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Mark F. Fernandez. *From Chaos to Continuity: The Evolution of Louisiana's Judicial System, 1712-1862.* Baton Rouge: Louisiana State University Press, 2001. xviii + 135 pp. $29.95 (cloth), ISBN 978-0-8071-2705-6.

Reviewed by George Dargo (New England School of Law)
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Mainstreaming Louisiana Legal History

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Land of Mardi Gras, Preservation Hall, the Latin Quarter, an erstwhile streetcar named Desire, birthplace of jazz, the home court of the Sugar Bowl and of numerous Super Bowls, the Crescent City is as much a part of American popular culture as Mount Rushmore, the World Series, and Thanksgiving Turkey. As for the Pelican State itself, Louisiana was an integral part of the antebellum South, and prominent Louisianians served as high officials in the Southern Confederacy. Post Civil War Louisiana was also the state that produced the infamous 1896 *Plessy v. Ferguson* decision that embedded "separate but equal" into the fabric of American Law, the legal doctrine most responsible for the perpetuation of racial apartheid in the United States. And, in the twentieth century, during the Great Depression, the name of Huey Long was as familiar to most Americans as that of the President of the United States. In short, in good times and in bad, the Louisiana historical experience has always been very much a part of the American past.

But Louisiana is also different, special, peculiar, even European–or, at least, Caribbean–a difference captured by Tennessee Williams when he has Stanley Kowalski explain to his sister-in-law, Blanche Dubois, that "there is such a thing in this state of Louisiana as the Napoleonic Code, according to which whatever belongs to my wife is also mine–and vice versa."[1] Kowalski was wrong in the specifics but right overall. The legal regime to which Kowalski referred–"the community of acquets and gains"–was indeed a distinctive feature of Louisiana property law, but the weight of historical thinking on the subject of the state's unique legal origins has established that Louisiana law was primarily based upon Spanish rather than French sources–that the Louisiana Code of private law going all the way back to the Digest of 1808 was by no means merely a duplicate copy of Napoleon's famous Civil Code. As Judge Alexander Porter declared in an important case decided under Lousiana's Code of 1825: "The jurisprudence of Spain came to [Louisiana] with her laws.... The opinions of [Spanish jurisconsults] ... have obtained an authority ... of which the history of no other country offers an example."[2]

The key point to consider, however, is not that Louisiana law was primarily Spanish in its origins rather than French, nor even that it was continental European and not Anglo-American. It is, rather, that while Louisiana's rich past is part of the deep mainstream of general American history, the history of its law has been, at best, but a marginal sub-plot in the American story.

Mark Fernandez's new book, *From Chaos to Continuity*, must therefore be seen as a significant contribution to the developing effort by Louisiana legal scholars and historians to end this marginalization. The main theme of Fernandez's interesting analysis is that "Louisiana's legal order should not be viewed as an anomaly in the American judicial system" (p. xvi). Fernandez even goes so far–perhaps a bit too far–when he advances the bold suggestion that when viewed from the perspective of the courts at least, Lousiana's legal system, far from being anomalous, was a "representative American jurisdiction," a model of the developing legal culture in other American states particularly in the South.

From Chaos to Continuity traces the history of Louisiana's unusual legal development from the earliest times of French rule right up to the period of the Civil War. Of particular interest is Fernandez's skillful discussion of the Spanish period, from 1762, when France ceded the colony to Spain, until the retrocession to France, which did not take effect until late in 1803, twenty days before the American takeover of all of Louisiana on December 20 of that fateful year. These abrupt regime changes had significant effects upon the law, not only by creating uncertainty and confusion, but also by depositing sedimentary layers of law upon the earliest foundations established by the French. Fernandez is skillful in sorting this out. For example, his discussion of Alejandro

O'Reilly, the Irish mercenary who had served the Spanish crown in the recently concluded Seven Years' War, is particularly lucid. Not only was the "Code of O'Reilly" an effective instrument in the establishment of Spanish substantive law, but the legal administration that O'Reilly set up through the force of his own imposing personality made his law reforms of lasting consequence to the future state. The forty year period of Spanish rule was a formative period of Louisiana legal history, and Fernandez's discussion of this sometimes confusing sequence of events is most useful.

Fernandez's treatment of the territorial period from 1803 until Louisiana entered the union as the eighteenth state is equally impressive. This was the period of Jeffersonian rule when American migration to Lower Louisiana grew with exponential force and when the foundations of the legal profession were established by an elite band of lawyers both French and American. Fernandez views the tensions between the two cultures struggling for supremacy during this short but turbulent decade as not nearly as dramatic as previous writers (including this one) have tried to suggest. He eschews the notion that there was a "clash" of legal civilizations, instead suggesting that Jeffersonian policy was highly nuanced in its demonstrations of respect for local traditions while at the same time gently introducing basic American liberties as well as American principles of judicial governance. At the very end of Jefferson's second term, this policy saw its fruition with the enactment in 1808 of the Civil Digest of the Laws in Force–an elegant effort to reduce to writing in both English and French the large bulk of Spanish civil law in order to make it accessible to the new rulers of Louisiana and its growing number of English-speaking law officers. Fernandez builds upon the position taken a few years ago by Richard Holcombe Kilbourne Jr., another able writer on this subject who has written: "The Digest, then, should be seen at least in part as a means of preparing the Orleans Territory for statehood. If any one person was responsible for the digest, it was Thomas Jefferson, who insisted on a thorough reformation of the existing legal system, a condition precedent to statehood."[3]

