The Strange Science of Codifying Slavery—Moreau Lislet and the Louisiana Digest of 1808

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I. INTRODUCTION

The Digest of 1808 was the first European-style code to be enacted in the Americas—the cause of our present celebration—but it was also the first modern code anywhere in the world to incorporate slave law, and that distinction is the cause of my paper. The decision to combine the two subjects in a single code is curious and intriguing, and has not been explained. It is as if the Digest was to be the simultaneous expression of two contradictory impulses or perhaps two contrasting blueprints. It was,

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on the one hand, a code of enlightenment and natural reason,[1] drafted shortly after the French and American revolutions, and embodying therefore all the *acquis* of those revolutions—the end of feudalism, the monarchy, the power of the church, the privileged orders and social differences. Thus it heralded the beginning of liberal society, equality, freedom of contract and property rights.[2]

On the other hand the Digest embodied slavery and was therefore a code of darkness, a code *contra naturam*, dedicated to the continuance of human bondage. Ever since Roman times, slavery had been defined as an institution of the law of nations that was contrary to nature.[3] In the Siete Partidas we read denunciation after denunciation of slavery: "Servitude is the vilest and most contemptible thing that can exist among men . . . for the reason that man, who is the most noble and free among all the creatures that God made, is brought by means of it under the power of another, so that the latter can do with him what he pleases, just as he can with any of the rest of his property living or dead."[4] The Digest of Orleans, in contrast, omitted sentimental, conscience-salving statements and certainly made no apology for treating slavery. It has the tone of those who are comfortable in the right. Of course, the issues facing the legislature and redactors were not on that account any less problematic. Would not the juxtaposition of slavery in a liberal code produce a Janus-faced figure at war with itself? Was it possible to reconcile and unite the principles of liberal society with those of a slave-holding society? How would the slave be presented, as a person without rights or as human property without personality? How to reconcile the everyday contradiction that a slave could purchase his freedom, yet he was supposedly incapable of owning property, including that which he used in purchasing his freedom? Or how to reconcile that slaves were at times paid laborers (e.g., Sunday labor or hiring himself out in his free

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1. This faith in universal reason permeated the philosophy of the redactors of the French Civil Code. As Portalis expressed it, "Il existe un droit universel et immuable, source de toutes les lois positives, il n'est que la raison naturelle en tant qu'elle gouverne tous les hommes." PORTALIS, ECRITS ET DISCOURS JURIDIQUES ET POLITIQUES (Presses d'Aix-Marseille 1988).

2. Of course revolutionary aspirations were not instantiated in all European codifications of this period. The Prussian Landrecht of 1794, for instance, confirmed a stratified society organized into three "estates" –the nobility, the bourgeoisie and the peasantry, in which each sector had its own laws, differing capacities, legal privileges and degrees of liberty. *See* MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE, 1000-1800, at 6 (Cochrane trans., Catholic Univ. Press 1995).

3. See Florentinus' definition of slavery, D. 1.5.4. Alan Watson believes this to be "the only instance in Roman law in which a rule of the law of nations—defined as the law which all nations obey—is said to be contrary to nature. ROMAN SLAVE LAW 7 (Johns Hopkins Univ. Press 1987).

4. Partida IV, tit. V, Concerning the Marriages of Slaves.

time) but remained enslaved the rest of the time? Could the code distinguish between the civil rights enjoyed by free whites and those rights held by free persons of color? Were those gradated distinctions even settled or understood in 1808 and what could be codified about them? One imagines that these must have been only some of the challenges facing Moreau Lislet, the principal draftsman.

Historians tell us that in Brazil the codifiers had great difficulty drafting the nation's first civil code so long as slavery was extant in the land. Codification attempts foundered for nearly a hundred years because the drafters could not find the ways and means of stating clear definitions and consistent rules.[5] In marked contrast, Moreau Lislet and Brown produced the Digest in a record breaking twenty-one months.[6] The speed and efficiency with which they worked suggest that they were unencumbered by policy disagreements or drafting difficulties.[7] The task was undoubtedly facilitated by two favorable circumstances. The law of slavery had been comprehensively restated by the Legislature in the same year as their appointment, and the members of the Legislature were apparently united behind the decision to draft an integrated document. This investigation of their efforts, however, is somewhat hampered by the meager materials at our disposal: the jurisconsults themselves left no notes or *motifs* to explain their thinking; and the Legislature kept no journal of its debates. There are gaps and uncertainties on various points in this account. Nevertheless we are fortunate in that the era 1806-1825 affords an acute angle of historical observation. In 1806, 1808 and 1825 the Legislature took three consecutive general positions on slavery, thus allowing us to follow the expression and the evolution of the legislative will.

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5. Keila Grinberg, *Slavery, Liberalism, and Civil Law: Definitions of Status and Citizenship in the Elaboration of the Brazilian Civil Code*, *in* HONOR, STATUS AND LAW IN MODERN LATIN AMERICA 109-27 (Caulfield, Chambers & Putnam eds., Duke Univ. Press 2005).

6. Actually a first draft was ready in merely nineteen months. In January 1808, the Moniteur reported that the draft was ready for examination by legislative committees. LE MONITEUR, Jan. 27, 1808.

7. Brown's intellectual contribution is unclear. Some historians, such as Professor Batiza, believe that Moreau produced the Digest by himself. This view rests upon the statement in the Preliminary Report (February 13, 1823) that "the unaided exertions of one person [Moreau] were not sufficient for the completion of the task." *See* Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971). John Cairns, however, finds the sole-authorship theory to be improbable and unconvincing. THE 1808 DIGEST OF ORLEANS AND 1866 CIVIL CODE OF LOWER CANADA: AN HISTORICAL STUDY OF LEGAL CHANGE 110 (1980).

II. THE TWIN ASPIRATIONS OF THE DIGEST

The Digest is usually, and rightly, presented as a profoundly conservative and preservationist document in which the Creoles attempted to perpetuate their own legal culture and to avoid imposition of the common law. What has not received sufficient attention, however, is that the decision to enact a *slavery-inclusive* Digest involves a separate and distinct political goal. By introducing slavery into the civil law, the Creoles apparently intended to make an equally important political and cultural statement. After all, there was nothing absolutely necessary or historically inevitable about the decision to introduce slavery into the Digest. Technically speaking, nothing required it. Indeed it would have been the easier path to leave all slavery matters confined in the Black Code, as they always had been, and simply proceed to draft a new Digest of civil law strictly for free persons.

Whether the idea for an integrated code originated with Moreau Lislet and Brown or originated with a legislative committee or the Legislature as a whole, we actually do not know because of lack of surviving records. However, it would not be fully persuasive, in my view, to trace such a decision merely to the choices at the discretion of the redactors or to the legal models (French or Spanish) influencing their choices. Important and consequential as redactorial choices were, and there are many examples of important choices, the basic decision to showcase and entrench slavery in the social constitution of Orleans seems to reflect the dominance of the planters in the legislature and their visceral attachment to slavery. Ascribing the primary decision to them is a thesis that should surprise no one. They had shaped slave laws for decades during French and Spanish rule by virtue of their preponderant influence in the Conseil Supérieur and the Cabildo.[8] In the absence of the Crown, they now had even tighter control over the legislature than in the past, and the decision to merge slavery into the Digest was consistent with their self-interest and their own contemporaneous actions to preserve the institution in the territory. Two indications of their resolve were the enactment of the Black code in 1806 and the sending of the Memorial (also called the Remonstrance) to Washington to protest Congress's embargo on the further importation of slaves into Louisiana.

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8. On the earlier efforts under Spanish rule to draft a new slave code, see my essay, *The Customs of Slavery: The War Without Arms*, XLVIII AM. J. LEGAL HIST. 177, 187-89 (2006); *see also* GILBERT DIN, SPANIARDS, PLANTERS AND SLAVES: THE SPANISH REGULATION OF SLAVERY IN LOUISIANA, 1763-1803 (Texas A&M 1999).

At this remove I do not pretend to prove the actual intent behind the Digest, but I would suggest, based on the planters' predominance in the Legislature and the biographical details of the primary drafter, that this thesis is quite plausible.

A. Influence of the Planters in the Legislature

The legislators who enacted the Digest of 1808 were generally large landowners and slaveowners. The bicameral legislature established in 1805 by Act of Congress was an all-white exclusively male body. It consisted of twenty-five members in the House of Representatives (the lower house) and five members in the Legislative Council (the upper house).The qualifications for election to the House of Representatives were citizenship, residence and 200 acres of land; for the Legislative Council, the qualification was higher: 500 acres of land.[9] These leaders largely owed their prominence to the ownership of land and slaves. In the lower house sat such notables as Etienne de Boré, Charles Bouligny and Julien Poydras, who was reputedly the wealthiest and most influential man in Louisiana. There were also a few physicians serving in this body, but they too had diversified landed interests.[10] The five members of the upper house—Joseph Bellechasse, Jean Noel Destréhan, Augustin Macarty, Pierre Sauvé and Evan Jones—owned plantations and large entourages of slaves.[11] Leading men of this kind had served in the administration set up by de Laussat at the transfer, and then served in the transitional legislature of 1804 set up by Claiborne. They were known as warm advocates of the slave trade and two of them had been chosen to carry the Creoles' Memorial to Washington which, among other things, took exception to Congress's ban on further slave importation into the territory.[12] Nearly the first project undertaken by the Legislature was to

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9. These property qualifications for elected representatives were taken from the Northwest Ordinance of July 13, 1787 (secs. 9 and 11) and were made applicable in the Territory of Orleans by the Act of Congress of March 2 1805 (Sec. 2). *See also* CHARLES GAYARRÉ, HISTORY OF LOUISIANA: THE SPANISH DOMINION vol. 4, at 66-67 (2d ed. 1879).

