge Workman's Opinion on the Code of Practice, transcribed in KILBOURNE, supra* note 117, at 214.

“three jurisconsults [*i.e.*, Moreau-Lislet, Derbigny, and Livingston] shall be bound to add to their work [. . .] a treatise on the rules of civil actions and a system of the practice to be observed before our courts.”¹⁸⁶

Louis Casimir Elisabeth Moreau-Lislet¹⁸⁷ was born in the island of Saint-Domingue in 1766.¹⁸⁸ He studied law in France and moved to New Orleans due to the French Revolution. He was a successful lawyer who acted as judge, attorney general, and senator for Louisiana.¹⁸⁹ Pierre Auguste Bourguignon Derbigny was born in France in 1769 and studied law at Saint Genevieve.¹⁹⁰ He went into exile to the Caribbean during the French revolutionary period, and from there immigrated to the USA.¹⁹¹ After living in several regions of the country, he settled in Louisiana.¹⁹² His ability with the English and French languages helped explain his appointment as official interpreter of Governor Claiborne.¹⁹³ During his life he served in the three branches of government in Louisiana, being, amongst others, member of the legislative council,¹⁹⁴ judge of the Supreme Court,¹⁹⁵ and governor.¹⁹⁶

The work of the three jurisconsults was approved by the legislature on March 22, 1823,¹⁹⁷ was followed by a projet,¹⁹⁸ and on April 12 of the following year, the final text of the code was adopted,¹⁹⁹ being entitled “Code of Practice in Civil Cases for the State of Louisiana”²⁰⁰ (Practice

186. 1822 La. Acts 108; *see also* WALLACH, *supra* note 60, at 56.

187. For additional readings on Moreau-Lislet, see the complete study by LEVASSEUR, *supra* note 33, at 69-166.

188. There is some debate, however, that is the most probable date. LEVASSEUR, *supra* note 33, at 80, 83.

189. SHAEL HERMAN, THE LOUISIANA CIVIL CODE: A HUMANISTIC APPRAISAL 25 (1981).

190. <http://www.sos.louisiana.gov/tabid/364/Default.aspx> (last visited Mar. 14, 2011).

191. 2 APPLETON'S CYCLOPÆDIA OF AMERICAN BIOGRAPHY 146 (Wilson & Fiske eds., 1888).

192. *Id.*

193. SHAEL HERMAN, THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES 60 (1993).

194. 2 APPLETON'S CYCLOPÆDIA *supra* note 191.

195. HERMAN, *supra* note 193, at 60.

196. <http://www.sos.louisiana.gov/tabid/364/Default.aspx> (last visited Mar. 14, 2011).

197. Tucker, *supra* note 136, at 84.

198. 2 LOUISIANA LEGAL ARCHIVES (1937).

199. 1824 La Acts 172, art. 9; *see also* Tucker, *supra* note 136, at 87. According to the Supreme Court of Louisiana it took effect on October 2, 1825. It was also alleged that the code was not effective because it lacked an enacting clause, hence, an act in 1828 was passed to avoid further controversies. (Tucker, *supra* note 136, at 88).

200. 1824 La Acts 172, art. 9; *see also* WALLACH, *supra* note 60, at 56.

Code). In case of conflicting provisions, the text of the Practice Code had primacy over the text of the Civil Code of 1825.²⁰¹

The Practice Code referred to a *System of Practice, Containing Rules To Be Observed in the Prosecution of Civil Actions*.²⁰² The text comprised 1,161 articles and was divided into two parts. The first part, *Of Civil Actions*, had one title (*i.e.*, *Of Actions in General*), which was subdivided into chapters and sections. The second part, *Containing Rules To Be Observed in the Prosecution of Civil Actions*, was divided into four titles (*i.e.*, *Proceedings to Be Observed in the Prosecution of Actions Before the Courts of Original Jurisdiction*, *of Proceedings in the Supreme Court of the State*, *of the Proceedings in Courts of Probates*, and a final title *On Proceedings Before Justices of the Peace*) also with subdivisions into chapters and sections. As was the case with the Civil Code, the text of the Practice Code was adopted both in French and English versions.²⁰³

The Practice Code reflected an “eclectic synthesis”²⁰⁴ of continental European and common law principles. The drafters of the Practice Code had listed sources of inspiration for most relevant articles as notes in their projet.²⁰⁵ Notes made reference to French, Spanish, and Roman sources, though rarely to common law.²⁰⁶ Spanish sources provided grounding for several important sections,²⁰⁷ while references to French sources were also significant.²⁰⁸ In addition, the Practice Act and local statutes were also mentioned in various notes.²⁰⁹ Common law materials had been available for the drafters, having in their own libraries copies of works by, amongst others, Bacon, Coke, Story, and Blackstone.²¹⁰ Common law elements (for example: habeas corpus, jury trial, adversarial system²¹¹) harmonized the provisions of the Practice Code with the requirements of

201. 1824 La Acts 172, art. 10; *see also* Shael Herman, *The Louisiana Code of Practice (1825): A Civilian Essai Among Anglo-American Sources*, 12.1 ELECTRONIC J. COMP. L. 3 (May 2008).

