

**Legal Transplants: Slavery and the
Civil Law in Louisiana**

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Louisiana is unique among American states in having been governed first by France, then by Spain, before becoming a U.S. territory and state in the nineteenth century. Unlike other slave states, it operated under a civil code, first the Digest of 1808, and then the Code of 1825. With regard to the regulation of slaves, these codes also incorporated a “Black Code,” first adopted in 1806, which owed a great deal to both French and Spanish law.

Comparisons of Louisiana with other slave states tend to emphasize the uniqueness of New Orleans’ three-tier caste system, with a significant population of *gens de couleur libre* (free people of color), and the ameliorative influence of Spanish law. This reflects more general assumptions about comparative race and slavery in the Americas, based on the influence of Frank Tannenbaum and other historians of an earlier generation, who drew sharp contrasts between slavery in British and Spanish America. According to Tannenbaum, Spanish American slavery was less harsh than that of British America because of the ameliorative influence of the Catholic Church; because Spanish law provided more avenues for emancipation; and because a less restrictive approach to interracial marriage and a less rigid racial system meant less racism.¹ Revisionists in the 1970s-1990s criticized Tannenbaum for a focus on legislation that provided a misleading top-down history without sufficient attention to the conditions of slavery on the ground. The New Social historians demonstrated the brutality of Latin American sugar

¹ Frank Tannenbaum, *Slave and Citizen* (Beacon Press, 1946); see also Carl Degler, *Neither Black Nor White: Slavery and Race Relations in Brazil and the United States* (1971).

plantations, the persistence of racial hierarchy and inequality in Latin America, and the lack of enforcement of paternalist laws about slave treatment. They pointed to demographic factors to explain variations in slavery regimes – for example, imbalances in sex ratios to explain higher rates of interracial marriage or sex, and fluctuations in commodity prices to explain changing rates of manumission. Thus, for several decades, historians of slavery in both the U.S. and Latin America turned away from legal history, de-emphasizing the importance of law to the culture and economy of slavery.²

Likewise, in Louisiana, social historians have shown the harshness of plantation slavery, and legal historians have followed suit. Judith Schafer, the leading legal historian of slavery in Louisiana, suggests that the institution of slavery in Louisiana differed little from the rest of the Deep South, and that by 1806, when the territorial legislature adopted Louisiana's new slave code, only the harshest rules of French law survived.³ In part, the comparison depends on what we are looking at: the law of slavery, or the law of freedom. Significant differences remained between Louisiana and other states in the ability of slaves to gain their freedom through legal means. By contrast, the everyday law of slavery differed little across the U.S. South.⁴

In the last two decades, recent work in both U.S. and Latin American legal history has begun to look at law from the bottom up: slaves' claims in court; trial-level

² For a good summary of the literature, see Alejandro de la Fuente, "The Tannenbaum Debate Revisited," *Law & History Review* (2004).

³ Judith Kelleher Schafer, *Slavery, The Civil Law, and the Supreme Court of Louisiana* (LSU Press, 1994).

⁴ For colonial Louisiana, see Thomas N. Ingersoll, "Slave Codes and Judicial Practice in New Orleans, 1718-1807," *Law & History Review* 23, 62 (1995) ("conditions in New Orleans reveal the basic uniformity of slave society, although guaranteed freedom purchase during the Spanish period provided opportunity for a small minority of slaves to modify their condition...In practice, the successive legal regimes in early New Orleans were so much alike that if the slaves had been asked to choose among them they would have regarded it as an empty privilege indeed.")

adjudications; interactions among ordinary people and low-level government officials, and so on. At the local level, one can see the way slaves took advantage of the gap between rules and enforcement, and to fathom racial meanings at the level of day-to-day interactions rather than comparisons of formal rules. At this level, can looking at Louisiana tell us something about civil law vs. common law regimes of slavery? What can the Louisiana experience tell us about a civil law jurisdiction “transplanted” in a common-law country?

No legal historian has had more influence on the notion of “legal transplants” than Alan Watson, the historian of Roman law, who insists that most provisions of slave law in the Americas can be traced to Rome.⁵ Furthermore, the harshness or mildness of a slave law regime correlates with its distance from Rome; France and Spain, with legal systems more influenced by Roman law, had milder legal provisions than Britain and Holland, whose legal systems were more removed from Rome. Watson argues that much legal development in the modern world can be attributed to the transplantation of legal provisions and structures from other systems and societies far removed in time and place, and therefore that one cannot view law as a reflection of society. There can be no simple correlation between a society and its law, if most of its law is borrowed from elsewhere.⁶ Insofar as Watson provides a corrective to reductive theories that law is “all politics” etc., his perspective is valuable.⁷ Yet I think he seriously misperceives the relationship between the law and culture of slavery in the U.S., and my own research leads me to nearly the opposite conclusion about the effect of Louisiana’s “legal transplant” of civil

⁵ Alan Watson, *Slave Law in the Americas* (U. Ga. Press, 1989).

⁶ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (U. Ga. Press, 1974; 2d ed., 1993).

⁷ See William Ewald, “Comparative Jurisprudence (II): The Logic of Legal Transplants,” 43 *Amer. J. Comparative Law* 489 (1995).

law. It makes some difference, but much less than you might think, in the operation of law regarding slaves – much more difference with regard to the transformation of slaves into free people.

This paper will focus on three areas of law and everyday practice in Louisiana – manumission and the practice of self-purchase; racial definition; and “redhibition” or the law of sales. I will argue that in each of these areas, there were some significant differences between Louisiana and neighboring states that can be traced to the difference in legal traditions, but that there was also a great deal of regional legal-cultural similarity. In each section, I will also briefly compare manumission, racial definition, and redhibition in New Orleans to practices in French and Spanish colonies to highlight the way local culture transformed legal transplants.

I. Colonial Background

Not long after slaves first landed in colonial Louisiana, the colony adopted the “Code Noir of 1724,” based on the 1685 slave code for French colonies in the Caribbean. The Code Noir established the Catholic Church in Louisiana, expelled Jews from the colony, and provided for marriage and religious instruction for slaves. The Code set minimum food and clothing allowances for slaves and established their right to complain if rations were substandard; it forbade the sale of young children away from mothers; decreed that no one should labor on Sunday; provided for baptism of slaves; prohibited interracial marriage or concubinage; and allowed manumission of slaves above twenty-five years of age with the consent of the Counsel Superior. While some of these provisions derived from Roman law, important aspects of Roman law were not adopted.