10. For instance Dr. John Sibley was a physician, planter, cattle raiser and salt manufacturer. Dr. John Watkins, who in 1805 served concurrently as Speaker of the House and as Mayor of New Orleans, owned enough land (according to Henry Clay) "to form a respectable state". *See* Jerah Johnson, *Dr. John Watkins, New Orleans' Lost Mayor*, 36 LA. HIST. 187-96 (1995).

11. While visiting Washington in 1804, Pierre Sauvé related to Senator Plumer that he had 150 acres of sugar cane under cultivation. Jean Noel Destréhan reported that he had 200 acres of sugar cane under cultivation and that it took 60 negroes to manage his crop. EVERETT S. BROWN, CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803-1812, at 156 (U. Cal. Press 1920).

12. According to JUDITH SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 4 (LSU 1994), "Louisianians saw this prohibition as a violation of the language and

enact the most detailed and repressive slave code that Louisiana had ever had.[13] In their world view slave law was not some variety of special legislation merely regulating the hours and working conditions of field hands. Rather, it was essential to social order, agriculture and way of life, as much a part of their *droit commun* as the civil law.[14] In this light the Digest expressed their twin aspirations. They were not only trying to preserve and entrench civil law, but were asserting their identity as a slaveholding society.

B. A Glimpse at Moreau

The man to whom the Legislature turned to co-draft a mixed code may be the most important legal figure in the history of the state. The details of his life remain somewhat sketchy, but his legal achievements were monumental.[15] An extraordinary jurist, linguist and scholar, Louis Casimir Elisabeth Moreau Lislet [b. 1766-d. 1832] was born in St. Domingue, educated in Paris, and served in the public administration up until the last days of the Haitian revolution.[16] How he escaped that calamity and safely emigrated to Louisiana owed something to the fickle winds in the French isles *sous le vent*. According to Moreau's own deposition,[17] he was a passenger on the falouche *l'Alexandrine* en route

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spirit of the treaty of cession and possibly the first step toward abolition of slavery itself." Moreover, she argues that the Act of 1806 declaring Spanish law to be the law of the land, which did not go into effect because of Claiborne's veto, was intended to prevent the establishment of English common law in civil matters but also intended to protect slavery in the territory.

13. They were not unfamiliar with slave insurrection. The revolt in Pointe Coupeé in 1795 began at Julien Poydras's plantation. The slave uprising near New Orleans in January 1811—the largest in American history—began on the plantation of Manuel Andry, a member of the House of Representatives.

14. The Memorial, which Edward Livingston drafted, contained an apologia for the necessity of maintaining slavery in Louisiana:

> To the necessity of employing African laborers, which arises from the climate and the species of cultivation pursued in warm latitudes, is added a reason in this country peculiar to itself. [Levees were needed and could not be built or maintained except] "by those whose natural constitution and habits of labor enable them to resist the combined effects of a deleterious moisture and a degree of heat intolerable to whites.

Quoted in GAYARRÉ, *supra* note 9, vol. iv, at 62.

15. *See* ALAIN LEVASSEUR, LOUIS CASIMIR ELISABETH MOREAU LISLET: FOSTER FATHER OF LOUISIANA CIVIL LAW (LSU Law Ctr. 1996). Further details of his life have been uncovered by Augusta Elmwood. *See* SAINT-DOMINGUE NEWSLETTER, vol. 20, nos. 1 & 2, Jan.-Apr. 2008.

16. He was initially appointed the *premier substitut de procureur général au conseil supérieur de Saint-Domingue*, a position equivalent to that of first assistant public prosecutor. In 1803 he served as the curator of vacant successions. SAINT-DOMINGUE NEWSLETTER, *supra* note 15, at 2.

17. See the Declaration of Moreau-Lislet 3 May 1804 given at Santiago, Cuba, as translated *id.*

to Cap Français on official business in 1803 when the ship was driven off course by contrary winds and then pursued by enemy cruisers. The captain was forced to seek safe haven in Santiago, Cuba, where Moreau found himself spared from danger, stranded for a year, and speaking Spanish. Unable to return to St Domingue which by then was consumed in flames, he and his family set sail for New Orleans in 1804 to launch a new life.

Moreau Lislet was born into a prosperous family at Cap Français in St-Domingue. His father was a militia officer but the basis of the family's wealth appears to have been coffee plantations. Moreau eventually inherited two plantations and along with them, one would assume, a large quantity of slaves. His vocation however was not that of a planter but rather that of jurist and public official. He was sent to study law at the Sorbonne in Paris and in 1789, at the age of 23, he married Mlle de Peters. Moreau de St Méry, the famous statesman, served as his tutor and attended his wedding. Returning to St Domingue he was appointed assistant public prosecutor and served in various government capacities. Sources indicate that at some point during the Haitian upheavals he served as personal secretary to Toussaint l'Ouverture,[18] a position that would have been consistent with his gifts as a linguist and translator. Fluent in French, Spanish, English and Latin,[19] he immediately found employment in New Orleans as official translator to the Territorial Legislature.[20] His talents as a lawyer soon came to the fore[21] and in 1806 he and James Brown were officially nominated to draft a civil code for the Territory of Orleans. In the course of his career in Louisiana he held nearly every office of public trust, from parish judge to state representative, state senator, attorney general and, most important for present purposes, he was selected to draft both the Digest of 1808 and

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18. *See* G. Debien & R. le Gardeur Jr., *Les colons de St.-Domingue refugiés á la Louisiane*, 1975 BULLETIN DE LA SOCIÉTÉ DE L'HISTOIRE DE LA GUADELOUPE, No. 1, at 99; FREDERICK STARR, BAMBOULA: THE LIFE AND TIMES OF LOUIS MOREAU GOTTSCHALK 27 (Oxford 1995). LEVASSEUR, *supra* note 15, at 84-88, is doubtful of any link to Toussaint, though he does not cite the preceding authors.

19. His library contained more than a 1000 books in French, English Spanish and Latin. *See* Mitchell Franklin, *Libraries of Edward Livingston and of Moreau Lislet*, 15 TUL. L. REV. 399 (1941). For comparative perspectives on these collections, see the essay in this volume by Florence Jumonville, *Formerly the Property of a Lawyer: Books That Shaped Louisiana Law*, 24 TUL. EUR. & CIV. L.F. 161 (2009).

20. The earliest record of his employment as a translator appears in October 1804, letters from Casa Calvo (in Spanish) to Claiborne.

21. He argued the pivotal case of *Paul v. Succession of Carriere* (1806) (citation unknown), which recognized the civil law as the law in force in the Territory.

the Civil Code of 1825.[22] He also engaged in an extensive private practice which involved him in the greatest cases of the day.[23]

Of the philosophical or inner mind of Moreau Lislet we know very little because there are no surviving letters. He was, however, by every indication a legal conservative who was committed not only to the civilian tradition but to the institution of slavery. There is no evidence that he had any qualm about the morality of slavery. After losing plantations and slaves in St Domingue, he acquired domestic slaves in New Orleans and at his death his estate contained several slaves.[24] As a state Senator, he opposed a bill that would have set a time limit for the emancipation of slaves.[25] He was probably very comfortable with the task of integrating slavery into the civil law and certainly carried out the task with alacrity.

III. THE STATE OF SLAVE LAW ON THE EVE OF THE DIGEST

To understand the task that Moreau Lislet entered upon, we should bear in mind the slave laws that Louisiana possessed at the end of the colonial period and shortly after the Louisiana Purchase. That law was now encapsulated in a new Black Code passed by the Territorial Assembly in 1806. It represented the first slave law ever drafted and enacted by the Louisianians themselves and its character departed sharply from laws formerly in force. It was the best expression of what white Louisianians thought about and wanted in a slave law.[26] To understand this sharp departure, however, we must briefly revisit the antecedents of Louisiana's slave legislation.

A. The French and Spanish Background

The oldest roots of slave law, chronologically speaking, dated from the French Code Noir first decreed in 1685 and directly introduced into

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22. An indication of the esteem in which he was held was that in the balloting to select three jurisconsults to draft the Civil Code of 1825, he received nearly twice the number of votes received by Livingston and Derbigny. LEVASSEUR, *supra* note 15, at 140.

23. He was law partner with Pierre Soulé. According to Levasseur's research, he appeared as counsel before the Supreme Court in 208 cases over the years 1809-1832.

24. Olographic will, 6 Dec. 1832. There are at least nine notarial acts containing sales or purchases of slaves by L. Moreau Lislet. *See* LEVASSEUR, *supra* note 15, at 281 ff.

25. Journal of the Senate, 8th Legis., 1st Sess., at 13, *cited in* LEVASSEUR, *supra* note 15, at 147.

26. The pen behind the Black Code is unknown. It might have been Moreau Lislet, for he had been working for the Legislature as a translator since 1804. Nevertheless the generally inelegant style of the document, and its heavy reliance upon verbatim borrowings from the slave statutes of sister states tends to suggest a less distinguished provenance. The authors may have simply been members of an internal committee of the Legislature.