202. *See* CODE OF PRACTICE, IN CIVIL CASES, FOR THE STATE OF LOUISIANA (1825). For a collection of related acts that followed the enactment of the Practice Code, *see* ALBERT VOORHIES, THE CODE OF PRACTICE OF THE STATE OF LOUISIANA, WITH REFERENCES TO ACTS OF THE LEGISLATURE (1875).

203. CODE OF PRACTICE, *supra* note 202.

204. Herman, *supra* note 201, at 11.

205. 2 LOUISIANA LEGAL ARCHIVES, *supra* note 198; McMahon, *supra* note 150, at 11.

206. Herman, *supra* note 201, at 11; McMahon, *supra* note 150, at 11.

207. McMahon, *supra* note 150, at 11.

208. *Id.*

209. *Id.* at 7, 11.

210. Herman, *supra* note 201, at 12.

211. *Id.* at 3.

the US Constitution.²¹² The local legislature had to respect common law institutions that had been authorized by the Federal enactment,²¹³ resulting in remedies similar to those of common law being identified with unusual taxonomy.²¹⁴ At the same time, the drafters tried to include salient features of continental European procedure. For example, they preserved the *via executiva*,²¹⁵ or executive proceeding, that “extended to all cases where the debtor was considered as having confessed judgment,”²¹⁶ providing thereby an expeditious way of collecting debts.²¹⁷

The reception of the Practice Code by the bench and bar of Louisiana was well noticed, and tended to revolve on the interaction of both systems of law. Some members noticed that the Practice Code was more “civilian” than what common law trained practitioners were expecting.²¹⁸ In addition, some criticized the merits of the code. For example, Gustavus Schmidt, editor of the *Louisiana Law Journal*, stated that the Practice Code was “a source of much error and embarrassment.”²¹⁹ As decisions started to interpret the Practice Code, the Supreme Court began to sense a common law derivation in significant sections and hence embraced the common law when facing lacunae.²²⁰ It was possible to identify an increasing influence of common law practice that derived from a decline in the Spanish and French language on the part of practitioners and from the numerous common law publications arriving in the state.²²¹

The Practice Code was effective in Louisiana until 1870. Once replaced, common law kept percolating into Louisiana civil procedure.²²² That percolation continues today,²²³ and results mainly from the legal education that some lawyers practicing in Louisiana received in other

212. Shael Herman, *The Uses of Analogia Iuris in the Louisiana Code of Practice* (1825), 12.3 ELECTRONIC J. COMP. L. 2 (December 2008).

213. Shael Herman, *The Louisiana Code of Practice (1825): Part II A Civilian Essai Among Anglo-American Sources*, 12.1 ELECTRONIC J. COMP. L. 2 (October 2008 Supplement).

214. Cross, *supra* note 128, at 418.

215. On the evolution of *via executiva* in Louisiana, see Robert Wyness Millar, *The Louisiana Executory Process: A Note on Its Background*, in 2 SCRITTI GIURIDICI IN MEMORIA DI PIERO CALAMANDREI 537 (1958).

216. *State Bank v. Seghers*, 1819, 6 Mart.(o.s.) 724.

217. Dart, *supra* note 71, at 93.

218. KILBOURNE, *supra* note 117, at 44.

219. Gustavus Schmidt, *The Supreme Court and Its Decisions*, 1:4 LOUISIANA LAW JOURNAL 132, 149 (1842), *cited in* KILBOURNE, *supra* note 117, at 48.

220. Groner, *supra* note 54, at 377.

221. MIXED JURISDICTIONS, *supra* note 161, at 265.

222. MARAIST, *supra* note 142; McMahon, *supra* note 150, at 13.

223. MARAIST, *supra* note 142.

states, and from the commercial interactions between Louisiana and the remaining states of the Union.²²⁴

C. Civil Law²²⁵

Efforts to codify civil and criminal law were contemporaneous in Louisiana. On December 10, 1804, five days after the appointment of the drafters of a new criminal law, the Legislative Council appointed the same committee (*i.e.*, Watkins, Pollock, and Morgan) to draft a civil code for the territory.²²⁶ Later, on February 4, 1805, it was resolved that the committee was “authorized to employ two counselors at law, to assist them in drafting the said [civil and criminal] codes.”²²⁷

May and June of 1806 were marked by events reflecting the interest of local inhabitants toward the continental European system in private law matters. In May, the local legislature adopted a bill²²⁸ by which the pre-existing Spanish and Roman laws would govern the territory,²²⁹ but Governor Claiborne vetoed the bill.²³⁰ In addition, the New Orleans newspaper *Le Telegraphe*²³¹ published a manifesto dated May 28 and signed by ten members of the House of Representatives in which the members protested Claiborne’s veto, proposed the dissolution of the Legislature, and explained the reasons why they preferred the continental European system.²³² Later, on June 7, James Brown and Moreau-Lislet

224. *Id.*

225. See generally Agustín Parise, *A Constant Give and Take: Tracing Legal Borrowings in the Louisiana Civil Law Experience*, 35 SETON HALL LEGIS. J. 1 (2010).