Significantly, there was no provision for slaves to own property, or a *peculium*, as under Roman law, and no self-purchase.⁸ Vernon Palmer and Guillaume Aubert persuasively demonstrate the importance of the French colonial experience to the 1724 Code Noir, in addition to Roman influence. Jennifer Spear also argues that the differences between the 1685 and 1724 Codes can be explained both by the Caribbean experience, and by changing French ideas about the administration of slaves over time.⁹

In 1763, Louisiana became part of Spain, and six years later, don Alejandro O'Reilly took possession, abolishing French laws and introducing Spanish law, including *Las Siete Partidas*, the medieval code governing slavery in Spanish colonies.¹⁰ *Las Siete Partidas* provided for judicial sale of slaves who could prove cruel treatment, manumission without government permission or proof of meritorious acts, and *coartación*, or self-purchase. While there has been some disagreement among historians about how Spanish the law became during this period, most now agree that Spanish law did govern in eighteenth-century Louisiana – and, indeed, retained influence in the nineteenth century as well. In 1803, Louisiana reverted to France briefly (for twenty days), during which time the Code Noir was reenacted; however, the practice of *coartación* continued – there were two hundred such emancipations in 1803-06.

⁸ *Le Code Noir, ou, Édit du Roi* (La., 1724) ; *Le Code Noir ou recueil des règlements rendus jusqu'à présent* (Paris : Prault, 1767) [1980 repr. By Le Societé d'Histoire de la Guadeloupe]

⁹ Vernon Valentine Palmer, "The Romanist Tradition in Louisiana: Legislation, Jurisprudence, and Doctrine: A Symposium: The Origins and Authors of the Code Noir," 56 *Louisiana L. Rev.* 363 (1995); Guillaume Aubert, "Origins of the Code Noir," unpublished paper 2008; Jennifer Michel Spear, "Whiteness and the Purity of Blood": Race, Sexuality, and Social Order in Colonial Louisiana (unpublished Ph.D. diss., Univ. of Minnesota, 1999).

¹⁰ *Las Siete Partidas*, Vol. 4 (trans. Samuel Parsons Scott, ed. Robert I. Burns, U. Penn. Press, 2001).

II. The American Codes

In 1806, Louisiana became an American territory. In the same year, the territory adopted a Black Code for the regulation and punishment of slaves, written by James Brown of Virginia and L. Moreau Lislet of Santo Domingo. The Black Code re-enacted many of the provisions of the Code Noir, and added a provision that “free people of colour ought never to insult or strike white people, nor presume to conceive themselves equal to the white; but on the contrary that they ought to yield to them in every occasion, and never speak or answer to them but with respect, under the penalty of imprisonment.”¹¹ One year later, an act regarding emancipation decreed that “no person shall be compelled either directly or indirectly, to emancipate his or her slave or slaves,” thereby implicitly abolishing self-purchase. The act required judicial permission for manumission, including proof that a slave was thirty years old and had exercised good behavior for four years; and limited the slave’s right of recourse against a cruel master – only with a criminal conviction of the master could a slave be sold away. Additional acts limited the emigration or settlement of “free negroes or mulattos.”¹²

The Digest of 1808 represented itself as a compilation of “all the law now in force in the territory,” which was Spanish law, but with regard to slaves, left in force the Black Code of 1806, adding to it the contractual incapacity of slaves, and the requirement that free people of color be identified in all legal documents as “fmc” or “fwc.”¹³ Compared to other states, the lingering influence of civil law allowed greater rights of manumission,

¹¹ *Acts Passed at the First Session of the First Legislature of the Territory of Orleans* (Bradford & Anderson, New Orleans, 1807), Sec. 40, pp. 188-190.

¹² *Acts Passed at the First Session of the Second Legislature of the Territory of Orleans* (Bradford & Anderson, New Orleans, 1807), Chap. X, p. 82.

¹³ *Digest of the Civil Law Now In Force in The Territory of Orleans* (1808), Chap. III, pp. 38-40; Act of March 31, 1808, Orleans Territory Acts, 1808, pp. 138-40.

including the right to sue for freedom without a next friend or guardian ad litem, but harsher treatment for slaves accused of crimes. The Louisiana Supreme Court confirmed in an 1816 ruling that self-purchase was still enforceable in the state.¹⁴

Much ink has been spilled by Louisiana historians over the question of whether the Digest of 1808 was more French or more Spanish. In the arcane but vigorous “Pascal-Batiza” debate, Rodolfo Batiza went so far as to identify the French or Spanish roots of each of the Digest’s provisions, reaching the conclusion that 85% of the Digest was French in origin. Later historians have generally agreed that the Digest was largely inspired by French law, but that many jurists continued to rely on Spanish law, even where contrary to the Digest itself. There are several puzzles about the Digest, for example, how to explain the “Lislet” copy of the Digest annotating many of the provisions with the analogue provisions in Spanish law, or the fact that in 1819, a translation was commissioned of “Las Siete Partidas Which Are Still in Force in the State of Louisiana.” Regardless of the exact proportion of French to Spanish influence, it is certain that Louisiana jurists continued to draw on an amalgam of French, Spanish and Roman law, in addition to the 1808 Digest.¹⁵

¹⁴ Schafer, p.6. *Victoire v. Dussau*, 4 Mart. 212 (La. 1816)(while the right of self-purchase was affirmed, parol evidence was inadmissible to prove the contract).

¹⁵ Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1972); Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4 (1971) and Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 Tul. L. Rev. 628 (1971). For guidance on this arcane debate, see Vernon Valentine Palmer, *The Louisiana Civilian Experience: Critiques of Codification in A Mixed Jurisdiction* (Carolina Academic Press, 2005); Richard Holcombe Kilbourne, Jr., *A History of the Louisiana Civil Code: The Formative Years, 1803-1839* (1987); Hans Baade, *The Bifurcated Romanist Tradition of Slavery in Louisiana*, 70 Tul. L. Rev. 1481 (1996); A.N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in *Louisiana’s Legal Heritage* 87, 96-100 (Edward F. Haas ed., 1983). For Louisiana law, see Warren M. Billings & Mark F. Fernandez, eds., *A Law Unto Itself? Essays in the New Louisiana History* (LSU Press, 2001); Glenn R. Conrad, ed., *The Louisiana purchase Bicentennial Series in Louisiana*

At the same time, most of Louisiana's judges were trained in the common-law tradition, and upon statehood, Louisiana adopted a jury system and other common-law procedures. In addition to Lislet, leading jurists included Francois Xavier Martin from France and Martinique, Edward Livingston of New York, and Alexander Porter from Ireland. In 1822 Livingston, Pierre Derbigny and L. Moreau Lislet were appointed to rewrite the civil code, which was adopted in 1825, apparently with the hope that codification would eliminate the recourse to myriad confusing laws from different jurisdictions. The 1825 Code provided that from that point forward "the Spanish, Roman, and French laws, which were in force in this state, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the legislature of the Territory of Orleans, and of the legislature of the State of Louisiana, be and are hereby repealed in every case . . . and that they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code."¹⁶ The 1825 Code was several times the size of the 1808 Digest, much of it taken directly from the French Civil Code, and it remained in force until 1870.

