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THE INFLUENCE OF SPANISH LAWS AND TREATISES ON THE JURISPRUDENCE OF LOUISIANA: 1762-1828

Raphael J. Rabalais*

In recent years there has been a rebirth of interest in the civilian influences on the development of law in Louisiana. While a number of scholarly articles have discussed the French sources of the Louisiana Civil Codes of 1808 and 1825,¹ there have been relatively few comprehensive attempts to assess Spain's influence on Louisiana jurisprudence.² The purpose of this paper is, first, to recall briefly

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1. See, e.g., Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 TUL. L. REV. 3 (1978) [hereinafter cited as Baade]; Batiza, *The Actual Sources of the Louisiana Project of 1828: A General Analytical Survey*, 47 TUL. L. REV. 1 (1972) [hereinafter cited as Batiza, *Sources of the Louisiana Project*]; Batiza, *The Actual Sources of the Marriage Contract Provisions of the Louisiana Civil Code of 1808: The Textual Evidence*, 54 TUL. L. REV. 77 (1979) [hereinafter cited as Batiza, *Sources of the Marriage Contract*]; Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971) [hereinafter cited as Batiza, *The Louisiana Civil Code*]; Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972) [hereinafter cited as Batiza, *Sources*]; Sweeney, *Tour-nament of Scholars Over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972) [hereinafter cited as Sweeney].

See also Barham, *Methodology of the Civil Law in Louisiana*, 50 TUL. L. REV. 474 (1976); Dainow, *Civil Law Translations and Treatises Sponsored in Louisiana*, 23 AM. J. COMP. L. 521 (1975) [hereinafter cited as Dainow, *Civil Law*]; Dainow, *Planiol Citations by Louisiana Courts: 1959-1966*, 27 LA. L. REV. 231 (1967) [hereinafter cited as Dainow, *Planiol Citations*]; Dainow, *The Use of English Translation of Planiol by Louisiana Courts*, 14 AM. J. COMP. L. 68 (1965) [hereinafter cited as Dainow, *The Use*]; Dart, *The Place of the Civil Law in Louisiana*, 4 TUL. L. REV. 163 (1930) [hereinafter cited as Dart, *The Place*]; Groner, *Louisiana Law: Its Development in the First Quarter-Century of American Rule*, 8 LA. L. REV. 350 (1948); Hood, *The History and Development of the Louisiana Civil Code*, 33 TUL. L. REV. 7 (1958); Howe, *Roman and Civil Law in America*, 16 HARV. L. REV. 342 (1903); Stone, *The Civil Code of 1808 for the Territory of Orleans*, 739 (1955) [hereinafter cited as Stone]; Tate, *The Splendid Mystery of the Civil Code of Louisiana*, 25 LA. B. J. 29 (1977) [hereinafter cited as Tate]; Tucker, *The Code and the Common Law in Louisiana*, 8 LA. L. REV. 350 (1948) [hereinafter cited as Tucker, *The Code*]; Tucker, *Source Books of Louisiana Law: Part I—Civil Code*, 6 TUL. L. REV. 280 (1932); Tucker, *Source Books of Louisiana Law: Part II—The Code of Practice*, 7 TUL. L. REV. 82 (1932); [hereinafter cited as Tucker, *Source Books: Part II*]; Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat and the French Codes*, 44 TUL. L. REV. 264 (1970); Tullis, *Louisiana Civil Law, in the Light of its Origin and Development*, 2 U. TORONTO L. J. 298 (1938).

2. See Batiza, *Sources of the Louisiana Project*, *supra* n. 1; Batiza, *Sources of the Marriage Contract*, *supra* n. 1; Batiza, *The Louisiana Civil Code*, *supra* n. 1; Batiza, *Sources*, *supra* n. 1. See also G. SCHMIDT, *THE CIVIL LAW OF SPAIN AND MEXICO* (1851); Baade, *supra* n. 1; Batiza, *The Influence of Spanish Law in Louisiana*, 33 TUL. L. REV. 29 (1958) [hereinafter cited as Batiza, *The Influence*]; Batiza, *The Unity of Private Law in Louisiana Under the Spanish Rule*, 4 INTER-AM. L. REV. 139 (1962) [hereinafter cited

the major events of Spanish colonial rule in Louisiana; secondly, to summarize the findings of Louisiana legal scholars to date regarding the influence of Spanish law on that of Louisiana; thirdly, to describe the results of my own research to date on the influence of Spanish legal sources on Louisiana judicial decisions from 1809 through 1828; and finally to suggest several ways in which legal scholars in Spain and Louisiana might work together in the future.

SPANISH RULE IN LOUISIANA—1762-1803

The major events pertaining to Spanish rule in Louisiana are well known and need be recalled only briefly.³ In 1761, Charles III of Spain entered into a "family compact" with his cousin, Louis XV of France. As a result of this agreement, France in 1762 ceded Louisiana to Spain.⁴ However, it was not until 1766 that the first Spanish governor, Ulloa, reached New Orleans. There he encountered numerous difficulties with the local population, which was predominantly French.

as Batiza, *The Unity*); Dart, *The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana*, 6 TUL. L. REV. 83 (1931) [hereinafter cited as Dart, *The Influence*]; Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972) [hereinafter cited as Pascal]; Pugh, *The Spanish Community of Gains in 1808: Sociedad de Gananciales*, 30 LA. L. REV. 1 (1969) [hereinafter cited as Pugh]; Schmidt, *Ancient Jurisprudence of Louisiana: The Ordinances and Instructions of O'Reilly*, 1 LA. L. J. 1 (1841); 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 LA. L. J. 22 (1842); Tucker, *Source Books: Part II. supra n. 1*; Tucker, *Source Books of Louisiana Law: Part III—Spanish Laws*, 8 TUL. L. REV. 396 (1934) [hereinafter cited as Tucker, *Source Books: Part III*].

3. For books containing accounts of Spanish colonial rule in Louisiana, see, e.g., I, II CATALOGO DE DOCUMENTOS DEL ARCHIVO GENERAL DE INDIAS, SECCION V., GOBIERNO, AUDIENCIA DE SANTO DOMINGO, SOBRE LA EPOCA ESPANOLA DE LUISIANA (Archivo General de Indias, Seville, Spain 1968) [hereinafter cited as CATALOGO]; J. CAUGHEY, BERNARDO GALVEZ IN LOUISIANA: 1776-1783 (1934); J. CLARK, NEW ORLEANS, 1718-1812: AN ECONOMIC HISTORY (1970); THE SPANISH IN THE MISSISSIPPI VALLEY: 1762-1804 (J. McDermott ed. 1974); II SPAIN IN THE MISSISSIPPI VALLEY 1765-1794 (L. Kinnaird ed. 1899). For articles relating to the Spanish colonial rule in Louisiana, see, e.g., Brooks, *Spain's Farewell to Louisiana, 1803-1821*, 27 MISS. V. HIST. REV. 29 (1940); Burns, *The Spanish Land Laws of Louisiana*, 11 LA. HIST. Q. 557 (1928); Dart, *Civil Procedure in Louisiana Under the Spanish Regime as Illustrated in Loppinot's Case 1774*, 12 LA. HIST. Q. 33 (1929); Dart, *Courts and Law in Colonial Louisiana*, 22 LA. B. A. REV. 17 (1921); Dart, *Sources of the Civil Code of Louisiana*, 13 LA. B. A. REV. 21 (1911); Howe, *Development of Law in Spain and Her Colonies*, 60 ALB. L. J. 101 (1899); Howe, *Development of Law and Jurisprudence in Spain and Her Colonies*, 42 OHIO L. B. 118 (1899); Morazan, *The Cabildo of Spanish New Orleans, 1769-1803*, 12 LA. STUD. 591 (1973); Porteus, *Index to the Spanish Judicial Records of Louisiana*, 17 LA. HIST. Q. 572 (1934); Wood, *Life in New Orleans in the Spanish Period*, 22 LA. HIST. Q. 642 (1939).

4. For succinct descriptions of the legal aspects of Spanish rule in Louisiana from 1762 to 1803, together with citations to relevant treaties and other documents, see Baade, *supra n. 1*; Batiza, *The Influence*, *supra n. 2*; Batiza, *The Unity*, *supra n. 2*; Dart, *The Influence*, *supra n. 2*; Tucker, *Source Books: Part III*, *supra n. 2*.