226. WALLACH, *supra* note 60, at 46; *Orleans Legislative Council: Monday, Dec. 10*, LA. GAZETTE, Dec. 21, 1804, at 3.

227. 1805 La. Acts 458-60.

228. See also Mitchell Franklin, *Introduction* to 1 THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA 1, 8-11 (L. Moreau Lislet & Henry Carleton trans., 1978) (1820); Mitchell Franklin, *Some Considerations on the Existential Force of Roman Law in the Early History of the United States*, 22 BUFF. L. REV. 69, 69-70 (1972); Mitchell Franklin, *The Eighteenth Brumaire in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806*, 16 TUL. L. REV. 514, 516 (1942); Mitchell Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 TUL. L. REV. 319, 323-26 (1942) [hereinafter Franklin, *The Place of Thomas Jefferson*].

229. Yiannopoulos, *supra* note 51, at liv. See the text of the act at Franklin, *The Place of Thomas Jefferson*, *supra* note 228, at 323-26.

230. Letter from W.C.C. Claiborne to the Legislative Council and the House of Representatives (May 26, 1806), in 3 OFFICIAL LETTER BOOKS OF W.C.C. CLAIBORNE, 1801-1816, at 313 (Dunbar Rowland ed., 1917).

231. Letter from W.C.C. Claiborne to the Secretary of State (June 3, 1806), in 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, 1803-1812, at 642-57 (Clarence Edwin Carter ed., 1940); see also Elizabeth Gaspar Brown, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 AM. J. LEGAL HIST. 35, 49-53 (1957).

232. 9 THE TERRITORIAL PAPERS, *supra* note 231, at 650.

were appointed to draft a project of a civil code.²³³ According to the resolution, the “two jurisconsults shall make the civil law by which this territory is now governed, the ground work of said code.”²³⁴

James Brown²³⁵ was born in Virginia in 1766. He studied at the College of William and Mary and was then admitted to practice law in Kentucky.²³⁶ Brown moved to Louisiana soon after the Purchase, and was appointed Secretary of the territory.²³⁷ Both Brown and Moreau-Lislet were familiar with the three main languages in Louisiana: English, French, and Spanish.²³⁸

In February 1808, the different books of the projected civil code were presented by the committee to the local legislature for debate.²³⁹ On March 31, 1808, the Legislature promulgated the *Digest of the Civil Laws Now in Force in the Territory of Orleans* (Digest of 1808).²⁴⁰ This time, Claiborne did not veto the initiative.²⁴¹ The Digest of 1808 comprised 2,160 articles and was divided into a Preliminary Title, *Of the General Definitions of Rights and the Promulgation of the Laws*, and three books: Book I *Of Persons*,²⁴² Book II *Of Things or Estates*,²⁴³ and

233. 1806 La. Acts 214.

234. *Id.* at 214.

235. For additional readings on Brown, see 1 ALCÉE FORTIER, LOUISIANA; COMPRISING SKETCHES OF PARISHES, TOWNS, EVENTS, INSTITUTIONS, AND PERSONS, ARRANGED IN CYCLOPEDIA FORM 132 (1914); LAWRENCE KEITH FOX, THE POLITICAL CAREER OF JAMES BROWN (LSU Dep’t of History Theses, 1946).

236. See *James Brown*, in <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000921> (last visited Mar. 14, 2011).

237. FOX, *supra* note 235, at 21-22.

238. 3 AMERICAN NATIONAL BIOGRAPHY 683 (Garraty ed., 1999); LEVASSEUR, *supra* note 33, at 114.

239. GEORGE DARGO, LEGAL CODIFICATION AND THE POLITICS OF TERRITORIAL GOVERNMENT IN JEFFERSON’S LOUISIANA, 1803-1808, at 321 (1970).

240. The complete French title is *Digeste des lois civiles actuellement en force dans le territoire d’Orléans, avec des changemens et améliorations adaptés à son présent système de gouvernement*. 1808 La. Acts 122. See generally A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, WITH ALTERATIONS AND AMENDMENTS ADAPTED TO ITS PRESENT SYSTEM OF GOVERNMENT (1808).

241. Claiborne informed the Legislature that he approved the Digest of 1808 by a letter dated March 31, 1808. Letter from W.C.C. Claiborne to the Legislature (Mar. 31, 1808), in 9 THE TERRITORIAL PAPERS, *supra* note 15, at 642-57; see also Vernon Valentine Palmer, *Two Worlds in One: The Genesis of Louisiana’s Mixed Legal System, 1803-1812*, in LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 23, 34 (Vernon Valentine Palmer ed., 1999).

242. Book I had ten titles (*i.e.*, of the distinction of persons, and the privation of certain civil rights in certain cases; of domicil and the manner of changing the same; of absent persons; of husband and wife; of the separation from bed and board; of master and servant; of father and child; of minors, of their tutorship, curatorship and emancipation; of persons insane, idiots, and other persons incapable of administering their estate; and of communities or corporations). The text of the Digest of 1808 is available at www.law.lsu.edu/digest (last visited Mar. 14, 2011).

