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Entanglements in Legal History: Conceptual Approaches

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Entangled up in Red, White, and Blue: Spanish West Florida
and the American Territory of Orleans, 1803–1810 | 213–251



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Everywhere the Anglo-Americans settle, the lands become productive and progress is rapid.... They build their own cabins, cut down and burn trees, kill the savages or are killed by them, and disappear from the land either by dying or by giving it up. When a score of new colonists have, in that way, gathered in a place, a couple of printers appear, one federalist, the other anti-federalist, then doctors, then lawyers, then adventurers; they drink toasts, they choose a speaker; they constitute themselves a city; they vie with each other in the procreation of children. They vainly advertise vast territories for sale; they attract and cheat as many buyers as possible. They paint inflated pictures as to the size of the population, so as to arrive quickly at a figure of sixty thousand souls, ... and there is then one more star affixed to the pavilion of the United States!

PIERRE CLÉMENT DE LAUSSAT,
Memoirs of My Life (2003 [1803–1804]),
tr. A.-J. PASTWA, 9.

Introduction

“Entangled histories”, as Eliga Gould (citing Jürgen Kocka) noted, examine interconnected societies. [They] are concerned with “mutual influencing,” “reciprocal or asymmetric perceptions,” and the intertwined “process of constituting one another.”¹ Gould contrasts *entangled* histories, perhaps a little unfairly, with merely *comparative* histories. Although there is often little difference in practice between the two, comparative histories might, at least theoretically, ignore important trans-national or trans-territorial movements and influences. In contrast, entangled histories – with *histoire croisée* and other

* This chapter was originally written in 2011–2012; minor changes were added in 2013–2014. I want to thank those who commented on drafts of the paper, especially Ignazio Castellucci, Samuel C. Hyde, Jr., Richard Kilbourne, and Aniceto Masferrer. Any remaining errors are, of course, my own.

1 GOULD (2007) 766 (citing KOCKA, J (2003)). See Gould’s footnotes on related historiographical approaches and COHEN/O’CONNOR (2004).

relational approaches to historiography – can serve as antidotes to insular, frequently anachronistic nation- and state-centred histories.² Apparently local or internal developments may turn out to be instantiations, whether uniform or unique, of wider regional or even global trends. Communities and their cultures are revealed to be compound hybrids created by the complex diffusion of people, ideas, and institutions. By productively problematizing simpler narratives, such approaches can also be of great significance and utility to historical research on laws and norms.³

This article is a preliminary case study of legal and normative entanglement in Spanish West Florida – which stretched across the Gulf Coast of present-day Louisiana, Mississippi, Alabama, and Florida – between 1803–1810. Between the time of the Louisiana Purchase (1803) and the annexation of Westernmost part of West Florida by the United States (1810), the laws and norms of the Territory criss-crossed in various ways those of Spain and the United States. Indeed, the territory was, in turn, French, British, and Spanish before being annexed, in part, by the Americans. For the period under study here, and decades before, its settlers were largely Anglophone, while its laws were a variant of the Spanish colonial *ius commune*. This fact, “how an alien group ... adapted to living in a Spanish colony with Spanish law ... does not seem to have been a subject of intensive study.”⁴ This text is a small step in that direction.

West Florida had an especially close relationship with the area that would become the new American Territory of Orleans (1805), especially the city of New Orleans. Carved out of the vast Louisiana Territory purchased from France, the Territory of Orleans had its own complex history. Its population was still largely Francophone. In its first decade, its laws were already a gumbo of continental and Anglo-American ingredients. Together, the two territories sat at the precipice of the modern nation-state, of nationalism and popular sovereignty, of legal positivism and legal formalism. In both territories, the diffusion – direct and indirect, formal and informal, ongoing and sporadic – of the various laws and norms of natives and newcomers

2 See, e. g., WERNER / ZIMMERMANN (2006). Cf Ibid., 58 (on intermixing and hybridization).

3 In this paper, *laws* and *norms* refer to legal norms and social norms respectively, the former a subset of the latter. *Legality* and *normativity* refer, in turn, to legal normativity and social normativity.

4 GREENE (2008), 21

created intricate legal and normative hybrids. In both, there were complex and illuminating relationships between law and culture.

It has recently been argued that the ‘experiences [of the American South] need more frequently to be placed into comparative context.’⁵ My own comparative research, on both the past and the present, has attempted to investigate legal and normative mixtures and movements. Joining in particular the study of *mixed legal systems* and *normative* or *legal pluralism*, I’ve sought to place laws within the wider matrix of norms to provide a kind of descriptive, critical and constructive *deep focus* on lived normativity in all of its forms.⁶ I’ve referred to this as a project on ‘*hybridity and diffusion*’, a trans-disciplinary combination of comparative law, legal history, legal philosophy, and the social sciences. Like entangled history, this is perhaps less an heuristic tool than a way of seeing differently, of sensitivity to complexity and change. *Hybridity* here refers in the first place to legal or normative plurality, to complex origins and organization; it also refers to the complex relationship, not infrequently the gap, between expressed principles and actual practices. And while individuals are ultimately the most important, if often unintentional, norm-creators – as articulated by *critical legal pluralists* – my research concentrates on the approximate, but meaningful, aggregative legality and normativity of corporate communities and institutions. Accounts of hybridity are snapshots of a perpetual blending process generated by the ongoing, multidirectional *diffusion* of laws and norms. These mixtures of legal and social norms are always in movement across both space and time, with continuity provided by the weight and inertia of convention, of traditions and practices.⁷ Conducted with care, the result is a far more nuanced picture of lived legal and normative experiences. And it suggests

5 HADDEN/MINTER (2013), 8. On contextualising Louisiana’s legal history, see BILLINGS/FERNANDEZ (2001), who attempt to place it in the wider American context. But cf. DONLAN (2012), criticising the former for being insufficiently comparative. On the wider context, of ‘revolutionary borderlands’ and ‘crossroads of the Atlantic World’, see SMITH/HILTON (2010a) and VIDAL (2014) respectively.

6 *Deep focus*, as used in photography and cinema, establishes clarity in depth through lighting and sustained focus. Unlike ordinary images, it attempts to keep all of the objects in the frame in focus.

7 For my general approach (and citations), see DONLAN (forthcoming) and DONLAN (2011b). For legal history, see DONLAN (2010), DONLAN (2011a), and BROWN/DONLAN (2011).

that the relationship between legal consciousness and culture is, as with individual loyalties and identities, complex and constantly changing.

History and hybridity

As is well-known, the early nineteenth century was an important turning – or tipping – point in Western legal history. It saw the acceleration of the movement from “[m]ulticentric legal orders – those in which the state is one among many legal authorities” to “state-centered legal orders in which the state has at least made, if not sustained, a claim to dominance over other legal authorities.”⁸ The plurality of laws that had characterized Europe for centuries, the myriad jurisdictions and mediating institutions of the old regimes, was slowly giving way. Non-legal normativity was increasingly marginalized by legality. “Law increasingly became the standard by which all forms of disputing were measured.”⁹ While the diffusion of the laws of the Old World into the New World generated new hybridities and entanglements, colonialism was also central to the rise of common legalities. Colonial administration required a *common law*, eg English common law and Equity, the *Customs of Paris*. This development would feed back into the creation of uniform laws in the mother countries, towards legal unity, monism and centralism. All of this was part of an increasing level of criticism of legal inequality and restraints, of crown interference, and of religious influence and intolerance. The focus on legal positivism, on law-making and legal clarity, was linked to both the new powers of the state and demands for popular accountability. Throughout the West there was a gradual shift towards legislation, to clearer and more systematic law, and reforms in criminal law. More generally, the idea of a coherent, holistic *legal system* and a single dominant common law, the rationalization of traditional legal regimes, continued.¹⁰

In continental law, this was expressed in legislation, often codal, and subsequently in exegetical interpretation. Many nineteenth-century codes were attempts to create a set of laws that was authoritative, comprehensive,

8 BENTON (2002) 11. See also BENTON (2009).

9 MANN (1986) 1438.

10 This transition from considerable legal hybridity to greater legal unity also effectively created the modern distinction between *pure* and *mixed* legal traditions. It is, that is, the “hidden temporal dimension” in the categorization of mixed traditions. GLENN (1996) 1.

systematic, and internally harmonious. They were intended to abrogate previous or conflicting law and to unify the legal system into a national common law. While reflecting the laws of the *ancien régime*, both Romanesque and Germanic in origin, this was exemplified in France's *Code Civil* (1804). Modern nationalism and codification marked an important change from Europe's plural, juridical culture. It was a shift from European *iura communia* and local *iura propria* to national law, from persuasive to binding authorities, from open to closed legal systems, and from judges and jurists to legislators. This movement included Anglo-American law as well. Jeremy Bentham and John Austin echoed this concern for legal uniformity and clarity. This was linked, in Britain, to parliamentary supremacy and the rise of statute law. American lawyers were also more receptive to modest codification. If this was especially true in procedural law, codification of private law also occurred. Still more importantly, over the course of the century, in both Britain and the United States, persuasive precedent hardened into binding precedent.¹¹ Legal education and law reporting improved.¹² A clearer appellate hierarchy of courts was established. The archaic writ system was relaxed in favor of general pleading, bringing a new focus on substantive, rather than procedural, law and an attempt to limit judicial subjectivity. Common law and equity were fused and other jurisdictions enveloped by the courts of common law.¹³ If this did not entirely eliminate, in fact, either legal or normative hybridity, “[b]y the end of the nineteenth century law can hardly be thought of except in its formal or professional sense.”¹⁴

The histories of Louisiana and Spanish West Florida, especially the Westernmost part of West Florida, are deeply entangled. In her colonization of the Americas, the Spanish claimed large sections of southeastern North America as early as the sixteenth century as *La Florida*. It did not, however, permanently settle much of the territory. In 1682, Robert de La Salle (1643–87) claimed large sections of North America, west and south of the British

11 Usually referred to as *stare decisis*, where a single judicial decision is binding on the basis of the court's authority alone, rather than persuasive on the basis of equitable interpretation or with the idea that consistent judicial decisions represent a legal *communis opinio*. See EVANS (1991) and STEIN (2003).

