

**AN UNCOMMON BIRTH:  
SHAPING LOUISIANA'S LEGAL TRADITION FOR STATEHOOD**

*A Short Play*

*By Barry W. Ashe*

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*Cast of Characters*

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| <i>Narrator</i>       | <i>Female, dressed in black.</i>   |
| <i>Jefferson</i>      | <i>Male, long red hair drawn back, dressed in early 19th century garb (green jacket, gold breeches, knee socks).</i> |
| <i>Claiborne</i>      | <i>Male, dressed in colonial military uniform with blue coat.</i>  |
| <i>Casa Calvo</i>     | <i>Male, dressed in colonial governor's coat. Fluent in Spanish.</i>   |
| <i>Translator One</i> | <i>Female, dressed in black.</i>   |
| <i>Poydras</i>        | <i>Male, dressed in early 19th century planter garb. Fluent in French.</i>   |
| <i>Translator Two</i> | <i>Female, dressed in black.</i>   |
| <i>Livingston</i>     | <i>Male, dressed in black or brown 19th century garb.</i>  |

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*(The scene involves a Narrator, center stage, who is lit as the play begins. Five other characters are on stage, four to the left of the narrator, with a writing desk, and one (Jefferson) to the right, also with a writing desk, all with heads down and unlit. Each occupies his own space.)*

NARRATOR: The decade before the dawn of statehood for Louisiana was pivotal in shaping Louisiana's laws for both its state and federal courts. With the Louisiana Purchase in 1803 there began a clash of legal traditions in what was then, as now, the multicultural world of the Louisiana territory and its thriving port city of New Orleans. The

French had long settled the area, the Spanish had ruled it for over three decades, and the restless Americans were moving in as a result of their westward expansion.

The clash of legal traditions is symbolized by several leading figures of the day, so some introductions are in order.

*(Each character lifts his head and nods to the audience as introduced.)*

This man we all know. Thomas Jefferson, the President who, with the Louisiana Purchase, presided over the largest acquisition of territory by the United States in its history. Here he sits in Washington, D.C., the young nation's capital, steering the effort to make Louisiana ready for statehood.

This man we should know. William C.C. Claiborne, President Jefferson's designee, on the scene in Louisiana, to accomplish Jefferson's plans to ready Louisiana for statehood. Claiborne was the first American territorial governor of Louisiana and then its first governor after statehood.

Then there were persons born in Louisiana, largely but not exclusively French, who everyone down here knew as Creoles, the "ancients" or the "old inhabitants." Symbolized here by Julien Poydras, they were afraid that the Americans were bound and determined to turn their world upside down – changing all things French to all things American. Having retained their French cultural roots through over three decades of Spanish rule, the Creoles were not about to let the Americans have their way. Still, Poydras was an old inhabitant who was largely pro-American during the period of transition to statehood.

And this is the forgotten man in the days following the Purchase and the run up to statehood – the Marquis de Casa Calvo, the former Spanish commissioner in New Orleans, who is emblematic of the last vestige of Spanish rule and an ominous reminder of Spanish pretensions to Louisiana. Spain's lasting influence on Louisiana and its law may be greater than either the Creoles or the Americans will ever want to acknowledge.

This is Edward Livingston, a New York lawyer who came to New Orleans after the Purchase in search of professional and business opportunities. The Creoles were at first suspicious of the American opportunist, but he eventually became Louisiana's foremost champion of legal codification and a draftsman of Louisiana's revised Civil Code in 1825.

Let's listen in to their enduring exchange, which here occurs in the early part of 1809.

*(With these last words, the Narrator extends his right arm with open palm and exits stage left in a sweeping movement, but always facing the audience.)*

CASA CALVO: *(Lifting his head and speaking to the audience in Spanish.)*

**[Translate into Spanish:** I am disheartened to see what Louisiana has become in so short a time after my government foolishly returned her to Napoleon, and I fear what she will become now that the French pretender has sold her to the upstart Americans.

And all this after the Spanish empire had taken pains to establish the civil law and jurisprudence of Spain – the law of Castile – as the authoritative source of law for Louisiana.]

TRANSLATOR ONE: *(Holding placard or banner saying, "Translation.")*

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And all this after the Spanish empire had taken pains to establish the civil law and jurisprudence of Spain – the law of Castile – as the authoritative source of law for Louisiana.