243. Book II had four titles (*i.e.*, Of Things or Estates; Of Absolute Ownership; Of Usufruct, Use and Habitation; and Of Predial Services or Services of Land). *Id.*

Book III *Of the Different Manners of Acquiring the Property of Things*.²⁴⁴ The Digest of 1808 was drafted in French and then translated into English.²⁴⁵

The Digest of 1808 did not include an *exposé des motifs* explaining its sources.²⁴⁶ Nevertheless, a number of copies contain interleaves with manuscript notes dictated by Moreau-Lislet, or in some cases, even written by him.²⁴⁷ One of these manuscripts, the de la Vergne copy, includes references to Roman and Spanish materials linked to titles and articles.²⁴⁸ The manuscript also includes references to French texts of Roman grounding, such as the works of Pothier and Domat.²⁴⁹ The content of that copy was tested in 1971 by Rodolfo Batiza,²⁵⁰ who identified the textual origins of 2,081 articles.²⁵¹ He concluded that approximately 85% of the text of the articles had been extracted from French texts (for example: *Code Napoléon, Projet* of 1800, French commentators).²⁵² In 1972, Robert A. Pascal published a reply²⁵³ claiming that French law, composed after elements from Roman, Romanized Frankish, Burgundian, and Visigothic origin, habitually resembled the Spanish law that derived from Roman or Roman-Visigothic origins.²⁵⁴ He understood that the *Code Napoléon* provided a mine of texts written

244. Book III had a preliminary title (*i.e.*, On General Dispositions) and 21 titles (*i.e.*, Of Successions; Of Donations Inter Vivos and Mortis Causa; Of Contracts and of Conventional Obligations in General; Of Engagements Formed Without Agreements, or of Quasi Contracts and Quasi Offences; Of Marriage Contract; Of Sale; Of Exchange; Of Letting and Hiring; Of Partnership; Of Loan; Of Deposit and Sequestration; Of Aleatory Contracts; Of Mandate or Commission; Of Suretyship; Of Transactions; Of Respite; Of Compromises or Arbitration; Of Pledge; Of Privileges and Mortgages; Of Occupancy, Possession and Prescription; and Of the Title by Judgment or Seizure). *Id.*

245. E.B. Dubuisson, *The Codes of Louisiana (Originals Written in French; Errors of Translation*, LOUISIANA BAR ASSOCIATION ANNUAL REPORT 143 (1924); John M. Shuey, *Civil Codes-Control of the French Text of the Code of 1825*, 3 LA. L. REV. 452 (1941).

246. Joseph Dainow, *Moreau Lislet's Notes on Sources of Louisiana Civil Code of 1808*, 19 LA. L. REV. 43, 43 (1958).

247. John W. Cairns, *The de la Vergne Volume and the Digest of 1808*, 24 TUL. EUR. & CIV. L.F. 31, 74 (2009).

248. See the text of the *avant-propos* at www.law.lsu.edu/digest (last visited Mar. 14, 2011); see also Cairns, *supra* note 247, at 76-77.

249. In addition, 645 articles do not have corresponding notes. Vernon Valentine Palmer, *The Recent Discovery of Moreau Lislet's System of Omissions and Its Importance to the Debate over the Sources of the Digest of 1808*, 49 LOY. L. REV. 301, 337 (2003).

250. Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971).

251. *Id.* at 11.

252. *Id.* at 12.

253. Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972).

254. *Id.* at 605.

in French.²⁵⁵ Thus, the drafters used French texts that contained or could be modified to contain in substance the Spanish-Roman law then in force in Louisiana.²⁵⁶ The work of Batiza and Pascal reflected that whether French, Spanish, or Roman, the laws were mainly taken from the continental European system, and that the Digest of 1808 was not a mere copy of the *Code Napoléon* or of a single text.²⁵⁷

The Digest of 1808 did not completely repeal the civil laws that had existed in Louisiana.²⁵⁸ In 1817, Justice Derbigny decided in the case of *Cottin v. Cottin*²⁵⁹ that those laws that were not contrary to the Digest of 1808 were not repealed with its enactment.²⁶⁰ Hence, the interpretation of the courts showed that there was uncertainty about the preservation of the Spanish, French, and Roman laws.²⁶¹ This uncertainty encouraged the local legislature to resolve on March 14, 1822, that “three juriconsults be appointed . . . to revise the [Digest of 1808].”²⁶² That same day, the members of the Legislature appointed attorneys Pierre Derbigny, Edward Livingston, and Moreau-Lislet to draft a revision.²⁶³

The work towards a revised text of the Digest of 1808 began immediately. In February 1823, the three attorneys presented their Preliminary Report to the Louisiana legislature.²⁶⁴ The latter approved the work plan in March,²⁶⁵ and ordered the distribution of the Preliminary Report to all members of the local legislature.²⁶⁶ In the Preliminary Report, the drafters claimed that: “We shall keep a reverent eye on those principles, which have received the sanction of time, and on the labors of the great Legislators, who have preceded us. The Laws of the *Partidas*, and other Statutes of Spain, the existing digest [of 1808] of our own Laws, the abundant stores of the English Jurisprudence, the comprehensive Codes of France, are so many rich mines from which we can draw treasures of Legislation.”²⁶⁷ The sources of the revision were

255. *Id.*

256. *Id.* at 606.