12 See DONLAN (2005).

13 I referred to this as “sausage-making” in DONLAN (2010) 290.

14 ARTHURS (1984). See also ARTHURS(1985) and HARTOG (1985).

colonies, for the French. The Perdido – or *lost* – River, now dividing the American states of Alabama and Florida, was eventually agreed to be the boundary between French and Spanish territories. In the vast French *Louisiane*, the most important development was that of the *Île d'Orléans* (the *Isle* of Orleans), or New Orleans, near the mouth of the Mississippi River. The French introduced the *Customs of Paris*, a Romano-Germanic folk-law linked to the site of the French throne, as its common law. A Superior Council had jurisdiction over most matters, both under French direct rule (1712–17, 1731–62) and indirect rule through the Company of the West (1717–32).¹⁵ Inevitably the law in practice, administered by authorities with both military and judicial competences, differed from its application in France. Of course, even in the *ancien régimes*, “[a] high proportion of the innumerable conflicts of everyday life” were not “settled by official proceedings or ... the judicial system”.¹⁶ Both at home and abroad, social regulation was a *métis*, a complex hybrid of legality and normativity. Indeed, it was precisely this period that Voltaire (1694–1778) could complain, of France, that “[a] man that travels in this country changes his law almost as often as he changes his horses.”¹⁷

French “rogue colonialism” ended in 1763 with the *Treaty of Paris* (1763) and the end of the *Seven Years War* (the *French and Indian War*, 1756–63).¹⁸ That war had pitted, among many others, Britain against France and Spain. The Treaty ceded French territories east of the Mississippi, excluding the Isle of Orleans, to Britain. Spain also ceded Florida (presumably all the way to the Mississippi) to Britain in exchange for Cuba, which had been captured by the British during the war. In addition, under the secret *Treaty of Fontainebleau* (1762), French territories west of the Mississippi, including the Isle of Orleans, were formally transferred to Spain.¹⁹ The Treaty, which also obscured long-standing border disputes between France and Spain on *Louisiane*’s western boundary, was only made public in 1764. Actual possession of Louisiana by the Spanish took several years, in part due to

15 JOHNSON (1989). See DART (1919).

16 CASTAN (1983) 219. See also RUFF (2008).

17 ‘Custom – Usages’ AROUET (1901) (no pagination).

18 DAWDY (2008). An historical anthropologist, Dawdy’s discusses *mētis*, *creolization*, and *hybridization* at *Ibid*, 5–6. On the last of these, however, she defines it in its older sense of a complex singularity.

19 See the overview of ‘The Spanish Regime’ in BEERS (2002).

resistance of the French Louisianans. Spanish law was imposed, however, with the French slavery laws of the *Code Noir* (1685), by the Irish-Spanish General Alexandro O'Reilly (1722–94) and his successors.²⁰ Other administrative alterations were made, including the building of a *Cabildo*, the “Spanish-style city government”, in New Orleans.²¹ The population and culture of Spanish *Luisiana* remained, as did much of its judiciary, Franco-phone. This included significant numbers of French-Canadian Acadians who arrived in the aftermath of British victory in the Seven Years War. This continental *ius commune*, rooted in rich Romano-Germanic roots and significantly altered by colonial conditions, created a complex hybrid legality and normativity throughout Louisiana and Florida. During Spanish rule, its formal laws co-existed with other social/legal practices, especially away from the metropole.²²

For its part, Britain subsequently divided Florida. *West Florida* was separated from *East Florida* along the Apalachicola River, to the east of the Perdido and the earlier French-Spanish boundary.²³ The northern boundary was set at the 31st Parallel, but remained fluid and contentious, subsequently extending north (32 22 north) from the Yazoo River to the Chattahoochee River. It also maintained its own laws. Many Anglophones moved into the Territory during British rule. As the American war (1776–83) approached, this population was primarily loyalist. It rejected, for example, the invitation of the Continental Congress in 1774 to send delegates. During the war, a small force of Americans even attacked in 1778 in the so-called *Willing*

- 20 This was once the subject of debate, but the general consensus is that Spanish law was imposed. SCHMIDT (1841–42). See TUCKER (1933–34); REYNOLDS (1971); CARRIGAN (1972). Note that the Spanish Governor of West Florida from May 1871–November 1782 was Arturo O'Neil y Tyrone (1736–1814).
- 21 DIN (1996b) 143. Note the cases of Jean Baptiste Villard and Julian Jalio – both “free mulattos” – in the Archives of the Spanish Government in West Florida, xvi.173 et seq and xvi.319 et seq. See also PRIESTLEY (1922).
- 22 Some of these customary practices were rooted in earlier French laws. Hans Baade has, for example, investigated the persistence of marriage contracts rooted in the *Custom of Paris*. BAADE (1979). See also *Ibid*, 58. This “*living law* of Louisiana matrimonial property”, perhaps *praeter legem* rather than *contra legem*, persisted in “notarial jurisprudence”. *Ibid*, 6. See also YIANNPOULOS (1983) 100 (using *law in action*). Too much made be made, however, of this limited example.
- 23 The capital of the eastern colony remained St Augustine; the capital of the west was Pensacola.

Expedition. More importantly, in 1779–81, the Spanish allies of the Americans successfully invaded the territory from *Luisiana*. Led by its Spanish Governor, Bernardo de Galvez (1746–86), they quickly captured Baton Rouge, Natchez, Mobile, and Pensacola in turn.²⁴ After the war, Britain ceded both Floridas to Spain in the *Treaty of Paris* (1783). West Florida was divided in several districts. The Baton Rouge District was further sub-divided into smaller units, ie Baton Rouge, Feliciana, Saint Helena, and Chifoncté. And in both of the Floridas, Europeans and Africans, free and slave, remained outnumbered by the native population.

Settlement patterns in West Florida were not, however, very different under the Spanish than they had been in the previous two decades of British rule. The Spanish developed the area as a buffer against American expansion. But to so, it found it necessary to continue to encourage Anglo-American settlement. The loyalty of these citizens was rooted in property laws, both of land and slaves.²⁵ As Andrew McMichael puts it,

Spain provided what Britain and the United States could or would not: a centralized government willing to at in residents' interests as long as those residents displayed a reciprocal loyalty. This loyalty was cemented by the Spaniards' willingness to accommodate the Anglo-Americans' quest for the main chance – to obtain and cultivate land through a liberal system of grants. Given that the same processes were at work in the British colonies during the same period suggests that for Americans, including those who migrated to West Florida, land and national loyalty went hand in hand.²⁶

Spanish colonial laws applied, though administered separately from Louisiana and with some local variation.²⁷ For example, in the Natchez District, “English was permitted in the courts, and English local government customs were followed from the beginning of Spanish rule.”²⁸ But the lack of clarity

24 HAARMANN (1996).

25 “Throughout their lives, individuals negotiate complex entanglements of multiple identities and loyalties. Identity is a socially constructed sense of self. All individual human beings function in the world with several (or even many) personal identities.” SMITH / HILTON (2010), 346.

26 McMICHAEL (2008) 16. While McMichael covers the region as a whole, he pays particular attention to the jurisdiction of Baton Rouge. See also CUMMINS (1988).

27 HOLMES (1967).

28 HOLMES (1963) 187. An earlier Anglophone historian had written that “[t]he yoke of [the Spanish] government always sat easy on the neck of the Anglo-Americans, who lived under it, and they still speak of Spanish times, as the golden age.” [INGRAHAM] (1835) 263–264 (cited in HOLMES (1963) 201).

in the boundaries between American and Spanish territories led to persistent disputes, the ‘West Florida Controversy’, between the former allies. As an indication of things to come, in 1791, future American President Thomas Jefferson (1743–1826) wrote George Washington (1731/2–99), then President, that American settlement in Spanish regions might provide “the means of delivering to us peaceably, what may otherwise cost us a war.”²⁹ The *Treaty of San Lorenzo* (*Pinckney’s Treaty* (1795)) eventually established the 31st parallel as the boundary. This required Spain to surrender Natchez. Indeed, in its pattern of Anglophone settlement leading to Spanish loss, “the Natchez district served as a prototype for West Florida, as that region in turn did for Texas and California.”³⁰ In West Florida, Anglophones continued to be attracted to the area on the basis of low taxes, generous land grants, and *de facto* religious tolerance.³¹ Indeed, the last of these was “greater ... than was commonly allowed in the United States.”³²

The essential unity?