III. Manumission

Comparative historians have given inordinate weight to the ease of manumitting slaves as a gauge of the severity of a legal system of slavery. In general, while slaves' escape and freedom suits can be seen as destabilizing to slavery, individual manumission can also strengthen slavery as an institution, especially when given as an act of grace. In

History, Vol. 1: The French Experience in Louisiana (1995); George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* 105-74 (1975).

¹⁶ *Code Civil de L'État de Louisiane* (1925), Art. 3521.

Roman law, there were many ways a slave could be freed –by entry on the census roll of citizens with the owner’s consent (*censu*); by touching with the rod (*vindicta*); or by will (*testamento*). Formal manumission bestowed both freedom and citizenship on the freed slave; unprecedented in the ancient world, emancipation was a form of social incorporation. While Roman law was by no means incorporated whole cloth into any New World society, there is some evidence that the Spanish law, the *Siete Partidas*, created more possibilities for manumission in the Spanish colonies. Slaves used the law to claim rights in court, both for manumission and against cruel masters, and the *sindico procurador* helped to protect slaves’ rights.

The practice of *coartación* began in the sixteenth century in Spanish America and less often in Portuguese America; it appeared in Spanish royal laws in the seventeenth century. *Coartación* was a form of self-purchase in which the slave and master agreed on a fixed price, and then the master could not sell the slave for a higher price. Furthermore, in some parts of Spanish America, once the slave began payments, he only owed a fraction of his labor. *Coartación* did not emerge in the English, Dutch, or French colonies although there was self-purchase. Related was the practice of *pedir papel* – demanding “paper” and the right to seek a new owner. These practices were described by courts as *derechos* (rights), and seen by masters as incursions on their dominion. A small percentage of slaves were *coartado* in the Cuban Census in the nineteenth century – only 1% -- although a study of the slave market suggests a much higher percentage – 13%. Some *coartados* were able to credit a portion of their time and labor towards their manumission price, which could speed up the process. There was also the issue of unborn children: some women argued that the value of a child should be reduced in a

proportion similar to the payments already made by the mother. In Cuba, the 1842 *Reglamento de Esclavos* ratified these customary rights.¹⁷

By contrast, in the U.S., many laws governed manumission during the colonial era. In Virginia, manumission was heavily restricted in 1691 with the requirement that an owner had to provide for transportation “out of the country within six months” and win the approval of the governor and council. These restrictions were loosened in 1782 after the American Revolution; within two years of that time, the population of free people of color had doubled, and reached 12,000 in 1790.

Other states followed suit, relaxing regulations on manumission, and often combining them with plans for “colonization,” sending freed slaves back to Africa. From the American Revolution through the 1820s, there was a relatively high rate of manumission across the U.S. South, and practices looked quite similar to the Spanish colonies. Keila Greenberg has compared freedom suits in Baltimore to Rio de Janeiro, Brazil, from the 1790s through the 1820s, and found that despite different legal traditions, the suits involved similar juridical discussions. In both cities, slaves were persons and property, in both, slave status followed that of the mother. In both, the courts dealt with property, not freedom, and viewed manumission as a commercial transaction (buying self). Slaves used an old strategy but gave it new meaning.

Things changed, however, beginning in the 1820s. As more and more people lived on the “middle ground” between slavery and freedom, black and white, they made it at once more difficult and more urgent for courts to attempt to draw those boundaries sharply and to equate race with free or unfree status completely. By the 1830s, nothing

¹⁷ Alejandro de la Fuente, “Slaves and the Creation of Legal Rights in Cuba: *Coartación* and *Papel*,” 87 *Hispanic American Hist. Rev.* 659 (2007).

had come to seem more anomalous to many white Southerners than a free person of African descent. Legislatures hurried to remedy the problem of blacks who were not slaves with a plethora of new laws limiting manumission. In a typical Southern slave code of the latter decades of slavery, slaves could only be freed if they left the state within a few months and if the owner followed other complicated rules. The rights of creditors were protected, and a substantial bond had to be posted for the care of the old or infirm freed slave.

Southern states also tightened restrictions on free blacks beginning in the 1830s and accelerating in the 1840s and 1850s. In part this was a reaction to the Denmark Vesey (1822) and Nat Turner (1831) insurrections, for Vesey was free, and Turner was a foreman, a near-free slave. But it was also part of the reaction, beginning in the 1830s, to anti-slavery sentiment in the North. In the late eighteenth century, most slaveholders spoke of slavery as a necessary evil – the Thomas Jefferson position. They were racists, but they did not pretend that blacks loved slavery; rather, they took the position that given current circumstances, slavery was the best that could be done. Blacks could not survive as free people in the United States – perhaps colonization would be a very long-range solution. By the 1830s, however, Southern white ideologues, including judges and lawyers, had developed a racially-based defense of slavery that pronounced it a positive good. According to Thomas Reade Cobb, the Georgia Supreme Court reporter whose treatise on slavery law was an apologia for the institution, blacks were incapable of self-government, so that slavery was the best possible institution to allow them to flourish. Cobb wrote, “A state of bondage, so far from doing violence to the law of his nature, develops and perfects it; and that, in that state, he enjoys the greatest amount of

happiness, and arrives at the greatest degree of perfection of which his nature is capable.”¹⁸

As Southerners articulated the positive-good defense of slavery more often in terms of race, they increasingly emphasized a dual image of the black person: under the “domesticating” influence of a white master, the slave was a child, a happy Sambo, as described by Cobb, but outside of this influence, he was a savage beast.¹⁹ As they strove to convince themselves and Northerners that slaves were happy Sambos, they more frequently portrayed free blacks as savages. With this emphasis on race, Southerners felt the need to draw the color line more clearly than ever, aligning the slave/free boundary with black and white. This placed the South’s free people of color in an increasingly precarious position.

Along with increased restrictions on manumission, the most important new limitations on the rights of free people of color were constraints on their freedom of movement. Free blacks were required to register with the state and to carry their freedom papers with them wherever they went. They were frequently stopped by slave patrols who mistook them for slaves and asked for their passes. If their papers were not in order they could be taken to jail or even cast into slavery. Mississippi required that, to remain in the state, free people of color be adopted by a white guardian who could vouch for their character. A larger number of criminal statutes were framed in terms of race rather than status, so that differential penalties applied to free people of color as well as slaves, including banishment and reenslavement. In most of the new state constitutions adopted

¹⁸ Cobb, *Inquiry into the Law of Negro Slavery*, 51.

¹⁹ See George Fredrickson, *The Arrogance of Race*, on the “child-savage duality.”

during the 1830s, free people of color were barred from testifying in court against a white person, voting, serving in one of the professions, or obtaining higher education. About the only rights that remained to them were property rights. Some managed to hold on to their property, including slaves. But by the eve of the Civil War, white Southerners had made every effort to make the line between slave and free congruent with the line between black and white. Free people of color and people of mixed race, both slave and free, confounded those efforts. It is no surprise that they were the target of so many legal regulations.