257. HERMAN, *supra* note 193, at 32.

258. KILBOURNE, *supra* note 84, at 62.

259. *Cottin v. Cottin*, 1819, 5 Mart. (o.s.) 93.

260. *Id.*

261. HERMAN, *supra* note 189, at 26.

262. 1822 La. Acts 108.

263. H.R. JOURNAL, 5th Leg., 2d Sess., at 73 (La. 1822); Flory, *supra* note 92, at 53.

264. Edward Livingston et al., *To the Honorable the Senate and House of Representatives of the State of Louisiana*, in 1 LOUISIANA LEGAL ARCHIVES, at lxxxvi (1937).

265. 1823 La. Acts 88-89.

266. 1823 La. Acts 90-91.

267. Livingston et al., *supra* note 264, at lxxxix.

also of interest for Rodolfo Batiza.²⁶⁸ In a new study he indicated that the drafters used, among others, the *Corpus Iuris*, the *Partidas*, the *Projet* of 1800, the *Code Napoléon*, the Digest of 1808, acts of the local legislature, and the works of Blackstone, Domat, Febrero, Maleville, Merlin, Toullier, and Pothier.²⁶⁹

The revised text resulted in a civil code. On April 12, 1824, the Louisiana legislature ordered the printing and promulgation of the revised text with the proposed changes.²⁷⁰ The new text had 3,522 articles, and was entitled *Civil Code of the State of Louisiana*²⁷¹ (Civil Code). The structure of the Civil Code was similar to the one of the Digest of 1808, having a Preliminary Title *Of the General Definitions of Rights and the Promulgation of the Laws*; and three books: Book I *Of Persons*,²⁷² Book II *Of Things and of the Different Modifications of Property*,²⁷³ and Book III *Of the Different Modes of Acquiring the Property of Things*.²⁷⁴

Codification of the civil law continued developing in Louisiana well during the rest of the nineteenth and all of the twentieth centuries. Endeavours were undertaken in 1870, 1908, and continually since 1970, by the Louisiana State Law Institute.²⁷⁵ Contrary to the codification

268. Rodolfo Batiza, *The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey*, 47 TUL. L. REV. 1 (1972).

269. *Id.* at 28-30.

270. 1824 La. Acts 172; WALLACH, *supra* note 60, at 48. Derbigny, at that time Secretary of State, issued a certificate of promulgation on May 20, 1825, indicating that the new text would take effect one month later. Nevertheless, the Louisiana Supreme Court stated that the code had been promulgated on different dates in different parts of the state. John H. Tucker, Jr., *Source Books of Louisiana Law—Part I: Civil Code*, 6 TUL. L. REV. 280, 288-89 (1931); Yiannopoulos, *supra* note 51, at lviii; WALLACH, *supra* note 60, at 48.

271. CIVIL CODE OF THE STATE OF LOUISIANA (1825).

272. Book I had ten titles (*i.e.*, Of the Distinction of Persons; Of Domicil and the Manner of Changing the Same; Of Absentees; Of Husband and Wife; Of the Separation from Bed and Board; Of Master and Servant; Of Father and Child; Of Minors, Of Their Tutorship, Curatorship and Emancipation; Of Persons Insane, Idiots and Other Persons Incapable of Administering Their Estates; and Of Corporations). *Id.*

273. Book II had six titles (*i.e.*, Of Things; Of Ownership; Of Usufruct, Use and Habitation; Of Predial Servitudes or Servitudes of Land; Of Fixing the Limits, and Surveying of Lands; and Of New Works, the Erection of Which Can Be Stopped or Prevented). *Id.*

274. Book III had a preliminary title (*i.e.*, General Dispositions) and 24 titles (*i.e.*, Of Successions; Of Donations Inter Vivos and Mortis Causa; Of Obligations; Of Conventional Obligations; Of Quasi-Contracts, and Of Offences and Quasi-Offences; Of the Marriage Contract, and of the Respective Rights of the Parties in Relation to Their Property; Of Sale; Of Exchange; Of Letting and Hiring; Of Rents and Annuities; Of Partnership; Of Loan; Of Deposit and Sequestration; Of Aleatory Contracts; Of Mandate; Of Suretyship; Of Transaction or Compromise; Of Respite; Of Arbitration; Of Pledge; Of Privileges; Of Mortgages; Of Occupancy, Possession and Prescription; and Of the Signification of Sundry Terms of Law Employed in This Code). *Id.*

275. Parise, *supra* note 225, at 21-29.

endeavours of criminal law, in the area of civil law, Louisiana clearly followed principles to be found in continental European systems.