In 1800, however, the secret *Treaty of San Ildefonso* formally returned *Louisiana* to France, with Spain retaining both East and West Florida, the capital of the latter moving to Pensacola. This included the former French territory to the West of the Perdido. For its part, the United States hoped to buy both New Orleans and the Floridas and to expand all the way to the Gulf of Mexico. Instead, they found that they were able to obtain, through the *Louisiana Purchase* (1803), the vast Territory of *Louisiane*. The addition of Louisiana doubled the size of the United States. It was a critical component of America’s future expansion. But it was also problematic. Both the Americans and Spanish saw the division of the area as precarious for their respective settlements and interests. “New Orleans without Florida made no sense and would be difficult, perhaps even impossible, to hold.”³³ The

29 JEFFERSON (1861) 2 April 1791. “I wish a hundred thousand of our inhabitants would accept the invitation.” Ibid. Note, however, that “Jefferson also feared that settlers within the United States’ own limits were capable of transferring their allegiance in other, less welcome directions, including to the crown of Spain.” GOULD (2007) 781.

30 COX (1918) 41.

31 HOLMES (1973).

32 Ibid., 259.

33 DARGO (2009) 6.

‘essential unity’ of Louisiana and West Florida was severed.³⁴ Boundary disputes involving the Floridas, as well as western Louisiana, would continue for two decades. The Spanish claimed, and they were almost certainly correct in claiming, that West Florida was not ceded to France in the *Treaty of San Ildefonso*. It had also understood that France would not cede Louisiana to a rival. But the curiously-worded Third Article of the *Treaty of San Ildefonso* created a hostage to fortune that extended the ‘West Florida Question’. The Article read:

His Catholic Majesty promises and engages in his part, to retrocede to the French Republic the colony of province of Louisiana with the same extent that it now has in the hands of Spain, *that it had when France possessed it*; and such as it should be after the treaty subsequently entered into between Spain and other states.³⁵

The French had, of course, held both Louisiana and what became West Florida between the Mississippi and the Perdido Rivers. The Spanish, having received that area, along with East Florida, from the British saw things differently. For their part, the United States claimed that the Purchase included all French territory prior to 1763.³⁶ This included considerable territory at the west edge of *Louisiane*, leading to the creation of a large neutral area (1806) between Spain and the United States in which settlement was prohibited.

The Spanish had continued to govern in *Louisiane* until the arrival of French Governor Pierre Clément de Laussat (1756–1835) in 1803, shortly before transferring it to the United States after the Louisiana Purchase. In the brief period of French rule, Laussat eliminated existing judicial structures but left the existing laws unaltered.³⁷ While Laussat respected the

34 Cox (1918) 3.

35 Italics added. The *Treaty of San Ildefonso* is available at <http://www.napoleon-series.org/research/government/diplomatic/cildefonso.html>. See also COX (1918) 82.

36 Jefferson himself later wrote an essay on the subject of ‘The Limits and Bounds of Louisiana’. JEFFERSON (1817). This question, with respect to land titles, would subsequently arise in the American courts. In *Foster and Elam v. Nelson*, the Supreme Court simply accepted the decision of the other branches of government, ie “a question ... respecting the boundaries of nations, is ... more a political than a legal question”. 27 US 253, 1829 WL 3115 (U.S.La.) 39. That decision followed that in the Louisiana case of *Newcombe v. Skipwith*, 1 *Martin’s Reports* 151. Fulwar Skipwith was the ‘Governor’ of the briefly independent ‘State of Florida’. See also BURNS (1928) 568–569 (listing five additional cases) and BURNS (1932).

37 LEVASSEUR (1996) 608. See MOREAU LISLET/CARLETON (1820) xxi.

Americans, and indeed continued to live in the territory for the next few months, he also wrote that

Everywhere the Anglo-Americans settle, the lands become productive and progress is rapid. There is a special class among them engaged in the occupation of penetrating all unsettled districts for fifty leagues ahead of the oncoming populations.... They build their own cabins, cut down and burn trees, kill the savages or are killed by them, and disappear from the land either by dying or by giving it up. When a score of new colonists have, in that way, gathered in a place, a couple of printers appear, one federalist, the other anti-federalist, then doctors, then lawyers, then adventurers; they drink toasts, they choose a speaker; they constitute themselves a city; they vie with each other in the procreation of children. They vainly advertise vast territories for sale; they attract and cheat as many buyers as possible. They paint inflated pictures as to the size of the population, so as to arrive quickly at a figure of sixty thousand souls, ... and there is then one more star affixed to the pavilion of the United States!³⁸

When the Americans gained control of *Louisiane*, they divided it into two regions. The *Territory of Orleans* was largely the modern state of Louisiana minus West Florida between the Mississippi and Pearl rivers. The remaining *District of Louisiana* spread across the continent. It had always, however, been thinly populated. There Anglophone settlers would relatively easily envelop the existing French-speaking population. Its laws were as easily altered, at least on the surface.³⁹

In any event, American control of the Orleans Territory brought its existing common laws in contact with Anglo-American laws, especially the dominant laws of the courts of common law.⁴⁰ Governor William CC Claiborne (c1772–5-1817) sought, with President Jefferson, to navigate this meeting of legal traditions.⁴¹ By an Act of Congress in March of 1804, the Americans initially maintained the established laws where they were not inconsistent with the Act itself. Over the course of the decade after the Louisiana Purchase, however, a sectional *mixed jurisdiction* of continental private or civil law, Anglo-American criminal law, and American public law would be established. This encounter has long been characterized as a “clash of legal traditions”, most notably in George Dargo’s *Jefferson’s Louisiana*. But even Dargo has recently suggested a more subtle complexity and continuity

38 DE LAUSSAT (2003) 9.

39 ARNOLD (1985).

40 See PALMER (1999) and PALMER (2005).

41 See BROWN (1956).

in Louisiana's laws.⁴² "Hybridity", he wrote, "produced a rich interaction – call it conflict, contestation, or negotiation – from within the mix of languages, cultures and legal traditions that the Americans found in their first true colony."⁴³ The diffusion of the various laws and norms of natives and newcomers – voluntary, involuntary, or indifferent – created an intricate legal and normative hybrid. This gentler, more complex and accommodating analysis serves us better than the stark imagery of a 'clash'. Indeed, both the continental and Anglo-American laws of the nineteenth century differ in significant respects from their common modern forms. The former was, for example, still dominated by the flexible methods of the *ius commune* and pre-modern digests that acted as restatements of the law; the latter had not yet adopted a binding system of *stare decisis*.⁴⁴ As Robert A. Pascal put it, the law of the Orleans Territory was, in contrast to that of contemporary France,

a law, or legal system, much closer in thought and method to the Anglo-American law of the time. The Romanist-Spanish law certainly contained much more legislation than the Anglo-American, but the opinions of the commentators on the Roman and Spanish legislation occupied a position similar to those of the judges in Anglo American law.⁴⁵

Legal positivism was not yet dominant. The formalism of, for example, the French exegetical school hadn't yet secured a preeminent position even in France.⁴⁶ The legal and normative hybridity of Spanish West Florida was, as we'll see, a still more subtle affair.⁴⁷

42 See DARGO (2010). First published in 1975 and revisited in 2010, Dargo's work remains the classic work on the founding of Louisiana's mixed jurisdiction. The idea that the meeting of the two legal traditions was confrontational is, however, much more long-lived. See, e.g., BROWN (1957). That view has also been challenged in recent years. Richard H. Kilbourne, Jr, for example, stressed continuity as well as a constructive role for Jefferson and Claiborne in the creation of Louisiana's legal hybridity. See KILBOURNE (2008).

43 DARGO (2009) 30. Dargo specifically cites 'post-colonial' scholar Homi K. Bhabha at *Ibid.*, 29–30. I was not aware of this as I began to employ the term. Cf the discussion of "middle ground", based on WHITE (1991) in DRUMMOND (2005) 906–910.

44 For a brief, critical discussion of the *New Louisiana Legal History*, see DONLAN (2012, suggesting that, as a programme, this approach is too inattentive to comparative legal history).

