

# THE LOUISIANA CIVILIAN EXPERIENCE

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CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION

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Back cover image: Detail from an engraving of Edward Livingston, redactor of the Civil Code of 1825. Reproduced courtesy of the Howard Tilton Library, Louisiana Collection, Tulane University.

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*For Martha and Val, my sister and brothers,  
and in loving memory of our parents*



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## PREFACE

The subject of codification has a rich literature, but codification in the mixed jurisdictions has received far less attention. These essays are historical and comparative critiques of the Louisiana codes and some of the debates which surround them. They present my own views on perennial questions about the origins and antecedents of these codes and their unique development over the past two centuries.

Louisiana was the first jurisdiction in the Western Hemisphere to enact a civil code and was first among the “mixed jurisdictions” to codify her civil law. Her past is an unbroken line of codes stretching back nearly two hundred years. It is a history virtually concurrent with that of the *Code Napoléon* which celebrates its bicentennial this year. These paths are of course historically intertwined. The civil code of 1808, also known as the Digest of 1808, was enacted only four years after the *Code Napoléon* and the Louisiana redactors chose the French code as among the most important sources and models. In 1825 the redactors of Louisiana’s second civil code relied again on the Code Napoléon and deepened the ties with France even further. In this way the Louisiana codes, which might be called the first children born into the extended French family, became fascinating social experiments in a mixed-jurisdiction laboratory in the New World. The ingredients of the mixed-jurisdiction experience, as Kenneth Reid describes it, are indeed remarkable:<sup>1</sup>

“Take half a dozen or so countries, selected for cultural and geographical diversity. Implant civil law. Wait a hundred years or more, and implant common law. Forbid all communication. After 200 years examine the results to determine patterns of growth, similarity, and difference.”

If we were to place a European code into the petri dish, then we might be fairly describing the general theme of this book:

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1. Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 7 (2003). Of course Professor Reid rightly cautioned that this is only a crude parody of the actual process.

*Plant French-style codes in an utterly different soil. Subject them to all the pressures and vicissitudes of the mixed jurisdiction experience. After 200 years assess the results and assemble the academics for a veritable tourna ment of schol - ars.*

The great debates of the Louisiana civilian experience generally expose two sides of the codes. On the one hand, they are historical artifacts posing a variety of puzzling questions about their origins and sources. On the other hand they are also living documents, “codes in action,” evolving with an ever increasing discrepancy between the texts as written and their actual implementation and an increasing disparity between civilian theory and practice.

Both viewpoints are represented in these writings. After an introduction setting the scene for Louisiana’s codification movement, the first essays seek to unearth the “historic” codes of 1808 and 1825, attempting to trace their legal antecedents and influences and to understand those influences within the surrounding socio-political context. The beginning essay “Understanding Moreau” presents the discovery of the principal redactor’s system of omissions and argues that these omissions are in reality Moreau Lisle’s admissions of the Digest’s substantive indebtedness to French sources. The essay “The French Connection and the Spanish Perception” delves into the complicated interplay of Spanish, French and Common Law influences in nineteenth-century Louisiana. It attempts to show that the codification movement is responsible for a tectonic shift in the foundation of Louisiana private law. Another essay searches for the true authors and origins of the historic Code Noir of 1685 which Versailles extended to Louisiana in 1724. Based on original documents in French archives, this research corrects the conventional view that the Code Noir was heavily based upon Roman slave law. It presents a different and unfamiliar code, written not by savants in Paris but by on-the-scene French administrators of the islands attempting to translate an immediate slave experience into law.

The later essays shift the focus to the codes “in action,” seeking to understand their adaptation to the mixed-jurisdiction environment and the malleable instrument they became in the hands of Louisiana judges. “The Death of a Code, the Birth of a Digest” chronicles the transformations they have undergone, culminating with the modern revision. The essay “The Collapse of the General Clause” presents a case study of common law culture subverting a famous tort principle taken from French law, and the study, “The Many Guises of Equity in a Mixed Jurisdiction,” provides a glimpse of judicial creativity at work and the means by which judges broke free of the system of equity prescribed in the preliminary title.

These essays were previously published, but a number of them appeared in foreign journals or books and were relatively inaccessible. This volume allows me to bring together my writings on codification and to present them more coherently. I have in some cases made a few revisions and updated developments but the changes are generally minor. I wish to thank the Canadian Institute for Advanced Legal Studies in Ottawa, the Sach er Institute in Jerusalem, Intersentia in Holland, the Juridical Review in Edinburgh, the Revue Internationale de Droit Comparé in Paris, and the Tulane, Loyola and LSU law reviews for their gracious permission to republish prior works.

Vernon Valentine Palmer  
New Orleans  
June 2004



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