D. Commercial Law

In Louisiana, a need for change in commercial law was felt as early as February 1805.²⁷⁶ At that time, a group of merchants advocated the implementation of a commercial court in New Orleans.²⁷⁷ These merchants sensed that there was a delay in the administration of justice pertaining to commercial claims and that members of the judiciary faced misinformation.²⁷⁸ Their request included, amongst others, the appointment of arbitrators, juries, court officers, and lawyers, who would deal especially with matters of the trade.²⁷⁹ That group of merchants condemned the common law apparatus that would decide commercial claims in ordinary tribunals.²⁸⁰ In addition, those merchants advocated the implementation in Louisiana of a commercial code.²⁸¹ The reform efforts of these merchants did not come to fruition in Louisiana at that time.²⁸²

The Spanish ordinances of Bilbao of 1737²⁸³ had been applied in the territory when dealing with commercial matters. However, the effects of the Louisiana Purchase and the commercial needs reflected that some inhabitants also valued other laws pertaining commerce. Accordingly, in May of 1806, the local legislature adopted the previously mentioned bill by which they stated which laws would govern the territory.²⁸⁴ That bill, which was eventually vetoed by Governor Claiborne, read in part:

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.

[. . .]

276. DARGO, *supra* note 139, at 297.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 297-98.

281. *Id.* at 297.

282. A commercial court was established in New Orleans pursuant to an act of 1839. See 1 MEINRAD GREINER, *THE LOUISIANA DIGEST, EMBRACING THE LAWS OF THE LEGISLATURE OF A GENERAL NATURE ENACTED FROM THE YEAR 1804 TO 1841*, at 100-01 (1841).

283. See the study by Jesús Motilla Martínez, *Las Ordenanzas del Consulado de Bilbao, interesante fuente histórica del derecho mercantil (versión paleográfica y notas sobre fragmentos del texto)*, 15 JURÍDICA. ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA 189 (1983).

284. See *supra* note 228 and accompanying text.

Section 2: And be it further declared, that in matters of commerce the ordinance of Bilbao is that which has full authority in this Territory, to decide all contestations relative thereto; and that wherever it is not sufficiently explicit, recourse may be had to the roman laws; to Beawes *lex mercatoria*, to Park on insurance; to the treatise of the insurances by Emorigon, and finally to the commentaries of Valin, and to the respectable authors consulted in the United States.²⁸⁵

The statements expressed in the bill were also ratified by decisions in the local courts. For example, in 1809, in a maritime law claim, it was said at court that “the Ordinance of Bilbao, [is] *our commercial code*.”²⁸⁶ Another example of the reception of the statements of the bill is provided by a decision of 1815 in the case of *Kemper v. Smith*²⁸⁷ concerning partnerships. In that case citations to French, Spanish, and Anglo-American authorities were made by the members of the tribunal (*n.b.* Derbigny was amongst the members of the court) and by the practicing attorneys.²⁸⁸

An attempt to codify the commercial laws would have to wait until the early 1820s. According to the resolution of March 14, 1822, Moreau-Lislet, Derbigny, and Livingston²⁸⁹ had to “add to their [codification] work a complete system of the commercial laws in force in this state together with the alterations they will deem proper.”²⁹⁰ On February 13, 1823, the drafters said that the commercial law codification endeavours were “assigned to a [. . .] member of the commission, who has begun and made some progress in the work.”²⁹¹ The draft was completed by February 10, 1825, when the local legislature approved the compensation for the work of the drafters.²⁹² However, the draft was never adopted by the legislature, which abandoned the project without a formal rejection.²⁹³ In the winter of 1826, the legislature omitted to decide on the fate of the work.²⁹⁴ On the one hand, this omission could have been motivated because of a concern about the authority of the local legislature to

285. Franklin, *The Place of Thomas Jefferson*, *supra* note 228, at 326.

286. (Emphasis added). *Sandry v. Lynch*, 1809, 1 Mart.(o.s.) 57; *see also* Brown, *supra* note 231, at 68.

287. *Kemper v. Smith*, 1815, 3 Mart. (o.s.) 622.

288. *Id.*; F. Hodge O’Neal, *An Appraisal of the Louisiana Law of Partnership*, 9 LA. L. REV. 307, 312 (1949).

289. KILBOURNE, *supra* note 117, at 29.

290. 1822 La. Acts 108; *see also* KILBOURNE, *supra* note 117, at 28.

291. Livingston et al., *supra* note 264, at xciv.

292. KILBOURNE, *supra* note 117, at 30. References are made to the payment to Livingston for the drafting of the Commercial Code in the case of *Flower v. Arnaud*, 1825, 4 Mart. (n.s.) 73.

293. KILBOURNE, *supra* note 117, at 33.

294. *Id.*

elaborate in that area or because they recognized conflicts between state and federal provisions.²⁹⁵ In addition, if the legislature had rejected the work, they would have contradicted previous interpretations of applicable commercial law.²⁹⁶ On the other hand, the omission could have been motivated, as a statement before a court in 1848 indicates, because “the commercial law of England and of the sister States of the Union was thought better adapted to the habits and commercial relations of our people.”²⁹⁷

Edward Livingston is generally identified as the jurist who completed the commercial law project. He wrote in February 1824 to a friend that his “part of the Commercial Code is finished and gone on.”²⁹⁸ Therefore, it cannot be claimed that he was the only author, but that Moreau-Lislet or Derbigny also participated in the endeavor.²⁹⁹ However, in the period 1824-1825 Livingston was out of the state and heavily involved in the drafting of his penal codes, and this generated doubt about his authorship of the commercial law project.³⁰⁰