Thus, there is more continuity than we might expect between Spanish and British America in terms of manumission; the real anomaly is the U.S. South after 1830, where manumission radically diminished. Louisiana was exceptional in this respect, because of the continuing practice of manumission and even *coartación*, and the continuing success of manumission lawsuits (although some slaves continued to win lawsuits in other states as well, especially in the border states of Delaware and Maryland). In other ways, Louisiana followed the U.S. Southern trend of increasing restrictions on manumission in the nineteenth century, laws about removing from the state, and regulations on free people of color, culminating in re-enslavement laws in the 1850s. Yet the removal provisions were almost never enforced and manumission continued at a higher rate than in other states in the region, although less than in Cuba and Brazil. And the 1825 Code retained the right of self-purchase for slaves in article 174: “the slave is incapable of making any kind of contract, except those which relate to his own emancipation.” This right to contract for their freedom was a watered-down version of *coartación*, because it did not force master to sell the slave if the slave put together the purchase price, and

slaves could accumulate property and money only with consent of owner. Nevertheless, Louisiana was the only state where slaves were allowed to contract for their freedom. The Supreme Court heard a number of appeals in which slaves tried to enforce self-purchase contracts, and found for the slaves in some cases.²⁰

Hans Baade argues that there is a “direct causal connection between the Spanish Louisiana judicial practice of *coartación* and the emergence of a numerous and socially significant community of free *gens de couleur*” in Louisiana by the time of its purchase by the United States.²¹ Baade found that in the years of Spanish rule, freedom-purchase was quite frequent in Louisiana. While there were only two judicial decisions per year for the thirty-three year period, he estimated that “nine out of ten paid-for manumissions were obtained by agreement rather than litigation, and that 500 or more manumissions in the Spanish period were obtained by these two devices in combination.”²² The population of free people of color grew from three percent of the total New Orleans population in 1771 to almost twenty percent in 1805 on the eve of the Louisiana Purchase.²³

Empirical studies of manumission in antebellum Louisiana reach some interesting conclusions. First, Louisiana continued to free a steady stream of slaves, a majority of whom were women, after the adoption of the 1825 Code. Laurence Kotlikoff and Anton Rupert studied petitions to the police jury of New Orleans to manumit slaves, and counted 1159 successful petitions in twenty years. Second, a large proportion of these

²⁰ Schafer, 224.

²¹ Baade, *The Law of Slavery in Spanish Louisiana*, in Louisiana’s Legal Heritage, Edward F. Haas, ed. (LSU Museum, 1983), at 48.

²² Ibid., 76.

²³ Jennifer M. Spear, review of Gilbert C. Din, *Spaniards, Planters, and Slaves: The Spanish Regulation of Slavery in Louisiana, 1763-1803*, in 58 WMQ 276 (Jan. 2001).

slaves, 36.5 percent, were freed by free people of color. One-eighth of free black households were involved in emancipating a slave, and a slave owned by a free black had 3.5 times the chance to be manumitted as a slave owned by a white. At least 63% of slaves freed by free blacks were family members.²⁴ After 1827, manumission required the approval of three-fourths of the parish police jury, and the freed slave had to leave the state unless the police jury permitted her to stay; in every case, the police jury allowed freedpeople to stay, however. Even after a new Constitution is adopted in 1845, and manumissions were further restricted, the district courts continued to hear manumission cases, including self-purchase, and slaves continued to win some of them. The Louisiana Supreme Court even set slaves free on the basis of sojourns on free soil at a time when the consensus among other states was that a brief visit to the North was not enough to free a slave.²⁵

Trials of self-purchase litigation in the nineteenth century reveal not only the established nature of this practice, but the courts' resort to Spanish as well as Roman law in deciding self-purchase cases.

Cuffy v. Castillon was an 1818 appeal of a slave woman's suit for freedom based on an agreement by her father in the Spanish period. Apparently, a Spanish tribunal had set the price and directed the defendant to free the slave when she received the price, in 1799. Cuffy, however, had paid only \$316 on \$2400; she hoped to win her freedom based on the labor done after the price was set, as in Cuba. She tried to rely on two Roman law principles: one, in favor of freedom; two, allowing her to work for the

²⁴ Laurence J. Kotlikoff & Anton J. Rupert, *The Manumission of Slaves in New Orleans, 1827-1846*, *Southern Studies*, 1980, pp. 172, 179-180.

²⁵ Schafer, *Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846-1862*

“residue.” The court held that her claim contravened other principles, and that her labor would only count toward the price if she had become free immediately and worked to pay her debt. Nevertheless, the court treated the resort to Roman law principles as routine and unremarkable.²⁶

In *Doubrère v. Grillier’s Syndics*, Louis Doubrère sought to enforce an arrangement in which Pierre Grillier had purchased him from his master for \$1800, and he had then paid Grillier back \$1700 for his freedom. Three years later, Grillier’s creditors seized Doubrère as payment for Grillier’s debts, claiming they were defrauded by the emancipation. Louis’s former owner, also named Doubrère, testified that “during the time that [Louis] belonged to him, he let him have a Pirogue for the purpose of trading up and down the coast. That he was very industrious and made a good deal of money, and that his friends also lent him money some twenty, others thirty Dollars and some more, and that in this way he made up [the self-purchase price].” A free woman of color also explained that Louis collected about \$350 “by voluntary contributions among the free people of color.” The trial ended in a hung jury, whereby the parties agreed to let the judge decide, and he found for the creditors. On appeal, the briefs (including one prepared for the creditors by Moreau Lislet) cited not only the Civil Code but the *Siete Partidas*. The Louisiana Supreme Court found for Doubrère, requiring him only to make up the additional \$100 to win his freedom.²⁷

As late as 1842, a jury found in favor of the freedom of an enslaved man who had purchased himself. Prince Mathews had paid Michael Boland \$650 for his self-purchase,

²⁶ Cuffy v. Castillon, trial record no. 255, Louisiana Supreme Court Collection, Univ. of New Orleans, appeal in 5 Mart. (O.S.) 494 (La. 1818).

²⁷ Doubrere v. Grillier’s Syndics, Trial record no. 860, Louisiana Supreme Court Collection, Univ. of New Orleans, appeal in 2 mart. (N.S.) 171 (La. 1824).

but Boland had turned around and sold Mathews to William Smith for \$600. One witness testified that “Smith had knowledge that Pliff had purchased his freedom . . . witness told Smith that the negro had bought his freedom & Smith said, ‘that mattered not he would beat them at law.’”²⁸ The Louisiana Supreme Court reversed the decision freeing Mathews, on the ground that “public policy forbids absolute emancipation by simple agreement of this kind, and requires certain formalities, which cannot be dispensed with.” Nevertheless, the court ordered William Smith to emancipate Mathews “unless some legal obstacle should be shown to exist, growing out of conduct and character”; in other words, Mathews would have to show four years of good conduct in order to be freed, according to the Civil Code.