Louisiana in 1724. The 1685 edict had been written in the time of Louis XIV by his on-the-scene colonial administrators in the French Islands. They were non-lawyers, who sought the advice of the planter class and applied their own administrative experience to confect the provisions. Their *oeuvre* consisted of sixty provisions divided into seven titles denominated Religion, Police, Nourishment, Status and Incapacity, Crimes and Punishment, Seizures and Slaves as Movables, and Emancipation. In my view it was in large part the product of France's own fifty years' experience with plantation slavery. It did not owe its inspiration—except perhaps for certain instances in the rules on manumission—to the ancient slave law of Rome.[27] When this code was introduced in Louisiana under Governor Bienville in 1724, it was an organic transplant of a distant Caribbean experience. It had been drafted long before Louisiana had slaves or any need for slave law.[28]

By the time of the Louisiana Purchase, however, very little of this old law was still extant. It had been superseded by Spanish law. Governor O'Reilly kept the old Code Noir in effect for a time, but by proclamation on November 25, 1769, he repealed and replaced it with Spanish law. The actions and declarations of later governors, notaries and courts leave little doubt as to the effectiveness of this repeal.[29] This is not to say that the French law was ever entirely forgotten. To begin with, there had always been considerable overlap between the Spanish and French versions of slave law. There was also a certain amount of mutual influence and interaction: The Code Noir was studied and imitated by Spanish jurists, for example in confecting the 1784 Código Negro in

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27. See Vernon Valentine Palmer, *The Authors and Origins of the Code Noir*, 56 LA. L. REV. 363, 367 (1995). To Alan Watson, however, the Roman connection is quite pronounced.

28. Amusingly, in their haste, or perhaps in their ignorance of geography, the King's scribes referred to Louisiana in the preamble of the Code as a set of islands ("des esclaves dans lesdites isles").

29. Justice Derbigny recognized the repeal of the Code Noir, at least pro tanto, in *Poydras v. Beard*, 4 Mart. (O.S.) 348 (1816). Professor Baade, *Law of Slavery in Spanish Luisiana 1769-1803*, *in* LOUISIANA'S LEGAL HERITAGE 54-55 (Haas ed., Perdido Press 1983), produced evidence of the repeal (though some parts may have remained 'living law') during the Spanish period. His argument is supported not only by the archives, but by the instances in which fundamental Spanish rules running contrary to rules of the Code Noir were enforced, including involuntary freedom purchases (coartación) and manumissions without prior government permission. He notes that the Courts, when professionally advised, did not apply the Code Noir. Yet the question of the Code Noir's repeal is not uncontested. MANUEL LUCENA SALMORAL in LOS CODIGOS NEGROS DE LA AMÉRICA ESPAÑOLA (Unesco 1996) holds to the thesis that Governor O'Reilly, instead of repealing the code, simply appropriated it as Spanish law. This created an exceptional situation in which this Code was "el único que tuvo vigencia in las Indias españolas." His research is supported by archival evidence. The weakness of his claim, however, is that, unlike Professor Baade, he made no investigation of the contrary practices and declarations of the colonial officials.

Santo Domingo.[30] There were at least two attempts by Creole forces to revive the Code Noir, once by the Cabildo around 1777,[31] and on a later occasion when they prevailed upon Pierre Clément de Laussat to resurrect it only days before the transfer of Louisiana to the United States. These resuscitation attempts failed, but they tended to show that the Creoles preferred the Code Noir's planter-friendly provisions over Spanish law. In drafting the 1806 legislation, the Legislature reinstated a few provisions from the old Code, but it was by no means a significant influence any longer.[32]

Spanish slave law was no longer a major influence either. One of the first statutes passed in the American period explicitly called for the use of Spanish law in the punishment of slaves,[33] but this provision was abrogated in 1806. If any other monuments of Spanish slave law were still standing, only two were conspicuous. One was received, the other was suppressed. The received provision stated that slaves were reputed to be immovable property ("real estate" according to the Black Code[34]) and subject to be mortgaged. This law was based upon an Ordinance by Governor Unzaga in 1770, and it required all transactions involving slaves to be in writing. This resulted in a trove of notarized documents,

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30. The policy there was "Hacer un Código como el "francés". SALMORAL, *supra* note 29, at 61-94.

31. Historians generally agree that the Cabildo's Code Noir of 1777 did not go into effect (see Vernon Valentine Palmer, *The Customs of Slavery*, XLVIII AM. J. LEGAL HIST. 177, 187 (2006)). Nevertheless its long-term influence was patent. At least eight of its provisions were copied directly into the 1806 statute. It was, inter alia, the original source of provisions stating that slaves cannot be hired to themselves, that the slave's condition was a "passive one" in which he/she owes "a respect without bounds" to the master, and that free people of color ought never "presume to conceive themselves equal to the whites". *See* Code Noir ou Loi Municipale, 14 Mai 1777, arts. 18, 29 and 72.

32. It appears that at least five provisions in the Black Code of 1806 are direct borrowings from the old Code Noir of 1724. For example under the old Code Noir it was a capital offence for a slave to strike the master and cause "a contusion or effusion of blood". That crime with its unique wording reappears verbatim in the Black Code of 1806. (*Compare* ¶ 9, Crimes and Offences, 7 June 1806, *with* art. 33 of the Code Noir of 1724.) Another instance is that the old Code Noir stated that the master was not discharged from his duty to feed the slaves by permitting them a day off to work for their own account, nor from his obligation to care for disabled and sick slaves for life. The latter rule probably endured because much of the French slave law, even if repealed by the Spanish, continued to set the daily standard of plantation life. It is known that the Spanish accepted and continued a variety of customs that were started under the French, and ended up codifying such customs in their Regulations of 1795 (Carondelet's Decree of June 1, 1795, Library of Congress, Louisiana Papers, AC 1333). *See* Palmer, *supra* note 31, at 191.

33. By section 47 of the Crimes Act, May 4, 1805, "every slave accused of any crime shall be punished according to the laws of Spain for regulating her colonies, provided however, that no cruel or unusual punishment shall be inflicted."

34. Art. 10, BLACK CODE 1806.

the boon of future historians.[35] The immobilization of the slave also turned the slave into a somewhat higher form of property which perhaps brought more stability to the slave condition.[36] In Spanish *Luisiana* the slave was not technically a chattel; his importance rivaled that of the land.

The rule suppressed by the Black Code was a liberal form of manumission called *coartación*. It had led to a considerable increase in the number of free persons of color in the late 18th century. *Coartación* permitted a slave to have his value appraised and fixed, even over the objection of his master, so that he might purchase his freedom. An owner who refused to negotiate could be carried before a tribunal which would fix the price and order forced execution, though this was usually not necessary.[37] This form of manumission had always been offensive and unpopular with slaveowners, and once they secured control of the territorial legislature, the institution was eliminated.[38] With its disappearance the influence of Spanish slave law reached low ebb.

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35. The Mortgage and Conveyance Ordinance is published in GAYARRÉ, *supra* note 9, vol. 3, at 631-32, and discussed in Baade, *supra* note 29, at 60-61.

36. Jean Carbonnier has pointed out that the slave, when defined as movable, could be deracinated at will by his master and was subject to unrestricted transfer at every credit seizure or division of the community. As an immovable he was less likely to be ripped from his social and family environment where he had always lived. *See* J. Carbonnier, *L'esclavage sous le régime du Code civil*, *in* ANNALES DE LA FACULTÉ DE LIÈGE 53, 54 (1957). Nevertheless in Louisiana, apparently due to nonenforcement of the principle, definition as immovable oftentimes did not protect father, mother and child from being separated. ANN PATTON MALONE, SWEET CHARIOT—SLAVE AND HOUSEHOLD STRUCTURE IN NINETEENTH-CENTURY LOUISIANA 213-16 (N.C. Univ. Press 1992) ;*see also* THOMAS MORRIS, SOUTHERN SLAVERY AND THE LAW 1619-1860, at 76-77 (N.C. Univ. Press 1996).

37. *See* IRA BERLIN, MANY THOUSANDS GONE 213-14 (Harv. 1998); H.S. Aimes, *Coartacion: A Spanish Institution*, XVII YALE REV. 412-31 (1909); HERBERT KLEIN, SLAVERY IN THE AMERICAS: A COMPARATIVE STUDY OF VIRGINIA AND CUBA 196-99 (U. Chi. Press 1967).

38. The provision read, "That no person shall be compelled either directly or indirectly, to emancipate his or her slave or slaves, but in the case only where the said emancipation shall be made in the name and at the expence of the territory, by virtue of an act of the legislature of the same." Act To Regulate the Conditions and Forms of the Emancipation of Slaves § 1 (Mar. 9, 1807).

B. The Black Code of 1806—Four Characteristics

The Black Code is really an amalgam of three statutes passed in 1806-1807.[39] I refer to these laws as the "Black Code", as others have done, because there has been a dismemberment of the subjects that used to be treated in a single law by that name.[40] Since there is no space to describe this law in meaningful detail, I will condense my remarks into four characteristic features.