These difficulties culminated in the famous revolt of October 1768, which led to Governor Ulloa's expulsion from Louisiana. On August 18, 1769, General Alexander O'Reilly arrived in New Orleans at the head of a force of two thousand soldiers and took formal possession of Louisiana on behalf of Spain. On November 25, 1769, O'Reilly issued a set of documents that established the basis of governmental organization in Louisiana and the central administration of justice in New Orleans. The primary sources of these documents were the *Recopilación* of the Indies, the *Recopilación* of Castile and *las Siete Partidas*. The effects of O'Reilly's laws were, according to one scholar, to transform:

Louisiana into a Spanish ultramarine province, governed by the same laws as the other Spanish possessions in America and subject to the same system of judicial administration. Constitutionally, these ultramarine possessions were part of the Crown of Castile, and their legal orders were derived from Castilian law to the exclusion of other peninsular *fueros*.⁵

From 1769 to 1803, the law of Louisiana was predominantly Spanish, being based on the law of Castile, the *Recopilación* of the Indies and legislation of both general and limited territorial applicability—the “*cédulas*.” In addition, it appears that certain French customs, such

5. Baade, *supra* n. 1, at 40. See Batiza, *Sources of the Louisiana Project*, *supra* n. 1, at 5-6:

The succeeding Spanish regime [in Louisiana] . . . replaced the French legal system with a simplified version of the system in force throughout the Spanish Empire. Based primarily on the Compilation of the Laws of Castile and the Compilation of the Laws of Indies, Spanish law in Louisiana was supplemented by other enactments, principally *las Siete Partidas*. [Citations omitted].

See also Batiza, *Sources*, *supra* n. 1, at 645, 645 n.92:

[T]he marriage of Isabella of Castile and Ferdinand of Aragon did not bring legal unity to Spain, and the various regions in the peninsula retained their particular legal systems. Louisiana, like the other territories comprising the Spanish Empire, was ruled by *Castilian* law as supplementary law. The Compilation of the Laws of the Indies provided in Law II, Tit. I, Lib. II, that in cases of gaps or *lacunae* the laws of the Kingdom of Castile, according to the order of preference set forth by the laws of Toro, would apply. . . . The Laws of Toro (1505) essentially reproduced the order of preference set forth in *Ordenamiento de Alcalá* (1348). The order to be followed by courts in deciding legal disputes was: ordinances and decrees in force; where these were silent, resort was to the municipal *fueros* (local custom and usage having the force of law); where these were silent, the *Siete Partidas* would govern. [Citations omitted].

See also Batiza, *The Unity*, *supra* n. 2, at 151:

As it is known, it was the Code of the Seven Partidas which in practice became the primary source of law in the Americas, despite its supplementary character.

Both the Seven Partidas and the Compilation of the Laws of the Indies, contained provisions on commercial matters. However, it is in several Ordinances, such as those of Burgos, Seville and Bilbao where a systematic treatment of Spanish commercial law of that time is found. [Citations omitted].

as the widespread use of marriage contracts, survived during this period.⁶

On October 1, 1800, the Treaty of St. Ildefonso resulted in the retrocession of Louisiana from Spain to France. However, Spanish sovereignty in Louisiana did not end until November 30, 1803. Twenty days later, the French colonial prefect, Laussat, transferred sovereignty over Louisiana to the United States, pursuant to the Louisiana Purchase treaties.⁷

THE INFLUENCE OF SPANISH LAW ON THE LAW OF
LOUISIANA AFTER 1803—SCHOLARSHIP TO DATE

Civil Code of 1808

In 1971, Professor Rodolfo Batiza of the Tulane University School of Law published what is currently the most comprehensive and detailed analysis of the sources of the Civil Code of 1808. Professor Batiza concluded that 87% of the 2,160 provisions contained in that code could be traced directly to French sources, while only 8% of the provisions could be traced directly to Spanish sources.⁸ Spanish influence on the Civil Code of 1808, according to Professor Batiza, could be seen in such areas as: the opening and proof of wills,⁹ the

6. Baade, *supra* n. 1, at 40-43.

7. *Id.* at 79.

8. See Batiza, *The Louisiana Civil Code*, *supra* n. 1, at 11-12:

Briefly, the results revealed by the investigation are as follows: the French *Projet* of the year VIII is the source of 807 provisions; the French Civil Code of 1804 is the source of 709 provisions. Thus, the French *Projet* and Code, combined, account for 1,516 provisions, or about 70 percent of the Louisiana Code of 1808. . . . Domat contributed 175 provisions, or 8 percent, Pothier 113, or 5 percent, and eighteen can be traced either to Domat or Pothier or both. The Custom of Paris and the Ordinance of 1667 on civil procedure add to the French sources that account for about 85 percent of the Code of 1808.

The remaining provisions are distributed as follows: *las Siete Partidas* can be recognized in 67 provisions, *Febrero Adicionado* in 52, the Institutes in 27, Blackstone in 25, the Digest in 16, the *Curia Philipica* in 16, the Act of April 6, 1807, concerning marriages in 16, and the Compilation of Castile in 14. The old *Code Noir*, the Black Code, Gaius' Institutes, Justinian's Novel LIII, the Act of 1806 on apprentices and indentured servants, the Fuero Real, the third Cambaceres *Projet*, the Ordinances of Bilbao, the Ordinance of 1804 on intestate estates, the Act on emancipation of slaves, and the Act of 1805 regulating the practice of the Superior Court in civil causes account for the balance. [Citations omitted].

But see Pascal, *supra* n. 2. See also Batiza, *Sources*, *supra* n. 1. For a brief résumé of other scholars' assertions, see Batiza, *The Louisiana Civil Code*, *supra* n. 1, at 7-10 nn.25-38.

9. Batiza, *The Louisiana Civil Code*, *supra* n. 1, at 29 n.167 (where the author points out that "most of the provisions in the Code [of 1808] regarding the opening and proof of wills came from *Febrero Adicionado*").

system of the community of acquets or gains (*sociedad de ganancias*),¹⁰ and the sale of immovables.¹¹

Projet of the Civil Code (1823)

In 1972, Professor Batiza examined the *Projet* of the Civil Code prepared in 1823. He concluded that: "The predominant French influence, clearly apparent in the Code of 1808, was considerably enhanced by the *Projet* [of 1823]. The sources from Roman and Spanish (Castilian) legal texts, which had been of significance in several areas in the Code of 1808 lost substantial ground."¹² Of the *Projet's* 1,050

10. *Id.* at 29 (wherein the author states: "The Spanish system of community of acquets or gains (*sociedad de ganancias*) that appears in the Code [of 1808], rather than being opposed to the French system of *communauté*, supplements it."). *Contra* Pascal, *supra* n. 2, at 616-20.

11. Batiza, *The Louisiana Civil Code*, *supra* n. 1, at 29-30 (wherein the author states: "The basically consensual system regarding sales accepted by the French *Projet* and Code, inherited from Domat and Pothier, was abandoned by the code of 1808 in favor of the Spanish system requiring a formal deed in the case of immovables."). It should be noted that a number of intriguing questions posed by Professor Ferdinand Stone of the Tulane University School of Law to date remain unanswered. *See* Stone, *supra* n. 1, at 2-3:

A third interesting aspect of the Code of 1808 is that it was essentially inspired by France rather than by Spain. Does this mean anything more than that the legislative committee, pressed for time and required to produce something of substance, took the *projet* of the Code Napoleon as their model, there being no similar Spanish model available? Does this mean that the committee saw in its mandate an occasion to restore French influence in the legal system, which had been eclipsed during the Spanish rule? Does this mean that the committee sought consciously the more liberal reforms and views of the French code and rejected the "medieval" quality of some of the Spanish law? If this be true, why then did they not repeal the old law and substitute the new? These and many other questions plague and excite the historian. . . .

12. *See* Batiza, *Sources of the Louisiana Projet*, *supra* n. 1, at 23-24 (where the author notes that, regarding the *Projet* of 1823, "as compared with the Civil Code of 1808, Pothier became the predominant source, closely followed by Toullier, whose work had appeared three years after the Code, while Domat's impact greatly diminished. The French Civil Code took a diminished role, but overcame that of the French *Projet*"). *See also id.* at 22-23:

The present research led to identification of the sources of about 1050 provisions in the *Projet* [of 1823]. . . . This figure includes a number of paragraphs representing separate rules under a single provision and some new rules in the form of amendments. The principal sources are as follows: Pothier: 246 provisions, Toullier: 228, French Civil Code: 150, Louisiana 1808 Civil Code: 139, Domat: 55, French Code of Commerce: 11, Merlin: 12, Digest: 8, *Febrero Adicionado*: 7, Louisiana Act of 1806 on apprentices and indentured servants: 5, Louisiana Act of 1817 on curatorship: 5, Pardessus: 5, French Code of Civil Procedure: 3, French *Projet*: 3, Louisiana Act of 1817 on release of mortgages: 3, *Lus Siete Partidas*: 2, Maleville and the Laws of Toro: 1, Pothier and/or Toullier: 49, Domat and/or Pothier: 28, Domat and/or Toullier: 10. The remaining provisions show various combinations of three

provisions whose sources were identified by Professor Batiza, 801 provisions or 76% were French, while only 10 provisions or 1% were Spanish.