Thus, in nineteenth-century Louisiana, manumission continued to be more frequent than in other parts of the U.S., including self-purchase, although statutory restrictions were growing, for the same reasons that they were across the United States. It does appear that the Spanish practice of *coartación* made substantial inroads in Louisiana, and that this left a lasting legacy in two ways. First, by expanding the class of free people of color, it indirectly expanded the practice of manumission, because free people of color were the most likely to emancipate a slave, to help a slave raise the money for self-purchase, and to buy family members in order to free them. They were also willing to agitate for greater rights, and in general acted in solidarity with slaves. Second, the practice of self-purchase continued even when it was strictly speaking prohibited by statute, and courts continued to uphold the practice, even turning to Spanish and Roman law principles in deciding cases. Yet, by comparison to Cuba, the practice

²⁸ Testimony filed 2 July 1842, p. 15, Trial record, Prince Mathews vs. Michael Boland & William Smith, no. 5119, appeal in 5 Rob. 200 (La. 1843).

was relatively modest in terms of the rights slaves were able to carve out. They could not force owners to sell them; they could not find their own owners; they could not use time served to pay a contract price; and they could not demand a sale for violations of their rights.

IV. Race

I began this paper with Alan Watson as a foil, and he makes a good foil for any socio-legal or cultural-legal historian who wants to argue that there is some (if not simple) relationship between a society and its law. Yet, interestingly, in his own recounting of his intellectual evolution, Watson came to the study of slave law because of his horror at the racism of Southern society on a visit to the U.S. in 1967. “Struck by the very different configuration of the law of slavery in the American South and at Rome,” he “concluded that the principal reason for the difference lay in the inherently racist nature of Southern slavery.”²⁹ Thus, one aspect of culture, race, does make a big difference to the law of slavery. In the conclusion of *Slave Law in the Americas*, Watson elaborated: Racist slave societies place more obstacles in the way of manumission, education and training of slaves, and incorporation of ex-slaves into society than do nonracist slave societies. However, racist slave societies whose legal system was based on Roman law, “insofar as [their law] remained unchanged or developed on the basis of its European tradition, the law remained nonracist in its rules....Even where law is made in a society that has a racist social system of slavery, slave law inherited from Rome will

²⁹ Alan Watson, *Roman Slave Law*, xvii.

continue to show important elements of the nonracist Roman slave law.”³⁰ Because of Watson’s commitment to the notion that a legal system’s genealogy governs its future trajectory, he felt certain that Louisiana must have been different from other states because of its French and Spanish roots – and because he assumed that those traditions were less racist than the British. Watson recognized that slavery under France and Spain was at least as harsh as in the British colonies, but he argued that the law was milder. Yet recent work in legal history, more focused on ground-level trials and the claims of slaves and free people of color from the bottom up, suggests more commonalities than differences.³¹ Louisiana provides an interesting test case. If Louisiana and neighboring states look similar, perhaps in fact local culture does matter – and local culture was above all a culture and politics of white supremacy. Race operated in the U.S. South very powerfully, in Louisiana as elsewhere, despite the significant population of free people of color.

The standard story about race in the U.S. and Latin America contrasts a black/white binary in the U.S. with a fluid world of many racial gradations in Latin America; Louisiana is seen as falling closer to Spanish America in having an “intermediate category” of mulatto *gens de couleur*. Yet my own work, and that of other legal historians of race in the U.S. as well as in Latin America, tends to show more commonalities than previously believed. The U.S. system was never black and white, and the one-drop rule did not take hold until well after slavery, if at all. The U.S. racial

³⁰ Watson, *Slave Law in the Americas*, 133.

³¹ In other work, co-authored with Alejandro de la Fuente, we are looking at the history of law and race under slavery in the Americas, arguing that there are more commonalities in the law regarding race than expected when one views it in operation on the ground.

system was never a binary one, despite all efforts, nor was it the case that increased racial “mixing” in Latin America eliminated the significance of racial distinctions. If that is so, how different was Louisiana? I will suggest that Louisiana was not qualitatively different from other Southern states in terms of racial definition, despite the larger population of free people of color in New Orleans.³²

Let us begin with what we can say for certain. By the time of the British colonial settlement in North America, slavery was fairly widespread in what is now known as Latin America and was already becoming associated with sub-Saharan Africans. Many of the colonizers came from (or through) cities in Mediterranean Europe, such as Seville, Lisbon, or Valencia, which were very familiar with slavery in general and with black slavery in particular. Seville and Lisbon were the slaveholding capitals of sixteenth-century Western Europe.

These societies had begun the process of creating a body of knowledge about what it meant to be *negro* or *preto*. The Castilian preoccupation with purity of blood (*limpieza de sangre*) had contradictory effects. By establishing an association between nature (blood) and social status, it took an important step towards the formulation of racial theories of social organization. But since purity of blood was usually defined using traditional religious arguments and perceptions of lineage linked to religious orthodoxy, Africans shared their low status with a multitude of other groups.

Still, ideas of blood purity informed efforts to stratify colonial societies from the very beginning. The creation of a racial order in the Americas was neither natural nor

³² The several pages that follow are drawn from preliminary research by Alejandro de la Fuente and me comparing race under slavery in the U.S. and Latin America.

automatic: it was not *just* an outcome of the enslavement of Africans. As the Europeans attempted to reproduce their own societies of hierarchy and stratification in the colonial world, they made conscious and deliberate efforts to turn race into a major principle of social organization. The need to delineate the contours of social inclusion and exclusion was felt with some urgency in the early colonial towns and cities, where rapid social change and economic circumstances threatened to loosen the structures of a properly ordered society. In response, the emerging local elites in the colonial world attempted to shape local society in ways that kept them atop the social structure and relegated racial others to the bottom or the margins of society. They systematically tried to create a racially-stratified order, one in which blacks, whether enslaved or “free,” were marked as social subordinates. This was true across Latin America.

Likewise, Guillaume Aubert has recently argued that French colonists, like the Spanish, had already developed discourses of social order based on the belief in the inherent superiority of certain groups according to virtues transmitted through “blood” in the seventeenth century, and that in the first half of the eighteenth century, “the language of race previously confined to the preservation of the purity of the blood of the highest ranks of French society was being extended to the French colonial population at large.”³³ His research persuasively undercuts the largely unexamined assumption that French colonists were less racist than the English or Spanish, and that racial discourse “began to appear only during the second half of the eighteenth century, after France had lost New France and Louisiana.”³⁴

³³ Aubert, “The Blood of France”: Race and Purity of Blood in the French Atlantic World, *WMQ* 61;3, para. 4, www.historycooperative.org/journals/wm/61.3/aubert.html.