The first characteristic is that it was a broad retrenchment from the more liberal dispositions of earlier laws. For instance, as already mentioned, the liberal form of manumission under Spanish law, called *coartación*, was expressly suppressed. The slaves' *peculium*, which law and custom had once recognized, was also suppressed. A less obvious form of retrenchment resulted from the sudden secularization of the master/slave relationship, apparently as a result of American constitutional requirements. Prior laws granted religious rights to slaves and imposed religious duties on owners that they usually sought to avoid. Under the 1724 Code Noir slaves were to receive baptism and instruction in the Catholic faith and to have the opportunity to marry within the Church. They were guaranteed Sunday rest and Christian burial. It appears, however, that under cover of the concept of separation of church and state, the Creoles systematically purged the Black Code of these spiritual rights and duties. The concept of the slave's 'moral personality' was probably lost in the process[41], along with some of the more humane and protective rules that had been placed there for religious reasons.

The second characteristic is a noticeably greater anxiety over public safety, reflecting a society on high alert against the danger of uprisings, revolts and slave criminality. This can be seen in the provisions controlling slave assemblies, unpermitted movement and the amassing of weapons. The Code's enforcement mechanisms were the use of citizen informers, a system of written permits, and, for the first time, a special

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39. The first statute, the only one actually entitled the Black Code, consists of forty sections and prescribes "the rules and conduct to be observed with respect to Negroes and other Slaves of this Territory." The second statute has twenty-two sections setting forth "Crimes and Offences". The third has eight sections and deals solely with the manumission of slaves. *See* BLACK CODE, Act of June 7, 1806, as amended April 14, 1807; Crimes and Offences, Act of June 7, 1806; and Act To Regulate the Emancipation of Slaves (Mar. 9 1807).

40. Judith Schafer refers to the three parts of the Code in this generic sense as well. *See* Judith Schafer, *"Under the Present Mode of Trial, Improper Verdicts Are Very Often Given": Criminal Procedure in the Trials of Slaves in Antebellum Louisiana*, 18 CARDOZO L. REV. 635 (1996), *reprinted in* THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY vol. XIII.

41. Carbonnier, *supra* note 36, at 59.

court was created to deal with slave crimes. There was wider reliance upon the citizen as informer and vigilante. Any slave away from his usual place without a white person accompanying him could be questioned, seized and subdued by any "freeholder".[42] A model permit to be carried by slaves was set forth in the law.[43] An unusually high number of provisions dealt with the capture and return of runaway slaves.[44] Property found in the hands of slaves for buying selling or trading could be confiscated, as well as any barge, pirogue or boat or horses under their control.[45]

Insurrection was not a distant or theoretical menace at this time, and history tends to show that the stronger the fear of insurrection, the more likely restrictive laws will be passed targeting free people of color. The Louisianians witnessed the major slave uprising at Pointe Coupee in 1795, and experienced three slave plots in 1804-1805 that were aborted (one involving a plan to kill all city officials in New Orleans and take over the city).[46] Only six years later the largest slave rebellion in the history of the United States unfolded a few miles from New Orleans. Governor Claiborne wrote to James Madison that he had received a petition from notables of New Orleans. "You will discover there is some apprehension of an insurrection among the Negroes and that much alarm exists, although I am not myself of opinion that we are in as imminent danger. I have nevertheless taken every means of precaution in my power."[47]

The third characteristic feature is that massive amounts of American slave law were directly introduced. Six provisions in the statute on "Rules and Conduct" were copied from the South Carolina Act of 1740,[48] and more than half of the Code's "Crimes and Offences", were taken bodily from that Act as well.[49] The South Carolina Act, as we know, was a reactionary slave code passed just after the Stono insurrection of 1739,

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42. Black Code of 1806 ¶ 32.

43. *Id.* ¶ 30.

44. *Id.* ¶¶ 26-29, 34-37.

45. *Id.* ¶ 38. Slaves on horseback were viewed as a social menace. *Id.* ¶ 25.

46. *See* James H. Dormon, *The Persistent Specter: Slave Rebellion in Territorial Louisiana*, 18 LA. HIST. 389, 392-93 (1977); Jack D.L. Holmes, *The Abortive Slave Revolt at Pointe Coupée, Louisiana, 1795*, 11 LA. HIST. 341 (1970); Gilbert Din, *Carondelet, the Cabildo, and Slaves: Louisiana in 1795*, 38 LA. HIST. 5 (1997).

47. Letter of Sept. 20, 1804, *reprinted in* LETTERBOOKS OF WCC CLAIBORNE (1801-1816) vol. 2 (Rowland ed., 1917).

48. *See* BLACK CODE, Act of June 7, 1806, ¶¶ 30-32, 34, 38-39.

49. The first provision on Crimes and Offences is taken from the preamble to the South Carolina Act and acknowledges due process as a natural right even of slaves ("As the natural purport of justice forbids that any person, let their situation in life be what it may, should be condemned without a legal hearing . . . ."). The other borrowed provisions are ¶¶ 2-7 and 11-15.

which in turn, traces its roots to borrowings from the laws of Barbados, which were notorious for their severity. Whatever we may have heard or believed about the deep and abiding antipathy of the Louisianians toward common law does not seem to hold true in this context, for the drafters of 1806 did not stand upon cultural pride or protocol when it came to their slave law. The Territorial Legislature embraced an American model that suited its objectives and its nervous mood. Borrowed English texts were simply reverse translated into French on the facing page. There was no pretense of civilian drafting. Everything was borrowed including the common law terminology (e.g., terms such as 'freeholder' entered the Louisiana vocabulary; the slave is not designated as immovable property but as 'real estate') and the centerpiece of the legislation was also borrowed—a special slave court composed of justices and freeholders with jurisdiction over slave crimes.[50]

A final characteristic of the Black Code is that it effectively recognized a three-caste society and targeted free persons of color in new discriminatory ways.[51] Free people of color appeared early in Louisiana history,[52] but they were not a distinct and sizable class until the late 18th century. Their number doubled between 1803 and 1806[53] and by 1810 it

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50. These were partly lay tribunals, composed of a judge (or two Justices of the Peace in his place) and differing numbers of "freeholders" depending on whether the offence was capital or non-capital. It has been suggested that this special court was modeled upon Virginia law, perhaps reflecting the influence of WCC Claiborne, a native Virginian who had practiced there. SCHAFER, *supra* note 12, at 450. In my view, however, this is unlikely since Virginia's 1786 act called for a court composed of at least five justices and did not include freeholders, whereas South Carolina's special court provided the precise model. The use of a freeholder court appeared first in the Barbados Code of 1661. Barbados and other island legislatures rejected the premise that the regular courts and the protections of English common law applied to slaves. *See* RICHARD DUNN, SUGAR AND SLAVES 239-40 (N.C. Univ. Press 1972); E.V. GOVEIA, THE WEST INDIAN SLAVE LAWS OF THE 18TH CENTURY 32-33 (Univ. of West Indies 1970).

51. To be sure the caste structure progressively hardens during the American period. The oppressive legislation passed in 1830, for example, was a later watershed. (*See* Act Mar. 16, 1830 requiring newly manumitted persons to leave the state and forbidding immigration of free people of color into Louisiana and requiring slaveowners to post $1000 bond for each slave upon his emancipation to ensure removal from the state within thirty days.) *See* SCHAFER, *supra* note 12, at 181-84; BROWN, *supra* note 11, at 139-40. Nevertheless, the point I am making in the text is that the seeds of 1830 (and thereafter) were already planted in the Black Code of 1806.

52. According to Donald Everett, their presence dates from the year 1722. Free Persons of Color in New Orleans 1803-1865, at 16 (1952) (unpublished Tulane dissertation). Alice Dunbar-Nelson notes that free black officers commanded Negro troop regiments as early as 1735. *People of Color in Louisiana*, *in* CREOLE 12 (Sybil Kein ed., LSU Press 2000).

53. There is some discrepancy in the numerical counts. According to Laura Foner, their number rose from 1,566 in 1803 to 3,350 in 1806. *The Free People of Color in Louisiana and St. Domingue: A Comparative Portrait of Two Three-Caste Slave Societies*, 3 J. SOCIAL HIST. 406, 422 (1970). But Donald Everett indicates that their number in 1806 was only 2312, and in 1810 rose to 5,727. *Emigres and Militiamen: Free Persons of Color in New Orleans, 1803-1815*, 38 J. NEGRO HIST. 377 (1953).

doubled again. In New Orleans they were nearly on a par with size of the white population.[54] The Ordonnances of 1685 and 1724 promised that the manumitted slaves would receive full citizenship and equality of rights, without the necessity of letters of naturalization. "We grant to the manumitted the same rights privileges and immunities that persons born free enjoy. . . ."[55] That guarantee, however, quickly became meaningless in the French isles, as the list of discriminatory measures against *gens de couleur libres* lengthened and their grievances festered.[56] If Louisiana was comparatively slower to develop and juridify its three caste society, one reason was the intervening period of Spanish rule in which the administration had restrained racial stratification by more tolerant policies toward free persons of color.[57] However self-government in the Territorial period now removed the Crown as an impediment, permitting racial sentiment to be translated directly into law. Yet the prompt denial of the right to vote, to seek public office and to freely assemble opened a cleavage that was not obvious during colonial government. Previously comparisons between these classes were more in terms of their equal rights to hold property, enter contracts, access the courts, establish legitimate families and so forth. In those respects the *état civil* of the two classes was somewhat comparable. By monopolizing political rights for themselves, however, whites in the American period opened a new division in racial separation.[58]

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54. According to Logsdon and Bell, by 1810 there were 4,950 free persons of color living in New Orleans, as compared to 6,331 whites, or 27.7% and 36.7% of the population, respectively. *The Americanization of Black New Orleans 1850-1900*, *in* CREOLE NEW ORLEANS, RACE AND AMERICANIZATION 206 (Hirsch & Logsdon eds., LSU 1992). About 2,000 had come in the 1809 migration from St Domingue. Only a small percentage lived outside of New Orleans. Jerah Johnson, *Colonial New Orleans*, in CREOLE NEW ORLEANS, RACE AND AMERICANIZATION, *supra*, at 53.