Civil Code of 1825

While Professor Batiza has traced the sources of the Civil Code of 1825, he has not to date subjected the sources to statistical analysis. With respect to the Spanish influence on the Civil Code of 1825, however, Professor Batiza has written that:

[A] comparison between the Fifth *Partida* (treating of loans, sales, purchase and exchanges, and of all other contracts and agreements) and the Code of 1825 would show that the spirit of the *Partidas* is embodied in that Code. Certain provisions relative to matrimonial property in the present Code have been considered of an obvious Spanish origin. Also, the rules and causes for disinheritance, retained by the present Code in virtually the same form as they appeared in the Code of 1808, were adopted from Spanish sources in general and from *Las Siete Partidas* in particular.¹³

or more sources. In addition, at least 11 borrowings from the Digest were not taken directly from it, but rather "verbatim" and "almost verbatim" from the French translation by Hulot. [Citations omitted].

13. Batiza, *The Influence*, *supra* n. 2, at 33 (citing Dart, *The Influence*, *supra* n. 2, at 92 [actually at 90]). See also Morrow, *Matrimonial Property Law in Louisiana*, in *MATRIMONIAL PROPERTY LAW* 33 (W. Friedman ed. 1955); Address by Professor Oppenheim, Notaries Association of New Orleans (April 10, 1958). *Contra* Dart, *The Influence*, *supra* n. 2, at 90-91 n.23:

It is also proper to note here that the Digest of 1808 and the Code of 1825 differ from the *Partidas* in the subject of the community of acquets and gains. The *Partidas* does not touch the subject and we know that the community of acquets and gains (partnership between spouses) came to Louisiana through the Custom of Paris, which was the primary or common law of the colony during the French era. It survived in the Spanish regime as the ganancial right which has been traced to the Custom of Spain mentioned in the *Fuero Juzgo*. The Code Napoleon took it from the customary law of France, established it permanently as a general law of France, and the authors of the Digest of 1808 and the compilers of the Code of 1825 restated it as a familiar principle of our law with changes authorized by the experience of Louisiana. See Arts. 2399, 2402, LA. CIV. CODE of 1870; *Partidas* 4, Tit. 11, L. 24; Lopez's note in 1 MOREAU & CARLETON, *PARTIDAS* (1820) 533; *Morales v. Morigny*, 12 La. Ann. 855, 857 (1859).

But see Pascal, *supra* n. 2, at 620 (wherein the author states that "Louisiana preserved essentially the Spanish community of gains with the aid of provisions in words often borrowed from, and sometimes copied from, French law books"); Pugh, *supra* n. 2. See also Batiza, *The Louisiana Civil Code*, *supra* n. 1, at 31, 31 n.176:

Except for about 333 provisions that were discarded, the Code of 1808, as a whole, was incorporated in verbatim or almost verbatim form into the Code of 1825. . . . In fact, 1827 provisions in all were incorporated into the Code of 1825: 1068 verbatim, 564 almost verbatim, 136 substantially influenced, and 59 partly influenced. The large number of new provisions added explain why, despite suppressions made,

Professor Batiza has also identified a direct Spanish influence on several other provisions of the Civil Code of 1825, such as:

[1] article 2412 in the code of 1825, . . . providing that the wife, whether separated in property or not, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage. This rule . . . was taken from law 61 of the Laws of Toro, which had become a part of the Compilation of Castile, law 9, title 3, book 5.

* * *

[2] article 2298 of the Code of 1825, . . . to the effect that the curators of insane persons are answerable for the damage occasioned by those under their care, . . . was borrowed from law 8, title IX, Seventh Partida. . . .

[3] paragraph second of article 10 of the Codes of 1825 and 1870, providing that the effects of acts passed in one country to have effect in another country are regulated by the laws of the country where such acts are to have effect. This rule was inspired by a comment by Gregorio López on law 24, title XI, Fourth Partida.¹⁴

Code of Practice of 1825

Most scholars to date have discovered a stronger Spanish influence on the Code of Practice of 1825, than on either the Civil Code of 1808 or the Civil Code of 1825. In 1931, Henry P. Dart, one of Louisiana's most distinguished legal historians, wrote:

It is indisputable that the compilers of the Code of Practice of 1825 adopted without change from the Spanish practice some names for procedure and also summarized some of the procedure itself. The proceedings *via executiva*, a valuable adjunct to the collection of debts in Louisiana was an outstanding feature of the Spanish law of the period.¹⁵

the new Code [of 1825] contained 3,522 articles as compared to the 2,160 of the Code [of 1808].

Another scholar who has identified a specific Spanish influence on the law of Louisiana is Oppenheim. "By way of origin, Louisiana succession law is an admixture of Roman, Spanish and French elements In regard to Spanish sources, Febrero Adicionado, Gomez Resolutions, the Recopilación de Castille and *Las Siete Partidas* were referred to by the drafters [of the *Projet* of 1823]." Oppenheim, *One Hundred Fifty Years of Succession Law*, 33 Tul. L. Rev. 43, 43 (1958).

14. Batiza, *Sources of the Louisiana Projet*, *supra* n. 1, at 26 (citation omitted).

15. Dart, *The Influence*, *supra* n. 2, at 93. See also Dart, *The Place*, *supra* n. 1, at 169: Legislative action [The Practice Act of 1805—Chapter XXVI of Acts passed at First Session of the Legislative Council of the Territory of Orleans, approved April 10, 1805, La. Act. No. 26 of 1805] established a simple form of pleading for Louisiana, thus eliminating the procedure of the Spanish regime. While this

In 1955, Colonel John Tucker, one of the founding fathers of the Louisiana State Law Institute, wrote:

Spanish law in Louisiana has no particular monument, although there are vestigial reminders that Spanish laws once prevailed. That is particularly true with respect to the organization for the enforcement of mortgages. The provisions of the Code of Practice [of 1825] for the foreclosure of a mortgage *via executiva* were in certain aspects almost literally taken from the ordinance of O'Reilly, the Spanish Governor, and the effect of the *pact de non alienando* was drawn from Febrero and the *Curia Philipica*.¹⁶

Judicial Decisions: 1803-1828

During the period from 1803 through 1828, Spanish law exerted a significant influence not only on Louisiana's codes, but also on its judicial decisions. In 1805, Judge John Prevost of the Superior Court of the Territory of Orleans "decreed that Roman, Spanish, and French civil law would be enforced as the customary law of the territory in all cases."¹⁷ In 1806, Governor Claiborne vetoed a bill enacted by the Legislature of the Territory of Orleans that would have provided for the statutory reception of Spanish law. The 1806 bill "enumerated the legal sources, chiefly Spanish, upon which the courts were to base judgments until such time as a definitive civil code could be framed for the territory."¹⁸

law had its basis in the contemporaneous pleading at Common Law, the Statute greatly simplified this procedure and also incorporated some parts of the Louisiana Spanish System. . . . The Practice Act of 1805 and the Digest [Civil Code] of 1808 remained in force until 1824-5.

16. Tucker, *The Code*, *supra* n. 1, at 751. Accord Batiza, *The Influence*, *supra* n. 2, at 33.

17. G. DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* 132 (1975) (citing W. HATCHER, *EDWARD LIVINGSTON: JEFFERSONIAN REPUBLICAN AND JACKSONIAN DEMOCRAT* 118 (1940)). Dargo states: "It is difficult to document the several judicial efforts to resolve the legal question. There was no system of court reporting during the first years of territorial life. The evidence for these early rulings is based upon accounts written by participants long after the events occurred." *Id.* at 225, n.17.

18. *Id.* at 136. See *id.* at 225-26 n.26 (wherein the author notes that the manuscript of the proposed legislation is to be found in the Territorial Papers of the Orleans Series located in the National Archives and has been reprinted in an *American Journal of Legal History* article by Elizabeth G. Brown). The 1806 bill read in relevant part: [T]he laws which remain in force, and those which can be recurred to as authorities in the tribunals of this Territory . . . are the laws and authorities following, to wit: 1.° The roman Civil code, as being the foundation of the spanish law, by which this country was governed before its cession by France and to the United States, which is composed of the institutes, digest and code of the emperor Justinian, aided by the authority of the commentators of the civil law, and particularly of Domat in his treaty of the civil laws; the whole so far as it has not been derogated from by the spanish law; 2.° The Spanish law, consisting of the books of *recompilation de Castilla* and *autos acordados* being nine books in the whole;

The Civil Code of 1808, termed *A Digest of the Civil Laws now in force in the territory of Orleans*, did not end judicial recourse to Spanish law.¹⁹

The enabling act for the Code [of 1808] had not attempted to repeal all the former laws—only those in conflict with the new provisions. This loophole was seized upon by lawyers and litigants who preferred to rely on the older laws.²⁰

the seven parts or *partidas* of the king Don Alphonse the learned, and the eight books of the royal statute (fuero real) of Castilla; the *recopilation de indias*, save what is therein relative to the enfranchisement of Slaves, the laws de Toro, and finally the ordinances and royal orders and decrees, which have been formally applied to the colony of Louisiana, but not otherwise; the whole aided by the authority of the reputable commentators admitted in the courts of Justice.

