

# ***EARLY LOUISIANA AND HER SPANISH WORLD:***

***LEGAL TRADITION, LAWS AND CUSTOMS IN LUISIANA AND THE FLORIDAS***

4 November 2016 – Tulane University School of Law

Supported by the Tulane University School of Law and *The Portalis Society*, the conference brings together historians and legal historians to discuss the laws, customs, and institutions of Spanish Louisiana and the Floridas. The scope is broad, covering both law and culture (doctrine, personalities, property, politics, extra-legal norms, etc).



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## **Lawyers of Early New Orleans**

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My paper will focus on the lawyers who represented free and enslaved people of color in Louisiana in the era straddling the Louisiana Purchase. I will address two sets of questions;

1. what motivated these elite white men to represent people of color? To what extent were they hired guns and to what extent were they motivated by a desire to help out the oppressed?
2. In what ways did the Louisiana Purchase and consequent transformation of Louisiana's legal system impact the legal profession in Louisiana, specifically as it related to lawyers who represented people of color?

This study will, of necessity, touch on continued debates about the differences between Spanish law and Anglo-American law with regards to race and slavery as well as the extent to which the law of colonial Louisiana survived the Louisiana Purchase. My specific interest, however, is in the way that these changes affected the legal profession and the practices of lawyers, especially those who represented free and enslaved blacks.

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## **Spanish Law, Encyclopaedias, and the Digest of 1808**

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It is clear that by the time the Legislature of the Territory of Orleans appointed James Brown and Louis Moreau Lislet to draft a “civil code” for the Territory, drawing on the civil law now in force, the basic private law of the Territory was understood to be in some way of Spanish origin, founded on the provisions of Spanish colonial law. The two men, remarkably quickly, produced *The Digest of the Civil Laws now in Force in the Territory of Orleans*, which was promulgated in 1808. More than forty years ago, Rodolfo Batiza explored the sources of the individual articles of the *Digest*, identifying those that he thought had a Spanish source underlying their text. Though it has been subject to criticism, his research has never been superseded, and this paper will explore some of those articles in the first book of the *Digest* that he thought had a Spanish origin, assessing what conclusions may be drawn from them about the work of the Brown and Moreau Lislet.

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## **Through a Glass Darkly:**

### **The Minor Judiciary of Feliciana, c1803-1810**

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From 1783-1810, Spanish West Florida extended from the Mississippi in the West to the Apalachicola in the East. It had been French and briefly, but importantly, British before Spain captured it in the American Revolution. For almost forty years, West Florida was ruled by Spain alongside its Louisiana Territory. The laws of both were complex, colonial variants of the hybrid European *ius commune*. They governed both settled nations and new settlers, including a large slave population.

If the first decade of the nineteenth century saw important legal-intellectual developments – particularly the promulgation of the French *Code Civil* (1805) – both Europe and the Americas were still some distance from the mature nation-state and the positivism it presumed. This was certainly true of West Florida; there, its minor magistrates had little access to legislation or doctrine. Its people engaged with the laws primarily through its low, discretionary jurisdictions; non-state normativities remained central to social life everywhere.

The specific complexity of West Florida was due, in part, to the fact that a significant part of its – relatively small – settler population was Anglophone. Traditional Spanish tolerance of local custom suggests that ordinary adjudication, at least in its westernmost districts known as Feliciana, reflected Anglo-American laws as customs in the courts. This paper examines the judicial records of the District of Baton Rouge from 1803-1810, when the area between the Mississippi and Pearl rivers was forcibly annexed by the United States. Not long afterwards, it would be tacked on to the new state of Louisiana.

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**“The Spanish Spirit in This Country”:  
Newcomers to Louisiana in 1803-1805, and  
Their Perceptions of the Spanish Regime**

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When Louisiana suddenly attracted the interest of both Bonaparte’s France and Thomas Jefferson’s United States in the first years of the nineteenth century, elite observers across the Atlantic world turned a critical eye to the nature of the Spanish regime that had governed the territory since the 1760s. After 1803, when newcomers from America, Britain, and France faced the challenge of building a new republican order in the former royal colony, this scrutiny intensified, as the Spanish regime’s legacy – for better or worse – lingered on in crucial ways. In private letters, published writings, and at least one play, these critics retrospectively imagined the rule of “the Dons” as a sort of negative image of the republican order they aspired to build. Their perceptions of the legal, political, military, and economic dimensions of Spanish Louisiana – further complicated by the continuing presence of Spanish officers, troops, and power in the region – informed important decisions taken in the chaotic transitional years 1804 and 1805, and shed revealing light on the subsequent course of development during the American period.