CLAIBORNE: *(Lifting his head, facing toward and speaking to Casa Calvo.)*

The influence and role of Spain's civil law have never been questioned by me or the judges of the Superior Court of the Orleans territory.

POYDRAS: *(Lifting his head and speaking to Claiborne in French.)*

**[Translate into French:** American imperialist – that's just the problem. You forget that the people of Louisiana are French. Your weakness and cowardice make you buckle to Spanish laws, as you choose to ignore the fact that Louisiana was founded upon the French civilian legal tradition. And all the while, don't believe for a moment that we Creoles don't know what you're really up to, Governor Claiborne – seeking to displace all civilian law with the English common law that prevails everywhere else in America. This could adversely affect our system of community property, our

inheritance laws, our family law, our law of obligations and property, our method of making legal decisions. And don't forget the organized protest against American rule in 1804 objecting to the Americanization of Louisiana law. Just leave our law alone, and we will be able to make the change to American statehood!]

TRANSLATOR TWO: *(Holding placard or banner saying, "Translation.")*

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POYDRAS: *(Turning toward Casa Calvo in French.)*

**[Translate into French:** And, Marquis, you seem to ignore the fact that lower Louisiana is overwhelmingly French in language, *moeurs*, manners and, yes, even legal expectations, and it remained that way throughout the period of Spanish rule.]

TRANSLATOR TWO: *(Holding placard or banner saying, "Translation.")*

And, Marquis, you seem to ignore the fact that lower Louisiana is overwhelmingly French in language, customs, manners and, yes, even legal expectations, and it remained that way throughout the period of Spanish rule.

LIVINGSTON: *(Lifting his head, pointing to himself and speaking to the audience.)*

That's what this transplanted New Yorker observed upon my arrival in Louisiana after the Great Purchase. Even after 35 years of Spanish rule, the population of Louisiana is still generally French in its tastes, customs, habits, religion, and language.

CLAIBORNE: *(Picking up his quill pen and sitting at a writing desk.)*

"President Jefferson: I urge that the government in Louisiana be as republican as the people can be safely entrusted with. I fear, however, that the principles of a popular Government are utterly beyond their comprehension. The system of representative government is an enigma that at present bewilders them."

POYDRAS: *(Turning to Claiborne in French.)*

**[Translate into French:** We have learned of your insulting correspondence with the President and the way you talk of Louisiana as some sort of Tower of Babel, suffering from the confusion of tongues, and Louisianians as a people stupefied by despotism or ignorance, and therefore unable to elevate themselves for a long time to the heights of a free constitution. Governor Claiborne, it is you and your English-speaking friends who are the strangers here. You must begin to take that into account.]

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JEFFERSON: *(Lifting his head, and then sitting at a writing desk and picking up a quill pen.)*

"Governor Claiborne: Louisiana – the American rage is for going to that country. Accordingly, the United States must do what it can to make Louisiana ready to receive more American settlers and to make Louisiana ready for statehood. That is why Congress passed the first organic law establishing a territorial government, including a rudimentary judicial system. But a majority in the Government should be Americans, and the rest French or Spaniards. And I agree with you, Governor, that Louisiana is not ready for immediate statehood.

"Anglo-American common law is familiar to and thus will attract even more American settlers to Louisiana, and Anglo-American common law is the foundation of American independence. We

need the common law in Louisiana in order to bind it more closely to the still fragile union of American states.

"After all, legal uniformity is necessary to national unity. For however I admit the superiority of the civil law over the common law code, as a system of perfect justice, yet an incorporation of the two would be like Nebuchadnezzar's image of metal and clay, a thing without cohesion of parts.

"Instead, we shall endeavor to introduce the American laws in Louisiana and that cannot be done but by amalgamating the Louisiana people with such a body of Americans as may take the lead in legislation and government. We shall draw Louisiana's laws and organization to the mold of ours by degrees as the people of Louisiana find practicable without exciting too much discomfort."

POYDRAS:

**[Translate into French:** The Anglo-American common law – a spurious monster, the mongrel offspring of injustice and chicane, has been introduced into my country – Louisiana – by our usurpers, who endeavor to pawn it on us as the lovely child of truth and justice; but we have with horror reject this hideous imp, this illegitimate monster. Its foster parents are now attempting to have him regenerated, and legitimated, and for this purpose they pursue means which are new, circuitous and dark; but I ardently hope their schemes may once more prove abortive.