The commercial law project had 1,963 articles,³⁰¹ and was entitled *Commercial Code for the State of Louisiana*³⁰² (Commercial Code). The Commercial Code was divided into two books. Book One, *of commerce in general*, had five titles (*i.e., of merchants in general; of the books they are bound to keep; of commercial partnerships; of commercial agents; and of bills of exchange, promissory notes, checks and bank notes*), which were subdivided into chapters and sections. Book Two, *of maritime commerce*, was divided into seven titles (*i.e., of ships and other vessels; of ship owners; of ship masters; of masters of boats and other crafts employed in the inland navigation; of the hiring and wages of sailors; of the carriages of goods in ships, and of insurance*), and also contained a subdivision into chapters and sections. The text was also drafted both in French and English.³⁰³

295. *Id.*

296. *Id.*

297. United States v. U.S. Bank, 1844, 8 Rob. (La) 262.

298. KILBOURNE, *supra* note 117, at 34.

299. *Id.*

300. *Id.*

301. It also included a selection of “articles to be added in the body of the code of commerce,” resulting in 1987 articles for the entire code. See COMMERCIAL CODE FOR THE STATE OF LOUISIANA 248-49 (1825).

302. *Id.*

303. *Id.*

The Commercial Code used the French *Code de commerce* as a model.³⁰⁴ The format of both texts is similar and several articles are identical.³⁰⁵ It was said before a local court that the Commercial Code “was mainly taken from the French Code on the same subject.”³⁰⁶ However, the Commercial Code has several original elaborations, and it rejected some French dispositions, such as the establishment of commercial courts and the system of registers.³⁰⁷ Common law influences are recurrent in the Commercial Code.³⁰⁸ For example, the majority of the 584 articles on commercial papers were inspired by the treatise of Joseph Chitty entitled *A Practical Treatise on Bills of Exchange*.³⁰⁹ It must be noted that some common law provisions encroached uncomfortably upon the continental European provisions.³¹⁰

There was duplication of articles in the Civil Code and in the Commercial Code, but both texts seem to have been intended as complete and independent.³¹¹ However, there were also cross-references between the texts. For example, the Commercial Code regulated commercial partnerships (providing at least 100 more articles than the French *Code de commerce*³¹²) while the Civil Code stated in article 2823 that “the particular rules, by which commercial partnerships are governed, will be found in the Commercial Code. All the provisions of this title, not repugnant to those contained in that [Commercial] Code, are also applicable to commercial partnerships.”³¹³ Therefore, when the Commercial Code was not adopted, lacunae arose and practitioners turned to treatises and decisions from other US states in that area of law.³¹⁴ On occasion, practitioners stated before the courts that “there cannot be any impropriety, in looking therein [*i.e.*, Commercial Code] for aid in interpreting the provisions of the C[ivil] Code, on commercial subjects.”³¹⁵

304. Max Nathan, *In Search of a Missing Link: Edward Livingston and the Proposed Code of Commerce for Louisiana*, 48 TUL. L. REV. 43, 48 (1973); see also ISAAC SMITH HOMANS, A CYCLOPEDIA OF COMMERCE AND COMMERCIAL NAVIGATION, WITH MAPS AND ENGRAVING 394 (2d ed. 1859).

305. Nathan, *supra* note 304, at 48.

306. *United States v. U.S. Bank*, 1844, 8 Rob. (La) 262.

307. Nathan, *supra* note 304, at 48.

308. KILBOURNE, *supra* note 117, at 67.

309. *Id.* at 68.

310. *Id.* at 68-69.

311. *Id.* at 62.

312. *Id.*

313. CIVIL CODE, *supra* note 271, at 894.

314. O’Neal, *supra* note 288, at 324.

315. *Kimbal v. Blanc & al.*, 1829, 8 Mart. (n.s.) 386.

Louisiana failed to adopt a commercial code,³¹⁶ and together with other US states adopted the *lex mercatoria*,³¹⁷ which started to govern commerce in the region.³¹⁸ Hence, the commercial provisions of other US states slowly started to percolate into the law of Louisiana.³¹⁹ Activities of local courts and the decisions they rendered provided a guideline for entrepreneurs, and identified local commercial practices with those of other US states. Eventually, commercial law in Louisiana would continue developing through these fair and elastic means.³²⁰

V. COROLLARY: A LABORATORY FOR CONTINENTAL EUROPEAN AND COMMON LAW SYSTEMS

A look into the early American period in Louisiana provides a unique illustration of the struggle between the incorporation of the continental European and the common law systems. Codification of different areas of the law was considered early after the Purchase in Louisiana. This consideration involved a clash between continental European and common law principles.³²¹ People in Louisiana, as early as 1804, were making clear their interest in adopting one of the systems.³²² Inhabitants had a deep interest in solving this matter, and expressed it in pamphlets, newspaper editorial comments, written manifestos and instructions to members of the local legislature.³²³ Those manifestations were then visible in the initiatives and reactions of the local legislative, executive, and judicial powers.