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**A Confusion of Institutions:  
Spanish Law and Practice in a Franco-phone  
Colony Louisiana, 1763-c1798**

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When Louis XV of France ceded La Louisiane to Spain in 1763, he assured his subjects in that province that he hoped that Spain would respect their laws and customs, but he could not guarantee that it would. This essay will examine three instances in which the expectations of La Louisiane's residents and Spanish law and practice came into conflict even though both European imperial powers had somewhat similar laws and what might have appeared to be similar practices of colonial administration. The three instances are Spain's effort to discover if the laws and practices of La Louisiane were congruent with those of the Spanish empire (Governor Antonio de Ulloa's fact finding of 1765-68 that revealed that the governmental practices of La Louisiane were not fully compatible with Spanish colonial practice), General Alejandro O'Reilly's various legal decrees and changes in governmental practices (and what Governor Luis de Unzaga felt he had to do to reconcile the conflicts and Spanish law and practice would have created if fully enforced) and the conflict over slave law and practice and the locus of local governmental power that surfaced under Governor the Baron de Carondelet in the 1790s.

Each of these cases has been studied; each shows the gap between law and established practices and the confusions that arose as men adept in one system tried to impose it on another and were confronted by men adept in the systems being superseded.

Finally, the paper will call for comparative study of what Spain did when it acquired various Italian provinces during the 18<sup>th</sup> century because those provinces, like La Louisiane, were European in law and custom, unlike the Native American polities that the Spaniards had overrun in the Americas. Such a study, if undertaken, could show how Spanish imperial practices had changed by the 1760s (as some historiography suggests) but will in any case put the Louisiana confusion of institutions into a new framework.

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**A Dark Legacy of Spanish Governance:  
The Tradition of Extra-Legal Violence  
in Louisiana's Florida Parishes**

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In the closing decades of the nineteenth century and first decades of the twentieth, Louisiana's Florida Parishes endured some of the highest rural homicide rates recorded in American history. The largely white-on-white violence flourished in a

region burdened by a compromised legal system, along with corrupt and ineffective leadership, amid a population long accustomed to resolving grievances on their own.

The instability that characterized the region resulted in part from the convoluted pattern of colonial development that witnessed governance by three European powers each of whom awarded frequently conflicting land grants. An armed insurrection and the emergence of a brief independent republic added to the regions troubled identity.

My presentation will highlight the policies and conditions initiated during the Spanish period in West Florida that contributed to the pattern of elusive stability characterizing the region well into the twentieth century. Methods of governance, trade restrictions, and settlement patterns among other issues will be included in the analysis. The West Florida Revolt may have terminated Spanish authority in the area, but the legacy of Spanish governance of the territory left a dark mark on the region that in some senses remains evident to this day!

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## **The Supreme Court, Florida Land Claims, and *Derecho Indiano***

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After Florida became a US territory in 1821, Congress established commissioners to determine land ownership in the territory. A series of federal laws on this subject followed until “an act for final settlement of land-claims in Florida” in 1830. Over the next three decades, the United States Supreme Court was the final arbiter in more than fifty cases of titles to land in Florida. While the Court often relied on the determinations of commissioners and on the decisions of lower federal courts, such as the territorial Superior Court of East Florida, some cases required the Court to examine Spanish colonial law, *derecho indiano*, to decide questions of title to land. The stakes were high; disputed grants often exceeded 10,000 acres.

This study focuses on the way the Supreme Court dealt with Spanish colonial law to decide these cases. It examines the Court’s sources, skill, limitations, and biases when addressing complex issues of land title under a foreign legal system. It appears that some lawyers developed a level of expertise in these matters and were consulted in such cases. Although focusing on the United States Supreme Court, this contribution notes that the records of lower courts and claims commissions are

promising and neglected sources for studying the development of comparative law and legal methodologies.

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### **Allegiance and Privilege:**

#### **William Panton and the Spanish Realm**

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The firm of Panton, Leslie and Company has gained considerable scholarly attention for its singular capacity to dominate the Indian deerskin trade through Spanish Florida's ports during the late eighteenth and early nineteenth century. My paper will consider William Panton, the firm's head at Pensacola, who swore his own loyalty oath to the Spanish crown in April 1787, and thereafter repeatedly renegotiated the terms by which he would conduct business under Madrid's authorization. Panton's oath is notable for its escape clause—the right of reserving “the allegiance which he owes to his Native Sovereign... His Britannick Majesty” so that he could depart Spanish territory with his property intact whenever he might choose at a future time, and relocate to a region under English sovereignty. The oath is a striking example of the ability of influential foreigners to obtain privileges under Spanish governance in Louisiana and the Floridas on condition of performing services for the crown or shoring up the realm in some manner.