55. *See* arts. LII and LIV, CODE NOIR (1724).

56. GABRIEL DEBIEN, GENS DE COULEUR LIBRES ET COLONS DE SAINT-DOMINGUE DEVANT LA CONSTITUANTE 3-6 (Montreal 1951).

57. Under Spanish rule, there was an "official" egalitarian rhetoric regarding the treatment of free people of color. Governor Carondelet's Regulations (1795) declared: "The Free People of every color enjoy by Law, the same privileges as the other members of the Nation, to which they are subject, and therefore are not to be molested in their possessions, or persons, nor injured, or abused, under penalty of the punishment prescribed by the Law." Decree of June 1, 1795, Library of Congress, Louisiana Papers, AC 1333, XX LA. HIST. Q. 593, 604-05 (1937). Benjamin Morgan in 1803 recalled that the Spanish government accorded them "rights in common with other subjects." Letter to Chandler Price (Aug. 7, 1803), *quoted in* Everett, *supra* note 53, at 377.

58. Article III of the Treaty of Cession provided that the *inhabitants* of Louisiana would enjoy "all the rights, advantages, and immunities of citizens" of the United States. On the basis of this language "free persons of color contended for the next sixty years that they should have been invested with the full rights of citizenship." Everett, *supra* note 53, at 377. Under the 1812 Constitution, Louisiana was the only state which specifically required a legislator or an elector to

In the wake of the Haitian rebellion free people of color were increasingly seen as natural allies of slaves and as potential leaders of slave revolts. An 1806 Louisiana statute barred entry to all free *men* of color from Hispaniola and said such persons "shall be considered suspicious, and treated as such, until [they find] a conveyance to quit the territory . . . ." Those already residing in Louisiana and "pretending to be free" had to prove their status before a magistrate and obtain a certificate, or otherwise be regarded as fugitive slaves.[59]

The Black Code was written amidst distrust and fears of this kind. The Code openly declared that free persons of color were legally inferior and subordinate to the whites. They must never insult or strike a white person, nor "presume to conceive themselves equal to the white . . . and never speak or answer to them but with respect."[60] The Code also required free blacks to carry certificates attesting to their status.[61] Certain provisions lumped free persons of color in the same category as slaves. Capital crimes theretofore reserved for slaves were now made into capital crimes for free people of color as well, though these were lesser offences for whites. A slave's testimony in a criminal matter was admissible against a free person of color, but remained inadmissible against whites.[62] At the same time all intermarriage between whites and free persons of color was prohibited,[63] and notary publics were obliged by law to insert

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be a "free white male citizen of the United States." Philip Uzée, The First Louisiana State Constitution: A Study of its Origin 26 (1938) (unpublished LSU Thesis).

59. The inability to produce this documentation caused many to be arrested and subjected to forced labor. Everett, *supra* note 53, at 164. Free women of color and children under fifteen years were not covered by the embargo of 1806. In 1807 the scope was enlarged to prohibit all free negroes or mulattoes, whatever their former residence, from emigrating or settling in Louisiana. Act of Apr. 14, 1807.

60. On the origin of these phrases, see SALMORAL, *supra* note 29.

61. BLACK CODE, "Rules and Conduct" Act of June 7, 1806, ¶¶ 21, 40. As mentioned earlier, the source of these provisions was ¶¶ 72 and 36, respectively, of the Cabildo's Code Noir of 1777, which never went into effect. *See* discussion *supra* note 29.

62. To maliciously set fire to stacks of rice or grain, to burn buildings or to rape a white woman were treated as capital crimes for free persons of color and slaves, but not for whites. ¶¶ 6-7, Crimes and Offences Act.

63. The 1807 marriage statute forbade free persons to intermarry with slaves. Act of April 6, 1807, ¶ 13. This did not expressly forbid marriages between free whites and free persons of color, and such marriages had taken place during Spanish rule. *See* KIMBERLY HANGER, BOUNDED LIVES, BOUNDED PLACES 92 (Duke Press 1997). The 1808 Digest, however, made the ban complete by forbidding whites to intermarry with free persons of color. Digest of the Civil Laws, Territory of Orleans (1808), art. 8, at 24. It is not clear why or by what authority the Digest enlarged the marital restriction. As mentioned, the 1807 statute did not reach so far, and the Partidas freely allowed intermarriage between slaves and free persons, provided they were Christians. *See* tit. 5, L. 1, at 4 This is one of several examples showing that Moreau Lislet quietly made significant policy changes in the course of redacting the Digest. For another

racial markers ("f.m.c." and "f.w.c.") after their names. Printers and auctioneers at public sale were similarly required to use these identifiers in their announcements.[64]

Here then, on the eve of the Digest, were a host of measures to delineate the castes and to open the laws to unequal treatment.

IV. THE INSERTION OF SLAVERY INTO THE CODES

As mentioned earlier, there was nothing absolutely necessary or historically inevitable about the decision to introduce slavery into the Digest or Code. Technically speaking, nothing required it. Indeed it would have been the easier path to leave all slavery matters confined in the Black Code, as they always had been, and simply proceed to draft a new Digest of civil law strictly for free persons. This would have produced a clean division *á la Francaise*: one law for slaves and another law for all free persons, including free persons of color. If speed were a consideration, a policy of strict separation would in fact have offered the fastest approach, and the French model was close at hand. There is of course a long-running debate over how deeply Moreau and Brown borrowed from French law,[65] but here is certainly an instance in which they could not follow the French model. It was incompatible with the decision to confect a synthesized slave/civil code.

A. An Unavailing French Model

France possessed a vast and lucrative overseas slave empire, but there was not a single word about slavery or empire in the Civil Code of 1804 nor in any of the preparatory *projets*. Slavery had not been recognized in France proper since medieval times. A proud and ancient maxim declared the Freedom Principle: "Nul n'est pas esclave en France".[66] French slavery was essentially overseas; its day-to-day

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example, see the elimination of the ban on donations to manumitted persons (*cf.* art. LII, CODE NOIR (1724), *with* Digest (1808) art. 5, at 209).

64. Act To Prescribe Certain Formalities Respecting Free Persons of Color (Mar. 31, 1808).

65. *See* John Cairns, *The de la Vergne Volume and the Digest of 1808*, 24 TUL. EUR. & CIV. L.F. 31 (2009).

66. MARCEL GARAUD, RÉVOLUTION ET L'EGALITE CIVILE 35 (Paris 1953). Loisel wrote in Inst. Cout., I, 24: "toutes personnes son franches, en ce royaume, et sitost qu'un esclave a attaint les marches d'icelui, se faisant baptiser est affranchi." A considerable number of African slaves were brought into France as servants in the 17th and 18th centuries, and according to Sue Peabody, there are hundreds of cases in which they obtained their liberty in the courts. SUE PEABODY, "THERE ARE NO SLAVES IN FRANCE": THE POLITICAL CULTURE OF RACE AND SLAVERY IN THE ANCIEN RÉGIME 3-4 (Oxford 1996). Nevertheless, certain edicts permitted slaves to enter

inhumanity was out of sight, and the regulations pertaining to slaves were conveniently compartmentalized in what was called "colonial law". French slavery, we might say, was both geographically and juridically confined. The Code Civil was essentially a *droit de cité* for a single class of persons: those who were deemed to be French citizens. The Code Civil declared that every Frenchman would enjoy civil rights under the Code, and it established an elaborate set of civil registries to identify the beneficiaries.[67]

The decision to exclude slavery from the Code Civil suited the design and fit the philosophy of the French redactors. They systematically resisted the incorporation of special legislation of all kinds into the Code civil, but in this case their objection was indeed more than technical. Slavery was an embarrassment to the professed ideology of the Republic. For slavery was more than "contrary to reason", as the Romans had said. It was a glaring violation of the principles of the French Revolution. As Robespierre, a member of *Les Amis des Noirs*, told the National Assembly: "From the moment you pronounce the word 'slaves', you will have pronounced either your dishonor or the reversal of your constitution. . . . Let the colonies die if you must keep them at that price."[68] Napoleon feared no such dishonor and sought militarily to reimpose slavery in the colonies. Yet to mar the Code named after him with the baseness of slavery would have been unthinkable.

B. The Castillian Alternative

Moreau and Brown could not have produce an integrated slave/civil code using the French model, but Castillian law provided an alternative.

France on a temporary basis, without altering their status, to learn a trade or receive religious instruction. *Id.* at 6.