Sect. 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 treaties of the insurances [sic] by Emorigon [sic], and finally to the commentaries of Valin, and to the respectable authors consulted in the United States.

This act was vetoed promptly by Claiborne on May 26, 1806.

Brown, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 AM. J. L. HIST. 35, 47-48 (1957) [hereinafter cited as Brown]. See also *id* at 53:

On June 7, 1806, the legislature adopted a resolution appointing James Brown and Moreau Lislet "to compile and prepare, jointly, a Civil Code for the use of this territory." The resolution provided that

The two juriconsults shall make the civil law by which this territory is now governed, the ground of said code.

This resolution was passed within two weeks of Claiborne's veto of the act establishing the Spanish law. The obvious implication was that the two juriconsults would use Spanish law as the basis for the proposed code. However, when the code was presented to the legislature in 1808, it was based, not on the Spanish law, but on the new French code, the Code Napoleon. To date, no fully satisfactory explanation for this fact has been offered. [Citation omitted].

19. See Brown, *supra* n. 18, at 53-54:

On March 31, 1808, the legislature passed

AN ACT Providing for the promulgation of the *Digest of the Civil Laws now in force in the territory of Orleans*

The text of the act stated

Whereas, in the confused state in which the civil laws of this territory were plunged, by the effect of the changes which happened in its government, it had become indispensable to make known the laws which have been preserved after the abrogation of those which were contrary to the Constitution of the United States, or irreconcilable with its principles, and to collect them in a single-work, which might serve as a guide for the decision of the courts and juries, without recurring to a multiplicity of books, which, being for the most part written in foreign languages, offer in their interpretation inexhaustible sources of litigation.

[Citation omitted].

20. *Id.* at 59. See also *id.* at 55-60. As reprinted in Brown, the Code of 1808 provided: "And be it further enacted, that whatever in the ancient Laws of this territory, or in the territorial statute, is contrary to the dispositions contained in the said digest, or irreconcilable with them is hereby abrogated."

In an 1817 decision, *Cottin v. Cottin*, 5 Mart (O.S.) 93 (1817), the Supreme Court of Louisiana in effect confirmed that Spanish law remained in force in Louisiana, unless "contrary to, or incompatible with the provisions of the code [of 1808]."²¹ In 1819, the Louisiana Legislature authorized the translation of *las Siete Partidas*, as a means of making Spanish law more accessible to Louisiana citizens.²² This translation, by two New Orleans attorneys, L. Moreau-Lislet and Henry Carleton, was published in 1820.²³

SPANISH AUTHORITIES CITED IN LOUISIANA
JUDICIAL DECISIONS: 1809-1828

Legal historians have long been aware that Spanish law was invoked and applied by Louisiana judges after the adoption of the Civil Codes of 1808 and 1825.²⁴ However, the full extent of Spanish influence

21. 5 Mart. (O.S.) 93, 94 (La. 1817). See Tucker, *Source Books: Part III, supra n. 2*, at 400-01:

In 1817, the Supreme Court held, in effect, that the Spanish law was still in force unaffected by the Civil Code except where expressly or by necessary implication changed or repealed, saying:

It must not be lost sight of that our Civil Code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the Code. [Citation omitted].

22. See Dart, *The Influence, supra n. 2*, at 88:

In 1819 the legislature . . . [adopted]:

An act to authorize and encourage the translation of such parts of the *Partidas* as are considered to have the force of law in this State. [La. Act of March 3, 1819]

This act was predicated on the proposition that:

it is of great importance to the citizens of this State, not only that the copies of the laws by which they are governed should be multiplied, but also that they should have them in a language more generally understood than the Spanish.

The legislature accordingly provided that the manuscript translation of the *Partidas* now being made by L. Moreau Lislet and Henry Carleton, counsellors-at-law, be examined by Messrs. Derbigny, Mazureau and Livingston, and upon their approval that seven thousand dollars be appropriated to compensate the translators, and to pay for copies of the books in printed form for the use of the State.

23. I, II THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA (L. Moreau-Lislet & H. Carleton trans. 1820, reprint 1978). See Tucker, *Source Books: Part III, supra n. 2*, at 401-02. See also L. MOREAU-LISLET & H. CARLETON, A TRANSLATION OF THE TITLES ON PROMISES AND OBLIGATIONS, SALE AND PURCHASE, AND EXCHANGE, FROM THE SPANISH OF LAS SIETE PARTIDAS (1818). Copies of this work are available at the Louisiana State University Law Center Library and the New York University Law Library.

24. The following list of early Louisiana cases citing old Spanish laws and old Spanish and Roman laws is found in Appendix 2, List B of 1972 COMPILED EDITION

on Louisiana judicial decisions during this period had never been analyzed. As a result, a number of months ago a Loyola University research team²⁵ undertook to document the authorities cited in each

OF THE CIVIL CODES OF LOUISIANA 808-09 (J. Dainow ed.):

Old Spanish Laws

- Arayo v. Currel, 1 La. 528, 540 (1830)
 Beard v. Poydras, 4 Mart. (O.S.) 348, 368 (1816)
 Beauregard v. Piernas, 1 Mart. (O.S.) 280, 293 (1811)
 Berluchaux v. Berluchaux, 7 La. 539, 543 (1835)
 Bourcier & Lanusse v. Schooner Ann, 1 Mart. (O.S.) 165 (1810)
 Broussard v. Bernard, 7 La. 216, 223 (1834)
 Cole's Widow v. His Executors, 7 Mart. (N.S.) 41, 46 (1828)
 Cottin v. Cottin, 5 Mart. (O.S.) 93 (1817)
 Daublin v. Mayor &c. of New Orleans, 1 Mart. (O.S.) 185 (1810)
 Ducrest's Heirs v. Bijeau's Estate, 8 Mart. (N.S.) 192, 197 (1829)
 Gonzales v. Sanchez, 4 Mart. (N.S.) 657 (1826)
 Handy v. Parkinson, 10 La. 92, 98 (1836)
 Hubgh v. New Orleans and Carrollton R. Co., 6 La. Ann. 495, 512 (1851)
 Kling v. Fish, 4 Mart. (N.S.) 391, 395 (1826)
 La Croix v. Coquet, 5 Mart. (N.S.) 527 (1827)
 Leblanc v. Landry, 7 Mart. (N.S.) 665 (1829)
 Malpico v. McKown, 1 La. 254 (1830)
 Matilda v. Autrey, 10 La. Ann. 555 (1855)
 McCarty v. Steam Cotton Press Co., 5 La. 16 (1832)
 Mossy Motors v. McRichmond, 12 So. 2d 719, 722 (La. App. 1943)
 Nixon v. Piffet, 16 La. Ann. 379 (1861)
 Patton v. Cities of Philadelphia and New Orleans, 1 La. Ann. 98, 103 (1846)
 Pecquet v. Pecquet, 17 La. Ann. 204, 227 (1865)
 Pepper v. Dunlap, 9 La. Ann. 137, 141 (1854)
 Rogers v. Beiller, 3 Mart. (N.S.) 569 (1815)
 Saul v. His Creditors, 5 Mart. (N.S.) 569 (1827)
 Seelye v. Taylor, 32 La. Ann. 1115, 1118 (1880)
 Stackhouse v. Foley's Syndics, 1 Mart. (O.S.) 228 (1811)
 Succession of Franklin, 7 La. Ann. 418, 434 (1852)
 Succession of Kunemann, 115 La. 604, 609, 39 So. 702 (1905)
 Testamentary Executors of Lewis v. Casenave, 6 La. 437 (1834)
 Valsain v. Cloutier, 3 La. 170 (1831)
 Wardens of the Church of St. Louis v. Blanc, Bishop, 8 Rob. 51, 86 (1844)

Old Spanish and Roman Laws

- Christy v. Casanave, 2 Mart. (N.S.) 451 (1824)
 Hayes v. Berwick, 2 Mart. (O.S.) 138 (1812)
 Moulin v. Monteleone, 165 La. 169, 182; 115 So. 447 (1928)
 Reynolds v. Swain, 13 La. 193, 198 (1839)
 State ex rel. DaPonte v. Board of Assessors, 35 La. Ann. 651, 656 (1883).