45 PASCAL (1984) 353.

46 See KILBOURNE (2008) xvii and 42.

47 Other ongoing debates in Louisiana legal history include:

(i) the status – ie, digest or modern code – of the 1808 redaction

(ii) the character – whether French or Spanish – of the *Digest* and the role of the 1808 redactors

In the Territory of Orleans, Spanish private law continued in practice.⁴⁸ Not long after taking up the position as the first judge of the Superior Court of the Territory, New Yorker John B Prevost (1766–1825) confirmed that the *common law* of the territory, *rather than the law of the Anglo-American courts of common law*, was still the law in force.⁴⁹ In any event, the substance of this Orleanian law could be difficult to locate. In this context, the Legislative Council of the Territory authorized redaction as early as 1805. In addition, in 1806, they met and created a bill entitled ‘An Act declaring the laws which continue to be inforce [sic] in the Territory of Orleans, and authors which may be recurred to as authorities with the same’. This included:

1. The *Recopilación de Castilla* (1567 and 1777);
2. The *Autos Acordados* (1745);
3. *Las Siete Partidas* (the law of the Seven Parts drafted 1256–1263 under Alfonso the Wise but not promulgated as law until 1343);
4. The *Fuero Real* of Castile (1254, also under Alfonso the Wise);
5. The *Recopilación de Leyes de los Reynos de las Indias* (1661);
6. The *Leyes de Toro* (1505);
7. The Royal Orders and Decrees which had formally been applied to Louisiana, all as aided by the authority of reputable commentators admitted in the courts of Justice.⁵⁰

These Spanish laws were supplemented by the *corpus iuris civilis*, “particularly as interpreted by the French commentator [Jean] Domat”.⁵¹ And commercial law, as laid out in the bill, was already a hybrid of general Spanish laws and specific Anglo-American doctrine. The bill read that

(iii) the significance of the ‘De La Vergne volume’ of the 1808 *Digest*
 (iv) the character – whether continental or Anglo-American – of its jurisprudence
 (v) the general character – whether natural law-oriented or positivist – of Louisiana law
 On (i)–(ii), (iv)–(v), see KILBOURNE (2008); on (i)–(ii), see also DARGO (2010). On (iii), see CAIRNS (2009). For a similar list of debates, cf BILLINGS (1983) 195.

48 RABALAIS (1982), especially 1504–05. See also VAZQUEZ (1982).

49 F.L. Gonzales, Senior translator of the Archives of the Spanish Government in West Florida, noted there, after a document from the Orleans Territory bearing the signature of Moreau-Lislet, that this “saved the Civil Law for Louisiana.” xvii.78.

50 FELIÚ/KIM-PRIETO/MIGUEL (2011) 11. Late in the article, the authors more accurately date the *Recopilación de Leyes de los Reynos de las Indias* to 1680. The original text of the bill also referred to both *habeus corpus* and trial by jury, “the two most important principles of the judiciary system of the common law” and to numerous laws relating to commerce. It’s available in CARTER (1940).

51 FELIÚ/KIM-PRIETO/MIGUEL (2011) 11.

in matters of commerce the ordinance of Bilbao [1757] is that which has full authority ... [and] 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.⁵²

While Anglo-American common law would have fared worse, this hodge-podge of laws, many unavailable in either French or Spanish, may have frightened Claiborne.⁵³ Whatever the cause, he vetoed the bill. This led to the much-quoted *Manifesto* issued by the Legislative Council in defense of their established private law.⁵⁴ Written in an impassioned style, the *Manifesto* likely had mixed motives: the stability of property and politics and the possibility of expediting statehood, as well as a genuine concern about the substance of the law and the culture to which it was attached. If the true motivations of the advocates of the common laws of Orleans and England cannot easily be divined, some amount of low-grade anxiety clearly existed.

In any event, the legislature subsequently decided to redact its private law, the Governor assented, and the *Digest of the Civil Laws now in force in the territory of Orleans* was promulgated in 1808. The completed text, prepared by Louis Casimir Elisabeth Moreau-Lislet (1766–1832) and James Brown, immigrants from Saint-Domingue (present-day Haiti) and Kentucky respectively, would certainly have impressed the Governor more than the 1806 miscellany. Prepared in French and only later translated (rather poorly) into English, it drew much of its text from recent French materials, including both the *Code Civil* (1804) and its *projet* (1800).⁵⁵ But this Francophone form

52 In CARTER (1940).

53 The complexity of English doctrine and jurisprudence (judicial decisions), including the absence of the modern doctrine of binding precedent, made knowledge of it difficult. Bentham wrote that “we are told that we have *rights* given to us, and we are bid to be grateful for those rights: we are told that we have *duties* prescribed to us, and we are bid to the punctual in the fulfillment of all those duties.... Hearing this, we would *really* be grateful for these same *rights*, if we knew *what* they were, and were able to avail ourselves of them: but, to avail ourselves of rights, of which we have no knowledge, being in the nature of things impossible, we are utterly unable to learn – for what, as well as to whom, to pay the so-called-for tribute of our gratitude.” BENTHAM (1829).

54 See DARGO (2010) 236–7. See the Manifesto, in French and English, in CARTER (1940) 643–657.

55 Cf. François Xavier Martin (1762–1846), who later wrote that “[a]lthough the Napoleon Code was promulgated in 1804, no copy of it had as yet reached New Orleans; and the gentlemen availed themselves of the project [sic] of that work, the arrangement of which

appears largely consistent with the existing substantive law of the Territory.⁵⁶ More a restatement rather than a modern code, it was neither merely doctrine nor declaratory. There was no wholesale abrogation of laws, but those that contradicted the *Digest* were annulled.⁵⁷ In addition, the sources of law resemble those of the *projet* rather than those in the *Code Civil*. For example, Article 1 – in Chapter One, ‘Of Law and Customs’– read, in English, that “[l]aw is a solemn expression of Legislative will, upon a subject of general interest and interior regulation.”⁵⁸ But Article 21, in Chapter IV on ‘the Application and Construction of Laws’ also added that

[i]n civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent.⁵⁹

The *Digest* was thus theoretically open where the *Code Civil* was, in theory, closed.⁶⁰ Once again, we might suspect mixed and even contradictory

they adopted, and mutatis mutandis, literally transcribed a considerable portion of it.” MARTIN (1827) 291.

- 56 See TRAHAN (2002–2003) 1036–7. The principal advocate of this view is Robert Pascal, who called the *Digest*, “a Spanish girl in a French dress”. PASCAL (1998) 303. Pascal was one of the antagonists, with Rodolfo Batiza, in the most heated debates of Louisiana legal history. The former, a Francophone Louisianan, argued that the *Digest* was substantially Spanish, the latter, a Mexican jurist resident in Louisiana, that it was French. See especially BATIZA (1971) and PASCAL (1972). Forty years ago, this was described as a “tournament of scholars” in SWEENEY (1972). See also YIANNPOULOS (1983) 100–103 and LEVASSEUR/FELIÚ (2008). It’s essential to note that a detailed examination of substantive law, both in books and in action, would need to be undertaken to confirm this. This has been suggested by, among others, Vernon Palmer in PALMER (2003b). In addition, the French form may have led those more familiar with French than Spanish to approach the *Digest* differently; this is obviously the story for Anglophones judges throughout Louisiana legal history.
- 57 Cf. YIANNPOULOS (1983) 102. On modern views of codification in continental private law, especially the French, see BERGEL (1988).
- 58 *Digest of 1808*, Book I, Title I. The *Digest* is available online through the *Center for Civil Law Studies* of the Paul M Hebert Law Center of Louisiana State University (<http://www.law.lsu.edu/index.cfm?geaux=digestof1808.home&v=en&t=005&u=005#005>). Article 3 noted that “[c]ustoms result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence acquired the force of a tacit and common consent.” *Ibid*.
- 59 *Ibid*. See TÊTE (1973). As Tête noted, the *projet* was also close to the approach suggested by Jean-Étienne-Marie Portalis (1746–1807), one of the four redactors of the *Code Civil*. See also LEVASSEUR (1969).
- 60 Vernon Palmer has argued that the designation of the redaction was changed from a *Code* (understood by the drafters in the new French style) to *Digest* (akin to the older, still

motives, not only between Anglophone and Francophones, but between the different legal actors and branches of government involved in the codification process.⁶¹ And if the hyper-positivism of the exegetical school is not embraced, the *Digest* nevertheless appears as a substantial shift towards positive laws in contrast to either the rule of jurist's doctrine or judge-made law. Indeed, this is all the more remarkable given that the local community had had little legislative experience under its earlier common law. Over time, beyond the period examined here, the French form may have led inevitably, if imperceptibly, to reception of French substance, a process accelerated by the subsequent codification of the 1820s.⁶² The same process would later occur through English, not least through a number of 'false friends' between English and French.

The jurisprudence of the courts, both before and after the *Digest*, also showed continuity with the law before the arrival of the Americans.⁶³ At least in private law. There was little novelty in the *Digest*. The radical positivism of the *Code Civil* was almost entirely absent. But the Territory would also develop a unique, modern sectional mix of laws and legal institutions, the latter bearing the imprint of Anglo-American structures. The local substantive private laws were filtered through hybrid Anglo-Spanish procedures. The Practice Act of 1805 drew on both legal traditions.⁶⁴ If its content was more liberal than its American analogues, the breadth of its provisions left considerable discretion to the courts. These courts were also quickly administered by Anglophone judges untrained in the *ius commune*, on the basis of the arguments of ever-larger numbers of Anglophone advocates.⁶⁵ In the decades ahead, Louisiana's legal procedures would become increasingly Anglicized. And, as early as 1805–6, criminal law was relatively easily converted to that of Anglo-American

common meaning of 'code') at the last minute, perhaps reflecting an anxiety about adopting the new French approach. They – the legislature and the Bar? – were defending their "acquired legal culture" and "preferred the freedom of the open spaces and fluid, plural sources of Spanish, French, and Common law." PALMER (2011) 34, 33.