67. It is very suggestive that the authors of the Digest omitted inclusion of all provisions in the French Code Civil dealing with civil registries. Moreau and Brown otherwise followed the structural outline of the Code civil, but when they came to these provisions (arts. 7-111), they were forced to skip nearly 100 articles, apparently because no civil registries yet existed in Louisiana (the first recording of Births and Deaths was introduced in 1811) and because there was no clear resolution of the question whether free people of color were considered citizens or not. The 1812 Constitution required a legislator or an elector to be a "free white male citizen of the United States" but it did not take up the question whether free persons of color were citizens. After the Civil War, in *Walsh v. Lallande*, 25 La Ann 188 (La 1873), the Louisiana Supreme Court ruled that gens libre de couleur in Louisiana had been admitted to U.S. citizenship all along "by the treaty whereby Louisiana was acquired," which was a convenient position to take in 1873 but unclear in 1808.

68. MARCEL GARAUD, LA RÉVOLUTION ET L'EGALITÉ CIVILE 44 (Paris 1953). Moreau de St. Méry had told the National Assembly that abolishing slavery would cause France to lose her Caribbean colonies: "You must renounce your wealth and commerce or declare frankly that the Declaration of rights is not applicable to the colonies."

Slave laws had been seamlessly integrated into Spain's famous code, the Siete Partidas, for more than 500 years. No fewer than forty *Leyes* were devoted to the subject, the greater number were clustered in the IVth Partida.[69] And Moreau and Brown had general legislative instructions to follow the "existing law" which could have inclined them toward the Spanish alternative to begin with. Then too, in the de la Vergne manuscript, Moreau-Lislet made repeated reference to the Partidas in his annotations to the Digest provisions, which some would have us understand to mean, "Here are the sources of the provisions."[70] In translating the Siete Partidas a few years later, he translated virtually all of its rules connected to slavery, and made some comparative observations about the Louisiana rules. Thus in a general sense, when Moreau and Brown drafted an integrated slave/civil code, they necessarily rejected the French example, and followed an old Spanish tradition.

C. Codifying the Castes

To merge slavery with the Civil Law required no superficial intervention. About forty-five articles were involved, and these appear in each of the three Books and run the length of the document.[71]

In approaching the task Moreau used two self-limiting techniques. Firstly, he did not try to codify the whole law of slavery. He concerned himself mainly with private law rules and left most of the public law in

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69. *See* tits. V, XXI, and XXII.

70. Do the provisions sufficiently agree in substance with the references he provides so that the latter may be regarded as a set of "sources"? If we compare the thirteen provisions in Chapter III with these references, the answer is equivocal for Moreau's practice is inconsistent. In this Chapter he lists the Partidas as a reference twelve times, the Spanish author José Febrero four times and Louisiana's Black Code (1806) five times. In the case of the Spanish citations, they are in some cases examples of concordant material, such as for the proposition that the slave is entirely subject to the will of his master, short of murder or mutilation. References to the master's near boundless power may indeed be found in passages in the Partidas, though Moreau left out important accompanying qualifications on that power, such as the slave's right to seek protection against a cruel master. On the other hand, in instances such as the treatment of slave marriages, Moreau refers us to Spanish rules that are directly opposed to those in the Digest, with no warning of any contradiction. To one in search of sources, the reference is self-contradictory. This must cast doubt on the view that these citations were meant to be a disclosure of actual sources. His true purpose must be more complex than that.

71. See the following provisions of the Digest of 1808: arts. 13-15 (p. 10); 8 (p. 24); 15-27 (p. 38-42); 47 (p. 65); 30 (p. 50); 19 (p. 98); 4 (p. 103); 114 (p. 114); 24 (p. 115); 72 (p. 124); 64 (p. 159); 5 (p. 209); 105 (p. 230-32); 5 (p. 232); 23 (p. 265); 21 (p. 322); 34 (p. 328); 47 (p. 331); 50 (p. 335); 16-17 (p. 348); 78-80 (p. 358); 114 (p. 367); 3 (p. 447); 24-25 (p. 451); 36 (p. 459); 3 (p. 453); 41 (p. 460); 74 (p. 488).

the special statutes.[72] Secondly, even with respect to the private law aspects, he was highly selective. He seems to have chosen for inclusion the more stable and important private law ideas, and, more importantly, he deliberately excluded any rules that contradicted the 1806 Black Code. In effect the Black Code was his substantive guide to the right balance to strike in the master-slave relationship.

Near the beginning of Book One on "Persons", Moreau presents provisions of a quasi-constitutional nature called the "Distinctions Among Persons" established by law.[73] In three brush strokes he delineates the classes or castes in antebellum society—the slaves, the former slaves and the free persons. The slave is defined as "one who is in the power of a master and who belongs to him in such a manner, that the master may sell him, dispose of his person, his industry and his labor, and who can do nothing, possess nothing nor acquire anything, but what must belong to his master." Manumitted persons are defined, tautologically, as "those who having been once slaves are legally made free." Free men are defined as "those who have preserved their natural liberty, which consists in a right to do whatever one pleases, except in so far as one is restrained by law." One might have expected Moreau, having stated these distinctions, thereafter to build an elaborate inequality around them, with differentiated provisions applicable to each strata in society. That does not, however, turn out to be altogether true. From the standpoint of differentiated treatment, there are basically two castes: slaves and free persons (including the manumitted). The Digest has few particularized rules differentiating the condition of free persons of color from free white persons.[74] This confirms the impression of most observers that, while equal political rights were denied to the manumitted, they enjoyed practically the same private law rights as white citizens.

In setting up these social tiers, Moreau dexterously refrained from using racial adjectives and he did not disclose the origins or causes of them. As Rebecca Scott aptly noted, the definition of a slave in the Digest is simply ostensive, pointing out rather than analyzing its object. To all appearances, Moreau might be legislating for a non-racial society in another time and place. His definitions have the sheen of classical

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72. He begins Chapter III "Des Esclaves" with the following provision: "The rules prescribing the police and conduct to be observed with respect to slaves in this territory, their enfranchisement and the punishment of their crimes and offences are fixed by special laws of the legislature." Art. 15 (p. 38).

73. *See* arts. 13-15 (p. 10).

74. There are very few instances in which the rules apply differently to free persons of color: *See* art. 30 (p. 50); art. 8 (p. 24). In the 1825 Civil Code, see art. 221.

purity, which is understandable because he obtained them from classical sources. All three provisions were taken verbatim from the 17th century French author Jean Domat,[75] who had in turn had taken them from Justinian's 6th century Digest.

As a consequence of his classical approach Moreau's reader cannot know on what basis persons in society became slaves or stayed free, because the enslaved are not called blacks, Indians or mulattoes; the manumitted are not called gens libre de couleur, and free persons are not called whites. Why one group was enslaved and others were free is left to the imagination. Domat listed two causes of slavery, but those causes did not account for African bondage in Louisiana, so Moreau simply deleted Domat's explanation.[76]

Yet Moreau's ability to suppress all use of racial adjectives and historical identifiers,[77] though it produces neutral drafting, creates a puzzling disaffect. From what we know of Moreau's background, it was not a reflection of personal *pudeur*, nor of his inability to devise clear definitions. A few years later he himself penned a frank racial definition of slavery, the very kind he had shunned placing in the Digest.[78] If he was deliberately disguising or minimizing reality, it was much in the same way the Founding Fathers strained to keep slavery by name out of the American Constitution, finding the euphemisms they needed to count slaves for purposes of taxation and political representation.[79] Indeed, this

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75. LES LOIX CIVILES DANS LEUR ORDRE NATUREL (1689-1694) tit. II (Des Personnes), § II, L. i, ii, iv. I have consulted the 1777 Paris edition.

76. The causes of slavery were basically capture in war and descent from a female slave:

> Les hommes tombent dans l'esclavage par la captivité dans la guerre, parmi les nations où c'est l'usage que le vainqueur sauvant la vie au vaincu, s'en rend le maitre, & en fait son esclave. Et c'est un suite de l'esclavage des femmes, que leurs enfans sont esclaves par la naissance.

Id. L. iii. The Partidas repeated the first two and added a third cause: the sale of oneself into slavery. *See* Partidas I. 21. IV.

77. One exception is art. 8 (p. 25), forbidding intermarriage between whites and persons of color. See also art. 30 (p. 50) allowing illegitimates to bring a paternity action only if they are free and white.

78. "Slavery in this state, is confined to negroes, brought immediately from Africa, or their descendants; with the exception of certain Indiens [sic] who were taken as captives in war; or who were sold as slaves while Louisiana was held by the French." THE LAWS OF THE SIETE PARTIDAS vol. I, at 582 n. (a) (Moreau Lislet & H. Carleton trans., 1820) (Madrid reprint 1996).

79. "Throughout the debates," Paul Finkelman writes, "the delegates talked about 'blacks,' 'Negroes,' and 'slaves.'" But the final document avoided these terms. The change in language was clearly designed to make the Constitution more palatable to the North." SLAVERY AND THE FOUNDING FATHERS 3 (Sharpe 1996). For instance, art. I, § 2 (1789), provided that "Representatives and direct Taxes shall be apportioned . . . by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

guise was adopted in Louisiana's first Constitution (1812) which was drafted without mentioning 'slave' or 'slavery' in the entire document.[80] Was Moreau's reticence a similar strategy? Perhaps he was only laminating the Digest with the veneer of respectable antiquity or perhaps this was how a cultivated Paris-educated jurist would naturally execute his legislative instructions. At this remove it is difficult to make reliable judgments, but clearly this recourse to classical sources had effects which went beyond the Digest itself. The Romanization that he embarked upon, for whatever reason, turned out to be more than a mere ornament. It brought classical rules and concepts into a field previously dominated by the Black Codes, and soon the courts, lawyers and litigants began to make use of this classical learning to develop and expand that law. This is a point to which I will return.