³⁴ Para. 1.

The British became involved, then, in an African slave trade already well established in the seventeenth century. Yet the early North American colonies functioned without clear definitions of race or of status, and featured a great deal of racial mixing. Africans, Indians, Irish, and other Europeans worked alongside one another as “servants”; many became free after some years of service. Legal cases involving “negros” between 1619 and 1660 were not clear about their status. Some were clearly freed by virtue of being Christian; for example, in 1624 the General Court of Virginia ruled that “John Philip A negro...was qualified as a free man and Christian to give testimony, because he had been ‘Christened in England 12 years since.’” In 1630, that court sentenced Hugh Davis to whipping for “lying with a negro,” without mentioning the sex or status of the “negro.” The first statute to mention “Negroes” was a 1639 Act excluding them from a state subsidy for arms and ammunition; not until 1659 was there a direct reference to blacks as slaves in Virginia legislation, in a statute imposing reduced import duties on slave merchants.

The connections between race and status began to be drawn more clearly after 1660. As many as 30% of the people of color in the Chesapeake Bay were free in the mid-1600s, and white elites increasingly feared political alliances among white indentured servants, blacks and Indians. A 1660 Act decreed that an English servant who ran away with Negroes had to serve their extra years if the Negroes were “incapable of making satisfaction by addition of time” (in other words, because they were already slaves for life). A 1669 “Act about the casuall killings of slaves” gave masters and overseers the right to kill slaves who resisted. Three other legal provisions solidified the institution of slavery: a 1662 law that the children of an Englishman and a Negro woman

would follow the status of the mother, and doubling the fine for fornication with a Negro; a 1667 law providing that baptism could not free a slave; and a 1670 act distinguishing servants who came by sea as slaves for life and by land (Indians) as servants to age thirty or for twelve years. Bacon's Rebellion in 1676, "led by a motley army of small holders and indentured servants, black and white," drove planters to turn to the importation of African slaves rather than indentured white servants on an even larger scale, as well as to pass new laws enslaving Indians, which were largely unsuccessful.³⁵

The first major slave codes in the North American colonies date to 1680-82. They draw numerous distinctions on the basis of race rather than status, including laws against carrying arms and against leaving the owner's plantations without a certificate. A penalty of thirty lashes met "any Negro" who "lift up his hand against any Christian." In 1691, English women were fined for having a bastard child with a negro. In 1705, all mulatto children were made servants to the age of 31 in Virginia; Maryland and North Carolina adopted the same rule within the next several decades.

By the time the U.S. became a republic, only those of African descent were slaves, and all whites were free. Yet there were a significant number of individuals and entire communities of mixed ancestry with ambiguous racial identity along the Eastern seaboard. In the southeast, Indian tribes both absorbed runaway slaves and, in the late eighteenth century, adopted African slavery. In addition to the 12,000 people designated in the Census as "free people of color" in Virginia, there were 8000 in Maryland in 1790, 5000 in North Carolina, 1800 in South Carolina, and 400 in Georgia.

³⁵ Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: Norton, 1975), 297.

While it is a commonplace to describe Louisiana as a three-caste society, the jury is still out on how distinct a caste the free *gens de couleur* of New Orleans really were. Colonial Louisiana was certainly unlike Cuba and Brazil, which had populations of free people of color equal to or greater than their slave populations. And Louisiana was hardly unique in North America in recognizing individuals and communities of free people of color with an intermediate status between black and white. At a recent conference on “Louisiana and the Atlantic World in the Eighteenth and Nineteenth-Centuries,” historians of race and marriage among free people of color in New Orleans vigorously debated whether the *gens de couleur* could be considered a separate caste. Emily Clark reported findings from an exhaustive study of the sacramental marriage records of New Orleans for 1759-1830, arguing that New Orleans contained “at least three fairly distinct free black communities...each marked by a high degree of endogamy: native-born Orleanians, Domingoïis, and African-born libres.”³⁶ The long-established New Orleans families did indeed appear to have formed a distinct communities with a high rate of legitimate marriage within their own community, whereas the refugees from St. Domingue may have been the most likely to place their daughters as concubines with white men. By contrast, Rebecca Scott and Jean Hébrard argued that the lives of whites, free people of color, and slaves were so intertwined that “the historian’s temptation to place people into discrete color categories, communities, or ‘castes’ may come to seem distinctly misguided.”³⁷

³⁶ Clark, “Atlantic Alliances: Marriage among People of African Descent in New Orleans, 1759-1830,” 22-23.

³⁷ Scott & Hébrard, “Two Households and a Marriage: Color and Class in New Orleans, 1809-1840,” 1.

Just as the U.S. parted ways with Latin America with regard to manumission beginning in the 1830s, likewise we see real differentiation with regard to the ideology of race in the same decade of the nineteenth century. The kind of racial justification for slavery that developed in the U.S. had no counterpart in Cuba or Brazil as a governing ideology. Equally important, Southern slaveholders had to navigate a system committed to political liberalism, and increasingly to democracy, at least in name. Thus, unlike planters in other parts of the New World, they worried about the loyalty of poor and nonslaveholding whites in a slave system. For Southern whites, the ideology of white supremacy and “white man’s democracy” provided the glue for their society. In this version of “herrenvolk democracy,” all white men could partake of citizenship and honor because of their race, despite the fact that they were poor or did not own slaves themselves. Again, there was no counterpart to this ideology in Latin America.

Despite the fact that there were more people “in-between” black and white in the U.S. than is usually portrayed, and the fact that the slavery era was *not* characterized by a rigid “one-drop-of-blood” rule, racial fluidity did not weaken white supremacy. And in this, Louisiana was very similar to the rest of the U.S. South. It shared the same commitment to white supremacy and to a racial justification for slavery.

Thus, it is not surprising that Louisiana, like other Southern states, saw an increasing number of trials in the decades before the Civil War putting at issue an individual’s racial identity. As it became more and more urgent to draw the line between slave and free as a line between black and white, litigation increased and became more hotly contested. Despite state statutes setting rules for the determination of “negro” or “mulatto” status, usually in terms of fractions of African “blood,” these definitions could

not resolve disputes about an individual's racial identity. Often, they just pushed the dispute back a generation or two as courtroom inquiry turned from the racial identity of the individual at issue to her grandmother. Still, the question remained: how could one *know* race?³⁸

In practice, two ways of “knowing” race became increasingly important in courtroom battles over racial identity in the first half of the nineteenth century, one a discourse of race as “science” and the other of race as “performance.” During the 1850s, as the question of race became more and more hotly contested, courts began to consider “scientific” knowledge of a person's “blood” as well as the ways she revealed her blood through her acts. The mid-nineteenth century thus saw the development of a scientific discourse of race that located the essence of racial difference in physiological characteristics, such as the size of the cranium and the shape of the foot, and attempted to link physiological with moral and intellectual difference. Yet the most striking aspect of “race” in trials of racial identity was not so much its biologization but its performative and legal aspects. Proving one's whiteness meant performing white womanhood or manhood, whether doing so before the court or through courtroom narratives about past conduct and behavior. While the essence of white identity might have been white “blood,” because blood could not be transparently known, the evidence that mattered most was evidence about the way people acted out their true nature.