61 Rodolfo Sacco's 'legal formants' approach might be useful in this analysis. See SACCO (1991a) and SACCO (1991b).

62 PALMER (2003a). See also PARISE (2012).

63 KILBOURNE (2008) chapters 2–3 and TRAHAN (2002–2003) 1038–45.

64 TUCKER (1932–33).

65 See FERNANDEZ (2001), especially chapter 2. See also GASPARD (1987) and LAMBERT (1992).

common law.⁶⁶ Trial by jury and *habeus corpus* were also received. A brief redaction of the Anglo-American law of crimes, authored by James Workman (d1832) on the basis of Federal legislation, was established for the Territory. This was supplemented by an official commentary: Lewis Kerr's *An exposition of the criminal laws of the territory of Orleans* (1806). That work would remain an important legal text for the following half-century.⁶⁷ Both Workman and Kerr were Irishman trained in the common law. Criminal procedures were immediately and thoroughly anglicized. Commercial law, it should be added, would change more slowly, but would, over time, align more closely to wider American laws. Three decades later, Alexis de Tocqueville (1805–59) would write that “[t]he two legal systems face each other there and are slowly amalgamating, as the peoples are also doing.”⁶⁸

Throughout this period, the laws of West Florida continued largely unchanged. As a result, they began to differ from those of the Orleans Territory where Anglo-American law was explicitly received. But the two territories were entangled in a number of other respects. American arrivals had continued to supplement earlier British settlements. Anglophones established in New Orleans also owned extensive properties in West Florida, especially that area between the Mississippi and Pearl Rivers. Many of those of both sides of the border sought to use their knowledge of the territories and their connections in both to further their interests. Some went further. As in other parts of the borderlands, some resorted to violence.⁶⁹ In the same year as the Louisiana Purchase, a minor revolt was led by the adventurer Reuben Kemper (1770–1826).⁷⁰ It was quickly extinguished by the French Governor of Spain's Baton Rouge District, Carlos Louis Boucher de Grand-Pré (?–1809) and the local Anglo-Spanish militia, but appears to have involved a number of important Anglophone Orleanians. This was part of a much larger pattern of frontier filibustering.⁷¹ The most important attempt involved former Vice-President of the United States, Aaron Burr (1756–1836):

66 Cf. LÓPEZ-LÁZARO (2002). In a number of articles, John Langbein has explored the relatively recent origins of Anglo-American criminal law. See, e. g., LANGBEIN (1978).

67 BILLINGS (1991). See BILLINGS (1997).

68 DE TOCQUEVILLE (1969) 271n2. He also suggested that the French might look to Louisiana's experience with the jury. *Ibid.*

69 See CUSICK (2011).

70 McMICHAEL (2002). See generally COX (1918).

71 From 1776–1814, for example, there were no less than seven filibustering attempts in the period in West Florida alone. McMICHAEL (2008) 79.

Burr planned to use the conflict as a lever for prying the western states from the Union, as an occasion for liberating all of the Spanish provinces, or as an excuse for the invasion of Mexico. No one, not even Burr, knew for sure which it would be.⁷²

He was unsuccessful, not least because of the second thoughts of his co-conspirator, General James Wilkinson (1757–1825), the commander of the American Army, who revealed the conspiracy to protect his own position. Both were linked to many of the new Anglophone elites of the Orleans Territory.⁷³ Wilkinson escaped prosecution. The event led to numerous arrests and trials, as well as an attempt to suspend *habeus corpus*.⁷⁴

A number of other critics of Spanish rule, many of them Irish, were involved. For example, before drafting the criminal law of the Orleans Territory and becoming a judge in the ‘County of Orleans’ (1805–7), Workman had recently written a play (1804) critical of Spanish law there.⁷⁵ With Kerr, the writer of the commentary on this criminal law, Workman was unsuccessfully prosecuted for his role in the conspiracy. Both were linked to the *Mexican Association* of New Orleans, whose members wished to invade Mexico and to seize it from the Spanish.⁷⁶ The creator of that society was another Irishman, Daniel Clark (1766–1813). Clark was an American consular agent in New Orleans, an associate of Jefferson, and a land speculator with considerable property in West Florida.⁷⁷ A delegate of the new Territory to Washington, he was later a member of its Legislative Council. There appear to be numerous links to Kemper, Wilkinson, and Fulwar Skipwith (1765–1839), the Governor of the short-lived ‘State of [West] Florida’.⁷⁸ Clark was also an enemy of Claiborne. He fought a duel with the Governor in 1807 in the disputed Spanish territory, wounding Claiborne in the leg.⁷⁹ More generally, the failure of the Kemper revolt and

72 DARGO (2010) 90.

73 See the links between Wilkinson, Edward Livingston, Clark, and Juan Ventura Morales (1756–1819), intendant of West Florida. ABERNATHY (1998) 280–281.

74 DARGO (2010) 97–98 et seq.

75 The Irish-born, London-trained Workman had emigrated to the United States just after the turn of the century. He wrote the play before moving to Louisiana. WATSON (1970).

76 Unlike Clark, both Workman and Kerr were allies of Claiborne.

77 URBAN ALEXANDER (2010). Clark counselled Jefferson “that the boundaries claimed by the Spanish were valid and that West Florida was firmly a Spanish possession.” McMICHAEL (2008) 59. See *Ibid.*, 58 et seq. See also Clark’s letter to Jefferson (8 September 1803) on Louisiana law, included in CARTER (1940).

78 See also WATSON (1970) 258 and McMICHAEL (2010).

79 CARRIGAN (1972) 225. Indeed, dueling, an extra-legal normative order rooted in concepts

the Burr Conspiracy seemed to question the loyalty of, respectively, West Florida's Anglophones and the Orleans *Creoles*. But the security of property may have been far more important than loyalties to cultures and legal traditions.⁸⁰

The widespread belief in Anglo-exceptionalism, in law and beyond, is well-known and long-lived. Accounts of continental laws have long suffered from a legal variant of *la leyenda negra*, the *black legend* of Anglophone historiography that painted Spanish colonialism as inherently tyrannical, corrupt and inefficient.⁸¹ As often as not, this scholarship conveys the unexamined prejudices of its proponents. Contemporary historians have been somewhat kinder to the laws of the Spanish in North America. In discussing the legal culture of northern New Spain – i. e., Texas and New Mexico – Charles Cutter underscored the general equity of Spanish colonial law, the *derecho indiano*. He argued, too, that it “often served as a legitimate expression of popular values”.⁸² Writing on crime and justice in Spanish Louisiana, Derek Kerr has written that “charges of corruption and inefficiency in the Spanish Courts are more a product of black legend historians than of actual court practice”.⁸³ And McMichael has written, in the context of West Florida, that:

The Spanish concept of *derecho vulgar*, or the local interpretations and variations on Iberian and New World law, certainly had more impact on locals. Judges needed to distinguish between *ley*, or written law, and *derecho*, what might loosely be termed ‘justice.’ *Derecho* could be found in a mixture and meeting of written law, the experience of judges, customs, and local community sensibilities. Local customs and customary laws were possibly more relevant to the everyday life of West Floridians, because customary laws derived from loyal practice – practices that eventually gained the force of law.⁸⁴

of personal honour, was common in New Orleans; it is usually, however, attributed to its Creoles.

80 For Louisiana and West Florida respectively, see KILBOURNE (2008) 10 and McMICHAEL (2008) 99.

81 WEBER (1992) 6–7.

82 CUTTER (1995), 43.

83 KERR (1993) 198. Kerr’s study included West Florida. WC Davis has written that “[d]espite a few American complaints, in 1804 justice in West Florida was more equitable than in most places.” DAVIS (2011) 17. On Spanish law in the region, see also DART (1929); DART (1925); PORTEOUS (1934).

84 McMICHAEL (2008) 38. See *Ibid.*, 85.

For most of the inhabitants of West Florida, such *low justice* was more significant than all of the volumes of the *ius commune*. Of course, such discretionary justice, adjudicated on the basis of unwritten community norms, was unique neither for the period or the Spanish tradition. Stuart Banner suggests, for example, something similar for the Francophone residents of Upper Louisiana.⁸⁵

Law was no less complex in West Florida, especially among its minor judicial officers, the *alcades* and *syndics*.⁸⁶ These elected, mediatory and largely discretionary magistrates typically lacked legal training. They had little access, too, to the wide variety of Spain's municipal and colonial laws or juristic doctrine. Their duties, as laid out by the colonial Governor of West Florida, Vincente Folch (1754–1829) in 1804 were extensive, in general comparable to American and English justices of the peace.⁸⁷ Magistrates were to keep records on residents, to monitor settlement and travel, slavery, and Indian trade.⁸⁸ They were to assist the militia, maintain roads, monitor timber harvests, oversee taverns and similar institutions, and even regulate emigration. Their mission could also be expressed in more impressive language. The judge, that is,

ought to be just, disinterested and impartial. The Laws or Ordinances, whether Civil, Criminal or Municipal have for their object individual security, the preservation of property, the defence of the poor against the influence of the rich man, and to support the weak from the oppression of the powerful, to protect innocence against the attacks of calumny, and that no individual of the society be maltreated or injured with impunity by another, and lastly to punish the wicked.⁸⁹

It is a more complex question, of course, whether these principles – and in this form they are little more than principles – were applied in practice. What can only be hinted at here is the significance of those who occupied

85 BANNER (1996) 53. He suggested the importance of “norms that had received no written expression ... before the disputes arose.” Ibid. Adjudication occurred “according to an intuitive sense of justice shared by the community, or at least by a large enough fraction of the community, to make the decision reasonable.” Ibid. Anglophones were the more positivistic of the two communities. See also BANNER (2000) and ARNOLD (1983).