D. Slave Rules in the Three Books of the Digest

The core of the treatment in the Book of Persons comes in Chapter III, entitled "On Slaves." There is no space to cover each provision in detail, so I will provide a brief overview.[81] The first article in the series is merely a cross-reference to the provisions of the Black Code, thus informing the reader that the Digest does not contain the entire law of slavery.[82] The second article in the series describes the intensity of the master's power over his slave. The relationship is conceived as an entire subjection to the master's will, with no limits on mastery other than to avoid the mutilation or death of the slave. The next articles plunge the slave into an abyss. Almost every aspect of civil personality is denied. The slave is incapable of contracting engagements, incapable of owning or possessing any property or of having a succession, incapable of holding public or private office, incapable of serving as tutor, attorney, witness or appearing in court as a litigant. He may appear in court in but one instance—"when he has to claim or prove his freedom", which is a fleeting glimpse of the slave's civil existence. Slaves may marry provided the master consents, but the marriage has no civil effects.[83]

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80. Uzée, *supra* note 58, at 28, 32. The stated reason for the omission was that the 'slave code' in force in the territory made adequate provision for that class of society.

81. *See* arts. 15-27 (p. 38-42).

82. *See* discussion *supra* note 72.

83. Thus slave marriages under the Digest were conceived as non-binding relationships. That view is not based upon any explicit provision in the Black Code of 1806, but was consistent with the French view in the original 1724 Code Noir. Pothier wrote in his TRAITÉ DU CONTRAT DE MARIAGE vol. I, pt. I, ch. III, art. I, § III (Paris 1813), that "Les esclaves n'ayant aucun état civil, . . . c'était un mariage destitué de tous les effets civils, et qui n'en avait d'autres que ceux qui naissent du droit naturel. On appelait ce mariage contubernium." In *Girod v. Lewis* (La. 1819)

Children born of a mother in a state of slavery, whether she be married or not, are slaves. Slaves may be manumitted by the master through acts *inter vivos or mortis causa* provided the forms and conditions of the special laws were followed, but it is stressed that no master shall be compelled either directly or indirectly to enfranchise a slave. Here was the express repeal of the doctrine of *coartación*. Insofar as a slave's criminal responsibility is concerned, art. 19 authorized direct prosecutions against slaves for their crimes and misdemeanors, without the necessity of joining their masters to the proceedings.

Book Two (Property) provided, following the Spanish tradition, that slaves were reputed to be immovable property by operation of law.[84] Slaves were therefore mortgagable, and creditors could execute on their mortgage though the slave had passed into the hands of third parties, provided the instrument was registered.[85] Book Three (Actions) provided that the slave was an "effect of commerce" and was subject to all manner of contracts and transactions.[86] He could be bought, sold, leased, and loaned and donated. When slaves were sold, the Roman remedy of redhibition (or quanti minoris) provided a guarantee to the buyer against latent defects and vices in the slave. The Digest gave surprisingly detailed treatment to this remedy in the sale of slaves,[87] allowing rescission for hidden vices of the slave's disposition or temper, such as the habit of running away or committing theft, as well as vices of the body, such as illnesses like leprosy and epilepsy. It stated that the principle of lesion beyond moiety did not apply to the sale of slaves.[88] The principles of prescription, however, did apply and ownership of a slave could be acquired by prescription.[89]

One other matter covered in Book Three is civil liability. The Digest provided that the master was civilly responsible for the damage caused by his slave to others. The liability was strict, applying even though the master was not negligent and could not have prevented the

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Mathews J. held that a marriage between slaves gave forth no civil effects during their enslavement, but upon emancipation their marriage would produce full civil effects. Certain passages in the Siete Partidas would indicate that Spanish law followed the church tradition which gave civil effect to slave marriages, but the matter is doubtful. *See* GAYARRÉ, *supra* note 9, vol. IV, at 292-93.

84. Digest art. 19 (p. 98).

85. *Id.* art. 41 (p. 460).

86. *Id.* arts. 16-17 (p. 348).

87. *Id.* arts. 78-80 (p. 358).

88. *Id.* art. 114 (p. 367).

89. The periods for acquisitive prescription, however, were half the length of those normally applicable—i.e., five years with just title, as compared to fifteen years without. *Id.* art. 74 (p. 488).

injury. However, he was entitled to give up the slave to the injured party or have the slave sold, in complete satisfaction.[90]

E. Conception of the Slave's Legal Nature

These articles may permit some insight into Moreau's conception of the slave. At first glance the placement in the law of "Persons" would suggest that the slave is viewed as a person since his status is defined and discussed under that rubric. Yet the actual content of the articles could throw that impression into disarray. It becomes apparent, as we read through, that virtually all the attributes of being a person in a legal sense (what French law would call "l'état de droits civils") are systematically withheld. The slave resembles someone who has suffered the equivalent of civil death. The utter absence of rights suggests that it would have been alternatively possible, and perhaps conceptually clearer, had Moreau merely defined the slave as property under the Second Book, and dispensed with any genuflection toward the law of persons.[91]

Curiously, it was the provision that made the slave subject to criminal prosecutions (Art. 19), which tempted Louisiana jurists to conclude that slaves were both persons and property at the same time.[92] For purposes of public law, he was seen as a responsible human being who must expiate his crimes, a moral actor in that regard and no mere piece of property.[93] This suggested that the slave really had two natures under Moreau's approach. Interestingly, this dual nature was acknowledged by F.X. Martin, then the Attorney General, when he was asked for an opinion on the question whether slaves possessed any constitutional rights under the Constitution of 1812. The question arose whether the Governor had the power to reprieve the criminal sentence of a slave, and it was objected that the Governor could not have that power since slaves were not "parties to the Constitution". Martin's opinion disagreed: "If there be . . . no mode pointed out by which the Governor is to act toward them when they are the object of the clemency of the State, he must act toward a slave as he would toward another human

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90. Curiously, the rule of noxal surrender is stated twice in the Digest. *See id.* art. 21 (p. 322), art. 22 (p. 40).

91. As Buckland points out, the Romans had always been ambivalent in their description of the slave, stating that a slave is a Res, but in other places referring to slaves as persons. "It is clear that the Roman lawyers called a slave a person, and this means that for them "person" meant human being." THE ROMAN LAW OF SLAVERY 4 (Lawbook Exch. 2000) (Cambridge 1908).

92. *See* SCHAFER, *supra* note 12, at 21.

93. *See, e.g.*, State v. Seaborne, alias Moore, 8 Rob. 518 (La 1843).

being." He concluded that "although, in civil cases, slaves are considered as things, in criminal cases they are considered as men."[94]

F. The Paradox of the Digest

It has already been suggested that Moreau used the Black Code as his policy guide and never contradicted a position or a policy expressly taken there. This would explain the selective nature of his borrowings from Roman-Spanish rules. In the de la Vergne volume he cited the Partidas frequently as if that law were his main inspiration, but actually he carefully bypassed rules in the Partidas that were incompatible with the Black Code. He ignored passages which recognized the slave's peculium (*cf.* art. 17) and he passed over provisions allowing slaves to marry without their masters' permission. Likewise, he ignored provisions giving civil effect to slave marriages and those allowing interracial marriages.[95] (*cf.* art. 23). He spurned rules allowing slaves to complain in court of cruelty by their masters (*cf.* art. 18) and those permitting manumissions without governmental approval or over the opposition of their master (*cf.* art. 27).[96] His selectivity perhaps sheds little light on the Pascal/Batiza debate about the sources of the Digest, except perhaps to show, in this one area at least, that the Black Code was more important to the substantive choices he made than either Spanish or French law. The greater importance of the Black Code was not clear until we evaluated Moreau's work not only by the slavery regime he actually codified, but in comparison to the regime he could have codified if he had been allowed to follow Spanish law in its full dimension. That comparison reveals the paradox of the Digest. Moreau's choices turn out to be both a repudiation and a revival of Spanish law.

G. Moreau the Realist?

It is worth asking, however, whether Moreau was in fact codifying the law of his own time and place, or was he blithely inserting rules with

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94. GAYARRÉ, *supra* note 9, vol. 4, at 292-93.

95. The Siete Partidas followed the church tradition that even in subjection the slave retained a sphere of autonomy and could marry without his master's knowledge or consent. Thus Aquinas, quoting Seneca, maintained, "It is wrong to suppose that slavery falls upon the whole man: for the better part of him is excepted. His body is subjected to the master, but his soul is his own." *See* Paul Cornish, *Marriage, Slavery, and Natural Rights in the Political Thought of Aquinas*, 60 REV. POL. 545, 550 (1998). According to Kimberly Hanger, marriages between whites and free blacks were allowed in the Catholic Church in New Orleans during Spanish rule. HANGER, *supra* note 63, at 92.