For brief discussions of a number of important Louisiana judicial decisions citing Spanish authorities, see, e.g., Batiza, *Sources of the Louisiana Project*, *supra* n. 1, at 2; Brown, *supra* n. 18, at 59-75; Dart, *The Influence*, *supra* n. 2, at 87 nn.12 & 13, 91 nn.24 & 25; Tucker, *The Code*, *supra* n. 1, at 751; Tucker, *Source Books: Part III*, *supra* n. 2, at 397 n.9, 399-405; Comment, 8 TUL. L. REV. 127, 134 (1933) [hereinafter cited as Comment].

See also E. N. VAN KLEFFENS, *HISPANIC LAW UNTIL THE END OF THE MIDDLE AGES* 268-74 (1968) [hereinafter cited as VAN KLEFFENS].

25. The Loyola University research team was comprised of the author, Ms. Karen

reported Louisiana decision from 1809 through 1828. These dates were selected because the first reported decision of the Superior Court of the Territory of Orleans appeared in 1809²⁶ and because in 1828 the Louisiana Legislature enacted a statute that was designed to prevent further recourse to Spanish law.²⁷

Whitt, a third-year law student at the Loyola University School of Law and recipient of an Alfred J. Bonomo, Sr. Family Scholarship, and Mr. Daniel Bontempo, Assistant Academic Systems Coordinator of the Loyola University Computer Center.

26. See Brown, *supra* n. 18, at 59-60 (noting that the first "systematically published reports of cases for Orleans Territory began in 1809, the year after the adoption of the Code [of 1808]"). See also Dart, *The Influence*, *supra* n. 2, at 85-86:

The judicial system . . . authorized in 1804 by Congressional enactment [2 U.S. Stat. 283 (1804)] . . . created a Superior Court of three judges, but difficulty was met in filling the bench. Ultimately, the court began to function in New Orleans in 1804, with only one judge, J.B. Prevost of New York. [Prevost was joined by] . . . Judge George Mathews of Georgia. . . . This court continued to function until the Territory was admitted to statehood and a Supreme Court of three judges was organized in March 1813. Two of the Superior Court judges, Mathews and [Francois-Xavier] Martin, became members of the first Supreme Court of Louisiana.

See also Tucker, *Source Books of Louisiana Law: Part IV—Constitution, Statutes, Reports and Digests*, 9 TUL. L. REV 244, 262 (1935):

Francois-Xavier Martin . . . published in 1811, the first reported decisions of the Louisiana Court. The first volume, now known as 1 Martin (Old Series) included cases from the fall term of 1809 through the spring term of 1811. . . . Judge Martin continued to report the decisions of the Supreme Court until March, 1830. He published in all twelve volumes of the first series . . . and eight volumes of the second or "new" series. . . .

27. See Dart, *The Influence*, *supra* n. 2, at 90-91:

The Civil code of 1825 contained the following repealing clause:

Art. 3521.—From after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be involved as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code.

See Tate, *supra* n. 1, at 38:

The intention of the 1825 Code commissioners to carry out these purposes was to be facilitated by two provisions of the new code—the express repeal of all prior laws; and a provision that, where there was no express law, the judge should decide according to "natural law and reason, or received usages." Thus, the deliberate intent was to create a comprehensive body of principles and law, which either self-evidently applied to a matter in dispute or else, if it did not, contemplated judicial resolution by equitable principles rather than by resort to ancient treatises or former laws. [Citations omitted].

According to Dart:

Nice distinctions began to appear in the opinions of the Supreme Court as in *Flower v. Griffin*, tending to limit the sweeping effect of this repeal. This discussion was sought to be closed by Section 25 of Act 83 of 1828, which provided that all the civil laws which were in force before the promulgation of the civil code lately promulgated, be and are hereby abrogated

In 1836 a case before the Supreme Court presented for interpretation a right

In undertaking this research, one could not help but recall Henry P. Dart's admonition, written in 1931: "To determine just how much Spanish law was incorporated into Louisiana jurisprudence, one must necessarily follow down the reported cases from the beginning. . . ." ²⁸

Methodology

The methodology employed by the Loyola research team was as follows:

1. One hundred ninety-one judicial decisions of the Superior Court of the Territory of Orleans, decided between 1809 and 1812, and 2,056 decisions of the Supreme Court of Louisiana, decided from 1813 through 1828, were examined. These decisions comprised all of the reported decisions of those two courts during the period from 1809 through 1828.

2. The following information was coded for each judicial decision:

the case citation in Martin's Reports; the name of each judge that wrote an opinion in the case; the name of each attorney that participated in the case; the nature of the basic transaction involved in the case:

evidence
family law

claimed under an article of the Code that was sought to be construed with reference to the Spanish law on the same subject, but the court answered that even though the cited Spanish law was not tacitly abrogated by the Code of 1808 or by that of 1825, the Act [83] of 1828 had closed that door by repealing the whole body of the Spanish law that remained in force after the promulgation of the Code of 1808. [Citations omitted].

Dart, *The Influence*, *supra* n. 2, at 91. See also Tucker, *Source Books: Part III*, *supra* n. 2, at 405, 405 nn. 43, 44:

Because it was still questionable whether the adoption of this Code [of 1825] repealed all former laws, the Legislature passed an act in 1828, expressly repealing all French and Spanish laws formerly in force. . . . La. Acts of 1828 (Adopted March 25, 1828) [Act No. 83]. In *Handy v. Parkinson*, 10 La. 92 (1836), the Supreme Court said: "This court has always considered this section of the act of 1828 (§ 25) as expressly repealing the whole body of Spanish law, which remained in force after the promulgation of the Code of 1808."

Since the passage of that act [No. 83, § 25 of 1828], Spanish laws have ceased to exert any direct influence in Louisiana . . . In *Reynolds v. Swain*, 13 La. 193, 198 (1834), [actually 1839] the supreme court, referring to Roman, Spanish and French laws, considered Article 3521 of the Civil Code [of 1825] and the Act [No. 83, § 25] of 1828 (Adopted March 25, 1828) as repealing only "the positive, written or statute laws of those nations and of this state; and only such as were introductory of a new rule, and not those which were merely declaratory—that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice." [Citations omitted].

Accord, Pascal, *supra* n.2, at 625 n.57.

28. Dart, *The Influence*, *supra* n. 2, at 91-92.

- torts
 - contracts
 - procedure
 - property
 - community property
 - conflict of laws
 - criminal law
 - successions
 - constitutional law
 - bankruptcy
 - citations of authority:
 - statutes
 - Louisiana
 - Other U.S. states or federal
 - Spanish
 - Roman
 - English
 - French
 - Other
 - judicial decisions
 - Louisiana
 - Other U.S. states or federal
 - English
 - French
 - Spanish
 - Other
 - court rules
 - Louisiana
 - Other
 - codes, customs and ordinances
 - Louisiana
 - Spanish
 - Roman
 - French
 - English
 - commentaries and treatises
 - French
 - Spanish
 - English
 - Other (including Roman)
 - American
3. The above information was classified by:
year, from 1809 through 1828;
number of cases citing only one authority;
judge;

type of issue involved in the case;
 attorney;
 type and nationality of authority cited.

As a result, a computerized data base was created which permits a statistical analysis of judicial decisions to an extent never previously attempted.²⁹ In addition, this data base represents a valuable information source for biographers and historians of the antebellum era, a source that can be tapped for many years in the future.

Findings

The major findings of the Loyola research project are as follows:

1. During the period from 1809 through 1828, there were a total of 6,585 citations to authority in the 2,247 reported Louisiana judicial decisions of that period.

2. Of these 6,585 citations, there were:

Number	Percentage of Total	Authority
2,100	31.89%	Judicial Decisions
1,877	28.50%	Codes, Customs and Ordinances
1,462	22.20%	Treatises or Commentaries
1,111	16.87%	Statutes
35	.53%	Court Rules

3. The following breakdown of authorities cited was observed:

Type of Authority	Nationality of Authority*			
	Louisiana	France	Spain	U.S. (Federal & State)
Judicial Decisions	66%	.002%	.002%	19%
Codes Customs and Ordinances	61%	5%	22%	0%
Treatises and Com- mentaries	0%	37%	32%	1%
Statutes	56%	1%	12%	20%
Court Rules	91%	0%	3%	3%

*Percentage of total citations in each category.