86 KAHLE (1951).

87 Cf., e. g., MORGAN/RUSHTON (2003).

88 [FOLCH] (1926). The regulations, including an oath of allegiance, appear to have been in English. Folch was Governor from 1796–1811.

89 Ibid., 409–410.

the position of *alcades* or *sydico*. Like the population as a whole, these elected lower magistrates tended to be, at least west of the Pearl River, Anglophones. Indeed, ordinary adjudication may have reflected Anglo-American laws *as customs* tolerated, explicitly or implicitly, under Spanish laws. The existing records for the jurisdiction of Baton Rouge show complex adjudication and administration on sales, successions, slaves, and crimes.⁹⁰

Links between law and culture are easy to exaggerate. It is true, of course, that the Creoles of Orleans defended their civil or private laws against the imposition, real or imagined, of Anglo-American laws. But they did so not merely on the basis of culture, but in continuity with the thousands of existing contracts and property titles that then existed. And faced with governance by others, they insisted, not surprisingly, on being given powers of law-making and self-government. But they appear to have had little objection to, or difficulty with, Anglo-American criminal and constitutional laws. With West Florida, the truth seems similarly complex. West Floridian loyalties, as in other times and places, seem more rooted in property than patriotism. This is not to say that culture is irrelevant. There were real, meaningful differences in legal consciousness across communities. In Mexican California between 1821–46, for example, David Langum has suggested another ‘clash of legal traditions’ between Spanish law and Anglophone settlers.⁹¹ This meant different conceptions of the state and the judiciary, as well as matters like property in marital regimes and successions.

Closer to Feliciana, Susan Brooks Sundberg has explored the position of women in Orleans, West Florida, and the Mississippi Territory.⁹² The first was culturally French with continental private laws; the last was culturally Anglophone with Anglo-American laws. In between, in West Florida, especially in West Feliciana, was a culture that was largely Anglophone with Spanish laws. Her work suggests that women fared best in Orleans and worst in Mississippi. And ‘West Feliciana ... demonstrates the encroachment of Anglo common law principles among male testators. These Anglo will writers often sought to circumvent the law, by reducing women’s share of marital property.’⁹³ Another unique hybrid, here of Anglo norms and

90 Archives of the Spanish Government in West Florida.

91 LANGUM (1989). See also REID (1980).

92 See BROOKS SUNDBERG (2012) and BROOKS SUNDBERG (2001).

93 BROOKS SUNDBERG (2012), 195.

Spanish laws, was created. But in both Orleans and West Florida, the relationship between law and culture was complex.

The 'State of Florida'

The events that saw the westernmost portion of Spanish West Florida, between the Mississippi and the Pearl Rivers, first briefly independent and then annexed by the United States, are too complex to relate in any detail here. They are important, however, in filling in the legal and normative picture of the region. The causes of the change were global as well as local. First, earlier American attempts in 1805–6 to buy the Floridas had been unsuccessful.⁹⁴ Spain had tightened its laws on property ownership and sales after the Kemper affair. Since 1807, the Americans had established an embargo, directed against Great Britain, that prohibited Americans from visiting foreign ports and *vice versa*. This had a crippling effect on West Florida. In addition, Napoleon had already disposed the Spanish King, Ferdinand VII (1784–1833) and placed his older brother, Joseph-Napoleon Bonaparte, on the throne as Joseph I (1808). Throughout the Spanish colonies, *juntas* were created (in present-day Peru, Venezuela, Columbia, Chile, and Mexico) to rule in the name of the deposed king. There was also considerable fear of French sympathizers in Orleans and, in West Florida, a significant number of Saint-Domingue refugees arrived by way of Cuba. Grand-Pré, the Governor of the Baton Rouge District, was also recalled to Havana and died shortly afterwards. Once a law student himself, Grand-Pré was a long-time resident of the region and was much-loved. His loss may have made West Floridians still more anxious about the security of their property.⁹⁵ All of this was exacerbated by the fear of French invasion or American annexation without security in property as well as American machinations. This was true of both Claiborne and David Holmes (1769–1832), the Governor of the Mississippi Territory and future Governor of the state, who began to agitate for annexation. And the West Floridians, or

94 EGAN (1969). The American Congress had voted to provide money for the purchase of West Florida. By the following year, this was no longer possible. See DAVIS (2011) 106.

95 See generally McMICHAEL (2008) 149. For other recent works, see HYDE (2004–2005) and the special issue of the *Florida Historical Quarterly* (2011). Cf. ABERNATHY (1998); FAVROT (1895); KENDALL (1934a); KENDALL (1934b); KENDALL (1934c).

rather the Felicians of the westernmost part of West Florida around Baton Rouge and Bayou Sara, had begun to meet even before the departure of Grand-Pré.

As in other Spanish colonies, the Felicians petitioned the new Spanish Governor, the French-born Carlos de Hault de Lassus (Delassus, 1767–1843) to hold a convention to secure the peace.⁹⁶ He agreed. In their meetings, beginning in the summer of 1810, “they attempted to work out some system by which they could retain the Spanish officials and preserve their allegiance to Spain, but still have their own legislative body for the protection of their liberties.”⁹⁷ A brief, proposed ordinance appeared in the *Natchez Chronicle* on 17 July. It noted the vacuum created by the deposition of the Ferdinand and devolution of power to the people of West Florida. In addition to guaranteeing contracts already made, it also stated, in Article 1, that

The laws, usages and custom heretofore observed in the administration of justice, and in determining the right of property, shall remain in full force, as long as the situation of the country will allow, until altered or abolished in the manner hereafter provided.⁹⁸

When the convention began a week later, on 25 July 1810, their members were all from the west of the Pearl River. The center of gravity was, however, very clearly with those members from Bayou Sara and Baton Rouge along the Mississippi at the westernmost edge of the Territory. The conventioners immediately attended to questions of judicial organization. They focused on the establishment of courts competent to give final judgment, presumably without appeal beyond West Florida. Indeed, they curiously argued that this was true of both criminal cases as well as “cases of law and equity.”⁹⁹ In addition, the only member with a Spanish surname, Manuel López, made a motion to consider “appointing a Counsellor well acquainted with the Laws of Castille and the Indies”.¹⁰⁰ They also gave special attention to questions of

96 KENDALL (1934a) 85–86.

97 PADGETT (1938b). They suggested that they wanted “to make as little innovation as possible in the existing laws of the country and to obtain the approbation of superior authorities.” ‘The Convention to De Lassus’ (22 July 1810) in *Ibid.*, 705. The journals of the Convention, as well as the Florida House and Senate are in *Ibid.* The Convention materials are also in CARTER (1940).

98 In ARTHUR (1935) 46.

99 *Ibid.*, 50–51 (from the Convention, 26 July 1810).

100 ‘The Journal of the Revolutionary Convention’ (27 July 1810) in PADGETT (1938b) 693. He also objected to the degree of powers claimed by the Convention. PADGETT (1938b)

land titles and to the organization of the militia. Throughout, the conventioners pledged their loyalty to Spanish rule. De Lassus consented.¹⁰¹

Within a month, the Convention had proposed an elaborate ‘Ordinance for the Publick Safety, and for the Better Administration of Justice with within the Jurisdiction of Baton-Rouge, in West Florida.’¹⁰² De Lassus eventually approved, though Lopez noted his objections. The Third Article established a “superior court of the jurisdiction of Baton Rouge, in West-Florida” consisting of the Governor and three judges, one each from the Baton Rouge, New Feliciana and St Helena and St Ferdinand Districts.¹⁰³ The court could decide its cases, and those taken on appeal, with finality.¹⁰⁴ As López had requested, a counselor “learned in the laws of Castile and the Indies” was also to be employed.¹⁰⁵ Three civil commandants were also to be selected, one each for the three judicial districts.¹⁰⁶ More surprisingly, the district courts that were established included a jury for criminal matters (as the Orleans Territory had already accepted). The courts:

shall have original jurisdiction in all cases, civil and criminal ... not within the jurisdiction of any single alcalde; but in all trials of criminal cases they shall order six free-holders of the vicinity to come and hear the testimony in open court, and to declare upon oath their conviction as to the guilt or innocence of the party accused, who shall be immediately discharged if the said declaration be ‘not guilty.’¹⁰⁷

There was provision, too, for alcaldes, eight each for the three districts.¹⁰⁸ And while the Ordinance stated that established procedures would continue,

702–703. The Convention also created a proposal on the “better administration of justice within the jurisdiction of Baton Rouge”.

101 See the discussion of American, loyalist, and independent factions in HYDE (2010), 265–267.

102 In ARTHUR (1935) 69–88.

103 *Ibid.*, 77 (Section 2).

104 See *Ibid.*, 77 (Section 1).

105 *Ibid.*, 78 (Section 7).

106 These officers would reside in the district “and in all civil cases shall have and exercise the powers and perform the duties heretofore ... together with those of a notary publick”. *Ibid.*, 78 (Section 10). See also *Ibid.*, 78 (Section 11).

107 *Ibid.*, 79 (Section 13).