I propose to focus on the legalistic basis of Panton's bargaining with Spanish officials, which coincided with his efforts to maintain his firm's commercial predominance and political influence among Indian peoples. As Panton faced various rivals in the Southern Indian trade in 1792, he wrote barón de Carondelet, Louisiana's governor, that his privileges, which were affirmed by successive royal orders, ought to be irrevocable unless the king altered them. My paper will link the resultant bargaining between Panton and Carondelet to concurrent negotiations between Panton and Cherokee leaders then pursuing Spanish assistance in their conflict with the United States.

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### **Reclaiming Homes across the Florida Straits**

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In 1763 the French moved out of North America, the Spanish moved out of Florida, and the Spanish moved into Louisiana. Ship transports carried Florida's evacuees, military weaponry, documents and religious items to Cuba. Land records traveled to Cuba, but the lands and lots remained in the Florida peninsula, ripe for use by the incoming British.

When Great Britain returned Florida to Spain after the American Revolution, Spain now claimed territory from the Mississippi River to the Atlantic Ocean--a goodly swath of today's Sun Belt. Evacuee families of 1763 returned to the Florida peninsula in 1784 to reclaim their ancestors' properties. In the confusion of relocating a colony in 1763 legal records had been spread around Havana, wedged in available space. In the upheaval residents lost their own private records.

Returning evacuees resorted to many sorts of evidence to prove ownership--bits of paper, eyewitness reminiscences and at times certified copies of deeds--while the property itself was occupied by someone claiming valid transfers during the twenty years of British possession of Florida. The sacramental records of St. Augustine's parish church, so needed in the process for establishing family relations, were unavailable, not repatriated from Havana until 1906. After 1821, land ownership would again be scrutinized when Florida became a US territory.

This sort of claims chaos is are not just an artifact of two centuries ago. Soon it may well be replicated in some manner as evacuee families return to Cuba and reclaim land their families abandoned in the twentieth century.

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### **The Prosecution of Clement:**

#### **Slave Violence and Spanish Legal Process in New Orleans, 1777-78**

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On February 21, 1778, New Orleanians gathered in the Plaza de Armas to watch the unusual execution of Clement, an enslaved man owned by Pierre Marie Cabaret Detrepis, who had been convicted of killing his brother, Pierre. After being whipped at the foot of the gallows, Clement was "hung by his neck...until he appeared dead and did not give any signs of life." What was unusual was what happened next: Clement's body was "put in a leather sack with a dog, a viper, a monkey, and a rooster."<sup>1</sup> The sack was then sewn shut, dragged to the river, and tossed in. Called the *poena cullei*, this punishment derived from Roman law and was reserved for

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<sup>1</sup> Crown v. Clement and Jacob, 30 October 1777, Spanish Judicial Records, Louisiana State Museum, quotations on 93v, 90.

those convicted of parricide.<sup>2</sup> While it was this striking method of execution in the case of *Crown v. Clement* that first caught my attention, the case itself reveals the ways in which, I argue, Spanish officials in Louisiana sought to follow, to their best of their ability, Spanish laws and legal procedures even when prosecuting violence among the enslaved. This paper examines the prosecution of Clement as it moved from a summary investigation in the home of German Coast commander Francisco Seimars de Bellile through the formal proceedings in the courtroom of Governor Bernardo de Gálvez in New Orleans and ending with Clement's execution in the Plaza de Armas.

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### **Entangled Lives, Entangled Law: Women of Property in early Louisiana**

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Ethnicity and custom profoundly influenced whether women in Spanish colonial Louisiana would enjoy the economic benefits of Spanish civil law. This paper compares the experiences of two women of property in Spanish West Florida one of them an Anglo, Catherine Turnbull of Feliciana, and the other a French-speaking Creole, Constance Duplantier of Baton Rouge. Entangled with each other through their husbands' business affairs, the paper explains how their Anglo husbands denied them as widows their rightful share of marital property under Spanish civil law, applying more restrictive Anglo common law instead; how even widows of French ancestry accustomed to civil law sometimes failed to assert their legal rights under Spanish civil law; and why it mattered whether civil or common law customs were followed, both in terms of women's economic well-being and in terms of maintaining loyalty in a borderland on the periphery of the Spanish empire. Turnbull and Duplantier's experiences stand in for many other women of property who were entangled between two legal systems in Spanish West Florida. Their stories place gender at the center of the contest between civil and common law legal systems in early Louisiana and they complicate our understanding of the Spanish borderlands.

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<sup>2</sup> Florike Egmond, "The Cock, the Dog, the Serpent, and the Monkey. Reception and Transmission of a Roman Punishment, or Historiography as History," *International Journal of the Classical Tradition* 2, no. 2 (1995): 159-92.