4. In the areas of greatest Spanish influence, the following Spanish authorities were cited most frequently:³⁰

29. See, e.g., INSTITUTE OF JUDICIAL ADMINISTRATION, A STUDY OF THE LOUISIANA COURT SYSTEM (1972) [hereinafter cited as A STUDY]; THE JUDICIAL COUNCIL OF THE SUPREME COURT OF LOUISIANA, ANNUAL REPORT WITH 1979 STATISTICS AND RELATED DATA (n.d.)

30. For the best bibliographical introduction to Spanish law, see J. VANCE, THE BACKGROUND OF HISPANIC-AMERICAN LAW (1943) [hereinafter cited as VANCE]. Less thorough accounts are available in T. PALMER, GUIDE TO THE LAW AND LEGAL LITERATURE OF SPAIN (1915) [hereinafter cited as PALMER]; K. WALLACH, RESEARCH IN LOUI-

SIANA LAW 203-17 (1958) [hereinafter cited as WALLACH]. See also R. KAGAN, LAWSUITS AND LITIGANTS IN CASTILE: 1500-1700, 257-65 (1981) [hereinafter cited as KAGAN]; VAN KLEFFENS, *supra* n. 24; C. WALTON, THE CIVIL LAW IN SPAIN AND SPANISH-AMERICA (1900); Porter, *On the Laws of Louisiana*, 5 Wheat. 33 (1820); Rafael Altamira, *Spain*, in 1 CONTINENTAL LEGAL HISTORY 579-702 (1912).

For an account of *las Siete Partidas*, see VANCE, *supra* at 93-107. See also *id.* at 94, 100-01:

As to the exact dates when it [*las Siete Partidas*] was begun and finished there is much disagreement among Spanish historians. However, the generally accepted opinion is that it was begun in 1256 and finished in 1265. The *Partidas* did not obtain binding force during the reign of its originator, Alfonso X, since it was not promulgated until 1348.

Practically all legal historians, including those outside of Spain, agree that the *Partidas* is an important monument of Spain's legal and political past, and one of the finest compilations ever put together by a contemporaneous civilization. . . . As to the consistency of its doctrine, the *Partidas* was superior to all earlier compilations. It was the most complete treatise of its time. . . . From a literary standpoint the style of the *Partidas* is rich in expression and is harmonious in construction. Being the first important work published in the Spanish vernacular, the *Partidas* has had a noteworthy influence upon the Spanish language. [Citations omitted].

For an account of the *Nueva Recopilación*, see *id.* at 121-24:

At the opening of the sixteenth century, the formative period of native law was practically at an end; but so far no unity of legislation had been attained. Inasmuch as the Laws of Toro regulated only the most important controversial questions, the idea of a complete compilation of the laws in force continued. . . . The task of compiling all the laws to remedy the legislative confusion which existed . . . was finally entrusted to Bartolomé de MATIENZA, who completed it in 1562 . . . [o]n March 14, 1567, the compilation was sanctioned by Philip II and published in two volumes under the name of *Nueva Recopilación de las Leyes de España*. This compilation was in use for a long time, and additions were made to it gradually; it comprised many laws from the *Fuero Real*, the *Ordenamiento de Alcalá*, the *Ordenamiento de Montalvo* and all of the *Leyes de Toro*.

This attempt at unification, so earnestly desired by the jurists and by all the people, again did not fulfill the hopes which had been placed on it. Its compilers apparently thought that by gathering together the most important laws, but letting all previous compilations continue to subsist, the desired unification would be attained without taking the trouble to establish a logical and consistent plan. Obviously, what was needed was the promulgation of a code abrogating all other compilations, and not a new compilation. Accordingly, from the time of its enactment the *Nueva Recopilación* was held in small esteem on account of its ambiguity and faulty arrangement. It was considered as only an additional cause of confusion in Spanish positive law, already so badly organized and chaotic by reason of the existence of a vast quantity of obsolete legislation still remaining in force. In fact this compilation was condemned as much as the *Ordenamiento de Montalvo*. . . . The *Nueva Recopilación* turned out to be no more than an elaboration of Montalvo's compilation. It suffered from the same defects and was, therefore, unpopular among practitioners.

For an account of the *Novísima Recopilación* of 1805, see *id.* at 124-27:

[The *Novísima Recopilación*] . . . was promulgated . . . [on July 15, 1805] . . . under the name of *Novísima Recopilación de las Leyes de España*, precedence being given to its provisions over all existing compilations. Supplements to it appeared as late as the year 1829. . . . [T]he same criticism that had been made of earlier

compilations applied also to the *Novisima Recopilacion*. It was said to be incomplete, deficient as to system, and representing a chaos of all sorts of laws and decrees from the medieval period down to the time of compilation. It was inadequate in meeting the requirements of existing conditions and, therefore, remained as the fundamental source of law only for a short time, soon being followed by the codifications. [Citations omitted].

For an account of the Ordinance of Bilbao, see PALMER, *supra* at 63:

It has been said that Spain has the distinction of producing the first code of mercantile law in the world in her "Ordinances" of the seventeenth century, as in them is combined in the first single body of law every matter of mercantile law applicable to land and sea. The statute that really covered the entire Peninsula for the first time was the "Ordinances of Bilbao," 1737, which also spread to the American colonies. . . . The "Ordinances of Bilbao" was intended as a code for merchants especially. [Citation omitted].

See also VANCE, *supra* at 173-75; Comment, *supra* n. 24, at 133. In the latter source it is stated that:

[T]he Ordenanzas de Bilbao . . . [were] one of several similar bodies of local custom in which the maritime laws of the middle ages were contained, and in which much of the law merchant was to be found. Brought into the Louisiana territory by the Spanish, it was, at the time of its transfer to the United States, regarded as the text law in commercial matters in Louisiana. Though its applicability may have been considered, in effect, the applicability of the law merchant, it is apparent from the Louisiana decisions that this text was not considered the sole source of commercial law in the state. [Citations omitted].

See also *id.* at 133 nn.41, 42:

The *Ordenanzas de Bilbao* were the ordinances formulated and compiled by the consulate of Bilbao in the northern part of Spain, which, by reason of its dealings with the northern people, had different traditions from those of the Mediterranean.

There were other bodies of commercial law in effect concurrently with the *Ordenanzas de Bilbao*. (1) *The Consulado del Mar*, a compilation of the commercial law, a methodical arrangement of the decisions of the consulate of Barcelona in Spain, which although not authorized by any monarch, was the basis of mercantile law on the Mediterranean coast. [Citations omitted].

For an account of the *Recopilación de Leyes de Indias*, see VANCE, *supra* at 160-65:

[The *Recopilacion de Leyes de los Reynos de Indias*] . . . [was promulgated by a decree of May 18, 1608. . . . The method of the *Recopilacion* of the Indies was similar to that of the other compilation of Spanish laws. No distinction had been made between laws and administrative acts of a temporary nature. The result was a digest of the royal enactments for the political, military and fiscal administration of the colonies. . . . The *Recopilacion* of the Indies possesses many technical defects. The laws are not expressed with precision and clarity. The compilation lacks likewise an adequate plan, distribution and systematic arrangement of legislative material. In the same book heterogeneous subjects are treated, and moreover, there are many historical inaccuracies. [Citations omitted].

For an account of the *Fuero Real*, see *id.* at 89-91 (wherein the author notes that the *Fuero Real* was "a compilation consisting of laws, *fueros* and customs of Castile, published in 1255" and that it "was promulgated as a general code which was intended for all dominions of Alfonso X").

For an account of the *Leyes de Toro*, see *id.* at 117-20:

[The *Leyes de Toro*] . . . promulgated . . . in 1505 . . . were explanatory in character . . . reconciling the old law with the new and filling lacunae brought to light by experience.

Certain Germanic elements were restored in the law, and in some matters both

native and Roman law were allowed to stand; but in the solution of conflicts, the compilers usually inclined to the Roman. *The Leyes de Toro* had full authority, and constituted one of the most important enactments in Spanish law, remaining in force until the publication of the contemporary codes. The proof of the authority of the *Leyes de Toro* is that, although practically no official editions were made of the compilation, its provisions were inserted verbatim in the *Nueva* and *Novísima Recopilación*. Their importance was such that they were consulted frequently as historical antecedents of the present status of Spanish law. [Citations omitted].

For a brief reference to Jose Febréro (1733-1770), author of *Libreria de escribanos, abogados y jueces* (with some editions being entitled *Febréro adicionado*), see WALLACH, *supra* at 216. See also Baade, *supra*, n. 1, at 47 (and sources cited therein).