In Louisiana, the first decisions on the adoption of provisions from different systems were taken in criminal law and procedure and in civil procedure. A group of inhabitants advocated the implementation of American law in the courts and another group advocated the continuity of the continental European court system (*n.b.* excluding criminal law).³²⁴

316. Louisiana never enacted a commercial code. The remaining states of the Union largely adopted provisions of the Uniform Commercial Code (UCC). A gradual adoption of the UCC took place in Louisiana. Even though articles 2 and 6 UCC are not applied directly in Louisiana, some of their dispositions have entered into the legal framework of the state. The adoption of the text of the UCC has been gradual in Louisiana during the past 30 years. Currently, Title X on commercial law may be referred to as the "Uniform Commercial Code." LA. REV. STAT. ANN. § 10:1-101 (Supp. 2009); Parise, *supra* note 225, at 29.

317. DARGO, *supra* note 139, at 297.

318. Groner, *supra* note 54, at 377.

319. See the illustration of early court decisions provided by Cross, *supra* note 128, at 414.

320. Robert Feikema Karachuk, *A Workman's Tools: The Law Library of Henry Adams Bullard*, 42 AM. J. LEGAL HIST. 160, 165 (1998).

321. See generally DARGO, *supra* note 139.

322. *Id.* at 33.

323. *Id.*

324. *Id.* at 222.

For example, some inhabitants welcomed jury trials in criminal cases, noting that the American criminal procedure had devices that protected better against an arbitrary authority; while other inhabitants preferred the uncomplicated forms of written petition in civil cases that the other system offered.³²⁵ In criminal law and criminal procedure the common law established a first bastion, and its principles prevailed. In civil procedure, at least during the first years, the terrain was shared between continental European and common law principles, although there was a preeminence of principles from the former. Daily life evolved in Louisiana, and Claiborne was forced to act because implementation could not have waited.³²⁶ Regulations in these areas had to be settled immediately, and were then followed by decision-making in matters of substantive law.³²⁷

In the area of civil law, continental European ideas established a bastion. Early, the inhabitants opted for those principles, perhaps due to cultural and economic interests,³²⁸ and to protect the property rights they had received during the French and Spanish periods.³²⁹ It seems as if local inhabitants wanted to follow continental European principles and in that way preserve the law and rights they previously had. However, those continental European ideas were not adopted blindly in Louisiana. John H. Tucker, former president of the Louisiana State Law Institute, provided an example of a selective adoption process:

In 1816 the Court decided that according to the civil law, expressed in the [Digest] of 1808, the perfect ownership of public roads was in the state. Livingston had argued that the State had only a servitude, analogous to the easement it had at common law. When Derbigny, a judge who decided the case, and Moreau [Lislet], who won it, and Livingston, who lost it, joined in writing the [Civil] Code of 1825, they adopted the rule of the common law that the state had only a servitude. They recognized that in a new country, largely frontier at the time, with change the order of the day, roads would not be permanently located, whereas the Romans, who originated the rule, built their roads to endure forever.³³⁰

Even though a Commercial Code was drafted, following to some extent continental European principles, the last bastion was won by the *lex mercatoria*. In commercial law, local inhabitants seemed to prefer the

325. *Id.* at 31-32.

326. *Id.* at 218.

327. *Id.* at 222.

328. Trahan, *supra* note 29, at 1024.

329. KILBOURNE, *supra* note 84, at 41.

330. John H. Tucker, *The Code and the Common Law in Louisiana*, 29 TUL. L. REV. 739, 749 (1955).

flexibility that the *lex mercatoria* provided. That flexibility would also enable local traders to have similar standing with traders from other nations and US states.

Codification endeavours in Louisiana were undertaken by a small group of drafters. Names of protagonists tended to recur in the *laboratory* that Louisiana provided: they are now all easily identified with codification. Drafters not only occupied positions as law givers, but some of them occupied positions in the judicial and executive branches. In addition, the drafters were representatives of both continental European and common law traditions. Some drafters were trained in the common law, others received a civil law education, while others were proficient in both systems. Drafters were also familiar with several languages, mainly the ones used in Louisiana legal discourse. This variety of skills, formation, and backgrounds resulted in an eclectic work. Therefore, the legal system that was produced in Louisiana during the early American period was quite eclectic.³³¹ Notwithstanding, the drafters reflected in their texts for Louisiana, especially in the 1820s, that they intended to follow guiding principles. In their report of 1823, the drafters of the civil, commercial, and procedural codes said that they recommended: “stating and defining the rights of individuals in their personal relations to each other, for giving force and effect to the different modes of acquiring, preserving and transferring property and rights, and for seeking civil redress for any injury offered to either.”³³²

331. Howe, *supra* note 49, at 79. This eclecticism may have provided grounding to the current system in Louisiana. Many consider Louisiana a traditional mixed jurisdiction where the predominant legal system is no longer pure, and the influence of the common law is sensed. See Vernon Valentine Palmer, *Introduction, in* LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 3, 4 (Vernon Valentine Palmer ed., 1999).

332. Livingston et al., *supra* note 264, at lxxxix.