Enslaved women suing for their freedom performed white womanhood by showing their beauty and whiteness in court and by demonstrating purity and moral

³⁸ I discuss this question in much greater detail in Ariela J. Gross, “Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South,” 108 *Yale L.J.* 109 (1998) and *What Blood Won't Tell: A History of Race on Trial in America* (Harvard Univ. Press, pub. date. Oct. 15, 2008).

goodness to their neighbors. White womanhood was ideally characterized by a state of legal disability, requiring protection by honorable gentlemen. In nineteenth-century legal settings, women of ambiguous racial identity were able to call on the protection of the state if they could convince a court that they fit this ideal of white womanhood.

Men, on the other hand, performed white manhood by acting like gentlemen and by exercising legal and political rights: sitting on a jury, mustering into the militia, voting, and testifying in court. At trial, witnesses translated legal rules based on ancestry and “blood” into wide-ranging descriptions of individuals’ appearances, reputation, and in particular a variety of explicit forms of racial performance: dancing, attending parties, associating with white people or black people, and performing civic acts. There was a certain circularity to these legal determinations of racial identity. As South Carolina’s Judge William Harper explained, “A slave cannot be a white man.” But this was not all that it seemed, for he also stated that a “man of worth, honesty, industry and respectability, should have the rank of a white man,” even though a “vagabond of the same degree of blood” would not. In other words, “A slave cannot be a white man” suggested not only that status depended on racial identity but also that status was part of the essence of racial identity. Degraded status signified “negro blood.” Conversely, behaving honestly, industriously, and respectably and exercising political privileges signified whiteness.³⁹

Despite the more established community of free people of color in New Orleans, and the fact that free people of color sometimes appeared as slaveholders in these trials, the lawsuits proceeded quite similarly in Louisiana to the way they did in other states.

³⁹ *State v. Cantey*, 20 S.C.L. 614, 616 (1835).

Even in cases involving witnesses and litigants from Santo Domingo, testifying about racial practices there, most witnesses made clear that “negroes had no priviledges at all.”⁴⁰ Another testified that “if a white man or a white woman had married a coloured man or woman at San Domingo they would have been disgraced...The whites fought in company with the Blacks but did not admit them in the families.”⁴¹

What limited research exists in Latin America on racial definition adjudications at the local level, including work by Jean Hébrard in Brazil on naming practices by local officials of the Church and state, and Richard Turits on Santo Domingo, suggest that legal officials and courts relied far more heavily on documentation to determine racial identity than U.S. courts could do. The fact that the Catholic church recorded marriages, births, and deaths, including notations of racial identity, meant less reason to rely on reputation and performance. Perhaps this is part of the reason for the greater recourse to discourses of racial science and performance in the U.S. But an equally important factor, I would argue in the importance of performance to racial definition in the U.S., was the ideological connection between whiteness and fitness for citizenship that was part of the politics of “white man’s democracy.” Racial identity litigation was shaped by that ideology and reinforced it as well.

⁴⁰ Boullemet v. Phillips, trial record, get cite, pp. 24-26, testimony of Jean Chaillot.

⁴¹ Testimony of James P. Banded, pp. 39-43. See also Cauchoix v. Dupuy.

V. Redhibition

Despite the importance of race to Southern society, high-profile racial-identity litigation and freedom suits were not everyday occurrences in southern courts. By far the most common form of litigation regarding slaves in Southern courts was the breach-of-warranty lawsuit, in which a buyer sued a seller for damages because he found the slave physically, mentally or morally “defective.” In my first book, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*, I explored the everyday law and culture of slavery in the marketplace in five Deep Southern states, including Louisiana. Sales law was different in the Louisiana Civil Code from that of other states, because some consumer protections were written in to the Code. Despite these differences, however, warranty litigation was more similar than different in Louisiana compared to other states in the region.

Under the Louisiana Civil Code, the action of *redhibition* allowed a buyer to have a sale rescinded if the slave exhibited certain “redhibitory vices” within one year of the sale. Absolute redhibitory vices included leprosy, madness and epilepsy. Redhibitory vices of character included commission of a capital crime, “addiction to theft,” and the “habit of running away.” The habit of running away was defined as running away twice for several days, or once for longer than one month. Other vices such as drinking were redhibitory if so severe that the slave was “rendered worthless” by them. Furthermore, declarations of a slave’s good qualities, such as a particular skill or good character, could give rise to a redhibitory action if the buyer could prove that was the main reason for the purchase. This meant that Louisiana, in effect, recognized a broad action for implied warranty, encompassing many moral and mental qualities not usually considered

warrantable. Most Louisiana litigation was instigated by buyers suing for redhibition; only 14% of redhibition cases involved sellers suing on notes.

Redhibition litigation was very common in Louisiana parish courts, judging from the cases that reached the state Supreme Court, probably because buyers did so well at the trial level. (The Louisiana Supreme Court had to take all appeals during this period, so there was no selection of cases if a litigant chose to pursue appeal.) In warranty suits, buyers and sellers did equally well before juries -- winning equally often in the Mississippi county where I sampled cases from the ground up. However, the five-state sample of breach-of-warranty suits appealed to higher courts comprised a group in which buyers had won 60% of the time at the trial level. Sellers were rewarded in their appeals; appellate courts redressed the balance in favor of sellers, overturning a higher number of jury verdicts in sellers' favor so that buyers and sellers won equally often at the appellate level in the five state sample as a whole. In Louisiana, buyers won at the trial level 62% of the time, but at the appellate level, only 52% of the time. Thus, despite Louisiana's vaunted consumer protections, the higher court overturned verdicts for buyers at a higher rate than they overturned verdicts for sellers. In South Carolina and Alabama, the supreme courts were even more likely to favor sellers, whereas in Georgia and Mississippi, however, the high courts left buyers' advantage intact. Interestingly, only South Carolina and Alabama had a significant fraction of credit sales in their warranty litigation (sellers suing on notes). Thus, high-court suspicion of breach of warranty as a defense may partly explain why sellers did so well in South Carolina and Alabama Supreme Courts.

These data suggest that despite variations in appellate doctrine from strong consumer protection to *caveat emptor*, juries largely decided cases based on the stories, or “facts,” presented to them in testimony, without great regional variation or bias towards one side or the other, and appellate courts, while more sympathetic to sellers (as well as to slave owners seeking recovery in tort), also relied more on ideological constructs of “character” than on strict rules in favor of one party or the other. The Deep South’s highest courts affirmed lower court judgments 62% of the time in civil cases involving slaves.