For a brief reference to Juan de Hevia Bolaños, author of the *Curia Philipica* (1602), See WALLACH, *supra* at 149. See also KAGAN, *supra* at 149:

[Hugo de] Celso's *Reportorio* remained the standard work on Castilian law until the seventeenth century, when it was supplanted by Alfonso de Villadiego's *Instruccion politica y practica judicial* (1612). Villadiego, an advocate from Toledo, was quickly overshadowed by Juan de Hevia Bolanos, a scribe attached to the royal audiencia of Peru. His book, entitled *Curia Philipica*, was a massive guide to Castilian law and judicial practice. Originally published (in Castilian) in Lima in 1602, a second edition, printed in Valladolid, appeared three years later, and it rapidly became the definitive book on Castilian procedural law. Subsequently reprinted no less than thirty-four times, it earned for its author the title of "oracle of practice." [Citations omitted].

Kagan also notes that:

Credit for this development [of a fixed body of rules governing litigation in all parts of the kingdom] must go to the prácticos such as Juan de Hevia Bolaños, whose *Curia philipica* set a standard for all courts to follow. This enormously successful work, which dealt with a wide variety of procedural questions, effectively served as Castile's legal bible until well into the nineteenth century.

Id. at 242.

For an account of the work of Gregorio López, see VANCE, *supra* at 103-04:

The edition [of *las Siete Partidas*] of Gregorio Lopez [de Tovar (1496-1560)] has been considered the best, and most of the subsequent editions reproduced his text and glossae. He obtained permission in 1522 to publish his version of the text of the *Partidas* (without glossae); this text was accepted as official and remained alone as such down to the year of 1818 when the Academy published its text. . . . [Lopez's] edition of the *Partidas* reveals a critical point of view unusual for its time. His glossae reveal erudition and confirm the fact that Lopez was one of the intellectual lights of Spain in his time, not only as an outstanding jurisconsult but also as a dialectician, as is evidenced by his work on the *Partidas*. [Citations omitted].

A surprising omission from the list of Spanish commentators cited by the Louisiana courts from 1809 through 1828 is Asso and Manuel's *Instituciones del Derecho Civil de Castilla*. According to Baade: "The leading eighteenth century texts on Castilian law are Asso and Manuel's *Instituciones del Derecho Civil de Castilla*, and Sala's *Ilustracion al Derecho Real de Espana*. . . . The former work first appeared in 1771, and the latter in 1803. Both were products of the 'Hispanicisation' of legal education at the peninsular universities." [Citations omitted]. Baade, *supra* n. 1, at 46, 46 n.229. See also I. ASSO Y DEL RIO & D. MANUEL Y RODRIQUEZ, *INSTITUTE OF THE CIVIL LAW OF SPAIN* (L. Johnson trans. 1825). It is also surprising that there is only one citation to Sala by the Louisiana courts from 1809 through 1828.

I. Codes, Customs and Ordinances*	Percentage of Total Citations
Las Siete Partidas (1348)	60%
Neuva Recopilación (1567)	10%
Novísima Recopilación (1805)	7%
Ordinance of Bilbao (1737)	5%
Recopilación de Indias (1680)	5%
Fuero Real (1255)	4%
Leyes de Toro (1505)	4%
Other (Ordinances, auto acordados, etc.)	5%
II. Treatises and Commentaries**	
Jose Febréro (1789-90); <i>Febréro Adicionado</i>	44%
Juan de Hevia Bolanos; <i>Curia Philipica</i> (1602)	34%
Gregorio López (1555)	6%
Other (Gomez, Castillo, Rodriguez, Matienzo, etc.)	16%

*Dates refer to date of promulgation.

**Dates refer to date of first publication.

5. The citations to *las Siete Partidas* doubled in 1821, the year after that work was translated into English by Moreau-Lislet and Henry Carleton. Citations to *las Siete Partidas* and Febréro declined significantly after the Civil code of 1825 went into effect.

6. Citations to the *Curia Philipica* declined significantly after the Code of Practice of 1825 went into effect.

7. During the period from 1809 through 1828, Louisiana judicial decisions citing authority from only one jurisdiction cited those from the following jurisdictions:

Louisiana	82%
Spain	6%
England	5%
U.S. (Fed. & Other states)	4%
France	2%

8. During the period from 1809 through 1828, the caseload of the Superior Court of the Territory of Orleans and the Supreme Court of Louisiana was comprised as follows:³¹

31. For a brief résumé of the judicial history of Louisiana from 1803 through 1828, see, e.g., A STUDY, *supra* n. 29, at 2-5. For a more complete account, see Dart, *The History of the Supreme Court of Louisiana*, in THE CELEBRATION OF THE CENTENARY OF THE SUPREME COURT OF LOUISIANA (1913). [hereinafter cited as Dart, *The History*]. Dart discusses the following judges and their terms in office: of the Superior Court of the Territory of Orleans (1804-1813)—John Bartow Prevost (New York, 1804-1806), William Sprigg (Ohio, 1806-1808), George Mathews, Jr. (Georgia, 1806-1813), Joshua Lewis (Kentucky, 1807-1813), John Thompson (New Orleans, 1808-1810), and Francois-Xavier Martin (North Carolina, 1810-1813); of the Supreme Court of Louisiana (1813-1828)—George Mathews, Jr. (Georgia, 1813-1836), Francois-Xavier Martin (North Carolina, 1813-1845),

Areas	Percentage of Total Cases
Procedure	43%
Contracts	24%
Evidence	8%
Successions	7%
Property	6%
Bankruptcy	6%
Community Property	2%
Family law	2%
Conflict of laws	1%
Torts	1%
Criminal law	0%
Constitutional law	0%

Conclusions

The findings of the Loyola research project can be seen to support the following conclusion:

1. During the period from 1809 through 1828, the Superior Court of the Territory of Orleans and the Supreme Court of Louisiana:
 - a. cited Spanish codes, customs or ordinances four times more frequently than French codes, customs or ordinances;
 - b. cited French treatises and commentaries only slightly more frequently than Spanish treatises and commentaries;
 - c. cited Spanish statutes twelve times more frequently than French statutes;
 - d. hardly ever cited either Spanish or French judicial decisions.
2. By far the most frequently cited Spanish authorities were

Dominick A. Hall (South Carolina, 1813), Pierre Derbigny (France, 1813-1820), and Alexander Porter (Ireland, 1821-1833). *Id.* at 6-17.

Interesting aspects of the history of the Supreme Court of Louisiana during this period include the facts that: the title of "Justice" was not authorized until the Louisiana Constitution of 1845, no criminal jurisdiction was conferred on the Supreme Court of Louisiana and none was ever exercised until 1845, and an act adopted on February 17, 1821 required "each and every [one] of the" judges of the Supreme Court to deliver separate and distinct opinions in each case, although this act was repealed by Act of February 27, 1822. *Id.* at 13-14. See also B. R. MILLER, *THE LOUISIANA JUDICIARY* 7-20 (1932); Hood, *The Louisiana Judiciary*, 14 *LA. L. REV.* 811 (1954); Schmidt, *The Supreme Court and its Decisions*, 1 *LA. L. J.* 132 (1842). Professor Dainow has noted that there is "an unavoidable measure of arbitrariness" in classifying judicial decisions on the basis of their subject matter, since many involve more than one issue. Dainow, *Planio Citations*, *supra* n. 1, at 245.

las Siete Partidas (247 citations), Febréro (207), and the *Curia Philipica* (162). These three authorities accounted for 60% of all citations to Spanish authorities.

3. The translation of *las Siete Partidas* into English in 1820 resulted in a 100% increase in the frequency with which it was cited by the Louisiana courts.

4. Citations of Spanish authority declined significantly after the adoption of the Civil Code of 1825 and Code of Practice of 1825.

5. Over 50% of the caseload of the Superior Court and the Supreme Court between the years 1809 through 1828 involved questions of procedure or evidence.

POSSIBILITIES FOR FUTURE SPANISH-LOUISIANA COOPERATION

It is obvious that the law of Spain had a profound influence on the development of Louisiana jurisprudence during its formative period. Spain's contribution to the unique legal heritage of Louisiana provides a firm foundation on which future cooperation can be built. There are several areas, in particular, where legal scholars in Spain and Louisiana could begin to work together to mutual advantage:

1. The Louisiana State Law Institute, in cooperation with Spanish legal scholars, could undertake the translation into English of the two Spanish authorities that, along with *las Siete Partidas*, had the most profound influence on the development of the law of Louisiana, namely Febréro and the *Curia Philipica*. The translation of these Spanish works would greatly facilitate research on the influence of Spanish law on that of Louisiana.³²

32. For a description of the translations sponsored by the Louisiana State Law Institute, see Dainow, *Civil Law*, *supra* n. 1. French works translated to date are as follows: (1) Planiol, *Treatise on the Civil Law* (1959); (2) Gény, *Method of Interpretation and Sources of Private Positive Law* (1963); (3) Aubry & Rau, *Obligations* (1965); (4) Aubry & Rau, *Property* (1966); (5) Aubry & Rau, *Testamentary Successions and Gratuitous Dispositions* (1969); (6) Aubry & Rau, *Intestate Successions* (1971); (7) Baudry-Lacantinerie, Tessier, Aubry & Rau *Prescription* (1972); (8) David, *French Law: Its Structure, Sources and Methodology* (1972).