We are on the eve of seeing confusion established on the banks of the Mississippi, by the forced introduction of a voluminous body of common law to which we are total strangers; laws which are quite foreign to our constitution, our liberty, our circumstances and our manners, and are wholly unknown and inapplicable to us.]

TRANSLATOR TWO:

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foreign to our constitution, our liberty, our circumstances and our manners, and are wholly unknown and inapplicable to us.

LIVINGSTON: *(Sitting at a writing desk, and picking up a quill pen.)*

"Dear brother Robert: Have you and your friend, Robert Fulton, made any progress on your silly invention? A ship powered by steam – unthinkable. I write to advise you on the state of legal affairs in the land for which you helped negotiate the Purchase. Louisiana is in a kind of equivocal state as to jurisprudence that produces the most comic effect. French law abrogated by Spanish law, only to be restored shortly before being displaced by the laws of the United States. Our Governor conceives himself authorized to legislate a mixture of the laws of Castille, the Customs of Paris, the Statutes of the United States and the omnipresent common law of England. This confusion is equaled only by the cacophony in our local courts where American attorneys, French procurers and Castilian abogaders each argue in his own language.

"Of course the lawyer who would know the greatest number of Judges speaking his language would always be the one who would win. You would have about as much chance by rolling dice as you would with such courts? If such a legal case was shown on the stage, the chances are you might die laughing at such a novel burlesque invention, but a man's heart grows sad and revolts, when he thinks that it is to the judgments of such Courts that the fortune and honor of old Louisiana families are entrusted! I hope one day to bring order to such chaos."

CLAIBORNE: *(With a stricken look and hands to his head.)*

I don't get paid enough for this – stuck in the middle between a stubborn and determined President and an even more stubborn and suspicious people of Louisiana, clinging to their passing culture and resisting their American destiny. So Louisianians condemn me for introducing the common law, and the Americans condemn me for delaying its introduction. Louisianians believe the American regime is bent on overturning the legal basis of the Louisiana way of life. And who knows? They may be right. At least this conflict is not quite as trivial as when the French and Americans argued about whose dances would be played first at the New Orleans balls.

I pay too great a price. I've lost two wives and a daughter to the yellow fever that plagues this swamp, and now my career is jeopardized by a conflict I can't find a way to resolve. But, alas, the approval of the President is the first object of my ambition, the

most anxious wish of my heart. And the second object is to steer a middle course between the French and the American population.

*(Sitting at a writing desk, and picking up a quill pen.)*

"President Jefferson: The council has already determined that the laws should be printed in French and English. The laws are to be passed in English, but official translations into French are to be made. I presume this will be satisfactory."

POYDRAS: **[Translate into French:** You are kidding yourself, Governor Claiborne, if you think these will be American laws. After all, in 1808, Louisiana saw fit to adopt its first civil code, the *Digest of the Civil Laws Now in Force in the Territory of Orleans*. This took place on your watch, with your approval, and the French version is mostly lifted verbatim or nearly verbatim from the new system of laws in France – the *Code Civil of Napoleon*.]

TRANSLATOR TWO: You are kidding yourself, Governor Claiborne, if you think these will be American laws. After all, in 1808, Louisiana saw fit to adopt its first civil code, the *Digest of the Civil Laws Now in Force in the Territory of Orleans*. This took place on your watch, with your approval, and the French version is mostly lifted verbatim or nearly verbatim from the new system of laws in France – the *Code Civil of Napoleon*.

CASA CALVO: **[Translate into Spanish:** Not so fast Senior Poydras. The Louisiana *Digest* was essentially a digest of the Spanish law then in force.]

TRANSLATOR ONE: Not so fast Senior Poydras. The Louisiana *Digest* was essentially a digest of the Spanish law then in force.

POYDRAS: **[Translate into French:** *Au contraire* ... The *Digest* represented a resurgence of French law in Louisiana, harkening all the way back to the tradition of the French civilian code, the Custom of Paris, that has governed here since 1712.]

TRANSLATOR TWO: *Au contraire* ... The *Digest* represented a resurgence of French law in Louisiana, harkening all the way back to the tradition of the French civilian code, the Custom of Paris, that has governed here since 1712.

CLAIBORNE: *(Speaking to the audience.)*

The *Digest* is nothing more than a compilation of laws in force in

this territory; it was not a new legal code intended to replace prior law. Louisiana has not broken with its past.