About one-quarter of all redhibition cases in Louisiana involved the habit of running away. Because of the explicit implied warranty for running away, more of these cases came up in Louisiana than in other states. However, the arguments raised look remarkably similar. For the most part, buyers explained running away as a vice of character, an incurable defect akin to a disease, whereas sellers argued “like master, like man” – that the slave was good when governed by a good master, and bad or runaway when governed by a bad master.

There was one exception, however. Louisiana courts were the only ones in the Deep South that occasionally accepted evidence openly of slaves’ own motivations to explain their running away. This was probably because Louisiana had such strict codified parameters for the “habit of running away” -- up to a certain point, a slave's behavior might be only “*petit marronage*” (“little running away”); after that point, the slave was a runaway. Because the definition of the runaway habit was strictly set out in the Civil Code, it may have been easier for judges to recognize a slave's personhood when his or her behavior fell outside the strict definition. This seems to be an unusual

twist on the perennial “rules vs. standards” debate—an instance where a rule gives more leeway than a standard.

For example, the New Orleans parish court did not consider that a slave’s running away to visit his wife made him “a runaway.” Ludger Fortier sued for the rescission of a slave sale because the slave left three days after the sale for several hours. According to defense witnesses, the slave had a good character and had never been whipped by his former owner, and had run away only to visit a slave woman on a neighboring plantation. The court denied Fortier’s claim, finding that “Negroes sometimes absent themselves from their masters in the night without being runaway.”⁴² Similarly, in *Bocod v. Jacobs*, the Supreme Court noted that a slave’s running away “may be the consequence of the displeasure of being sold -- of his dislike of the new owner.”⁴³ In *Nott v. Botts*, the trial judge found “nothing extraordinary in the fact of a negro coming from Kentucky, where they are treated almost on an equality with their master, running away in Louisiana,” implying a slave’s desire for greater autonomy.⁴⁴ All of these characterizations of slave motivation aver reasons that are rational, not products of mismanagement, “disease” or immutable viciousness.

The fact that Louisiana’s definition of a runaway led to greater recognition of slaves’ human agency had ramifications for litigants in nearby states. One Mississippi

⁴² Fortier v. LaBranche, Docket #3289, New Orleans, June 1839, *SCA-UNO*. Appeal reported in 13 La. 355 (1839). Similarly, a slave buyer was denied rescission of the sale in *Smith v. McDowell* when the court found that the slave had only been returning (twice) to his former owner’s plantation to see his wife. Docket #4431, New Orleans, *SCA-UNO*. Appeal reported in 3 Rob. La. 430 (1843).

⁴³ Bocod v. Jacobs, 2 La. 408, 410 (1831). Trial transcript is Docket #2101, Nov. 1830, N.O., *SCA-UNO*.

⁴⁴ Nott v. Botts, Docket #3123, N.O., Mar. 1839, *SCA-UNO*. Appeal reported in 13 La. 202 (1839).

¹³⁴ Kirk v. James, Drawer 348 #7049, Adams Cir. Ct., Miss.,

case became a referendum on the applicability of Louisiana law to local conditions. In 1848, John D. James, a Natchez and New Orleans slave trader, sold nine slaves to Joseph J. B. Kirk, a Natchez horse trader, in Point Coupee Parish, Louisiana.⁴⁵ In 1849, Kirk filed suit against James in Adams Circuit Court for \$750 on the basis of James' warranty, executed under Louisiana law, that "said Slaves were free from the redhibitory vices and diseases." Kirk complained that one of the slaves, Simon, had run away repeatedly, and finally drowned in an escape.⁴⁶

Both James and Kirk asked for jury instructions based on Louisiana law. Judge Posey refused to give several of James' instructions, but did explain the Louisiana Code on redhibition to the jury. James appealed the lower court decision on the ground that the jury had applied an "arbitrary rule of evidence of another state."⁴⁷ James argued that Louisiana was traveling down a slippery slope toward recognition of slaves' personhood, and protection of slave buyers that Mississippi should not follow. "For illustration, suppose that by the laws of Louisiana negro slaves are competent witnesses to prove the vice in a companion . . . Again, let us suppose that one of the redhibitory vices warranted against was a habit of drinking." Admitting slave testimony, argued James, was equally as outrageous as warranting that a slave would not run away.⁴⁸

⁴⁵ Kirk v. James, Drawer 348 #7049, Adams Cir. Ct., Miss.

⁴⁶ *Four juries* heard Kirk's suit. The first jury found for James, and Kirk was granted a new trial; two successive trials ended in mistrial. In 1853, the fourth jury found for Kirk, and Judge Stanhope Posey overruled James' motion for a new trial. James then lost his appeal to the Mississippi High Court of Errors and Appeals. *Ibid.*

⁴⁷ 29 Miss. at 208.

⁴⁸ Justice Handy was unmoved, affirming the lower court judgment. In this case, he ruled, the Louisiana rules were not mere evidentiary regulations unenforceable in Mississippi; they were express stipulations of the contract itself. *Ibid.* at 211.

James's argument about the dangers of accepting Louisiana's protections for slave buyers in Mississippi reveals general fears about the slippery slope of implied warranty. While a buyer's rule that strictly codified vices as "habits" made it possible to treat slaves as subhuman, buyer-claimants also introduced arguments about slaves' human agency, which threatened a law of sales in which slaves were property only. Judges resisted extending protections to buyers because they did not want to open the "Pandora's box" of putting slave character on trial. Going to trial risked long, involved proceedings (and possible hung juries) on the question of masters' treatment of slaves. In *James v. Kirk*, the testimony dwelt on whether a master was "as good a disciplinarian . . . as any of his neighbours." But Pandora's box held more than simply the difficulty of administering cases about property with unusual (human) qualities. Because these market transactions were risky, and slaveholders became personally invested in the outcome, slaves had the most chance to influence them by their behavior.

VII. Conclusion

Certain commonalities in the law of slavery in the New World, when viewed from the ground up, may be attributable to two universal features of the institution: first, human beings, with moral agency, were also articles of property under the legal system; second, slavery in the New World was reserved for people of African ancestry by the mid-eighteenth century. Different political systems, demographics, and economies also played an important role in the variation among slave systems. So how much variation can be attributed to legal traditions? Perhaps the most important distinction appears to be that of manumission, which had little relation to the everyday life and law of slavery,

except indirectly, through the growth of a population of free people of color. Louisiana, with its hybrid legal traditions, civil law planted in common-law surroundings, grew to look more like its neighbors and less like its ancestors over time. Local culture appears to have mattered more than genealogy, although some practices, like *coartación*, did persist, and helped to build a community of *gens de couleur* who became important players in the fight for civil rights after the Civil War and beyond.