96. For contrasts between Spanish and French slave law in Louisiana, see Baade, *supra* note 29, at 50-53; SALMORAL, *supra* note 29, at 52-59.

little normative connection? The question arises because he must have noticed the singular irrelevance of some of the rules he drafted. He could not have been oblivious to the contrast between the slave law on the books and the slave law in action. In the Digest he broadly declared that slaves had no legal capacity to enter contracts, which meant they could not legally sell their labor or goods to others. But that was not the reality in the Territory of Orleans. It was an everyday experience, supported by legal custom, for slaves to hire themselves out in their free-time and to sell their own goods for profit in the markets. In other words, they already possessed the legal capacity that the Digest withheld from them in principle.[97] Similarly, the Digest declared that a slave could own no property, that everything a slave might acquire or possess belonged to his master. This too defied reality and was in contradiction of positive law. Provisions in the Black Code indicated that wages paid for work on Sunday belonged securely to the slaves and could not be taken away.[98] Custom further held that the pigs, horses, chickens and fowl raised by slaves were theirs exclusively. Crops grown on "provision lands" for personal consumption or sale to others belonged to slaves as well. When slaves sold and exchanged goods within the plantation economy or in public markets, they generated wealth, however modest, which they were allowed to keep. Savings accrued in the process were in fact used to buy their freedom and the freedom of other slaves.[99]

One imagines Moreau as hard pressed to explain away the daily reality of slavery. If his definitions of "slavery" "property" or "capacity" appear stable and logical it is only because he glossed over inconvenient truths on the ground. A more realistic approach would be later adopted in the Civil Code of 1825 which made important concessions to the slave law in action. It recognized that the slave's entitlement to the *peculium* was a custom that preexisted the Codes. It also bestowed limited forms of contractual capacity.[100] In this way, the slave law in the Civil Code advanced in a slightly liberal direction, even as the Black Code increasingly tilted toward repression.

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97. This discussion is based upon my essay *The Customs of Slavery: The War Without Arms*, XLVIII AM. J. LEGAL HIST. 177, esp. 180-81 (2006).

98. BLACK CODE 1806 § 1.

99. In theory these contracts were enforceable in the courts, but actions by slaves could be stymied by problems of proof. Owners sometimes accepted their money and later denied the existence of a contract. *See* Judith K. Schafer, *Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846-1862*, at 45-58 (LSU 2003).

100. *See* text accompanying infra note 108.

V. THE ADVANCING SPANISH-ROMAN INFLUENCE: FROM THE DIGEST TO THE CODE

The interim years between the codes (1808-1825) saw constant resort to Spanish and Roman authorities in the courts, and the law of slavery expanded well beyond what was contained in the statutes and the Digest. The decision to include slavery in the Digest now bore Spanish and Roman fruit. The subject of slave law was also swept up in the general revival of Spanish law occurring at that time, a revival that would not have been conceivable had slavery remained isolated in the Black Code. The famous reasoning of *Cottin v. Cottin*[101] was instrumental in furthering this new direction. The *Cottin* reasoning stressed the limited footprint and porous design of the Digest (emphasizing it was a *Digest*, not a Code)[102] and permitted the recrudescence of Spanish slave law. Segments of Spanish law that the Digest did not specifically displace or abrogate were viewed as waiting in the wings and could be used as a rule of decision in the unprovided-for case. This was actually the method by which a novel and unanticipated means of manumission—emancipation by prescription—found its way into the jurisprudence. A slave could gain his freedom if his master failed to exercise dominion over him for a certain period of time. Justice Derbigny recognized this "liberative" prescription solely on the authority of the Partidas, never mentioning that it arguably conflicted with the strict controls on manumission established under the Black Code.[103] It was thereafter accepted bodily into the Civil Code of 1825.[104]

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101. Cottin v. Cottin, 5 Mart. (OS) 93 (La 1817). On the importance of this methodology, see Vernon V. Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 226 (1988).

102. In the statutes commissioning the work, the Legislature twice referred to the future projet as a "Code", but when it emerged, it bore the title of a Digest. This last-minute change has been the cause of much debate. In *Cottin*, Justice Derbigny used the distinction as indicative of the way it must be interpreted:

> 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.

103. *See* Metayer v. Noret, 5 Mart. (OS) 566 (La. 1818); Metayer v. Metayer, 6 Mart. (OS) 16 (La. 1819). In the latter case, the court held that a slave who had lived as a free person for more than twenty years, out of the presence of her master, was liberated. (A ten-year period would have sufficed if the master were present.) The court relied upon the authority of L. 23, tit. 19, Part. 3 and L. 7, tit. 22, Part. 4. The special statute of 1807 on manumission subjected all cases of manumission to a judicial inquiry with exacting requirements.

For a valuable account of the plaintiff's struggle in these cases to litigate her freedom, see Rebecca J. Scott, "*She . . . Refuses To Deliver Up Herself as the Slave of Your Petitioner": *

A more dramatic example of the power of the incoming tide of Spanish-Roman law was the appearance of the *statuliber*, a class of slave not contemplated by the Digest.[105] *Statuliberi* had been recognized as anciently as the Twelve Tables. According to Buckland, they were "persons to whom liberty has been given by will under a condition, or from a day, which has not yet arrived."[106]

In terms of the three castes, the *statuliber* fell somewhere between the categories or perhaps it constituted a fourth caste. The codifiers of 1825 reformulated this Roman idea as follows: "Slaves for a time or statu-liberi, are those who have acquired the right of being free at a time to come, or on a condition which is not fulfilled, or in a certain event which has not happened; but who, in the mean time, remain in a state of slavery."[107] Other provisions made clear that the *statuliber* had greater rights and capacities than a slave for life. The person of the *statuliber* could no longer be sold by his master; only his time of service could be sold. By virtue of this status the slave temporarily remained a slave, but was clearly no longer an object of property. He could not be transported out of the territory. While awaiting his emancipation he could receive testaments and donations in his favor. The child born of a female *statuliber* acquired her condition, automatically becoming free at the time when his mother should be free.[108]

The second civil code also attenuated the severity of the first in several other respects as well,. The slave was now accorded the capacity to enter into a contract for his own emancipation and could enter contracts as agent for his master.[109] Slaves could also own personal property acquired through their own industry, which was accomplished

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Emigrés, Enslavement, and the Louisiana Civil Code of 1808, 24 TUL. EUR. & CIV. L.F. 115 (2009).

104. Art. 3510 (1825). In 1862 in the case of *Rosalie f.w.c vs. Fernandez*, the District Court in New Orleans declared Rosalie and her daughter (born 1845) to be free, since Rosalie had enjoyed freedom for the past twenty years. DAILY PICAYUNE, Nov. 13, 1862.

105. Poydras v. Beard, 4 Mart. (OS) 248 (La. 1816), may have been the first case to recognize the statuliber. *See also* Catin v. D'Orgenoy's Heirs, 8 Mart. (OS) 218 (La. 1820); Moosa v. Allain, 4 Mart. (OS) 98 (La. 1825); Jun, f.m.c. v. Livaudais, No. 1292, 5 Mart. (NS) 301 (La. 1827); Dorothee v. Coquillon, 7 Mart. (NS) 350 (La. 1829); Valsain v. Cloutier, 3 La. 170 (La. 1831). Moreau and Livingston participated as counsel in many of these cases. James Brown purchased a husband and wife and their two-year-old child, Harcles, in 1807 and promised the seller that he would grant the child its freedom in the year 1829, thereby making Harcles a statu-liber, and he further agreed to pay a penalty of $500 if he failed to do so. *See* Everett, *supra* note 53, at 138.

106. BUCKLAND, *supra* note 91, at 286; WATSON, *supra* note 3, at 25.

107. LA. CIV. CODE art. 37 (1825).

108. ADDITIONS AND AMENDMENTS TO THE CIVIL CODE OF THE STATE OF LOUISIANA 3-4, 15 (Levy & Co. 1823).

109. Arts. 174 and 1783 (1825).

by adding an exception. "The slave possesses nothing of his own, except his peculium." The drafters explained that the slave's peculium was an old Roman institution and was already recognized by Louisiana customs. Finally the Civil Code provided that succession rights might pass through the slave to a free descendant. This allowed property that a slave would have inherited, had he been free, to pass to a free descendant or relative.

VI. CONCLUSION AND SUMMARY

In the years 1806-07 the Territorial Legislature passed three related statutes called the Black Code which reflected, for the first time, the kind of laws that Creole slave owners preferred. The Black Code, while retaining some rules inherited from the past, now borrowed heavily from American slave statutes. What emerged was a security-conscious Code that established new slave courts and new criminal offences, recognized a three caste society, tightened requirements for manumission and eliminated all references to Christianity.

It was at this juncture that Moreau Lislet was called upon to insert slavery provisions into the Digest of 1808. He did not attempt to codify the entire law. It is clear that he left the bulk of the police and criminal matters in the special law or Black code, thus allowing him to focus upon the private law aspects at a fairly high level of generality. By borrowing non-racial Roman definitions and principles he created the outward appearance of a racially neutral law that was in contrast to social reality and the very name of the "Black Code" by which he was guided. Moreau's opuscule on slavery in the Digest was formally different though substantively compatible with the core slave law of the Black Code. The effects of his work certainly resonated beyond the Digest. The provisions proved to be something more than an ornamental façade. In the interim period between the codes, the Louisiana judges and lawyers went back to Spanish/Roman sources and retrieved various non-codified slave rules and principles to resolve unanswered questions. Some of these tended to soften the rigor of slavery. The drafters of the second code continued the resurgence of Spanish-Roman law by introducing new concepts like the *statuliber* and by reviving older ones like the *peculium*. On the whole the Romanization of Louisiana's slave law in its private law aspects tended to produce a regime considerably more favorable to the slave than the Black Code enacted a few years before.