108 These would “be elected by the people ... [and] shall have final jurisdiction in civil cases in which the amount of the matter in dispute does not exceed fifty dollars, and who shall have in all other respects the same powers and emoluments, and perform the same duties as have heretofore been assigned to similar officers under this government.” *Ibid.*, 80 (Section 20). See *Ibid.*, 81 (Section 23).

two sections appear to bear the imprint of Anglo-American law.¹⁰⁹ Section 25 read that

in all criminal prosecutions, the accused shall have the privilege of a speedy and public trial, in which he shall be confronted with and allowed to examine all the witnesses against him, and to produce testimony in his defence. He shall also have compulsory process to procure the attendance of witnesses if required, and shall in no case be compelled to give testimony against himself.¹¹⁰

Section 26 is similar and allowed the process and records to be in Spanish or English.¹¹¹ With Section 27, courts had the power to appoint an interpreter.¹¹² Whatever the motives of the conventioners or the Governor, the result was that Spanish structures had, at least formally, received aspects of the common law.¹¹³ Within days, the Convention had proposed appointments to the positions established in the Ordinance. With some minor adjustments, the Governor consented.

As this was happening, however, the Americans, from President James Madison (1751–1836) on down, began to press settlements across the Floridas to rebel. The President “was implementing a new kind of foreign policy for the United States, a sort of passive imperialism aimed at gaining territory with the least exposure by inciting the inhabitants themselves to take the risk.”¹¹⁴ Governor Holmes, in particular, seems to have shown considerable encouragement to the growing sense of among Felicians that their future rulers would be American rather than Spanish. Delassus did all he could to maintain his rule. By his actions, he hoped that “this territory will be saved for His Catholic Majesty, and if possible will be freed from the

109 The procedures were largely consistent with those “heretofore established and practiced”. *Ibid.*, 81 (Section 24).

110 *Ibid.*, 81 (Section 25).

111 “[A]s may best suit the convenience of the parties concerned, and .. all witnesses may be examined by both parties on all points relative to the matter in controversy.” *Ibid.*, 81 (Section 26).

112 *Ibid.*, 81 (Section 27).

113 It might be a bit exaggerated to say that “Spain still ruled, but the courts were re-established as close to the US model as Spanish law allowed; a land office was to be opened, a new militia regime inaugurated, alien immigration regulated, deserters from armies friendly to Spain prohibited, and a printing press established.” DAVIS (2011) 169.

114 *Ibid.*, 132. Cf. SCALLIONS (2011), whose use of primary sources enriches, while not altering, McMichael’s account. Nor does it establish that West Florida was “an independent nation progressing to a viable republic ...”. *Ibid.*, 220.

horrors of anarchism”.¹¹⁵ By September, the rhetoric of the Convention had altered considerably. They declared Delassus “unworthy of their confidence”.¹¹⁶ They also decided to contact the Americans to state their “wish ... that the said Territory may be recognized and protected by them as an integral part of the United States.”¹¹⁷ Fearful of Spanish seizure of their land and of a force of Spanish regulars being raised by Folch and supplemented – or so they believed – by Choctaws and slaves, the Felicians could prevaricate no longer. By late September, the Felicians had taken the Spanish Fort at Baton Rouge.¹¹⁸ Among the few killed and injured was Louis de Grand-Pré (c1787–1810), the son of the former Spanish Governor, who died. A *Declaration of Independence* was also shortly issued.¹¹⁹

The rebellion was only a qualified success. It never extended in fact beyond the Pearl River. It was not unanimous even to the West of the Pearl. Ironically, the delegates of the Convention found it necessary to chastise the loyalty of those that disagreed with them.¹²⁰ One of the conventioners loyal to Spain was killed trying to escape. Indeed,

[a]t this point more than half of the delegates (perhaps smelling a rat), including three of the five from Baton Rouge and all the delegates from the eastern districts, resigned their seats in protest. This allowed the remaining delegates to pass the declaration.¹²¹

A mutiny also occurred at the Fort, though it was quickly repressed. A campaign to seize the Territory west of the Pearl River, especially Mobile, was unsuccessful. It was led by, of all people, Reuben Kemper, in league with local filibusters including the *Mobile Society*. Not surprisingly perhaps, Kemper did little to help the situation, either militarily or diplomatically. Meanwhile, the remaining rump of the Convention wrote the American Secretary of State stating that if the United States sought to annex them, they claimed admission “as an independent State, or as a Territory of the United States, with permission to establish our own form of Government, or to be

115 Archives of the Spanish Government in West Florida, xviii.80 (21 August 1810).

116 PADGETT (1938b) 717.

117 Ibid., 717–718. They wrote Governor Holmes in an appeal to their “mother country”. Ibid.

118 See ‘Colonel Philemon Thomas to the Convention (24 September 1810)’ in Ibid., 719 et seq.

119 HYDE (2004–2005). See STERKX/THOMPSON (1961) and PADGETT (1938b) 725–726.

120 ‘Convention to Philemon Thomas (30 September 1810)’ in PADGETT (1938b) 730. See PADGETT (1938b) on Kneeland, Jones, and Brown at 737–740.

121 McMICHAEL (2008) 164.

united with one of the neighboring Territories, or a part of one of them in such manner as to form a state.”¹²² In this last instance, they preferred being joined to the Orleans Territory.¹²³ “[A]nd they lost no time in focusing on the ever-present issue of land.”¹²⁴

In the interim, the Convention approved a Constitution on 27 October for what it referred to as the “State of Florida”.¹²⁵ It borrowed heavily from the Federal and Kentucky (1799) constitutions.¹²⁶ Maintaining their current laws, they provided for the establishment of a “Supreme Court, and inferior Courts”, “*Habeus Corpus* as defined by the Common Law of England”, and “the introduction of trial by jury”.¹²⁷ Its provisions on criminal law were especially close to the Federal ‘Bill of Rights’. With respect to land titles, Article 4, Section 1 gave the ‘General Assembly’ power over public lands. Article 4, Section 2 read that:

Every actual settler who now inhabits and cultivates a tract of land within the Commonwealth for which he has obtained no complete title, and which has not been legally granted to any other person, shall be entitled to such quantity including his improvement, as has usually been granted to settlers according to the laws[,] usages and customs of the Spanish government: proved the forms proscribed by law respecting the registering [?] and surveying thereof be complied with in due time: And no actual settler as aforesaid shall be deprived of a tract so inhabited and cultivated by him, in consequence of an claim hereafter brought by any person of which the said inhabitant has not now or heretofore notified.¹²⁸

The Constitution anticipated, too, the inclusion of Mobile. Had they known how little progress Kemper was making, they might have left this out.

For ‘Governor’, the Convention selected Fulwar Skipwith, a distant relative of Jefferson and a former American diplomat who had been involved in the negotiation of the Louisiana Purchase. He hadn’t been in the Territory

122 PADGETT (1938b) 743. See *Ibid.*, 741–744.

123 *Ibid.*, 743.

124 DAVIS (2011) 199.

125 See generally PADGETT (1937). In *Ibid.*, the text ends in the middle of Article 7. The original handwritten text is also included in BICE (2004).

126 The latter was also used as the basis of Louisiana’s first state Constitution in 1812. The Governor of the State of Florida was to be selected by the legislature, the process also chosen in the Louisiana Constitution of 1812. See DAVIS (2011) 207–8.

127 Article 3; Section 1, 3, 3 in PADGETT (1937) 890–891. Other writs, juries (both Grand and Petit), and Justices of the Peace, were mentioned, as was ‘real property’ (rather than ‘immovables’) and freeholders.

128 Article 4; Section 2 in PADGETT (1937) 891. See also Article 4; Section 3 in *Ibid.*

very long.¹²⁹ In his gubernatorial address, Skipwith noted, among other things, improvements in the administration of justice, especially the finality of the judgments of the courts. He noted the importance of the militia. Then, in an extraordinary passage, he said that “the blood which flows in our veins, like the tributary streams which form and sustain the father of rivers, encircling our delightful country, will return if not impeded, to the heart of our parent country.”¹³⁰ In the context, these sentiments seem to reflect a careful and cultured self-interest more than self-identity and culture. And on the same day that the Constitution had been approved, American President Madison issued a proclamation annexing West Florida, extending to the Perdido River (rather than the Apalachicola River to its east). The Americans, including Governors Claiborne and Holmes, arrived some weeks later to take control of the area. Indeed, the Felicians only acquiesced under protest over several days, shocked that they were unable to enter the union on their own terms.¹³¹ Skipwith was particularly unhappy with the behavior of the Americans. The seventy-nine days of the nominal independence of the ‘State of Florida’ was over. Its future was now in American hands.¹³²

After establishing control, at least west of Mobile, the Americans designated the whole the *County of Feliciana*.¹³³ Mobile would only be captured in 1813, during the *War of 1812* (1812–15); the area was added to the Mississippi Territory.¹³⁴ With control of the new county, the Americans had to decide what to do with it.¹³⁵ The Felicians again suggested unification with Orleans and the American state that would soon be created by it. Skipwith himself noted that “this arrangement would give to the State so formed a majority of American over [the] French Population.”¹³⁶ Rumors

129 He appears to have been in favor of annexation. He would be very unhappy, however, about the manner in which this actually occurred. Note the resolution “of the 23 to establ[ish] a court of Admiralty” at PADGETT (1938b) 773.