Fernandez marshals a good deal of evidence to support his important attempt to normalize Louisiana legal history. Of particular interest is his focus upon rules of court and the role of the organized bar in shaping the growth of the law in Louisiana. Contrary to the rather loose requirements for bar admissions that existed in the early nineteenth century in many of the other states, especially in the West, the Louisiana Supreme Court issued tight bar admission requirements that had the overall effect not only of limiting access to professional practise but had the collateral effect–perhaps intentional–of deepening the hold of Anglo-American law, legal procedures and legal sources as opposed to civilian and continental sources on the practise of law in the state. For example, in a series of landmark rule-makings in 1840, the state's high court required applicants for admission to master a defined syllabus of readings which increasingly stressed American common law materials rather than traditional European source books and treatises. In addition, rules of court practice developed by the court established structural routines that "reinforced the Anglo-American predispositions of the court's proceedings."

From Chaos to Continuity is not without weaknesses. Fernandez is at his best covering the early periods, but the structure and texture of the later chapters are less finished. Particularly bothersome is his tendency toward excessive explanation of the choicest legal cases. For example, *Syndics of Bermudez v. Ibanez and Milne*, a case involving a complex real estate transaction, is presented in all of its excruciating technical detail apparently for the purpose of supporting the book's main theme–namely, that the 1808 Digest (as well as the 1825 revised code) was not a truly modern code at all, but merely a compilation of laws which allowed the Louisiana Supreme Court to examine underlying Spanish precedents thereby fortifying its engagement in common law adjudication.[4] Presenting every twist and turn in this complicated bit of civil litigation amounts to the proverbial long climb for a short slide. Other examples abound in the same chapter tellingly entitled "Creating a Common Law." But surely some of these cases attracted a good deal of contemporaneous public comment. New Orleans had a spirited press in the early 19th century; it was still a small community with a very active resident population. Fernandez's narrative would have benefited from some attention to newspaper and other sources as a measure of public reaction to the activities of the Louisiana Supreme Court with its decided drift to the American model of jurisprudence. Such attentions would have provided a needed third dimension to Fernandez's analysis which dry case law recitations alone can never duplicate. Undoubtedly the local newspapers covered cases such as *Cottin v. Cottin* (1817), a simple inheritance case but arguably the most visible and important case at the time.[5] In *Cottin*, the distinguished jurist, Pierre Derbigny, laid the interpretive foundation of Louisiana Law under the Digest as well as the subsequent revisions that were to follow: "It must not be lost sight of," he wrote, "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 part of those laws are repealed, as are either contrary to or incompatible with the provisions of the code" (p. 73). Surely a case like *Cottin v. Cottin* would have seen a good deal of public discussion.

There is a more general point to be made, however. In trying to mainstream Louisiana legal history and to liberate that history "from the quirky restraints of the past" Fernandez has attempted to put to one side the truly unique position that Louisiana law occupies. In an age when intermarriage among members of different "families of law" are occurring with increasing frequency, the Louisiana model takes on new importance as a showcase for other American jurisdictions. At a time when our high appellate courts, including the Supreme Court of the United States, still appear to be working under a sealed carapace of isolation deflecting the vectors of change sweeping the rest of the developed legal world, Louisiana's special history becomes all the more exemplary. Whereas in the past, common law and civil law jurisdictions were defined by the bright lines of nation and region, today those frontiers have been breached as high courts in other parts of the world borrow freely across the boundaries of legal traditions. Today the "mixed legal system" is fast becoming the norm. Fernandez's effort to take Louisiana out of the side pocket of American legal history, therefore, seems a bit misplaced in time. Rather than emphasize Louisiana as a "representative model of an Anglo-American common law jurisdiction sharing remarkably similar experiences with its neighboring jurisdictions" (p. xiii), it might have been more timely to stress that "Louisiana emerged as the first jurisdiction to confront American [courts] with the problem of integrating the two systems of law" (p. xviii).

But this suggests that *From Chaos to Continuity* should have been a different project than the solid book that Mark Fernandez has written. *From Chaos to Community* is, in fact, a notable contribution to what Louisiana historians are calling "the New Louisiana Legal History." It is a work that is sure to stimulate further explorations in this most interesting field of historical scholarship.

Notes

[1]. Tennessee Williams, *A Streetcar Named Desire* (New York: Signet, 1951), Scene 2 (p. 40).

[2]. *Saul v. His Creditors*, 5 Mart. (n.s.) 569 (1828), quoted in R. H. Kilbourne, Jr., *A History of the Louisiana Civil Code: The Formative Years, 1803-1839* (Baton Rouge: Louisiana State University Press, 1987), at pp. 149, 150.

[3]. Idem., at p. 43.

[4]. *Syndics of Bermudez v. Ibanez & Milne*, 3 Mart. (o.s.) 17 (1813).

[5]. *Cottin v. Cottin*, 5 Mart. (o.s.) 93 (1817).

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