LIVINGSTON: *(Also speaking to the audience.)*

And yet it is a matter of public notoriety that our local *Digest* author, Monsieur Louis Moreau Lislet, has copied his new code from that of Bonaparte and the present imperial laws of France. It was wise of Governor Claiborne not to veto the adoption of this code as he had so unwisely vetoed the bill passed by the legislature back in 1806 declaring civil law to be in force throughout Louisiana. Now that ignited a political firestorm – a huge backlash from the local "ancients."

JEFFERSON: *(Sitting at his writing desk, pen in hand.)*

"Governor Claiborne: Congratulations on the adoption of the *Digest* which reduces Louisiana's private law to writing. This will give much assurance and certainty to Americans moving into Louisiana about the law to be applied to them. And it will help facilitate the assimilation of Louisiana's legal regimes to the principles of American democracy. After all, the wholesale introduction of American common law is completely infeasible because of local anxieties over the future of property rights in land grants made during the colonial period."

CLAIBORNE: *(Throwing up his hands.)*

Can the President not make up his mind as to the direction he wants Louisiana law to take?

POYDRAS: **[Translate into French:** Oh hush, Governor. It looks like he has – and we could not be happier about it.]

TRANSLATOR TWO: Oh hush, Governor. It looks like he has – and we could not be happier about it.

CASA CALVO: **[Translate into Spanish:** Nor we.]

TRANSLATOR ONE: Nor we.

CLAIBORNE: Perhaps the *Digest* has prepared the way for statehood, then, by putting to rest the fears of Louisianians that their law would be set aside by becoming a part of the United States. That alone would make the *Digest* worthwhile, and its adoption recommended by the strongest considerations of justice and policy.

LIVINGSTON: And Governor, the path to statehood has also been smoothed by the fact that Louisiana's territorial courts have long employed the practices and procedures of other American states – a common law-oriented judicial discourse applying a system of private civilian law.

CLAIBORNE: You might say the best of both worlds – American procedure applying French . . .

CASA CALVO: *(Interjecting.)*

**[Translate into Spanish: Spanish . . .]**

CLAIBORNE: . . . private civilian law. *[Pause.]* But there is a federal court in Louisiana occupied by my friend from South Carolina, Judge Dominick Hall. Will this compromise work for an American federal court?

LIVINGSTON: The federal court will apply common law; the local courts, civil law. I fear that as American procedural law is used more and more by the territorial and federal courts, the judges of the local courts will import Anglo-American common law doctrines into Louisiana law little by little. In time, as the people of Louisiana become Americanized, so will its laws.

JEFFERSON,  
CLAIBORNE: *(Simultaneously.)*

Genius!

JEFFERSON: Unity of law will help achieve national unity, and Louisiana will have avoided eternal alienation from the American union . . .

CLAIBORNE: . . . because Louisiana's "uncommon" civil law will be made common and American after all.

POYDRAS: **[Translate into French: A tragedy if it is to be so – to have American commoners debase the *uncommon* law of Louisiana's *uncommon* people would be a tragedy too great to bear.]**

TRANSLATOR TWO: A tragedy if it is to be so – to have American commoners debase the *uncommon* law of Louisiana's *uncommon* people would be a tragedy too great to bear.

NARRATOR: *(Sweeping back onto center stage.)*

As it would be too difficult to accomplish. Louisianians held on to their civil law and used statehood to preserve their cultural distinctiveness and their identity as a people, thereby turning the tables on President Jefferson's best laid plans. So Louisiana remains a civil law state – with a proud civilian legal tradition – and remains set apart from the Anglo-American common law tradition of all 49 other states in regard to its private law. A civil law island in a common law sea. And, yet, Louisiana – including especially its federal courts – became thoroughly American in its public and criminal law, accepting almost immediately the common law's two great features of civil liberty – trial by jury and the writ of habeas corpus.

And how did Louisiana accomplish this fete – of reconciling conflicting legal traditions? It did so largely using the same formula that has worked in every other area of Louisiana's history and the life of its people – by making room for everybody, the ancient inhabitants and American settlers alike. And, of course, the British greatly assisted in unifying the whole of the local population to resist their invasion just a few years later. Nothing forges unity in a resilient people like fighting for all you have against threats that would take it all. This is the *uncommon* birth of Louisiana's *uncommon* law for its *uncommon* people.