English translations and works containing translations of Spanish law and treatises include the following: (1) *las Siete Partidas* (S. Scott trans. 1931); (2) *The Laws of Las Siete Partidas which are still in force in the State of Louisiana* (L. Moreau-Lislet & H. Carleton trans. 1820); (3) *A Translation of the Titles on Promises and Obligations, Sale and Purchase, and Exchange, from the Spanish of Las Siete Partidas* (L. Moreau-Lislet & H. Carleton trans. 1818); (4) Asso & Manuel, *Institutes of the Civil Law* (L. Johnston trans. 1925); (5) Scott, *Visigothic Code* (1910) (a translation of the *Forum Judicium* or *Fuero Juzgo*); (6) *The Laws of Burgos of 1512-1513* (L. Simpson 1960); (7) E.N. Van Kleeffens, *Hispanic Law Until the End of the Middle Ages* (1968) (contains an English translation of the Table of Contents of the *Fuero Juzgo*, *Fuero Real* and *Las Siete Partidas*); (8) *The New Laws of the Indies for the Good Treatment and Preservation of the Indians promulgated by the Emperor Charles the Fifth, 1542-1543* (privately printed, London 1893) (This is a facsimile reprint of the original Spanish edition

together with a literal translation into English. A copy is on file at the Columbia University Law Library, under "Treasures, Foreign M."); (9) *The First Seventeen Chapters of The Ordinances of the Illustrious University and House of Trade of the Most Noble and Most Loyal Town of Bilboa* (1824) (This is a translation from Spanish; a copy is on file at the University of London Library of the Institute of Advanced Legal Studies, under "Res-GO 38.B."); (10) de Funiak, *Principles of Community Property* (1943-48) (This is a two-volume set which contains extensive translations of passages from the *Fuero Juzgo*, *Fuero Real*, *Siete Partidas*, *Leyes del Estilo*, and *Novísima Recopilación*.); (11) *Laws of Community Property (Bienes Gananciales)—Laws of Toro (1505)* (L. Robbins & B. Murphy trans. 1929) (includes commentaries of Llamas y Molina).

The lack of Spanish translations and the need for translations generally in order to facilitate research into the sources of Louisiana jurisprudence have been discussed by a number of legal scholars. Van Kleffens, for instance, has stated: "[I]t seems surprising that few translations have been made of this great work [*las Siete Partidas*]. [Besides Moreau-Lislet's translation and] S. P. Scott's English version . . . [n]o other translation appears to have been made in modern times. One has to go back more than six hundred years to find a Portuguese one. . . ." VAN KLEFFENS, *supra* n. 24, at 192. Likewise, Carro has noted:

It is an indisputable fact that there are not many English or other translations of the primary legal sources of Spain and Latin America. There are very few entries registered in the sections for Spain and Latin America in the *AALS Law Books Recommended for Law Libraries* that appear to be written in languages other than Spanish. The same situation is detected when browsing through the *AALL Basic Latin American Legal Materials*. Furthermore, of the hundreds of articles indexed in the *Index to Foreign Legal Periodicals* that refer to the legal systems of Spain and Latin America only a few appear to be written in a foreign language.

[A] close relationship might exist between the indifference of the foreign comparativists in studying and analyzing the legal systems of Spain and Latin America and the obstacles posed by the language barrier which complicates access to these systems.

Carro, *The Use of Legal Encyclopedias as an Alternative Approach in Building Up Collections of Spanish and Latin American Legal Materials*, 6 *INTER. L. J. LIB.* 285, 285-86 (1978). Professor Pascal, also, has remarked:

[T]he major Spanish works . . . must be made available by new editions, and, indeed, in good translations, if the significance of it all is to be appreciated by more than those few who would have the linguistic capacity to use the originals. Of prime importance, in the writer's estimation, is the publication of translations of the *Recopilacion de Castilla*, so far as its provisions relate to private laws, and Febrero's manuals on Testaments and Contracts and on Actions (*Juicios*), so much used in Louisiana during the Spanish period. . . .

Pascal, *supra* n. 2, at 626. Concerning the use and value of translations, Professor Joe Dainow has stated:

From an idealistic point of view, the use of translations is generally objectionable. Not only is some of the original meaning lost in the process, but the whole purpose and significance of the consultation may be depreciated. It must be granted that the ideal solution is rather a fluency in the foreign language which would result in consulting the original works and many more of them. A realistic appraisal of the situation reveals the impossibility of French becoming a current language of the Louisiana legal profession. Accordingly, the available choice is not as between using a translation or consulting the French original, but a more limited choice between the use of a translation or having no consultation at all

2. The law faculties in Spain and Louisiana could establish joint exchange programs for both law students and professors. These programs would result in a strengthening of the cultural ties between Louisiana and Spain and would stimulate an interest in acquiring a greater knowledge of the language and legal traditions of each area.³³
3. The staffs of the law libraries in Spain and Louisiana could attempt to strengthen their collections in the areas of Spanish and Louisiana law and could establish closer ties with law publishers in each area. This would facilitate legal research by scholars and rekindle a mutual interest in the law of each area. To initiate this program, I am pleased to note that a collection of the publications of the *Loyola Law Review* has been presented to Don Ramon Bela, Executive Secretary of the Joint Spanish-North American Committee for Cultural and Educational Affairs. It is hoped that this donation will be followed by many future exchanges of legal materials between Louisiana and Spain.³⁴

CONCLUSION

In his research in the law of Louisiana, Professor Hans Baade has called attention to the "vital endeavor to secure a broader

(except by a few experts). On this basis, translations are warranted and desirable; they can prove extremely useful.

Dainow, *The Use*, *supra* n. 1, at 71. See also C. FARRAR, BIBLIOGRAPHY OF ENGLISH TRANSLATION FROM MEDIEVAL SOURCES (1948); INTERNATIONAL INSTITUTE OF INTELLECTUAL COOPERATION, THE LEAGUE OF NATIONS, INDEX TRANSLATIONUM (1932-40); UNESCO, INDEX TRANSLATIONUM: INTERNATIONAL BIBLIOGRAPHY OF TRANSLATIONS (1948-).

For examples of recent disputes among scholars over the translation of foreign phrases, see, e.g., Sweeney, *supra* n. 1, at 596-601 (regarding the meaning of "*statut local*"); Batiza, *Sources of the Marriage Contract*, *supra* n. 1, at 94 n.69 (concerning the debate as to whether the antecedent of the feminine pronoun "*ella*" is "*libertad*" or "*sociedad*"); Batiza, *Sources*, *supra* n. 1, at 641 (regarding the question of whether "*sociedad de ganancias*" or "*sociedad de gananciales*" is the correct legal term).

33. Strong cultural ties already exist between Loyola University and Spain. According to the Loyola University Registrar, 7.2% of Loyola students are Spanish-surnamed. Spanish is in fact the second language on the Loyola campus. The Loyola University Law Clinic recently received a sizable grant from the United States Department of Education to implement a clinical law program focusing on the needs of the Hispanic community in New Orleans. In addition, the advent of cable television will result in a much broader distribution of Spanish-language programs. Recently the world's first international television network, Univision, was inaugurated in New York City. The new network, composed of New York, Mexican, and Spanish networks, claims a potential audience of 270 million people.

34. For a number of years, Loyola University and the Spanish Government have been cooperating in a joint program to microfilm and index the Spanish archival materials relating to Spanish rule in Louisiana. See, e.g., CATALOGO, *supra* n. 3.

jurisprudential basis for a civil law system that is otherwise quite isolated in the continental United States."³⁵ The late Professor Joseph Dainow of the Louisiana State University Law Center summarized well why the Louisiana legal community continues to manifest an interest in Spanish law:

The use of materials from a legal system other than one's own and the information about the experience and solutions of other systems can clarify issues and show up distinctions in a convincing manner. . . . Even more effective is the consultation of the history and interpretation as well as the subsequent developments in [p. 267] the legal systems in which the local law has many of its own roots.³⁶

35. Baade, *supra* n. 1, at 5.

36. Dainow, *Plainol Citations*, *supra* n. 1, at 266.