130 PADGETT (1938a) 127.

131 Including the charge of a “violation of the Law of nations”. PADGETT (1938b) 764.

132 See generally Stagg (2013).

133 Within the county were parishes, including from west to east, Feliciana, East Baton Rouge, Saint Helena, Saint Tammany, Viloxi, and Pascagoula. Saint Tammany Parish was bizarrely named by Claiborne after a Delaware Indian Chief, Tamanend (c1628–98).

134 MURDOCH (1964).

135 See MARKS (1971).

136 ‘Skipwith to Madison (5 December 1810)’ in PADGETT (1938a) 144. See *Ibid.*, 130. Skipwith stressed, too, the need for clarity with respect towards existing land grants. ‘Skipwith

that the area west of the Pearl River would be attached to Mississippi, led to a brief, minor revival in 1811. Later that year, John Ballinger argued that the County “forms a political family living in the same neighbourhood whose laws, Usages & Customs are the same, and bound by such ties as would produce harmony and cooperation in all its members.”¹³⁷ He accepted the possibility of severing the area west of the Pearl River. A subsequent ‘Memorial to Congress from Inhabitants of Feliciana County’ of the following year similarly stated that “[o]ur laws & customs respecting the descent of property, and other important subjects, having been similar, our union with them will be easy and natural”.¹³⁸ There was an interesting continuity, too, in the choices Claiborne made for the judges in the new County. John Rhea had served as an alcade in Spanish West Florida and was President of the Felician Convention. Dr Andrew Steele was a lawyer, a Secretary at the Convention, and had been chosen as a judge of the ‘State of Florida’. And, as Rose Meyers writes, “Claiborne’s actions were characterized by patience and sincere friendship for the West Floridians. From his letters, one gets the feeling that he was more in sympathy with the Anglo-American element in West Florida than with the Creole element in New Orleans.”¹³⁹

The following year, a convention was held to prepare a Constitution for statehood for the Orleans Territory. No representatives of *Feliciana* were present. The Constitution of what became the State of Louisiana was based on the 1799 Constitution of Kentucky, though translated into French. Indeed,

to John Graham’ (14 January 1811) in *Ibid.*, 167. Skipwith also complained about his portrayal in the press as a land speculator. *Ibid.*, 165–166. This is attributed, in part, to his co-ownership of land with the ubiquitous Clark. See also ‘Skipwith to his constituents’ (1 April 1811) in *Ibid.*, 177. He would continue to challenge the American account of the annexation for years. ‘Skipwith to his constituents’ (1 April 1811) in *Ibid.*, 173–174. See his historical account of West Florida in *Ibid.*, 172–173. He expressed frustration that annexation prevented the Floridian capture of the whole of the Territory. ‘Skipwith to his constituents’ (1 April 1811) in *Ibid.*, 175. He was later chosen to be included in the Orleans’ legislature, but rejected the offer as the Florida Parishes were not yet included in the Territory.

137 Ballinger to the Secretary of State (26 December 1811) in CARTER (1940) 967. A similar letter noted that West Florida, at least west of the Perdido River, “is of right already a part of Louisiana – that it has heretofore been governed by the same Laws – suffice it to say that, on this single circumstance, will chiefly depend the future Character of this State.” Secretary Robertson to the Secretary of State (2 January 2012) in *Ibid.*, 975.

138 (17 March 2012) in *Ibid.*, 1008.

139 MEYERS (1976) 129–30.

Of comfort to Gallic interests was a section that continued existing territorial laws and prohibited the legislative from adopting new statutes by general reference. Americans and Creoles alike warmed to another condition mandating the judges to base their decisions in writing on specific reasons and particular legislative enactments. These latter restrictions were seen as hedges against limitless intrusions of common law into Louisiana jurisprudence and bridles on judicial power.¹⁴⁰

Louisiana was admitted to the Union in 1812, though still with some confusion on its Western border.¹⁴¹ Shortly afterwards, the area between the Mississippi and the Pearl Rivers was added.¹⁴² Problems would continue in what is now called the *Florida Parishes*, not least in the administration of justice and in land claims. The latter continued for decades, as did the sense of the area as a “distinctive region”, an “ambiguous portion of the state”.¹⁴³ Assuming that Spanish claims were recognized this would still have meant that its laws were virtually the same as those of the former Orleans Territory, with the exception of Spanish legislation made between 1803–10. They would eventually occupy both of the former Florida territories. Spain eventually ceded the remaining Florida territories in the *Adams-Onís Treaty* (1819). When the Florida Territory was organized in 1822, it consisted of most of East Florida and a small portion of the former West Florida. This ‘State of Florida’ was very different than the first.¹⁴⁴

Conclusion

This is a first sketch of legal and normative entanglement in Spanish West Florida between 1803–1810.¹⁴⁵ Its hybrid laws and norms were created by the diffusion of different European populations and traditions into the

140 BILLINGS (1993a) 17. See also BILLINGS (1993b).

141 BROOKS (1940) 30.

142 See the materials in PADGETT (1938a) 191–201. The population of the Orleans Territory was 76,556 in 1810. GRONER (1947–48) 372. The population of West Florida – not the Florida Parishes – was estimated at 15000–20000 at that time. Note, too, that the population of the Orleans Territory had been only 55,534 in 1806. CARTER (1940) 923.

143 HYDE (1996) 22. See *Ibid.*, 4.

144 See PADGETT (1942).

145 Much remains to be done. Traditional legal sources, eg the Spanish judicial and administrative archives, must be supplemented by more novel sources, eg newspapers, private correspondence, diaries, etc. Both are scattered across continents. Additional research should, however, permit a still deeper description of the lived legalities and normativities, both in principle and in practice, of this time and place.

Territory over the previous century. The result was that the laws and principles of the Spanish colonial *ius commune* criss-crossed with the norms and practices of West Florida's Anglophone settlers, including its low magistrates. This only began to unravel with threats from beyond the borders of the Territory. The French war in Europe was important, particularly by leaving American expansion closer to home unchecked. In their minor rebellion and brief, nominal independence, the Floridians injected some Anglo-American legal elements into their Constitution and laws. But they appeared less anxious about their laws than their properties. Indeed, throughout the period, the laws, lives, and land ownership of the Floridians were also deeply intertwined with those of Francophone Orleanians and the ever-larger number of Americans, including lawyers and judges, there. In both territories, there was a struggle to balance the legal and normative desires of the population with changing economic, political, and social realities. Understanding the entangled histories of West Florida and the Territory of Orleans can tell us much about the wider entanglement of Western laws and norms and about continuity and change in a critical transition period for the modern nation-state and common laws.

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Contents

Introduction

- 3 | **Thomas Duve**
Entanglements in Legal History. Introductory Remarks

Traditions of Transnational Legal History

- 29 | **Thomas Duve**
European Legal History – Concepts, Methods, Challenges
- 67 | **Inge Kroppenber, Nikolaus Linder**
Coding the Nation. Codification History from a (Post-)Global Perspective
- 101 | **Geetanjali Srikantan**
Towards New Conceptual Approaches in Legal History: Rethinking “Hindu Law” through Weber’s Sociology of Religion
- 129 | **George Rodrigo Bandeira Galindo**
Legal Transplants between Time and Space

Empires and Law

- 151 | **Emiliano J. Buis**
Ancient Entanglements: The Influence of Greek Treaties in Roman ‘International Law’ under the Framework of Narrative Transculturation

- 187 | **Ana Belem Fernández Castro**
A Transnational Empire Built on Law: The Case of the Commercial Jurisprudence of the House of Trade of Seville (1583–1598)
- 213 | **Seán Patrick Donlan**
Entangled up in Red, White, and Blue: Spanish West Florida and the American Territory of Orleans, 1803–1810
- 253 | **Jakob Zollmann**
German Colonial Law and Comparative Law, 1884–1919
- Analyzing Transnational Law and Legal Scholarship
in the 19th and early 20th Century**
- 297 | **Francisco J. Andrés Santos**
Napoleon in America?
Reflections on the Concept of ‘Legal Reception’ in the Light of the Civil Law Codification in Latin America
- 315 | **Agustín Parise**
Libraries of Civil Codes as Mirrors of Normative Transfers from Europe to the Americas: The Experiences of Lorimier in Quebec (1871–1890) and Varela in Argentina (1873–1875)
- 385 | **Eduardo Zimmermann**
Translations of the “American Model” in Nineteenth Century Argentina: Constitutional Culture as a Global Legal Entanglement
- 427 | **Bram Delbecke**
Modern Constitutionalism and Legal Transfer: The Political Offence in the French Charte Constitutionnelle (1830) and the Belgian Constitution (1831)
- 461 | **Lea Heimbeck**
Discovering Legal Silence: Global Legal History and the Liquidation of State Bankruptcies (1854–1907)

- 489 | **Clara Kemme**
The History of European International Law from a
Global Perspective: Entanglements in Eighteenth and
Nineteenth Century India
- 543 | **Michele Pifferi**
Global Criminology and National Tradition: The Impact of
Reform Movements on Criminal Systems at the Beginning of
the 20th Century
- 565 | **Contributors**